No. _____

IN THE

Supreme Court of the United States

SERGIO OCHOA

Petitioner,

v.

OAK SMITH, ACTING WARDEN

Respondent

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SERGIO OCHOA, *Petitioner-Appellant*, v. RONALD DAVIS, Warden, California State Prison at San Quentin, *Respondent-Appellee.*	No. 18-99007 D.C. No. 2:02-cv-07774-RSWL OPINION

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted March 22, 2022
Pasadena, California

Filed October 5, 2022

Before: Johnnie B. Rawlinson, Kenneth K. Lee, and Lawrence VanDyke, Circuit Judges.

Opinion by Judge VanDyke

SUMMARY*

Habeas Corpus/Death Penalty

The panel affirmed the district court's denial of Sergio Ochoa's habeas corpus petition under 28 U.S.C. § 2254 challenging his conviction and death sentence imposed in California state court.

The district court issued a certificate of appealability for two of Ochoa's claims.

In the first claim certified by the district court, Ochoa contended that his constitutional rights were violated under *Wainwright v. Witt*, 469 U.S. 412 (1985), and *Witherspoon v. Illinois*, 391 U.S. 510 (1968), because seven prospective jurors were improperly removed for cause based on their moral qualms about the death penalty that did not substantially impair their abilities to perform their duties in a capital case. The California Supreme Court, whose opinion on direct review is the last reasoned decision on this issue, concluded that both the prosecutor's questioning of the challenged jurors and the excusals were proper. Applying the deferential review under the Antiterrorism and Effective Death Penalty Act (AEDPA) to the last reasoned state court decision, the panel held that the California Supreme Court's conclusion was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent.

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

In the second claim certified by the district court, Ochoa contended that his trial counsel were ineffective because the excusals were based upon counsel's failure to investigate, adequately object, and/or rehabilitate the prospective jurors. On this issue, the California Supreme Court's denial of Ochoa's second state petition is the last reasoned decision. The California Supreme Court summarily denied the ineffective assistance of counsel claim "on the merits." The panel took this opportunity to make explicit what has to this point been implicit: the California Supreme Court's summary denial is a decision on the merits and thus entitled to AEDPA deference. The panel held that Ochoa failed to overcome the presumption that defense counsel's conduct fell within the wide range of professional assistance, and failed to show how trial counsel's failure to object or try to rehabilitate some of the jurors prejudiced him. Applying AEDPA deference, the panel concluded that it was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent for the California Supreme Court to have determined that Ochoa's counsel were not ineffective during voir dire. The panel held that the district court did not abuse its discretion in denying Ochoa's request for an evidentiary hearing.

Because jurists of reason could disagree with the district court's denial of two uncertified claims, the panel expanded the certificate of appealability to cover those claims.

In the first uncertified claim, Ochoa contended that his defense counsel were ineffective during the penalty phase for failing to present mitigating evidence, such as evidence of his brain damage and traumatic childhood. He also faults his counsel for failing to investigate and attack the prosecution's aggravation evidence, including failing to

present a gang expert. Ochoa raised this claim in both of his state habeas petitions. The California Supreme Court summarily denied the claim "on the merits." The panel held that Ochoa failed to rebut the presumption of counsel's competence, and failed to establish prejudice with respect to counsel's alleged deficiencies. Applying AEDPA deference, the panel concluded that the California Supreme Court's conclusion was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent.

In the second uncertified claim, Ochoa asserted that his death sentence violates the Eighth Amendment because he "suffered mental impairments that are as severe as mental retardation from the date of his arrest to the present[,]" and he is therefore ineligible for execution under *Atkins v. Virginia*, 536 U.S. 304 (2002). Ochoa raised this claim in his second state habeas petition. The California Supreme Court summarily denied the claim "on the merits." Evaluating the criteria set forth in *Atkins*, and applying AEDPA deference, the panel held that it was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent for the California Supreme Court to have determined that Ochoa failed to demonstrate the onset of intellectual functioning and adaptive deficits as a minor.

COUNSEL

C. Pamela Gomez (argued) and Ajay V. Kusnoor, Deputy Federal Public Defenders; Cuauhtémoc Ortega, Federal Public Defender; Office of the Federal Public Defender, Los Angeles, California; for Petitioner-Appellant.

Nicholas Webster (argued), A. Scott Hayward and Analee J. Brodie, Deputy Attorneys General; James William Bilderback II, Senior Assistant Attorney General; Lance E. Winters, Chief Assistant Attorney General; Rob Bonta, Attorney General; Office of the Attorney General, Los Angeles, California; for Respondent-Appellee.

OPINION

VANDYKE, Circuit Judge:

I. INTRODUCTION

Petitioner Sergio Ochoa appeals from the district court's denial of his habeas corpus petition under 28 U.S.C. § 2254, challenging his conviction and death sentence imposed in California state court. In 1992, Ochoa was convicted of two counts of first-degree murder and one count of attempted robbery. *People v. Ochoa*, 26 Cal. 4th 398, 415–16 (2001). The jury found true the allegations that a principal was armed with respect to all three offenses and that Ochoa personally used a firearm with respect to one of the murders and the attempted robbery. *Id.* The jury also found true the special circumstance allegations that Ochoa committed multiple murders and that a murder was committed while he was engaged in robbery. *Id.* The jury set the penalty at death. *Id.*

Ochoa's conviction and death sentence were appealed to the California Supreme Court, which affirmed the judgment in its entirety. *Id.* at 464. Ochoa twice sought habeas relief from the California Supreme Court, but those petitions were denied. Ochoa also commenced federal habeas proceedings in the United States District Court for the Central District of California, but this petition was also denied. The district court issued a certificate of appealability for two of Ochoa's claims (together, "the certified claims"): (1) that seven jurors were improperly removed for cause under *Wainwright v. Witt*, 469 U.S. 412 (1985), and *Witherspoon v. Illinois*, 391 U.S. 510 (1968); and (2) that his trial counsel were ineffective for failing to object to the prosecutor's use of misleading hypothetical scenarios during voir dire and for failing to rehabilitate prospective jurors challenged for cause. On appeal, Ochoa requests that we expand the certificate of appealability to include two additional claims (together, "the uncertified claims"): (1) that trial counsel were also ineffective for failing to investigate and present mitigating evidence during the penalty phase; and (2) that his execution would violate the Eighth Amendment because he suffers from cognitive impairments and mental illness that are equivalent to intellectual disability.

We grant Ochoa's request to expand the certificate of appealability with respect to the uncertified claims, given that the accuracy of the district court's resolution of these claims is reasonably debatable. But we affirm the district court's denial of Ochoa's habeas corpus petition because he fails to establish that the California Supreme Court's conclusion as to any of his claims was contrary to or constituted an unreasonable application of clearly established federal law or an unreasonable factual determination. *See* 28 U.S.C. § 2254(d)(1), (2).

II. BACKGROUND

Appellant Sergio Ochoa was born in 1968 in Tijuana, Mexico. Three years later, he and his family moved to San Diego, and soon thereafter they moved to Los Angeles. In time, two of Ochoa's older siblings joined a Los Angeles street gang called the 18th Street Gang. Ochoa followed suit, joining the gang's Pee Wee Winos clique when he was eleven years old.

A decade later, Ochoa was still a member of the 18th Street Gang, which was engaged in a gang "war" with the Crazy Riders. On December 15, 1989, while Ochoa was walking with a fellow 18th Street Gang member, a white Toyota pulled up alongside them, and a Crazy Rider nicknamed "Pompis" stepped out of the car and shot at them five times. The next day, the Crazy Riders shot an 18th Street Gang member. Later that same day, an 18th Street Gang member killed a Crazy Rider in retaliation. On the evening of January 3, 1990, Pompis, in the same white Toyota, pulled up alongside a car carrying three 18th Street Gang members and shot one of them in the head.

Approximately three hours later, Ochoa drove up to a corner at which four fellow 18th Street Gang members were assembled and told them that he had just spotted the white Toyota. The four men, one of whom was armed with a double-barreled shotgun, got in Ochoa's truck. While driving, Ochoa again spotted what he believed to be the Crazy Riders' car, and he pulled up alongside it. Someone in Ochoa's truck fired two shotgun blasts into the car, and Ochoa drove off. The car Ochoa believed was the Crazy Riders' car turned out to be a white Datsun with a license plate number similar to that of the Crazy Riders' white Toyota; the Datsun's driver, a nineteen-year-old named

Pedro Navarette who was not involved with either gang, died of a shotgun wound to the head.

Weeks later, on the evening of January 20, 1990, Ochoa convinced four fellow gang members to join him for a carjacking. After agreeing that a particular parked car was a good target, Ochoa and an accomplice approached the car's driver side, while two other accomplices approached the passenger side. Ochoa, the only armed member of the group, placed a gun in driver Jose Castro's face and ordered him to exit the vehicle. When Castro refused, Ochoa stated, "I'm gonna shoot him." A passing motorist saw the tallest man in the group, who was standing on the driver side, shoot Castro; Ochoa was by far the tallest of the four assailants. When he returned to the car in which he and his accomplices had arrived, Ochoa told the getaway driver that he had shot Castro in the leg. Castro died from the gunshot wound; the bullet entered his left shoulder and exited the right side of his chest, which was consistent with the scene described by the eyewitness.

Later that night, Ochoa and three male accomplices approached a man at a gas station. They kicked the man to the ground, and when the man stood up, Ochoa punched him and warned, "Give up the car, otherwise I'm going to shoot you." An accomplice pressed a gun against the man's torso, Ochoa entered the man's car and sat down in the driver's seat, and the four drove off.

Ochoa was arrested the next day. During questioning, Ochoa denied having any knowledge of the Navarette killing. After that interview, Ochoa, who already had many 18th Street Gang tattoos, got a tattoo over his eye of the number "187," the California Penal Code section that proscribes murder. In February 1990, Ochoa admitted that on the night of the Navarette murder he drove the shooter

and others, but he claimed that he did not know the shooter was armed until he heard the gunshot. In March 1990, the eyewitness to the Castro murder was shown a photographic lineup that included an image of Ochoa, but the witness was unable to identify Ochoa as the shooter. In September of that year, however, the eyewitness selected Ochoa from a live lineup, identifying him as the shooter.

On August 31, 1992, Ochoa was convicted of two counts of first-degree murder and one count of attempted second-degree robbery in Los Angeles County Superior Court. At the penalty phase, the jury fixed the penalty to be imposed as death, and on December 10, 1992, the court sentenced Ochoa to the same. On August 6, 2001, the California Supreme Court affirmed Ochoa's convictions and sentence on direct appeal. *Ochoa*, 26 Cal. 4th at 464. On April 29, 2002, the U.S. Supreme Court denied Ochoa's petition for a writ of certiorari.

Ochoa filed his first state habeas petition on February 20, 2001. The California Supreme Court summarily denied the petition "on the merits" on August 21, 2002. Ochoa filed a federal habeas petition in the district court on September 19, 2003. Ochoa returned to the state court with a second state habeas petition on December 15, 2003, and the district court stayed the federal proceedings. The California Supreme Court summarily denied Ochoa's second state petition "on the merits" and on procedural grounds on December 21, 2010.

After his second state habeas petition was denied, Ochoa filed the operative amended petition with the district court. On July 8, 2014, the district court granted in part and denied in part the State's motion to dismiss. Ochoa filed a motion for reconsideration, which the district court likewise granted in part and denied in part. On August 13, 2018, the district

court denied all of Ochoa's remaining claims for relief on the merits. The district court issued a certificate of appealability as to the certified claims.

On September 10, 2018, Ochoa filed a notice of appeal, reserving the right to request that we expand the certificate of appealability. Ochoa challenges the district court's determinations regarding the certified claims and requests that we expand the certificate of appealability to include the uncertified claims.

III. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. We review the district court's denial of a habeas petition de novo and its findings of fact for clear error. *See Stanley v. Schriro*, 598 F.3d 612, 617 (9th Cir. 2010). Because Ochoa's federal petition was filed after April 24, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") governs our review. *See Murray v. Schriro*, 745 F.3d 984, 996 (9th Cir. 2014). Under AEDPA, habeas relief may not be granted unless the state court's decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1), (2). We apply the deferential review under AEDPA to the last reasoned state court decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803–04 (1991); *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012).

Under § 2254(d)(1), "clearly established" "refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision."

Lockyer v. Andrade, 538 U.S. 63, 71–72 (2003). A state court's decision is contrary to clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000) (O'Connor, J., concurring). A state court's decision is an unreasonable application of clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the [petitioner's] case." *Id.* "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (cleaned up).

IV. DISCUSSION

Ochoa presents four claims on appeal, two certified and two uncertified. We begin by addressing the certified claims and then turn to the uncertified claims.

A. The Certified Claims

1. First Certified Claim: *Witt*/*Witherspoon* Claim

Ochoa contends that his constitutional rights were violated because seven prospective jurors were improperly removed for cause based on their moral qualms about the death penalty that did not substantially impair their abilities to perform their duties in a capital case under *Witt* and *Witherspoon*.

On this issue, the California Supreme Court's opinion on direct review in *Ochoa*, 26 Cal. 4th 398, is the last reasoned decision. In that opinion, the California Supreme Court

concluded that both the prosecutor's questioning of the challenged jurors and the excusals were "proper." *Id.* at 428. Specifically:

> Prospective Juror Linda H.'s comments revealed her unambiguous opposition to the death penalty, and the trial court properly excused her. Substantial evidence likewise supports the exclusion of the other jurors. To the extent their responses could support multiple inferences, we defer to the trial court's determination of their unfitness to serve.

Id. at 432.

The district court considered the California Supreme Court's rejection of this claim and found that it was reasonable under AEDPA because the record supported the conclusion that the challenged jurors were substantially impaired. The district court thus denied Ochoa's *Witt/Witherspoon* claim.

Because the California Supreme Court's conclusion was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent, we affirm the district court. *See* 28 U.S.C. § 2254(d)(1), (2).

a. Applicable Law

In *Witherspoon*, the Supreme Court allowed the exclusion of jurors who "would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial . . . ." 391 U.S. at 522 n.21. In *Witt*, the Supreme Court replaced

Witherspoon's "automatic vote" test with a different formulation: a juror in a capital case is properly excluded for cause where the juror's views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." 469 U.S. at 424 (cleaned up). A juror's opposition to the death penalty is insufficient grounds for exclusion if the juror can set aside this view in making a decision with regard to penalty. *See Lockhart v. McCree*, 476 U.S. 162, 176 (1986). "[I]t is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." *Witt*, 469 U.S. at 423. At the same time, a juror's bias does not have to be proved with "unmistakable clarity." *Id.* at 424. When there is ambiguity in the prospective juror's statements, the trial court is "entitled to resolve it in favor of the State." *Id.* at 434.

In determining whether juror exclusion for bias is unreasonable, a trial court's findings of juror partiality are entitled to special deference. *See Uttecht v. Brown*, 551 U.S. 1, 9 (2007) ("Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, . . . a factor of critical importance in assessing the attitude and qualifications of potential jurors."); *see also Morgan v. Illinois*, 504 U.S. 719, 730 (1992) ("The adequacy of *voir dire* is not easily the subject of appellate review . . . ."). Such deference is necessary for practical reasons:

> [M]any veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true

> feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.

Witt, 469 U.S. at 424–26. Consequently, the Supreme Court has admonished the lower courts to "respect the limited role of federal habeas relief in this area." *Uttecht*, 551 U.S. at 10. In addition, § 2254(d) builds on the deference owed to the trial court by requiring us to review the California Supreme Court's determination through a "deferential lens." *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011) (cleaned up).

b. Analysis

The prospective jurors were questioned in nine groups of eleven to seventeen people. Each prospective juror submitted a juror questionnaire, and during voir dire was questioned first by the trial court, then by defense counsel, and finally by the prosecutor. After the first two groups had been questioned, the trial court granted the defense some "rebuttal" voir dire. Each side had thirty minutes for questioning, except for the last group, which was the smallest, so each side had twenty minutes. During each group's voir dire, the prosecutor explained the felony-murder and accomplice-liability doctrines that were applicable to the charges in the case. The prosecutor used hypotheticals to illustrate how the doctrines operate.

Ochoa contends that the trial court improperly removed the following seven prospective jurors from four different groups: Gertrude W., Patrice V., Alicia B., Linda H., Martha C., Arthur R., and Lynn J. Ochoa claims that the jurors gave disqualifying answers only after the prosecutor posed

hypotheticals that were "highly misleading" because they (1) "improperly described" the state-law framework to the jury by introducing "the theory of accidental, aiding and abetting felony murder" without clarifying that a defendant guilty of such a crime would be categorically ineligible for death; and (2) described a scenario that was a lot less blameworthy than Ochoa's crime as they described "an unintentional or accidental murder." Ochoa argues no deference should be applied to the trial court's decision to remove the jurors because the state law principles were improperly described to them. Ochoa also claims that the California Supreme Court unreasonably applied clearly established Supreme Court precedent, when it placed the burden of showing that the jurors were substantially impaired not on the prosecutor—the party seeking exclusion—but on the defense.

We address Ochoa's contentions as to each challenged juror based on the order in which their respective groups were questioned during voir dire, beginning with Getrude W. who was in the first group of prospective jurors, then Patrice V. and Alicia B. who were in the second, then Linda H. who was in the sixth group, and finally, Martha C., Arthur R., and Lynn J. who were in the eighth group.[1]

[1] The State argues that Ochoa's *Witt/Witherspoon* claim must be limited to the first three of the seven challenged jurors—Gertrude W., Patrice V., and Alicia B.—because the prosecutor modified her hypotheticals in later groups and Ochoa fails to explain how those hypotheticals were misleading. With respect to Ochoa's challenge to the first three jurors, the State argues that the claim is procedurally defaulted because the state court denied it relying on an adequate and independent state ground: counsel's failure to make a contemporaneous objection to the prosecutor's hypotheticals. Because we affirm the district court on the merits with respect to each of the seven prospective jurors, we need

i. Gertrude W.

Gertrude's panel was first apprised of the facts of the case during the voir dire by Ochoa's counsel. The prosecutor, who went next, also touched on the facts of the case. The prosecutor then discussed the aiding and abetting principle and gave a bank robbery hypothetical. Specifically, she described a situation where three people conspired to rob a bank, one acted as a getaway driver, the other as the lookout, and the third went into the bank, pointed a gun, and took the money. She noted that all three people can be guilty of bank robbery.

The prosecutor then described the second murder "that's alleged to have occurred on a different date, different time, under different circumstances" and that also involved "a somewhat complex legal principle," specifically, the felony-murder rule. The prosecutor pointed out that under this rule, even if a bank robber's gun accidentally went off during a struggle with a security guard, the robber would be guilty of first-degree murder, even though there was no intent to kill. The prosecutor explained that the felony-murder rule

> even reaches out to the people in the car, the driver and the person standing by the door, and in some situations they can be guilty of first[-]degree murder, too. The point I'm trying to make is under our law with the theory of first[-]degree murder, it's not necessary that an intent to kill be proven to

not address the State's alternative procedural arguments. *See Forest Guardians v. Dombeck*, 131 F.3d 1309, 1313 n.1 (9th Cir. 1997).

> find the defendant guilty of first[-]degree murder too.

Defense counsel did not object to the prosecutor's hypotheticals.

The prosecutor then moved on from the guilt phase to the penalty phase. She repeated that one of the murders and one of the special circumstances making Ochoa eligible for the death penalty involved the felony-murder rule. She asked whether knowing more about the charges, anybody felt that the death penalty "is an option." Gertrude spoke up, explaining that the death penalty "could be an option . . . when somebody" acts "deliberately" or "premeditated[ly]." This view was consistent with her answers in the questionnaire. But Getrude later explained that based on the circumstances of Ochoa's case, the death penalty "would not be an option for [her]." When pressed by the prosecutor and the trial court, she unequivocally confirmed her opposition.

When the prosecution asked to remove Gertrude for cause, Ochoa's counsel objected. Defense counsel pointed out that there was "a divergence" between Gertrude's questionnaire and oral responses, with her questionnaire making her "almost" eligible for challenge for cause by defense, "but when she was questioned in court, she indicated she could be, in fact, open to the evidence and she doesn't think she would consider it, but she didn't rule out that possibility." The trial judge disagreed:

> I tried to pin her down at the end and I think I did. Frankly, I thought I might be able to rehabilitate her, but I couldn't. I am satisfied that in this case she is of a state of mind that she would not consider a death verdict. And I think that's good for a challenge for cause.

With this background in mind, we turn to Ochoa's arguments on appeal. Ochoa contends that the prosecutor's hypothetical was "most egregious and misleading" when she spoke to the first group of prospective jurors, including Gertrude. But the prosecutor's hypothetical was neither "egregious" nor "misleading." Rather, the prosecutor's hypothetical accurately described a relevant principle of California law for the jurors. To be sure, the prosecutor discussed an accidental or unintentional murder by a triggerman through a felony-murder hypothetical. She also mentioned that a non-triggerman can be guilty of first-degree murder "in some situations." As the prosecutor explained, the "point" of her hypothetical was that under a felony-murder theory, "it's not necessary that an intent to kill be proven to find the defendant *guilty* of first[-]degree murder." This is both an accurate statement of California law and a principle relevant to this case because the prosecutor did not need to prove intent in Castro's homicide. And while it is true that under California law a getaway driver may be guilty of first-degree murder, but not eligible for the death penalty, *see People v. Armstrong*, 6 Cal. 5th 735, 763 (2019) ("Some getaway drivers, although guilty of first[-]degree felony murder, may not even be death eligible."), the prosecutor's hypothetical was introduced while addressing the guilt phase of trial, not the penalty phase. Moreover, any erroneous impression the prosecutor may have created was dispelled by both the defense and prosecution referencing the facts of Ochoa's case—the jury was aware that Ochoa was not alleged to be an aider or abettor with respect to any accidental shooting in the course of a felony. In short, the prosecutor's explanation of aiding and abetting and felony-murder principles was an accurate statement of California law and did not misrepresent the state-law framework. *See Ochoa*, 26 Cal. 4th at 431*; see also People v. Billa*, 31 Cal. 4th 1064, 1068 (2003) ("Th[e] felony-murder rule covers a

variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident . . . ." (cleaned up)).

With respect to Ochoa's argument that the prosecutor's hypothetical described a defendant that was a lot less blameworthy, Ochoa relies on the California Supreme Court's opinion in *Armstrong* for the proposition that with "sufficiently mild hypothetical scenarios, many competent jurors might say they would be quite likely to vote for life without the possibility of parole[,]" but that does not mean "that the same juror would not vote for death under more aggravating circumstances." 6 Cal. 5th at 756. In *Armstrong*, the defendant was charged with murder, kidnapping, robbery, rape, and torture, with six special circumstances and two sentencing enhancements. *See id.* at 748. During voir dire, the prosecutor presented potential jurors with several hypotheticals that involved accomplice liability, including a bank robbery hypothetical with a getaway driver, a lookout, and the actual killer who went inside and shot someone. *See id.* at 752–53. The California Supreme Court found a *Witt/Witherspoon* violation because the trial court excused four jurors for cause, erroneously focusing on "whether they would be equally willing to impose death on an aider and abettor as on an actual killer, rather than on whether they could follow the law and consider death as an option." *Id.* at 757. Ochoa argues that like in *Armstrong*, the prosecutor in his case questioned the potential jurors' view on the death penalty application "under significantly less aggravating circumstances than those presented in her case-in-chief." Consequently, the jurors' answers were not informative as to the question whether they would be able to fulfill their duties in this case by considering both penalty options, and those answers could not be used to find the jurors substantially impaired.

Ochoa's argument fails for two reasons. First, *Armstrong* is not clearly established United States Supreme Court precedent. Second, *Armstrong* is plainly distinguishable. The bank robbery hypothetical regarding the getaway driver in *Armstrong* was too dissimilar from the facts of that case: an accomplice holding down a woman being raped and tortured and helping kick her to death. *Compare id.* at 745–47, *with id.* at 752–53. More importantly, it was not used to test whether the jurors would faithfully apply the law of accomplice-liability. Rather, it was used to find out how a juror would vote in a particular fact scenario, which is improper. *See id.* at 752–53.

This is not what happened during voir dire in Ochoa's case. The prosecutor's hypothetical explaining the principles of accomplice-liability and felony-murder was not that different from the facts of this case: trying to steal a car with the owner sitting in it is no more violent or inflammatory than a bank robbery. Further, it was reasonable for the prosecutor to ask about unintentional shootings. The defense's position during the penalty phase was that Ochoa "did not intend Castro's death." *Ochoa*, 26 Cal. 4th at 460. The prosecutor was entitled to test whether the jurors would be willing to apply California law with respect to the felony-murder rule in this case even if they believed Ochoa did not intend to kill Castro. *See Morgan*, 504 U.S. at 733. Furthermore, Gertrude was not asked how she would vote with respect to a getaway driver in a bank robbery, that is, she was not asked to commit herself to a particular result. Rather, the prosecutor used the hypothetical to explore Gertrude's ability to convict Ochoa.

Additionally, the State is correct that there is no clearly established Supreme Court precedent that restricts the prosecutor from posing legally correct hypotheticals during

voir dire. Likewise, no Supreme Court authority demands that, for voir dire purposes, the prosecutor must disclose all facts that comprise its case. In *Morgan*, the United States Supreme Court held that general questions of ability to "follow the law" are not sufficient to afford the defendant adequate voir dire to figure out whether the prospective juror would be capable of imposing a life sentence; instead, the defendant was entitled to ask, "'If you found [the defendant] guilty, would you automatically vote to impose the death penalty no matter what the facts are?'" *Id.* at 723, 739. While *Morgan* established the minimum constitutional requirement to life-qualify a jury, the inquiry proposed by the defendant in that case did not involve any case-specific questions. Accordingly, *Morgan* left unanswered whether any case-specific inquiry is appropriate to determine whether a juror can consider both a life and a death sentence in a particular case.

Only the holdings in the Supreme Court's decisions constitute "clearly established Federal law." *Atwood v. Ryan*, 870 F.3d 1033, 1046 (9th Cir. 2017). "[I]f a habeas court must extend a rationale before it can apply to the facts at hand, then by definition the rationale was not clearly established at the time of the state-court decision." *White v. Woodall*, 572 U.S. 415, 426 (2014) (cleaned up). A state court's refusal to extend a precedent does not warrant habeas relief unless "it is so obvious that a clearly established rule applies to a given set of facts that there could be no fairminded disagreement on the question." *Id.* at 427 (cleaned up). Because *Witt*, *Witherspoon*, and *Morgan* only provide broad principles on the type of inquiry that is appropriate to death- and life-qualify the jury, they cannot foreclose the California Supreme Court's allowance of hypotheticals during voir dire as an unreasonable application of clearly established Supreme Court precedent. *See*

28 U.S.C. § 2254(d)(1); *see also Carey v. Musladin*, 549 U.S. 70, 77 (2006) (explaining that when Supreme Court precedent gives no clear answer, "it cannot be said that the state court unreasonably applied clearly established Federal law" (cleaned up)).

Ochoa's related contention that Gertrude was not substantially impaired to start with, but "vacillated only after the prosecutor misrepresented the state-law framework," is also not supported by the record. Gertrude's refusal to consider the death penalty with respect to felony murder was in line with her answers in the questionnaire. Further, after the prosecutor's questioning, the judge followed up with Gertrude and reminded her that there were two murders in the case and only one of them was based on the felony-murder rule. But Gertrude was firm that she was not willing to consider the death penalty. This supports an inference that Gertrude was not influenced by the prosecutor's hypothetical and her reaction to the hypothetical simply exposed her preexisting views on the death penalty.

Ochoa further contends that after misleading Gertrude, the prosecutor "badgered her into giving a disqualifying response." But this too is not supported by the record. The context of the prosecutor's questions does not demonstrate harassment. Rather, the prosecutor's questioning merely demonstrates an effort to satisfy the burden to establish that Gertrude was substantially impaired.

Finally, Ochoa claims that the California Supreme Court unreasonably applied clearly established Supreme Court precedent, when it placed the burden of showing bias not on the prosecutor—the party seeking exclusion—but on the defense. Ochoa relies on the following language in the state court's opinion: "To the extent a more accurate characterization of the case was possible, defendant had the

opportunity to provide it." *Ochoa*, 26 Cal. 4th at 431. But Ochoa's argument is contrary to Supreme Court precedent. In *Witt*, the Supreme Court also pointed out defense counsel's failure to question a prospective juror, reasoning that such "questioning might have resolved any perceived ambiguities in the questions." 469 U.S. at 435; *see also id.* at 431 n.11 ("[C]ounsel's failure to speak in a situation later claimed to be so rife with ambiguity as to constitute constitutional error is a circumstance we feel justified in considering when assessing respondent's claims."). Accordingly, the California Supreme Court's observation about defense counsel's actions in this case was a proper consideration and did not shift the burden of showing bias from the State to Ochoa.

Because the California Supreme Court's conclusion with respect to Gertrude W. was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent, we affirm the district court's judgment as to Gertrude. *See* 28 U.S.C. § 2254(d)(1), (2).

ii. Patrice V. and Alicia B.

Patrice's answers to the questionnaire showed her strong opposition to the death penalty. As she put it, it "is state-sanctioned murder," and the idea of voting for death "scares" her. Patrice felt that she could put aside her feelings "in determining guilt or innocence, but if the defendant was found guilty, [she] would have a difficult emotional time with the penalty portion."

In contrast, Alicia's questionnaire was very sparse and conveyed that she did not have "a certain opinion" regarding the death penalty. She also stated that the death penalty was imposed "too seldom." But when questioned by defense

counsel, Alicia clarified that she misunderstood the question and that she did not "fully agree with the death penalty."

Like the first group, the second group of prospective jurors was first informed of the facts of the case by Ochoa's counsel. When it was her turn, the prosecutor noted that with respect to one of the murders, Ochoa "did not actually pull the trigger" and explained the principle of aiding and abetting using a bank robbery hypothetical. The prosecutor then discussed the other murder Ochoa was charged with where it was alleged that he "killed someone during the commission of an attempted robbery." The prosecutor explained the felony-murder rule and referred to the bank robbery hypothetical where the bank robber struggled with a security guard and the gun "accidentally" went off and killed the security guard. This time, the prosecutor did not mention her theory of accidental aiding and abetting felony murder.

Beginning with Patrice, the prosecutor confirmed Patrice's opposition to the death penalty. Turning next to Alicia, the prosecutor asked whether she saw herself "imposing [the death penalty] in this type of case." Alicia answered unequivocally, "No." When the prosecutor asked again, Alicia twice confirmed her opposition to the death penalty in "this particular case."

At that point, defense counsel for the first time raised an objection to the prosecutor's hypotheticals. The judge overruled the objection and granted the prosecutor's challenge for cause as to Patrice. Defense counsel objected that her last answer, although unequivocal, was based on "an inapplicable hypothetical." The judge disagreed: "I think her views taken as a whole from all the oral and written responses she gave indicate that she does have a problem with death."

The prosecutor then challenged Alicia for cause. Even after the judge followed up with Alicia, she did not budge from her position that "this case is not the case for [the] death penalty" and that no matter what the prosecutor presented at the penalty phase, she would not vote for death. The court then excused Patrice and Alicia for cause.

Ochoa's arguments with respect to Patrice and Alicia do not differ from the ones related to Gertrude. With respect to the merits of his claim, it is notable that Ochoa argued that the prosecutor's hypothetical was "most egregious and misleading" when she talked to the first group of prospective jurors. Nevertheless, Ochoa elsewhere insists that "the prosecutor mischaracterized the state[-]law framework using the same misleading hypothetical." Specifically, Ochoa objects to the following statement by the prosecutor: "Under the law of aiding and abetting all three people are equally guilty of robbery. In other words, the law makes no distinction as to their level of culpability." Ochoa contends this is misleading because "California law does make a distinction as to the level of culpability between the triggerman and non[-]triggermen for death eligibility." Ochoa emphasizes that the hypothetical was so misleading that the trial court "felt the need to caution that the jurors were 'not getting the full picture.'" The concern is that jurors were disqualified for cause because they mistakenly believed the facts to be so benign that they would not support consideration of the death penalty.

As with the first group, the prosecutor's hypothetical was not misleading. She made no mention of the accidental aiding and abetting felony murder—the only arguably inapplicable statement in her hypothetical to the first group. The three people in the bank robbery hypothetical that the prosecutor presented to later groups—the getaway driver,

the robber, and the lookout—were in fact guilty of robbery under California law, like the prosecutor stated. The prosecutor did not discuss the liability of the triggerman and non-triggermen and did not state that any of those three people were eligible for the death penalty. She simply demonstrated an aiding and abetting principle under California law. Further, the judge cautioned about the jurors not getting the full picture. This was because the prosecutor's focus on the Castro murder could have resulted in the jurors losing sight of the willful, deliberate, and premeditated nature of the Navarette murder and the additional aggravating factors that would be presented during the penalty phase.

Turning to the merits of Patrice's removal, there was sufficient evidence in the record to support the conclusion that her personal beliefs about the death penalty would prevent or substantially impair her ability to abide by her oath and follow instructions. It was proper for the trial court to exclude her given her strong opposition to the death penalty and her contradictory statements on whether she could follow instructions regarding its application. *See Witt*, 469 U.S. at 434 (explaining that it is proper to resolve ambiguities in a juror's statements "in favor of the State"). It is also important to note that defense counsel did not ask the court to follow up with Patrice to rehabilitate her, even though counsel made this request about Alicia following the prosecutor's challenge to both Patrice and Alicia. This failure provides an inference that counsel must have made a judgment call that Patrice was not able to be rehabilitated. *See id.* at 431 n.11, 434–35.

The trial court's removal of Alicia was also proper. Even after the trial court followed up with her, she remained firm that she could not consider the death penalty in this case.

Defense counsel informed the prospective jurors that the Navarette murder involved a gang pay back. And the trial court reminded Alicia that there were two murders and that she might hear additional aggravating evidence during the penalty phase before she expressed her opinion that she could not consider imposing the death penalty. The trial judge's decision is entitled to considerable deference because it is based on his face-to-face credibility assessment of Alicia. *See id.* at 426–29.

Because the California Supreme Court's conclusions with respect to Patrice V. and Alicia B. were neither unreasonable factual determinations nor contrary to or unreasonable applications of clearly established Supreme Court precedent, we affirm the district court's judgment as to Patrice and Alicia. *See* 28 U.S.C. § 2254(d)(1), (2).

iii. Linda H.

Linda's answers to the questionnaire reflected both a clear opposition to the death penalty and an inability to follow the law. She indicated, for example, that she was "against the death penalty," believing it to be "murder on another human being." She also indicated that she would "always vote against death, no matter what evidence might be presented during a penalty trial," which she confirmed orally to the trial court.

As with prior groups of prospective jurors, defense counsel described the facts of the case to Linda's group before questioning from the prosecutor. While the prosecutor was explaining the principle of aiding and abetting, Linda expressed some confusion about the principle and asked for clarification. The prosecutor then used a hypothetical store robbery scenario to explain the principle. The prosecutor went on to explain the felony-

murder rule, which she illustrated with a hypothetical where a robber "gets nervous and pulls the trigger, totally spur of the moment kind of reaction, and he kills th[e] cashier."

Following the prosecutor's explanation of these principles, Linda confirmed her feelings that the death penalty was "premeditated murder" and that she was "against the death penalty always . . . in every case" and could not vote for the death penalty "in any case." Defense counsel did not try to rehabilitate Linda during rebuttal voir dire. He objected, however, to Linda's removal for cause. The trial court noted that Linda "was very strong at the end in stating, quote 'in no case could I vote for the death penalty.'" The California Supreme Court singled out Linda in its opinion, noting that she was properly excused because her "comments revealed her unambiguous opposition to the death penalty." *Ochoa*, 26 Cal. 4th at 432.

As with the prior groups, the prosecutor's hypothetical was not misleading. It was an accurate reflection of California law and closely tracked the facts of the Castro murder. And the two people described in the hypothetical were in fact guilty of robbery under California law, as the prosecutor stated. In addition, defense counsel described the facts of Ochoa's crimes to prospective jurors as well.

Further, there was sufficient evidence in the record to support the trial court's conclusion that Linda's beliefs about the death penalty would prevent or substantially impair her ability to abide by her oath and follow instructions. It was proper for the trial court to exclude her given her adamant opposition to the death penalty and her mostly consistent statements that she could not follow instructions regarding application of the death penalty. Notably, defense counsel reserved time for rebuttal voir dire but used that time on questioning other jurors. This might reflect counsel's

judgment call that Linda was beyond rehabilitation. *See Witt*, 469 U.S. at 431 n.11, 434–35.

Because the California Supreme Court's conclusion with respect to Linda H. was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent, we affirm the district court's judgment as to Linda. *See* 28 U.S.C. § 2254(d)(1), (2).

iv. Martha C., Arthur R., and Lynn J.

In her questionnaire, Martha expressed general opposition to the death penalty and an inability to follow the law. For example, she, like Linda H., indicated that she would "always vote against death, no matter what evidence might be presented during a penalty trial." Martha confirmed these feelings when questioned during voir dire. Arthur's questionnaire, on the other hand, showed his support of the prosecution and the death penalty. Finally, Lynn's questionnaire presented a balanced view of the death penalty.

As with the prior groups, the defense briefly informed the group of the facts regarding the two murders before questioning by the prosecutor. After hearing the prosecutor's description of aiding and abetting liability, Arthur volunteered he would have a "somewhat" difficult time finding an aider and abettor guilty of first-degree murder, but he could do so where it was "pretty clear that the person was really connected." Upon further questioning by the prosecutor, Arthur equivocated until finally concluding that even if the death penalty were "appropriate," he "would . . . not [be] able to follow through" with voting for it.

The prosecutor then explained the felony-murder rule. She posed her bank hypothetical where a person went to rob a bank, got into a struggle with a security guard, and the security guard was killed when the gun went off "accidentally." Finally, she discussed multiple murder and robbery-murder special circumstances, noting that this was "[not] an accidental killing necessarily, but it was a killing during the commission of a robbery without any premeditation or deliberation on the part of the defendant to kill his victim." Lynn volunteered he thought it might be best to limit capital punishment to premeditated and deliberate murders and confirmed his questionnaire statement that the death penalty should be limited to cases of mass murder, unusual cruelty, torture, or murder while in prison. Consistent with this view, he agreed "that this is not a case where [he] could consider the penalty of death."

The defense objected to the removal of Martha, Arthur, and Lynn for cause because their responses were based on "very misleading hypothetical situations which didn't bring about the facts of the case." The trial court responded it did not believe it was a close question as to any of the three jurors.

As with the prior groups, it was not misleading for the prosecutor to refer to accidental murder, as it qualifies as first-degree murder under the felony-murder rule in California. *See Billa*, 31 Cal. 4th at 1068. Notably, the prosecutor was not discussing an aider and abettor when talking about an accidental murder. And following the presentation of the hypothetical, the prosecutor clarified that the Castro murder was "[not] an accidental killing necessarily, but it was a killing during the commission of a robbery without any premeditation or deliberation on the part of the defendant to kill his victim." This was consistent

with the defense's description of the Castro murder to this group of jurors. In short, the jury was on notice that there was no accidental murder charged in this case.

Moreover, all three jurors provided unequivocal responses that they could not consider the death penalty and apply the law. That position was consistent with Martha's and Lynn's questionnaire answers. Martha's answers showed that she would always vote for life regardless of the evidence. Lynn's answers showed he was willing to consider the death penalty only in specific situations that did not include Ochoa's case, such as mass murders, torture, and murder while in prison. While Arthur's questionnaire was supportive of the death penalty, he went back and forth during the voir dire before finally concluding that he would not be able to impose the death penalty. The trial court was able to observe Arthur's demeanor and consider his final, unequivocal answers before it decided to exclude him. *See Uttecht*, 551 U.S. at 20 (holding that the trial court was within its discretion to exclude a juror because the record "show[ed] considerable confusion on the part of the juror"). As the Supreme Court emphasized in *Darden v. Wainwright*, 477 U.S. 168 (1986), even when "[t]he precise wording of the question asked of [the juror], and the answer he gave, do not by themselves compel the conclusion that he could not under any circumstance recommend the death penalty," deference to the trial court is necessary because so much may turn on its assessment of a juror's demeanor. *Id.* at 178. The trial court observed that it was not a close question as to any of the three jurors. And the court did not perceive any need to follow up with these three jurors after the prosecutor's questioning.

Because the California Supreme Court's conclusions with respect to Martha C., Arthur R., and Lynn J. were

neither unreasonable factual determinations nor contrary to or unreasonable applications of clearly established Supreme Court precedent, we affirm the district court's judgment as to Martha, Arthur, and Lynn. *See* 28 U.S.C. § 2254(d)(1), (2).

v. Totality of Voir Dire

"In applying the principles of *Witherspoon* and *Witt*, it is instructive to consider the entire *voir dire*." *Uttecht*, 551 U.S. at 10. In this case, the jury was selected over the course of seven days. There is no significant disparity between the trial court's rulings on the parties' challenges. *See id.* Moreover, before deciding a contested challenge, the trial court allowed each side to explain its position. And when issuing a decision, the trial court provided "careful and measured explanations." *Id.* at 11.

Several challenges illustrate the court's thoughtful and careful consideration and application of the *Witt/Witherspoon* substantial impairment standard. In the first group of prospective jurors, for example, the trial judge excused a prospective juror for cause on his own motion, over the prosecutor's objection, reasoning that the prospective juror was "all over the place" and thought Ochoa was guilty because he did not turn around to look at the jury. The record also reflects that the trial court paid close attention to the jurors' body language. *See Ristaino v. Ross*, 424 U.S. 589, 595 (1976) ("[T]he determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge." (cleaned up)).

The totality of voir dire thus supports the conclusion that the trial court's decisions as to the seven prospective jurors are entitled to deference. *See Uttecht*, 551 U.S. at 10–13

(analyzing the number of challenges for cause each party made and the number granted, that the trial court "gave each side a chance to explain its position and recall the potential juror for additional questioning[,]" that "the court gave careful and measured explanations[,]" and scrutinizing the vigor and persuasiveness of defense's objections). For all the reasons noted above, we affirm the district court's judgment as to Ochoa's *Witt*/*Witherspoon* claim.

2. Second Certified Claim: Ineffective Assistance of Counsel for Failing to Rehabilitate Prospective Jurors Challenged for Cause

Ochoa contends that his trial counsel were ineffective because the excusals for cause challenged in the claim above were based upon "counsel's failure to investigate, adequately object[,] and/or rehabilitate the prospective jurors." On this issue, the California Supreme Court's denial of Ochoa's second state petition is the last reasoned decision. The California Supreme Court summarily denied Ochoa's ineffective assistance of counsel claim "on the merits."

Applying AEDPA deference, the district court also denied this claim on the merits:

> The California Supreme Court may have reasonably rejected as speculative Petitioner's claims that there is a reasonable probability that counsel's investigation and rehabilitation of the jurors would have spared them. As to Petitioner's allegation that trial counsel should have objected to the prosecutor's hypothetical, the California Supreme Court may have reasonably held that prospective jurors Gertrude W., Patrice V., and Alicia B. were substantially impaired

> in their ability to impose the death penalty unrelated to the prosecutor's hypothetical. It may have reasonably denied that portion of the claim for lack of prejudice.

Because the California Supreme Court's conclusion was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent, we affirm the district court's denial of relief. *See* 28 U.S.C. § 2254(d)(1), (2).

a. Standard of Review

Before addressing the merits of Ochoa's claim, we must determine the proper standard of review. In his briefing, Ochoa argues that because the California Supreme Court summarily denied his ineffective assistance of counsel claim without conducting an evidentiary hearing, it was only a determination that he failed to state a prima facie case and thus de novo review, rather than AEDPA deference, is the appropriate standard of review. Notably, during oral argument Ochoa's counsel explicitly disclaimed this argument. Nevertheless, "we must determine the appropriate standard of review." *United States v. Ziskin*, 360 F.3d 934, 938 (9th Cir. 2003); *cf. Hernandez v. Holland*, 750 F.3d 843, 856 (9th Cir. 2014) ("[T]he AEDPA standard of review itself cannot be waived.").

Almost two decades ago in *Nunes v. Mueller*, 350 F.3d 1045 (9th Cir. 2003), a panel of this court expressly credited a prima facie argument similar to Ochoa's. *Id.* at 1056. But in *Pinholster*, the Supreme Court seemingly rejected the same argument, holding that AEDPA deference "applies even where there has been a summary denial." 563 U.S. at 187; *see Richter*, 562 U.S. at 99 ("There is no merit to the assertion that compliance with § 2254(d) should be excused

when state courts issue summary rulings . . . ."). Since then, we have consistently rejected—albeit implicitly—similar prima facie arguments. *See, e.g.*, *Montiel v. Chappell*, 43 F.4th 942, 956–57 (9th Cir. 2022); *Ochoa v. Davis*, 16 F.4th 1314, 1344 (9th Cir. 2021); *Sully v. Ayers*, 725 F.3d 1057, 1067 n.4 (9th Cir. 2013). Accordingly, we take this opportunity to make explicit what has to this point been implicit: the California Supreme Court's summary denial of Ochoa's claims—both certified and uncertified—is a decision on the merits and thus entitled to AEDPA deference.

b. Applicable Law

To prevail on his ineffective assistance claim, Ochoa must demonstrate that: (1) "counsel's performance was deficient"; and (2) the "deficient performance prejudiced [his] defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see Williams*, 529 U.S. at 390–91. Under the first prong, *Strickland* requires a showing that counsel's performance was deficient, measured under "an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. This standard gives a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, [Ochoa] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (cleaned up). Under the second prong, Ochoa must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 694.

"The *Strickland* standard is a general one, so the range of reasonable applications is substantial." *Richter*, 562 U.S. at 105. "Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more

difficult. The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." *Id.* (cleaned up). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

c. Analysis

i. Counsel's Performance

Ochoa contends that defense counsel's performance was deficient because counsel failed to: (1) object to the prosecutor's bank robbery hypotheticals; and (2) rehabilitate the jurors who were challenged under *Witt* and *Witherspoon*. But Ochoa fails to overcome the presumption that defense counsel's conduct fell within the wide range of reasonable professional assistance. *See Strickland*, 466 U.S. at 687. As discussed above, the prosecutor's hypotheticals were not objectionable. They were an accurate statement of relevant California law. Accordingly, counsel was not deficient in failing to raise a meritless objection.

Nevertheless, after the prosecutor challenged the jurors from the second group, Ochoa's counsel did object to the prosecutor's hypotheticals. Defense counsel vigorously argued that the prosecutor was downplaying both murders, which resulted in exclusion of four jurors. Counsel also asked the court to follow up with Alicia with the same questions that the court asked another juror, to remind Alicia that there were two murders in this case and that the prosecutor may present aggravating evidence during the penalty phase. After the second group was dismissed and following a recess, counsel renewed the objection to the prosecutor's hypothetical. Counsel also asked the court to

reverse the order in which the parties do their questioning and allow defense to go after the prosecution. While the court refused to reverse the order, it allowed defense counsel to reserve some time to rehabilitate the jurors. Counsel continued raising the objection with respect to the hypotheticals in subsequent groups.

Although Ochoa claims that counsel should have objected sooner to the hypothetical the prosecutor presented to the first and second group, the timing of the objection appears to be irrelevant since the objection was overruled. And Ochoa does not claim that objections with respect to the other groups were inadequate. After the first group, the prosecutor never again referenced an aider and abettor in a felony-murder situation.

Furthermore, there was considerable evidence that each of the challenged jurors was substantially impaired in his or her ability to impose the death penalty in this case. Ochoa has not explained how investigating them or further questioning would have rehabilitated a single excused juror to the point that excusal for cause was unconstitutional. First, they expressly stated that they would not be able to consider the death penalty and follow the law in response to questions from the prosecutor, the defense, and the trial court. Second, to the extent their answers were not clear, the judge followed up with some jurors either on his own accord or at the request of counsel. The judge also allowed the defense to save time at the end for a rebuttal voir dire and defense counsel did use that time.

Moreover, counsel was constrained by the ordinary and customary practical considerations such as the limited amount of time allowed for voir dire and a concern about tainting the jury against the defendant by highlighting the worst facts about the murders. *See United States v. Cronic*,

466 U.S. 648, 661–62, 662 n.31 (1984) (explaining that "external constraints" imposed on counsel do not give rise to an ineffective assistance of counsel claim merely because they make counsel's task more difficult). Counsel had thirty minutes for voir dire with each group of up to seventeen jurors. In addition to questioning, counsel strived to explain certain concepts to the jury. That left less than two minutes per juror to find out about their individual biases, clarify answers in the questionnaire, and attempt rehabilitation.

Finally, the presumption that counsel's conduct was reasonable is even stronger when an experienced trial counsel is involved. *Stewart v. Sec'y, Dep't of Corr.*, 476 F.3d 1193, 1209 n.25 (11th Cir. 2007). Both of Ochoa's counsel were experienced capital defense attorneys. Prior to being appointed to represent Ochoa, the counsel who handled the questioning of jurors during voir dire had been appointed or retained more than ten times in capital cases. Despite Ochoa's insistence on faulting counsel, he offered no testimony or other evidence from them on this issue. This omission is particularly significant given the range of deference given to counsel's strategic decisions based on, among other things, observations of jurors' credibility and demeanor.

For all these reasons, Ochoa fails to overcome the presumption that defense counsel's conduct fell within the wide range of reasonable professional assistance. *See Strickland*, 466 U.S. at 687.

ii. Prejudice to Ochoa

Ochoa also fails to show how trial counsel's failure to object or try to rehabilitate some of the jurors prejudiced him. Ochoa must show a "reasonable probability" that an objection would have led to any of the jurors not being

excused for cause. *See Knowles v. Mirzayance*, 556 U.S. 111, 127 (2009) (citing *Strickland*, 466 U.S. at 694). Ochoa cannot meet this standard. All he has done is speculate about whether any of the excused jurors would have given different answers to different hypotheticals. Further, "the trial court expressly indicated it would not dismiss for cause a prospective juror who based her stated inability to impose the death penalty on a description of the case that the court deemed misleading." *Ochoa*, 26 Cal. 4th at 431–32.

Because it was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent for the California Supreme Court to have determined that Ochoa's counsel were not ineffective during voir dire, we affirm the district court. *See* 28 U.S.C. § 2254(d)(1), (2).

d. Request for Evidentiary Hearing

Ochoa contends that the district court abused its discretion in denying an evidentiary hearing with respect to his ineffective assistance of counsel claim. He argues that "[a]t a hearing, [he] could have questioned the removed jurors regarding the impact of the prosecutor's hypothetical in order to establish a reasonable probability that at least one of the jurors would not have been removed."

We review the district court's denial of a petitioner's request for an evidentiary hearing for abuse of discretion. *See Schriro v. Landrigan*, 550 U.S. 465, 468 (2007); *Earp v. Ornoski*, 431 F.3d 1158, 1166 (9th Cir. 2005). AEDPA prohibits an evidentiary hearing where a petitioner has not been diligent in pursuing his claims in state court. *See* 28 U.S.C. § 2254(e)(2). The diligence determination is reviewed de novo. *Baja v. Ducharme*, 187 F.3d 1075, 1077 (9th Cir. 1999). In addition to finding diligence, "[i]n

deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations," and whether those allegations, if true, would entitle him to relief. *Landrigan*, 550 U.S. at 474.

Ochoa has not shown that an evidentiary hearing could result in any useful evidence to prove the factual allegations in his petition. First, even if the excluded jurors remembered what impact a hypothetical by the prosecutor had on them almost thirty years ago, there is no evidence in the record to show that the jurors if presented with the concepts of aiding and abetting and felony murder in a less innocuous fashion would conclude that they could apply the death penalty in a case like Ochoa's. After all, Gertrude made clear in her questionnaire that she felt anybody who did not commit premeditated murder should get life in prison. Likewise, Lynn felt that the death penalty should be limited to cases of mass murder, torture, or murder in prison, and none of those circumstances was present in this case. Second, any such testimony by the excluded jurors would not change whether counsel perceived them as substantially impaired and whether counsel believed any of them could be rehabilitated. Third, even if the jurors testified that they remembered that the prosecutor's hypothetical made a significant impact on their ability to consider the death penalty in this case, Ochoa would still not be able to show that in light of their demeanor and answers on the questionnaires, counsel would have successfully convinced the trial court that they were not substantially impaired. *See Witt*, 469 U.S. at 424–25. Moreover, the trial court is entitled to resolve any ambiguity in answers in favor of the State. *Id.* at 434. At most, the trial court would have been left with conflicting answers, and thus, it would have been justified in resolving the

ambiguities in favor of the State and excluding the jurors. *Id.*

Because the district court did not abuse its discretion in denying Ochoa's request for an evidentiary hearing, we affirm the district court's denial of his request.[2]

B. The Uncertified Claims

We may not review Ochoa's uncertified claims unless a certificate of appealability is granted on them. *See* 28 U.S.C. § 2253(c)(1)(A) ("Unless a . . . judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a habeas corpus proceeding."). To obtain a certificate of appealability on a claim, "a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (cleaned up). While we ultimately affirm the district court's judgment on the merits with respect to both of the uncertified claims, because we conclude that "jurists of reason could disagree" with the district court's denial of these claims, we expand the certificate of appealability to cover them. *See id.* at 327; *see also* 28 U.S.C. § 2253(c)(2).

[2] To the extent Ochoa argues that an evidentiary hearing is warranted with respect to his uncertified claims, he fails to specifically argue what an evidentiary hearing would add to the state court record. Accordingly, we also affirm the district court's denial of Ochoa's request for an evidentiary hearing with respect to his uncertified claims. *See Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992) ("Issues raised in a brief which are not supported by argument are deemed abandoned."); *see also Landrigan*, 550 U.S. at 474.

1. First Uncertified Claim: Ineffective Assistance of Counsel During the Penalty Phase

Ochoa contends that his defense counsel were ineffective during the penalty phase for failing to present mitigating evidence, such as evidence of his brain damage and traumatic childhood. He also faults his counsel for failing to investigate and attack the prosecution's aggravation evidence, including failing to present a gang expert.

Ochoa raised this claim in both of his state habeas petitions. The California Supreme Court summarily denied the claim "on the merits."

The district court also denied Ochoa's claim, finding that trial counsel was not deficient. The district court found that counsel's investigation and penalty phase presentation were reasonable, and counsel reasonably relied on Dr. Michael Maloney's evaluation of Ochoa. The district court further determined that the record belied Ochoa's allegations that counsel ignored evidence of grossly ineffective parenting. Counsel's strategy during the penalty phase was to evoke sympathy for Ochoa's family. Although counsel's investigation uncovered evidence of the father's drinking and siblings' gang affiliations, it was a reasonable strategic decision not to present this evidence to avoid undermining the defense's strategy. Likewise, the decision not to present a gang expert was done after a reasonable investigation and was itself reasonable.

Because the California Supreme Court's conclusion was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent, we affirm the district court. *See* 28 U.S.C. § 2254(d)(1), (2).

a. Applicable Law

As discussed above, ineffective assistance of counsel claims are reviewed under "[t]he standards created by *Strickland* and § 2254(d)[,] . . . both [of which are] highly deferential and when appl[ied] in tandem, review is doubly so." *Richter*, 562 U.S. at 105 (cleaned up). When reviewing a penalty-phase ineffective assistance of counsel claim, we first "focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [petitioner's] background *was itself reasonable*." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). To assess prejudice in the context of such a claim, federal courts must "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Id.* at 534. Ochoa must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694. In a capital case, this means he must show "a reasonable probability that at least one juror" would have voted for a life sentence. *Wiggins*, 539 U.S. at 537.

b. Analysis

i. Evidence Presented During the Penalty Phase

During the penalty phase, the prosecution presented evidence that Ochoa had previously pleaded guilty to several felonies as an adult. When Ochoa was eighteen years old, he and another gang member jumped out of the car, beat up fourteen-year-old Lionel Fricks and took his radio. *Ochoa*, 26 Cal. 4th at 419. When Ochoa was twenty, Ochoa took a vehicle without the owner's consent. *Id.* at 420. And when he was twenty-one, just hours after the Castro murder, Ochoa robbed Freddie Garcia at a gas station. *Id.*

The jury was also apprised that Ochoa had an "extensive" juvenile record, spent a year in a juvenile camp, and was on probation after the camp. The jury also learned that while awaiting trial in this case, Ochoa participated in a fight between black and Hispanic inmates in the jail; a deputy found a makeshift handcuff key inside Ochoa's wristband while he was transported to court; and another deputy found a shank in Ochoa's property bag. *Id.*

The victims' families provided victim impact evidence. Rudolfo Rivera, Navarette's brother and passenger on the night of the murder, testified Navarette worked long hours six days a week to help support his family. *Id.* Navarette's "death was especially difficult for his mother . . . nearly three years after the shooting." *Id.* Castro's sisters testified how close their family was and how much their mother was impacted. *Id.* Castro's wife testified that they were high school sweethearts and that he had a close relationship with their thirteen-year-old son, Joey. Joey had been attending counseling since the murder. He often asked his mother "what would Daddy do" in certain situations. *Id.* at 420–21.

In response, the defense produced Rosalba ("Rosie") Gallegos, Ochoa's oldest sister, Eduardo Ochoa Sr., Ochoa's father, and Lisa Martinez, mother of Ochoa's daughter, to describe Ochoa's life and character. *Id.* at 421–22. They testified that Ochoa was the fourth of five children born to Eduardo Sr. and Ofelia Ochoa in Tijuana. *Id.* at 421. The other children were Rosie, Eduardo Jr., Gloria, and Lisa. Ochoa's family moved to the United States when he was three years old. *Id.* His parents worked outside the home during the day, so Rosie often acted as Ochoa's surrogate mother. *Id.* Eduardo Sr. and Rosie testified that Ochoa was the only one of the children that had "trouble with the law." Although Ochoa did well in elementary school, he began

missing school, dressing as a gangster, and getting tattoos once he was in high school. *Id.* at 422.

When Ochoa was fifteen years old, he met Lisa Martinez. Ochoa studied with Lisa to become a dental technician. He earned his diploma but was unable to find work in the field. *Id.* Ochoa and Lisa had a daughter, Claudia. *Id.* They lived together with Ochoa's parents and siblings for two years. Ochoa loved and played with Claudia a lot. He also stayed in touch with Claudia after the couple split up and while he was in jail waiting for trial. Ochoa also maintained close ties with his sister Rosie's children. They visited him in prison and were excited when he called to speak with them on the phone.

The remaining evidence at the penalty phase was presented in rebuttal to the prosecution's case-in-aggravation. A fellow gang member testified that Ochoa did not hit the teenager during the robbery, but his accomplice did; correctional officers testified that Ochoa was a lesser player in the jail fight; and a correctional consultant testified regarding security measures at high-security California prisons housing life prisoners.

ii. Evidence Submitted with Ochoa's State Habeas Petitions

With his state habeas petitions, Ochoa submitted declarations from family members, neighbors, and experts. Ochoa contends that if his trial counsel were effective, the jury would have heard that: (1) Ochoa was raised in "desolate conditions" and left with an alcoholic father and then a babysitter during weekdays for the first two years of his life; (2) Ochoa was "plagued with risk factors making gangs attractive [to him], coupled with the utter lack of protective factors that could have helped him resist the gang

influence"; (3) Ochoa had neuropsychological deficits "probably from birth" that were worsened by the violent attacks he suffered during gang warfare; (4) Ochoa's tattoos, including the "187" he carved in his forehead while waiting for trial, were a reflection of how vulnerable and unprotected he had felt since childhood; and (5) Ochoa's sister Gloria suffered from cognitive disabilities and was most likely the victim of incest with her father.

According to the declarations, when Ochoa was "a baby," Eduardo Sr. and Ofelia went to work in the United States, leaving their children with a babysitter in Tijuana. The neighbors told Ofelia that the babysitter fed the children tortillas and black coffee and left them with Rosie while she went dancing. When Ofelia and Eduardo came home, the children were vomiting and had spots on their faces from coffee.

Ochoa's parents provided "little or no supervision" or guidance to Ochoa and his siblings. And throughout Ochoa's childhood, Eduardo Sr. drank heavily. Although Eduardo Sr. was arrested three times for driving under the influence, he was never violent or abusive when drunk.

Ochoa initially joined the Pee Wee Winos, the junior subgroup of the 18th Street gang, when he was eleven years old. He was jumped into the 18th Street gang when he was thirteen. According to Gloria, "it was normal to join the gangs" in their neighborhood, and half of the kids from their school were in gangs. Eduardo Jr. joined the 18th Street gang at thirteen years old and dropped out at eighteen. According to him, "[i]n those days, being in the gang really just meant hanging out together." Gloria joined the gang after Ochoa. Ochoa's parents "seemed to be concerned that their children were joining the gangs but they didn't know what to do about it. The mother used to cry a lot."

A psychologist, Dr. Patricia Pérez-Arce, conducted neuropsychological testing of Ochoa eleven years after the murders, and opined that Ochoa suffers from "significant deficits in his ability to analyze visual and verbal information when the content is abstract, complex, and/or unfamiliar, in using common sense judgment to solve problems, and in visual spatial memory functions." "This central nervous impairment is likely to have been present from birth and probably exacerbated" by two attacks from rival gang members Ochoa suffered as a teenager. Specifically, when Ochoa was twelve years old, he was "hit with a bumper jack in the chest" and "blanked out." And when he was eighteen, Ochoa was beaten by rival gang members with a bat. He had a "neck fracture" and spent time in the hospital.

Another psychologist, Dr. Nancy Kaser-Boyd, also conducted a psychological evaluation of Ochoa eleven years after the murders. She opined that Ochoa has a history of "overwhelming environmental stress by way of family circumstances and economic hardship." She diagnosed Ochoa with post-traumatic stress disorder ("PTSD") based on the assaults he experienced. She also opined that due to either "environmental deprivation, family genetics, or head trauma, [Ochoa] had limited cognitive abilities and coping skills" at the time of the offenses.

A third psychologist, Dr. Francisco Gomez, summarized Ochoa's life history and opined that his mental impairments were recognized by his peers when he was quite young.

According to Ochoa's gang expert Father Gregory Boyle, S.J., "[t]he mere presence or absence of tattoos will not necessarily tell you how involved a person is in gang violence." Tattoos "are a way of stating your involvement in the gang, but they can be posturing and posing." Father

Boyle also disputed the expertise of prosecution expert Detective Michael Berchem.[3] He believed that police officers who testify as experts "have limited knowledge of the actual lives of the gang members they arrest and interrogate."

Finally, the Silva family, the Ochoas' neighbors, and Lisa Martinez (who lived with the Ochoas for two years), believed that Eduardo Sr. carried on an incestuous relationship with his daughter, Gloria, and is the likely father of her five children. They related several incidents that appeared suspicious to them.

iii. Counsel's Performance

Ochoa fails to rebut the presumption of counsel's competence mandated by *Strickland*. As part of their investigation, Ochoa's trial counsel hired a mitigation investigator Sheryl Duvall, M.S., to assist with the preparation of the penalty phase defense. Duvall conducted a comprehensive review of Ochoa's background. She met with Ochoa in jail and reported to defense counsel, "He gave me a fairly comprehensive picture of his background." Duvall personally interviewed members of Ochoa's immediate family, including his parents, siblings, and the mother of his child, as well as Ochoa's former teacher and a former principal at Ochoa's court-ordered juvenile camp, two neighbors and close family friends, and a next-door neighbor of more than twenty-five years. Duvall also

[3] The trial court permitted Detective Berchem "to testify as an expert concerning [Ochoa's] gang-related tattoos, including the '187' mark." *Ochoa*, 26 Cal. 4th at 439. Detective Berchem explained the significance of this mark to the jury and testified that "the extent of [Ochoa's] 18th Street Gang tattoos signified his 'hard-core' member status." *Id.* at 437.

gathered and analyzed documents pertaining to Ochoa's education, physical health, and juvenile court record.

Counsel also retained Dr. Maloney, who was well known in the criminal defense community, had testified "hundreds of times" for both the prosecution and defense, and was liked by counsel after previously working for them. In a letter to Dr. Maloney in preparation for his work on Ochoa's case, counsel enclosed summary police reports and informed him that there was also extensive documentation from two "Murder Books" that was available. Counsel advised Dr. Maloney that Duvall should have provided him with her interview reports and that he would send Ochoa's medical records from an assault at age eighteen that had been subpoenaed. Counsel said that Ochoa was "a real mystery" and asked for Dr. Maloney's help in understanding him:

> His family background is different from other Death Penalty cases I have handled in that his parents seem extremely caring and concerned (as you can tell from Sheryl Duval[l]'s Reports). Though they do not speak English at all, they show up at every Court Appearance, including continuances. The parents, and Sergio's siblings have been very cooperative in terms of background investigation. In other words, Sergio does not seem to have the horrible family background that so often spawns Death Penalty candidates. . . .
>
> [T]he cold blooded Castro murder does not make sense to me in light of Sergio's background and family history, and in light of what his family and other people we have

> interviewed say about him; that is, that he is a nice, thoughtful, considerate guy.

Finally, counsel retained Diego Vigil, Ph.D., to assist in the preparation of the penalty phase. Dr. Vigil, a professor at the University of Southern California, had "extensive background and training in the field of Gangs, and Gang Activity, with a specialty in Hispanic Gangs." Dr. Vigil interviewed Ochoa, reviewed documents, and consulted with counsel on three occasions.

Ochoa raises several arguments why this investigation was not reasonable. First, he relies on counsel's "admission" that they presented a false picture of their client. He specifically points to the following argument that counsel made during closing:

> We always learn things at a trial.
>
> And yesterday one of the most significant things that I learned and that [my co-counsel] learned during the course of this trial was just how out of touch with reality Sergio's family was regarding his activities.
>
> If you will recall Rosie testified and Mr. Ochoa both testified that . . . the first time in his life there were problems was when he was approximately [thirteen] years old . . . .
>
> Yet yesterday there was testimony from Dr. Maloney which not only surprised me but I felt had inherent credibility to it, and clearly demonstrated the problems perceiving Sergio

> that unfortunately his parents had, their lack of touch with reality as to what was going on in his life . . . .
>
> [Y]esterday for the first time in when we were questioning Dr. Maloney regarding what information he relied on and he testified that he was relying on . . . Sergio's direct and clear statements to him that he first became involved in gang activity when he was about eleven and the gang was the Pee Wee Winos.

Ochoa's argument is not persuasive. This was no "admission" of incompetence, and it did not show that a false picture was presented to the jury. There was some confusion about the exact timing when Ochoa joined the gang because Ochoa did join the 18th Street gang—the gang that he committed the relevant offenses with—at thirteen years old. Other witnesses who submitted declarations with Ochoa's state habeas petitions discussed that fact as well.

Further, counsel used this fact to illustrate the mitigating factor that they had been presenting throughout the penalty phase—that Ochoa's family was well-meaning, but not attentive and did not notice him joining a gang for two years. Most importantly, there is no evidence that the difference between Ochoa joining a gang at age eleven or thirteen would have changed the jury's view of Ochoa. Rather, it seems to have not been a significant fact.

Next, Ochoa complains that counsel ignored "red flags" such as Ochoa being influenced by his older siblings' gang membership and joining the gang in their footsteps, as well as his father's heavy drinking. First, it is unclear whether either one of those could fairly be characterized as "red

flags." An argument about the older siblings' bad influence is not supported by the record. Further, while Eduardo Sr.'s drinking was unfortunate, Duvall's investigation concluded that it had minimal—if any—impact on the children.

More importantly, it was a reasonable strategic choice for counsel not to present the evidence of Ochoa's father's drinking and his siblings' gang affiliations. As the district court correctly found, Ochoa's counsel strategically chose to present the "family sympathy" defense at the penalty phase. This was a reasonable decision. Many witnesses discussed how loving, hardworking, and giving the Ochoa parents were. It was both their strength and weakness because they tried very hard for their children, but in the process left them without attention. While an extended family may have stepped in to help and provide supervision if they were still in Mexico, all that the children had in South Central were gangs. Evidence of Ochoa's father's drinking and his siblings' gang affiliations, while not of material mitigating weight, could have undermined this "family sympathy" defense. *See Livaditis v. Davis*, 933 F.3d 1036, 1048 (9th Cir. 2019) (explaining that counsel's decision to plead for mercy on behalf of Livaditis's family rather than delve into his mother's abuse of him was reasonable given the closeness of the family and the fact that emphasizing the mother's abuse "would have been inconsistent with portraying her as a sympathetic witness and would therefore have limited the efficacy of a family sympathy approach"); *see also Ochoa*, 16 F.4th at 1335 (holding that it was not unreasonable for the California Supreme Court to conclude that defense counsel's decision to present "humanizing portrayals of Ochoa by his family" at the penalty phase instead of "evidence regarding Ochoa's dysfunctional upbringing and mental health evaluations" was reasonable).

Further, counsel was not ineffective for failing to uncover the remainder of the mitigation evidence now identified by Ochoa. With respect to neglect by the babysitter in the first two years of Ochoa's life, counsel's failure to discover this information did not stem from any failure to ask sufficiently probing questions, but from the family either not remembering or not attaching significance to the event.

Ochoa also claims that counsel sought and received funding to go to Mexico but did not go for reasons unexplained in the record. Ochoa contends it was unreasonable for counsel to not interview family members in Mexico who could have apprised them of the Ochoa family's dysfunctionality. But it was reasonable for counsel not to interview the family in Mexico. None of the interviews conducted by Duvall showed any significant family dysfunction. And because the family left Mexico when Ochoa was two or three years old, it was reasonable for counsel to not consider the family in Mexico as an important source of mitigation material absent indications to the contrary.

The record supports this conclusion, as a review of the declarations that Ochoa submitted from the relatives in Mexico shows that they did not have a lot of insight into family dynamics, and any dysfunction they discussed was in conclusory terms. Moreover, this type of information was cumulative to what counsel already knew. It was also conclusory and innocuous and therefore would not have changed the jury's view of Ochoa. Ochoa appears to argue that despite what trial counsel found, they simply should have found more. But counsel need not undertake exhaustive witness investigation. The question is not "what is prudent or appropriate, but only what is constitutionally

compelled." *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (cleaned up). And the Constitution does not compel counsel "to mount an all-out investigation into petitioner's background in search of mitigating circumstances" if, as here, the decision not to do so "was supported by reasonable professional judgment." *Id.*

Ochoa also contends that counsel should have presented evidence of his neuropsychological deficits. Ochoa relies on declarations from Dr. Pérez-Arce, who diagnosed Ochoa with a brain impairment, as well Drs. Kaser-Boyd and Gomez, who diagnosed him as suffering from symptoms consistent with PTSD. According to Pérez-Arce, Ochoa's visual problems, which counsel was aware of, indicated the need to further test for neurological impairments. Finally, Ochoa claims that counsel did not properly assist Dr. Maloney in forming an accurate opinion of Ochoa. Specifically, counsel knew that Ochoa had poor coordination and could not complete his work at dental technology school, yet they "did not insist that when Ochoa was examined by his mental health expert, that he be examined uncuffed, so as to determine whether Ochoa had any visual-spatial memory impairments."

As noted above, counsel hired Dr. Maloney to assist in preparing the mitigation case. Dr. Maloney interviewed and evaluated Ochoa and administered several psychological and neuropsychological tests. Dr. Maloney was not able to perform some of the tests because Ochoa was handcuffed. Dr. Maloney testified at trial that he knew that Ochoa suffered a head injury at age eighteen when he was beaten with a baseball bat. Dr. Maloney conducted specific tests, such as the Bender Gestalt Test, and the Symbol Digit Modalities Test, because he "wanted to see if there was any kind of deficit as a result of [the beating]." Ochoa "did better

than average on all of those." Dr. Maloney concluded, "there really wasn't any suggestion of that kind of deficit." Dr. Maloney opined that there was no indication of psychosis or schizophrenia, Ochoa was somewhat insecure, not grossly disturbed, and he knew right from wrong.

There is no indication that counsel was deficient in relying on Dr. Maloney's opinion. According to Dr. Kaser-Boyd, the fact that Ochoa was handcuffed should not have precluded a complete examination because "psychologists routinely request that the handcuffs be removed for psychological testing, or changed to leg restraints." But Dr. Kaser-Boyd did not account for the fact that Ochoa was a death row prisoner housed in a "high powered module" because he was fighting in jail, had possessed a shank and a makeshift handcuff key, and was thus considered an escape risk. She also did not know whether Dr. Maloney made any unsuccessful request for the handcuffs to be removed. Without more information, Ochoa's claim that Dr. Maloney was deficient in testing Ochoa is speculative.

Furthermore, counsel cannot be ineffective for not supervising under what conditions a qualified, experienced expert does his testing and what testing the expert orders. It is not counsel's obligation to challenge the expert's decision or find a different expert. *See Payton v. Cullen*, 658 F.3d 890, 896 (9th Cir. 2011) ("Having retained qualified experts, it was not objectively unreasonable for [trial counsel] not to seek others."); *Earp v. Cullen*, 623 F.3d 1065, 1077 (9th Cir. 2010) (noting that there is "no constitutional guarantee of effective assistance of experts").

Finally, because Drs. Pérez-Arce, Kaser-Boyd, and Gomez conducted their analyses eleven years after the murders, their diagnoses carry less weight. *See Runningeagle v. Ryan*, 825 F.3d 970, 988 (9th Cir. 2016)

(discounting a diagnosis produced more than twenty years after the crimes were committed). In addition, they are based, in part, on two assaults when Ochoa was an adolescent. One of the assaults was self-reported by Ochoa eleven years after the crime and Ochoa has not described any injuries from it or that he sought medical attention.

Ochoa also argues that counsel should have presented a rebuttal of the prosecution's gang expert's testimony about Ochoa's tattoos. Because counsel hired Dr. Vigil as a gang expert for the penalty phase but did not present him, Ochoa argues the "only inference" to be drawn is that Dr. Vigil did not meet expectations and that a new expert should have been retained. That is speculative. Dr. Vigil had the requisite experience, met with Ochoa, reviewed documents, and consulted with counsel. There is nothing in the record that would suggest he was incompetent. Absent evidence to the contrary, the presumption is that counsel made a strategic choice not to call Dr. Vigil as a witness. *See Strickland*, 466 U.S. at 689.

As a point of comparison, Ochoa presents the expert hired by habeas counsel, Father Boyle. But Father Boyle's declaration about the significance of tattoos on Ochoa's body appears to be cumulative to the testimony presented by Dr. Maloney. Specifically, Dr. Maloney testified that the "187" tattoo could indicate lack of remorse, but it could also be used to signal to other gang members "how tough" Ochoa was and where he stood in a pecking order in jail. With respect to Father Boyle's attack on Detective Berchem's expertise, the jury heard that Detective Berchem's expertise was acquired through investigating the gangs' criminal activities. That a police officer would not have knowledge of all aspects of criminals' lives is within jurors' common

experience and does not need to be explained by a rebuttal expert.

Ochoa relies on *Hinton v. Alabama*, 571 U.S. 263 (2014), for the proposition that deficient performance can be found when defense counsel fails to request additional funds to replace an inadequate expert. In *Hinton*, the Supreme Court determined that trial counsel was deficient because he failed to research the expert-funding statute, and he then presented an expert at trial whom he knew to be unqualified based on his mistaken belief that he was not entitled to more funds. *Id.* at 273. The Court characterized this deficiency as a failure to "make reasonable investigations," and it emphasized that the deficient performance it found in the case "does not consist of the hiring of an expert who, though qualified, was not qualified enough." *Id.* at 274–75. The Court specifically stressed that "[w]e do not today launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired." *Id.* at 275. Thus, *Hinton* does not help Ochoa, as he invites the very examination *Hinton* expressly says that federal courts may not conduct.

Finally, Ochoa contends that counsel failed to investigate his father's incestual relationship with Ochoa's older sister, Gloria, and his father begetting Gloria's five children. Ochoa relies on declarations of three witnesses who knew the family explaining why they suspected the relationship. But none of these declarations constitute reliable evidence of an incestuous relationship. "[C]ounsel is not deficient for failing to find mitigating evidence if, after a reasonable investigation, nothing has put the counsel on notice of the existence of that evidence." *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998) (cleaned up). Counsel can hardly be faulted when Ochoa, his family,

family friends, and neighbors all failed to relate the information about incest when asked about family dynamics. Furthermore, if defense counsel put this evidence on, there are no assurances that the jury would have drawn a conclusion that there was an incestuous relationship, and it is even less certain that they would have found this information mitigating. There was a real danger that it would have turned into a mini trial on who was the father of Gloria's children, which certainly could have undermined Ochoa's "family sympathy" defense.

For all these reasons, Ochoa fails to overcome the presumption that his counsel's conduct fell within the wide range of reasonable professional assistance. *See Strickland*, 466 U.S. at 687.

iv. Prejudice to Ochoa

Ochoa likewise fails to establish prejudice with respect to counsel's alleged deficiencies. According to Ochoa, even though counsel failed to present powerful mitigating evidence, the jury still struggled to reach a decision: during deliberations, the jury sent out a note indicating that while they had reached a verdict as to the Castro murder, they were at an impasse as to the Navarette murder and "most [jurors were] not flexible either way." After the note, the jury did not ask for any readback or clarifications and did not pose any questions; they reached a verdict of death on the remaining count in the afternoon the following day. Because of this, Ochoa argues that the likelihood of a different result is substantial.

Ochoa overstates the significance of the jury's note. While longer jury deliberations may suggest a difficult case and thus weigh against a finding of harmless error, *see United States v. Velarde-Gomez*, 269 F.3d 1023, 1036 (9th

Cir. 2001) (en banc), at the time the jury sent the note, they had already reached agreement to impose a death sentence with respect to the Castro murder.

Ochoa also relies on *Sears v. Upton*, 561 U.S. 945 (2010), *Porter v. McCollum*, 558 U.S. 30 (2009), *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins*, and *Williams*, to support his claim, but these cases are inapposite. The additional evidence submitted by Ochoa was not so different in quality or kind that it would have shifted the jury's view of Ochoa as a person or his responsibility for the killings. The jury knew that even though his family loved him, Ochoa had been neglected growing up; the family worked hard but remained poor; he and his siblings were bullied for their ethnicity by neighborhood children; their home was burglarized on several occasions; one of the sisters was severely beaten; Ochoa was a good father; and he had a low-end IQ. The evidence gathered by habeas counsel is largely cumulative of the evidence presented at trial, and the remainder fails to dramatically change the way the jury would have viewed Ochoa.

At the same time, the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—must be reweighed against the aggravating evidence. *Williams*, 529 U.S. at 397–98. Ochoa participated in the killing of two people within the span of three weeks. The murder victims were not gang members and were very sympathetic. One was a teenager, murdered in front of his brother who was also endangered in the attack. The other was a Marine veteran who had a teenage son. Within hours of committing the second murder, Ochoa participated in another robbery, where he punched, kicked, and threatened to shoot the victim if he did not give up his car. That robbery could have ended

as dreadfully as the earlier one, had the victim tried to resist as Castro did. Even though Ochoa was only twenty-one years old at the time of the offenses, he already had prior adult criminal history, a long juvenile record, and he also committed misconduct in prison while waiting for trial. Ochoa fails to establish a "reasonable probability that . . .the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Because it was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent for the California Supreme Court to have determined that Ochoa's counsel were not ineffective during the penalty phase, we affirm the district court. *See* 28 U.S.C. § 2254(d)(1), (2).

2. Second Uncertified Claim: *Atkins* Violation

Ochoa asserts that his death sentence violates the Eighth Amendment because he "suffered mental impairments that are as severe as mental retardation from the date of his arrest to the present[,]" and he is therefore ineligible for execution under *Atkins v. Virginia*, 536 U.S. 304 (2002).

Ochoa raised this claim in his second state habeas petition. The California Supreme Court summarily denied the claim "on the merits."[4]

The district court also denied the claim on the merits under AEDPA, determining that the California Supreme Court could have reasonably concluded that Ochoa "failed to demonstrate the onset of intellectual functioning and

[4] *See* Section IV(A)(2)(a) supra.

adaptive deficits *while still a minor*, or *during his developmental period*."

Because the California Supreme Court's conclusion was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent, we affirm the district court. *See* 28 U.S.C. § 2254(d)(1), (2).

a. Applicable Law

The Supreme Court in *Atkins* explained that "the medical community defines intellectual disability according to three criteria": (1) "significantly subaverage intellectual functioning"; (2) "deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances)"; and (3) "onset of these deficits during the developmental period." *Hall v. Florida*, 572 U.S. 701, 710 (2014) (*citing Atkins*, 536 U.S. at 308 n.3). Subsequently, in *Hall*, the Supreme Court held that it is unconstitutional to foreclose "all further exploration of intellectual disability" on the sole ground that the petitioner has an IQ above 70. *Id*. at 704.

With respect to significantly subaverage intellectual functioning, IQ test scores may be "of considerable significance." *Id.* at 723. Because "[e]ach IQ test has a 'standard error of measurement'" of plus or minus five points, however, "IQ test scores should be read not as a single fixed number but as a range." *Id*. at 712–13. When a defendant scores between 70 and 75 on an IQ test, he or she "must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id*. at 723.

Subsequently, in *Moore v. Texas* ("*Moore I*"), 137 S. Ct. 1039 (2017), the Court held that states do not have unfettered discretion to reject medical community standards in defining what constitutes intellectual disability. *Id.* at 1048–49. In *Shoop v. Hill*, 139 S. Ct. 504 (2019), the Court "consider[ed] what was clearly established regarding the execution of the intellectually disabled . . . ." *Id.* at 506–07. The Court observed that *Atkins* "left 'to the [s]tates the task of developing appropriate ways to enforce the constitutional restriction'" on executing intellectually disabled persons. *Id.* at 507 (*quoting Atkins*, 536 U.S. at 317). In *Moore v. Texas* ("*Moore II*"), 139 S. Ct. 666 (2019), the Court reaffirmed its holding in *Moore I* that the petitioner, with an average IQ score of 70.66, "had demonstrated sufficient intellectual-functioning deficits to require consideration of the second criterion—adaptive functioning." *Id.* at 668 (*citing Moore I*, 137 S. Ct. at 1048–50).

California Penal Code § 1376, which governs *Atkins* claims for the state's prisoners, uses the same "intellectual disability" term adopted by the Supreme Court in *Hall*. *See* CAL. PENAL CODE § 1376(a). At the time when the California Supreme Court denied Ochoa's *Atkins* claim, that statute defined intellectual disability as "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of [eighteen]." CAL. PENAL CODE § 1376(a) (2010). Under California law, "[t]o state a prima facie claim for relief, the petition must contain 'a declaration by a qualified expert stating his or her opinion that the petitioner is mentally retarded" and "the declaration must explain the basis for the assessment of mental retardation in light of the statutory standard." *In re Hawthorne*, 35 Cal. 4th 40, 47 (2005).

b. Analysis

At age fifteen, Ochoa had a Wide Range Achievement Test score of 78. Prior to trial, Dr. Maloney administered the Wechsler Adult Intelligence Scales Test ("WAIS-III").[5] Ochoa, then twenty-four years old, scored a verbal IQ of 74, though if he were given the same test in Spanish, he would have scored several points higher, "in the 80 range." Dr. Maloney explained that although Ochoa was "functioning below average," his score was "above the cutoff for mental retardation" and that he was "not mentally retarded."[6] At age thirty-five, on WAIS-III, Ochoa's verbal IQ was 79. He had made no gains in his arithmetic skills, since scoring at the fifth-grade level at the time of the trial.

Ochoa relies on the declarations of Drs. Gomez, Pérez-Arce, and Kaser-Boyd to support his claim. As discussed above, Dr. Pérez-Arce determined that Ochoa suffers from significant impairment in the right part of the brain, that "is likely to have been present from birth and probably exacerbated by two attacks" that Ochoa suffered when he was twelve and eighteen years old. Additionally, Dr. Kaser-Boyd diagnosed Ochoa as suffering from PTSD and Cognitive Disorder Not Otherwise Specified. Dr. Gomez summarized Ochoa's life history and opined that his obvious

[5] WAIS-III, the standard instrument for assessing intellectual functioning, measures an intelligence range from 45 to 155, with an IQ "between 70 and 75 or lower . . . typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Atkins*, 536 U.S. at 309 n.5.

[6] The term "intellectual disability" has now replaced the phrase "mentally retarded." *See, e.g.*, *Brumfield v. Cain*, 576 U.S. 305, 308 n.1 (2015).

mental impairments were recognized by his peers and his teachers when he was quite young.

Ochoa contends he has subaverage intellectual functioning and deficits in adaptive functioning that occurred before he was eighteen years old. If we conclude that the state court's denial of his *Atkins* claim was reasonable, he asks that the court grant him a stay to exhaust a claim that he is categorically excluded from the death penalty under the new substantive rule announced in *Moore II*.

Ochoa's claim fails for several reasons. First, as the district court noted, none of Ochoa's experts diagnosed him with an intellectual disability. On appeal, Ochoa contends that the evidence he presented to the state court regarding his disability "substantially complied" with the California requirements of § 1376(a) and *Hawthorne*. But Ochoa does not explain how a different diagnosis equals substantial compliance and does not present any authority that substantial compliance is sufficient.

During Ochoa's habeas proceedings in the California Supreme Court, the State filed a supplement to the informal response, arguing that Ochoa's *Atkins* claim failed under *Hawthorne* because he had not submitted a declaration from an expert that he was intellectually disabled. Ochoa conceded that he had not submitted such a declaration. He argued, however, that his experts' declarations showed that he "suffers from cognitive impairments and mental illness that are *equivalent* to mental retardation."

Ochoa fails to cite any law, let alone clearly established Supreme Court precedent, supporting his contention that *Atkins* bars the execution of individuals with an impairment "equivalent" to intellectual disability. In fact, several other

courts that have considered this "equivalency" argument have rejected it. *See, e.g.*, *In re Soliz*, 938 F.3d 200, 203 (5th Cir. 2019) (explaining that the defendant failed to show that his fetal alcohol spectrum disorder is medically equated to intellectual disability as defined in *Atkins*); *Murphy v. Ohio*, 551 F.3d 485, 510 (6th Cir. 2009) ("[A]lthough it is evident that Murphy has severe psychological problems and certain mental deficiencies, these characteristics alone do not make him 'mentally retarded' such that his execution would violate *Atkins*.").

Second, the range of Ochoa's IQ scores generally falls above the range that clinical sources consider as satisfying *Atkins* prong one: an IQ range of approximately 65 to 75. Due to the standard error of measurement, the lowest of his scores, 74, could have qualified as falling into the intellectually disabled range. But Dr. Maloney, who administered that test, opined that the score was "probably a low estimate of" Ochoa's ability because "in some areas, nonverbal areas, he perform[ed] very much better than that." He opined that if the test was given in Ochoa's native Spanish, he would have scored "in the 80 range."

Considering the IQ score of 74 alone, without Dr. Maloney's explanation, Ochoa might still be classified as intellectually disabled, depending upon the level of deficits at prong two. *See Hall*, 572 U.S. at 720 ("Treating the IQ with some flexibility permits inclusion in the Mental Retardation category of people with IQs somewhat higher than 70 who exhibit significant deficits in adaptive behavior." (cleaned up)). Although the evidence on Ochoa's adaptive functioning is somewhat mixed, it does not appear that Ochoa had *significant* deficits in that area. Ochoa did well in school until seventh grade when he became involved in a gang and his grades dropped. *Ochoa*, 26 Cal. 4th at 421–

22. Ochoa was never held back in school. He did not graduate from high school, but did graduate from a dental technology school at age seventeen. During his six-month stay in the juvenile camp at the age of fifteen, Ochoa "performed above average in school and in the camp program." Dr. Pérez-Arce noted that Ochoa "has shown significant gains in his fund of general knowledge, the breadth of his vocabulary, and spelling skills" since his incarceration on death row. These fluctuations in Ochoa's academic performance in different settings are inconsistent with intellectual disability. *See Heller v. Doe*, 509 U.S. 312, 323 (1993) ("Mental retardation is a permanent, relatively static condition . . . .").

Likewise, Ochoa has not shown significant deficits in adaptive functioning with respect to his social relationships. Ochoa lived with his girlfriend and cared for their daughter for a year. He maintained the relationship with the daughter and her mother after the separation. He attempted to get a job as a dental technician after school, but his family and neighbors believed he was unsuccessful because he insisted on dressing as a gangster. The Silva family, neighbors of the Ochoas, discussed Ochoa being "very slow," "very quiet, more than normal," a follower, and having poor hygiene. But their perception of Ochoa was not corroborated by other neighbors. Bonzie Williams, the Ochoas' next-door neighbor of twenty-five years, discussed Ochoa's participation in her club where neighborhood kids got together once a week to talk, sing, and play. Ochoa participated from eight years old until twelve or thirteen. In Williams' opinion, Ochoa was not "easily influenced by his peers"; on the contrary, he "seemed to be somewhat of a leader in the neighborhood." *Cf. Atkins*, 536 U.S. at 318 ("[I]n group settings [intellectually disabled people] are followers rather than leaders.").

Other witnesses did not see anything wrong either. Ochoa's first- and second-grade teacher did not recall that Ochoa had any learning difficulties that indicated a need for special education. Ochoa's aunt from Mexico visited the family when Ochoa was eight years old and noted that he "was a normal eight-year[-]old boy." Eduardo Sr. told mitigation investigator Duvall that until high school and his involvement in the gang, Ochoa "did well in school and was considered by his teachers and the family to be quite bright."

Moreover, the trial judge, Ochoa's counsel, and Ochoa's accomplices all saw Ochoa as a leader in connection with his crimes. His counsel wrote a letter to Dr. Maloney, noting with respect to the Navarette murder that Ochoa denied knowing about the presence of the gun in the car, but "[s]tatements by his cohorts definitely dispute this. As a matter of fact, they indicate he was the leader, and since he was the oldest of the group, this is probably true." The trial court characterized the Castro murder as the result of a "planned affair." *Ochoa*, 26 Cal. 4th at 460. The court believed Ochoa was the "moving force" behind the Navarette murder, "the one who caused this entire incident to take place." *Id*. The court also found that several hours after murdering Castro, Ochoa "led an attack on" Freddie Garcia. *Id*. When arrested, Ochoa gave a false name to police and told them he did not know about the gun in his car, which shows a degree of adaptive skill.

Next, Ochoa's evidence does not show that he meets the last *Atkins* prong: onset before the age of eighteen. Dr. Kaser-Boyd diagnosed Ochoa with brain damage "likely to have been present from birth and probably exacerbated by two brutal attacks with bats that Mr. Ochoa suffered in early adulthood." The first attack was when Ochoa was twelve years old. He did not tell anyone and "was more guarded

after that." Dr. Kaser-Boyd noted that he "had the symptoms of" PTSD afterwards. The next assault Ochoa alleges and that is supported by documentation from the hospital occurred after Ochoa turned eighteen. In addition, when Ochoa was twenty-one years old, three months before the crimes at issue, he was struck by a car and thrown fifteen feet. He struck his head and lost consciousness. Finally, while waiting for trial in this case, he was involved in a fight in jail. Dr. Kaser-Boyd opined that "the head injuries [Ochoa] suffered likely changed the cognitive ability that is necessary for judgment and impulse and emotional control." Neither Ochoa nor Dr. Kaser-Boyd, however, alleged any head injuries from the assault at age twelve, and all the other assaults took place after Ochoa turned eighteen. In addition, Dr. Kaser-Boyd's diagnosis is contradicted by Dr. Maloney's testimony.

Ochoa faces an additional hurdle: namely, the requirement that he must show that the California Supreme Court's decision fails to pass muster under AEDPA. Ochoa relies on *Hall* and *Moore II*, but those decisions came after the California Supreme Court's 2010 denial of his *Atkins* claim. So he cannot rely on those decisions. *See Ybarra v. Filson*, 869 F. 3d 1016, 1024–25 (9th Cir. 2017) (noting that *Moore I* and *Hall* "cannot show that the [prior state court decision] applied *Atkins* in a way that 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement'" (quoting *Richter*, 562 U.S. at 103)). Ochoa may rely on *Atkins* itself, but *Atkins* "'did not provide definitive procedural or substantive guides' to determine who qualifies as intellectually disabled." *See id.* at 1024 (quoting *Bobby v. Bies*, 556 U.S. 825, 831 (2009)).

Moreover, at the time when the California Supreme Court denied Ochoa's *Atkins* claim, California law defined "intellectual disability" consistently with *Atkins* as "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of [eighteen]." CAL. PENAL CODE § 1376(a) (2010). Indeed, California law at the time was consistent even with the Supreme Court's subsequent decisions in *Hall* and *Moore I* and *II*. First, consistent with *Hall*, California's definition of intellectual disability did not "include a numerical IQ score." *See Hawthorne*, 35 Cal. 4th at 48; *see also Hall*, 572 U.S. at 702 (noting that "many [s]tates have . . . passed legislation allowing defendants to present additional intellectual disability evidence when their IQ score is above 70"). Second, consistent with *Moore I* and *II*, California law required a hearing "[u]pon the submission of a declaration by a qualified expert stating his or her opinion that the defendant is mentally retarded." CAL. PENAL CODE § 1376(b)(1) (2010). Accordingly, any stay of the appeal, so that Ochoa can exhaust a claim under *Moore II*, would be futile.[7]

Because it was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent for the California Supreme Court to have determined that Ochoa failed to demonstrate the onset of intellectual functioning and adaptive deficits as a minor, we affirm the district court. *See* 28 U.S.C. § 2254(d)(1), (2).

[7] In *Moore II* the Court simply reaffirmed its relevant holding from *Moore I*. 139 S. Ct. at 668.

V. CONCLUSION

We expand the certificate of appealability as to Ochoa's uncertified claims, but we affirm the district court's denial of Ochoa's habeas petition.

AFFIRMED.[8]

[8] The outstanding motions, Dkt. Nos. 58, 59, and 60, are **GRANTED**.

APPENDIX B

cc: Director of Courtroom Operations, Chief Deputy of Judical Services, Manager Legal Services Unit, Attorney Supervisor of the Legal Services Unit, Clerk of Court.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SERGIO OCHOA, Petitioner, v. RONALD DAVIS, Warden of California State Prison at San Quentin, Respondent.	CASE NO. CV 02-7774 RSWL **DEATH PENALTY CASE** ORDER DENYING FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS (REDACTED)

NOTICE REGARDING REDACTION

On April 12, 2011, the Court entered a protective order pursuant to *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003). (Docket No. 90.) In the order below, the Court has redacted allegations filed under seal and evidence from exhibits and state court records filed and lodged under seal. As set forth in the protective order, "modification or vacation of this [protective] order shall only be made upon notice to and an opportunity to be heard from both parties. Respondent or any other person may apply to have the sealing order lifted following decision in this case and completion of all appeals thereof." (*Id.* at 6.)

BACKGROUND

Petitioner Sergio Ochoa was convicted in 1992 of the first degree murders of Pedro Navarette and Jose Castro and one count of attempted second degree robbery. The jury found true a multiple murder special circumstance allegation and a robbery murder special circumstance allegation. It sentenced Petitioner to death. The California Supreme Court affirmed Petitioner's convictions and sentence on direct appeal. *People v. Ochoa*, 26 Cal. 4th 398 (2001), *abrogated in part as recognized by People v. Prieto*, 30 Cal. 4th 226, 263 n.14 (2003).

Petitioner filed his first state habeas petition on February 20, 2001. (Lodg. C1.) The California Supreme Court summarily denied it on August 21, 2002. (Lodg. C6.) He filed his second state habeas petition on December 15, 2003. (Lodg. D1.) The California Supreme Court summarily denied that petition on December 21, 2010. (Lodg. D7.)

Petitioner filed a habeas petition in this Court on September 19, 2003. (Docket No. 12.) He filed the operative First Amended Petition for Writ of Habeas Corpus ("Pet.") on April 26, 2011. (Docket Nos. 93 (Redacted), 102 (Sealed).)

On November 28, 2011, Respondent filed a Motion to Dismiss Identified Grounds of First Amended Petition for Writ of Habeas Corpus. (Docket No. 116.) The Court denied the motion in part and granted it in part. (Docket No. 134.) Petitioner filed a motion for reconsideration, which the Court granted in part and denied in part. (Docket Nos. 136, 140.) The Court dismissed Claims 2; 3; 6; 10(b)(2), (3), (4), (5) as to Oscar Montes, and (6) as to Mr. Montes and Mauricio Soriano; 14; 15; 18(b)(1), (4), and (5); 20 (a)-(c), (e)-(h), (j)-(m), (p), (q), (s), (t), (v)-(x), (bb), (cc); 25; 27; 32; and 40 as to inadequate review of the first state habeas petition. (*See* Docket Nos. 134, 140.)

The parties completed merits briefing. (Docket Nos. 153 (Petitioner's Merits Brief (Redacted)), 155 (Petitioner's Merits Brief (Sealed) ("Petr.'s Br.")), 169 (Merits Opposition Brief (Redacted)), 173 (Merits Opposition Brief (Sealed)

("Opp.")), 182 (Merits Reply Brief ("Reply")).) For the reasons set forth below, the Court denies the First Amended Petition.

Because the facts of the case are set forth in the California Supreme Court's decision on direct appeal, *Ochoa*, 26 Cal. 4th 398, they are repeated here only to the extent necessary for analysis of the claims.

DISCUSSION

I. Application of 28 U.S.C. § 2254(d)

28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (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 held in *Cullen v. Pinholster* that when determining whether a petitioner has satisfied § 2254(d), a court may only consider evidence in the state court record. 563 U.S. 170, 181, 185 n.7 (2011). The Court held that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Id.* at 181. Section 2254(d)(2) "includes the language 'in light of the evidence presented in the State court proceeding,' . . . [providing] additional clarity . . . on this point." *Id.* at 185 n.7.

The Supreme Court explained in *Lockyer v. Andrade* that a state court decision is "contrary to our clearly established precedent if the state court applies a

rule that contradicts the governing law set forth in our cases or if the state court confronts a set of facts that are materially indistinguishable from a decision of th[e] Court and nevertheless arrives at a result different from our precedent." 538 U.S. 63, 73 (2003) (internal quotations omitted). "[U]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 75 (internal quotation omitted). "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable." *Id.* (internal citation omitted). In addition, "relief is proper only if the federal court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict." *Davis v. Ayala*, 135 S. Ct. 2187, 2197-98 (2015) (discussing *Brecht v. Abrahamson*, 507 U.S. 619 (1993)).

"[A]s to the clause dealing with 'an unreasonable determination of the facts,'" § 2254(d)(2), "the statement of facts from the last reasoned state court decision is afforded a presumption of correctness that may be rebutted only by clear and convincing evidence." *Cudjo v. Ayers*, 698 F.3d 752, 762 (9th Cir. 2012) (internal quotation omitted). Under § 2254(d)(2), "if a petitioner challenges the substance of the state court's findings," the court:

> must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record. Similarly, when the challenge is to the state court's procedure, mere doubt as to the adequacy of the state court's findings of fact is insufficient; we must be satisfied that any appellate court to whom the defect [in the state court's fact-finding process] is pointed out would be unreasonable in holding that the state court's fact-finding process was adequate.

Hibbler v. Benedetti, 693 F.3d 1140, 1146-47 (9th Cir. 2012) (internal quotations omitted; alteration in original).

The United States Supreme Court explained in *Harrington v. Richter* that "[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." 562 U.S. 86, 101 (2011) (internal quotation omitted). Where the state courts have not issued a reasoned decision on a claim, "a habeas court must determine what arguments or theories . . . could have supported . . . the state court's decision;" the court must not "overlook[] arguments that would otherwise justify the state court's result . . . ." *Id.* at 102. Where the most recent state court decision on the merits "does not come accompanied with [its] reasons" but a prior state court decision did so:

> the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning. But the State may rebut the presumption by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision, such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed.

Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018).

II. Legal Standard: Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, Petitioner must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Counsel's representation is deficient if, "considering all the circumstances," it "fell below an objective standard of reasonableness" and was unreasonable "under prevailing professional norms." *Id.* at 688. "Judicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of

hindsight." *Id.* at 689. The Court "must indulge a strong presumption that counsel's conduct falls within the wide range of professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (internal quotation omitted).

To establish that counsel's deficient performance prejudiced the defense, Petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

As the Supreme Court emphasized in *Richter*:

> Surmounting *Strickland*'s high bar is never an easy task. . . . Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence. The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom.
>
> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is

> any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Richter, 562 U.S. at 105 (internal quotations and citations omitted).

III. Claims 1(B), 1(C)(2), 1(C)(5), 1(C)(6), 1(C)(8), 1(C)(11), 1(C)(16), 1(C)(27), 1(C)(34), and 22: Ineffective Assistance of Counsel[1]

A. Investigation of Petitioner's Background and Mental Health

1. Allegations of Deficiency

In Claims 1(B)(1), (2), and (3), Petitioner alleges that trial counsel was ineffective for failing to investigate and present evidence of Petitioner's brain damage and traumatic background, and for failing to provide a psychologist or social historian with adequate information about his background. (Pet. at 51-71.) In Claim 22, Petitioner alleges that his sentence lacks the reliability required by the Eighth Amendment because "the jury was not aware of Ochoa's multiple mental illnesses, the many risk factors in his background, prolonged childhood abuse and neglect, or his organic brain damage, and other mental health problems . . . ." (*Id.* at 339.) Petitioner raised Claim 1 and Claim 22 in state habeas proceedings. (*See id.* at 47, 339.)

Specifically, Petitioner alleges that effective counsel would have:

> (1) not relied so heavily on cursory interviews conducted primarily with immediate members of Ochoa's family, (2) not relied on investigators who had limited knowledge of the circumstances facing Ochoa's family, social history and other cultural influences, including the Spanish language and Hispanic culture, and (3) retained appropriate and competent mental health and gang experts who could have discussed the effects of the trauma Ochoa suffered on his emotional and cognitive functioning, as well as the decisions he made to join the gang and to participate in the acts at issue . . . .

[1] Additional claims of ineffective assistance of counsel, related to other claims of error, are identified and discussed later in this order.

(*Id.* at 63.)[2] Petitioner faults trial counsel for giving "their sole mental health expert an inaccurate description that Ochoa was [redacted] In a letter . . . , counsel described Ochoa to Dr. Maloney as not having [redacted]" (Petr.'s Br. at 43 (quoting Pet. Ex. 123 (Sealed)).)

Contrary to Petitioner's allegations, counsel did not rely on cursory interviews primarily with Petitioner's immediate family members. Petitioner's investigator, Sheryl Duvall, M.S., interviewed at least twelve witnesses, including all of Petitioner's four siblings, his parents, his ex-girlfriend and mother of one of his two children, his former teacher at court-ordered juvenile camp, a principal at the juvenile camp, two long-time neighbors and close family friends, and a next-door neighbor of more than twenty-five years. (*See* Pet. Exs. 161-173 (Sealed); *cf.* RT 2488-89.) She prepared extensive interview memoranda for defense counsel that relay thorough interviews along with her impressions of the witnesses' strengths and shortcomings and of Petitioner's potential motivations in life. Her memoranda show that she used a translator when necessary, and she used the same translator for the three interviews that needed translation. (*See* Pet. Ex. 166 at 3578 (Sealed); Pet. Ex. 169 at 3590 (Sealed); Pet. Ex. 171 at 3597 (Sealed).)

Further, counsel retained Michael Maloney, Ph.D., a clinical psychologist and, at the time of trial if not before, Clinical Professor of Psychiatry at the University of Southern California School of Medicine and a Diplomate in Forensic Psychology. (RT 2566-67.) In a letter to Dr. Maloney in preparation for his work on Petitioner's case, counsel recorded Dr. Maloney's [redacted]. (Pet. Ex. 123 at 2816 (Sealed).) Counsel enclosed [redacted]. (*Id.*) He also told Dr. Maloney that he had [redacted]

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[2] Petitioner's allegations regarding defense counsel's retention of a gang expert are addressed below in Claim 1(B)(4).

[redacted] and asked Dr. Maloney to [redacted]. (*Id.*) He added that he would [redacted]. (*Id.* at 2819.)

Counsel said that Petitioner was [redacted]. (*Id.* at 2818.) He told Dr. Maloney that Petitioner's:

[redacted]

(*Id.* at 2818-20.)

The California Supreme Court may have reasoned that counsel's statement that Petitioner [redacted] was sufficiently supported by counsel's reasonable investigation that it is not itself evidence of deficiency. The California Supreme Court may have reasonably

determined that defense counsel provided Dr. Maloney with adequate information and reasonably relied on Dr. Maloney's evaluation of Petitioner. *See Crittenden v. Ayers*, 624 F.3d 943, 966 (9th Cir. 2010) ("That none of [petitioner's mental health experts] happened to unearth the particular line of mitigating evidence Crittenden now presents does not compel the conclusion that the investigation was deficient. Attorneys are entitled to rely on the opinions of properly selected, adequately informed and well-qualified experts."); *Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990) ("It is certainly within the wide range of professionally competent assistance for an attorney to rely on properly selected experts," including mental health experts (internal quotation omitted)).

2. Reasonableness of Counsel's Investigation and Strategy

More broadly, the California Supreme Court may have determined that defense counsel were not constitutionally deficient in their penalty phase investigation and presentation. The California Supreme Court may have reasonably determined that Petitioner "failed to rebut the presumption of competence mandated by *Strickland* – here, that counsel had adequately performed at the penalty phase of trial." *Pinholster*, 563 U.S. at 194; *Cox v. Ayers*, 613 F.3d 883, 896 (9th Cir. 2010) ("[A]s long as a reasonable investigation was conducted, a reviewing court should defer to counsel's strategic choices."). The record belies Petitioner's allegation that defense counsel "apparently ignored" evidence of his "grossly ineffective parenting . . . ." (Petr.'s Br. at 38.) To the contrary, it was part of defense counsel's express presentation to the jury. Counsel argued that Petitioner's parents were inadequate yet sympathetic, and Petitioner's life should be spared for their sake.

The California Supreme Court may have reasonably determined that counsel's strategy was to evoke sympathy for Petitioner's family members: his sister and her children, his father, and his daughter. *Cf. Ochoa*, 26 Cal. 4th at 422 ("The mother of defendant's daughter, Claudia[, testified that] . . . [d]efendant

loved and played with Claudia. . . . Defendant has maintained close ties with his sister's children. They visit him in prison and get excited when he telephones."). Counsel made the case that although Petitioner's family struggled, and his parents failed to provide guidance and discipline, the family was worth keeping intact and Petitioner's life, as a member of that family, was worth sparing. *Cf. Pinholster*, 563 U.S. at 193 ("Given these impediments [petitioner's revelling in his crimes and his psychiatric expert's finding no mental disorder or defect other than psychopathic personality traits], it would have been a reasonable penalty-phase strategy to focus on evoking sympathy for [petitioner's] mother."); *Cox*, 613 F.3d at 897 (holding counsel adequately investigated mitigating evidence and reasonably decided not to present "all available evidence about [petitioner's mother's] abusive conduct and Petitioner's experiences with gang and [California Youth Authority] violence[, which] would only have raised inferences that his abusive childhood turned him into a hardened criminal who was quite capable of murdering four people.").

Defense counsel presented testimony from Petitioner's oldest sister that when she was fifteen years old and Petitioner was three, their mother worked almost all day and their father was out all day looking for work. (RT 2450.) She said she had the primary responsibility for the younger children at that time. (*Id.*) When Petitioner was five or six years old, and when he began junior high school, she cared for the younger children while their parents worked. (RT 2454, 2460.) Petitioner's father testified that around the time Petitioner started kindergarten, he and his wife were both away from the home for work from 5:00 a.m. until 11:00 p.m. (RT 2625-27.)

Though, as Petitioner alleges (Petr.'s Br. at 37-39), counsel's investigation uncovered evidence that Petitioner's siblings were also gang members (*see, e.g.*, Pet. Ex. 161 at 3562 (Sealed); Pet. Ex. 165 at 3575 (Sealed); Pet. Ex. 168 at 3587 (Sealed)) and that his father consumed alcohol heavily (*see, e.g.*, Pet. Ex. 161 at

3563 (Sealed); Pet. Ex. 169 at 3592 (Sealed)), counsel may have reasonably strategized against presenting that evidence, to avoid the impression that the family was not worth saving. (*Cf.* Pet. Ex. 161 at 3561 (Sealed) (Investigator Duvall's impressions that Petitioner's oldest sister was [redacted]); Pet. Ex. 166 at 3582 (Sealed) (Investigator Duvall's impressions that Petitioner's father was [redacted]).)

Petitioner's oldest sister testified that she visited Petitioner in jail every month or two with her three children, ages six, three, and one. (RT 2463-64, 2466.) She said Petitioner calls their home two or three times a week and she and her children speak to him for a half hour or an hour at a time, for the last three years. (RT 2464, 2467.) She testified that her children love Petitioner and get excited when he calls, and he draws and mails them cartoons. (RT 2464-65.) Her oldest daughter sent Petitioner a photograph of herself and Petitioner used it to draw a picture of her. (RT 2466.) She said her parents visit Petitioner every week, despite their mother's poor health, and before the jail changed its rules their mother would visit him almost every day. (RT 2466, 2474.) She said that about two weeks prior to her testimony, she and her parents, her children, and her sister went to visit Petitioner and all waited from 10:00 a.m. until 3:50 p.m., ten minutes before closing, when they were able to see Petitioner. (RT 2474-75.)

Counsel argued to the jury in closing:

> When he [Petitioner] was three he moved to L.A. [¶] The first thing that occurred when he moved to L.A. was his mother was working and his father was roaming the streets looking for work were the incidents that occurred on Figueroa. [¶] And I don't know about how that would affect most people as parents, but I find it kind of troubling to think of a three year old getting hot water dumped on him, getting beat up by the neighbor kids, getting his clothes stole[n] off the line and thrown away, getting his food stolen from him and nobody around

to do anything about it. [¶] Nothing done. I mean Rosie [Petitioner's oldest sister] couldn't deal with it. [¶] Father was out looking for a job. And those incidents went on and on. They just continued. And nothing was done. . . .

There is no doubt whatsoever that Eduardo and Ophelia [sic] Ochoa are two of the kindest, most giving, sweetest people that anyone is ever going to meet in your life. [¶] On the other hand, their background, nothing equipped them period for the parenting skills necessary to raise children in a challenging urban environment like we have. [¶] It is hard enough raising children in this environment if you possess normal intelligence and your kids possess normal intelligence. [¶] There is a difficult enough time doing that without facing the problems created by the lack of parenting skills and lack of ability to do that which I thought became very apparent when Mr. Ochoa was testifying before you. . . .

[Petitioner became involved in gang activity at age 11,] two years before anyone even as the prosecutor keeps referring to Rosie, even before his surrogate mother Rosie had any notion, any hint of what was going on. [¶] That does not provide evidence of the types of parenting skills that are necessary. . . .

Yesterday when you have a nice man like Eduardo Ochoa up there testifying on the witness stand and having to ask him things about his knowledge of his son's teachers, what schools he went to, his knowledge of his other activities, and see him respond in a manner that indicates that he had very little real knowledge of what was going on in Sergio's life. [¶] And that given his background from a very simple family in a very rural area of Mexico, simply did not have the skills necessary to raise and guide and direct. . . .

[Petitioner's] father as far as his discipline, I mean he is a sweet guy, you know. But what did he do when Sergio started messing around and getting in trouble. [¶] He would talk to Sergio. He would tell him not to do those things and of course that wasn't effective. [¶] That might be effective in Itslan, [sic] Mexico [where Petitioner's father was raised], a village of 50 or 75 or even a hundred people, but it is certainly that type of parental control and supervision is not effective in a complex urban environment like Los Angeles. . . .

> [P]utting two and two together you suddenly realize here is a parent who says he is concerned about his son. [¶] Here is a prosecutor who is telling you here is a parent that did everything in the world they could to get their son out of gang involvement. [¶] Yet here is a parent who is working half a block away from where his son is hanging around with the 18th Street Gang while he is at work. . . .
>
> Are there any of us here that don't feel compassion for those people [the family members of the victims], but can we not feel the same compassion for Ophelia [sic] Ochoa, Eduardo Ochoa, Rosalba Gallegos, Lisa Ochoa, Gloria Ochoa, his sisters, and Eduardo, Junior, his brother. [¶] If you kill Sergio Ochoa, aren't they going to suffer the same kind of pain and loss. . . .
>
> I started thinking, well Claudia Ochoa, Sergio's daughter, six years old now. If you vote do kill Sergio, when he finishes his appeals about six or seven years from now, eight years maybe, she will be 15, 16; 14, 15, 16. And if all his appeals are turned down and he gets the death penalty, there will be another media c[i]rcus . . . , there will be articles in the newspaper. She will in high school [sic] about that time. Another person who will suffer. The type of victim impact we are talking about.

(RT 2819, 2821, 2824-28, 2865-66.)

Confirming the crux of defense counsel's argument, the prosecutor began her penalty phase rebuttal argument by asking the jury "to come back to the real focus of this case. It's not what both defense counsel have spent a lot of time talking about. Yes, we feel sorry for the family of Sergio Ochoa. Yes I feel sorry for his parents, sisters, daughter." (RT 2866-67.)

The California Supreme Court may have reasonably determined that defense counsel's penalty phase strategy was constitutionally effective. Because the state court may have reasonably determined that defense counsel was not deficient at the penalty phase of trial and that Petitioner's sentence was sufficiently reliable under the Eighth Amendment, Claims 1(B)(1), 1(B)(2), 1(B)(3), and 22 are DENIED.

B. Gang Expert

In Claim 1(B)(4), Petitioner alleges that defense counsel were ineffective for failing to retain and present a competent gang expert at the penalty phase of trial. (Pet. at 71-74.) In Claim 1(C)(11), Petitioner alleges that trial counsel should have engaged a gang expert to refute Detective Michael Berchem's testimony at the guilt phase of trial that Petitioner's "187" tattoo referred to the California Penal Code section prohibiting murder. (*Id.* at 93.) Petitioner raised Claim 1(C) in state habeas proceedings. (*See id.* at 47.)

The California Supreme Court may have reasonably held that Petitioner failed to show counsel's performance to be deficient.

Trial counsel [redacted] (Docket No. 154, Supp. I CT 222 (Sealed); Pet. at 71.) [redacted] (*see* Supp. I CT 269, 271 (Sealed)) [redacted] gang expert. (Pet. at 71.) Petitioner alleges that "[a]lthough trial counsel recognized the importance of retaining a gang expert, trial counsel never made any attempts to locate a substitute gang expert, and they simply let the matter drop." (*Id.*)

Petitioner's trial counsel [redacted]. (Supp. I CT 220-24 (Sealed).) [redacted]. (Supp. I CT 271 (Sealed).)

Petitioner's two trial attorneys were John Hud and Richard Ross. Mr. Hud's billing records show [redacted] before the beginning of the prosecution's guilt phase case on August 10, 1992. (Supp. I CT 879-85 (Sealed); RT 1077.) Mr. Hud's billing records show [redacted]

- [redacted]
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- [redacted]
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- [redacted]
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- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

(Supp. I CT 879-85 (Sealed).)

In his second state habeas petition, Petitioner alleged that "[c]ounsel ultimately found Vigil pompous and difficult to work with and decided not to use him for this reason." (Lodg. D1, vol. 2, at 437.) Petitioner cites, and the Court has uncovered, no evidence of that assertion in the record, however. Mr. Hud declares that he and Mr. Ross [redacted] (Pet. Ex. 236 ¶¶ 8-9 (Sealed).)

"There is a strong presumption that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect." *Richter*, 562

U.S. at 109 (internal quotations omitted). The California Supreme Court may have reasonably determined that Petitioner failed to show evidence to overcome that presumption and to establish that counsel did not call a gang expert at trial because they "never made any attempts to locate a substitute gang expert, and they simply let the matter drop." (Pet. at 71;) *cf. Pinholster*, 563 U.S. at 188 n.12 (explaining that when determining whether a habeas petition states a prima facie case for relief, the California Supreme Court "review[s] the record of the trial . . . to assess the merits of the petitioner's claims" (internal quotation omitted)).

Moreover, as to Claim 1(B)(4), challenging the lack of a gang expert at the penalty phase of trial, Mr. Hud declares that Mr. Ross [redacted] (Pet. Ex. 236 ¶ 13 (Sealed).) Petitioner cites, and the Court has uncovered, no declaration or evidence from Mr. Ross regarding any [redacted] The California Supreme Court may have reasonably determined that Petitioner presents no evidence to show that counsel's penalty phase investigation into gang expert witness testimony was deficient, that counsel had no strategic reasons for not presenting a gang expert witness, or that counsel were required to seek another potential gang expert witness to provide constitutionally effective assistance.

As to the lack of a gang expert at the guilt phase of trial to explain Petitioner's "187" tattoo (Claim 1(C)(11)), Mr. Hud and Ms. Ross argued against the admission of the evidence. (RT 1191, 1215-31.) Fairminded jurists could debate whether it would have been a reasonable strategy for counsel to focus on excluding evidence of the tattoo rather than preparing expert witness testimony to explain it in the event their efforts failed. *See Richter*, 562 U.S. at 103 (habeas petitioner is not entitled to relief unless he or she can show "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement").

Claim 1(B)(4) and this portion of Claim 1(C)(11) are DENIED.

C. Victim Outreach

In Claim 1(B)(5), Petitioner alleges that trial counsel were ineffective for failing to "conduct any victim outreach" before family members of the victims gave their penalty phase testimony. (Pet. at 74.) Petitioner points to defense counsel's statement at the time of trial that after talking with another attorney about the potential victim impact evidence he had "concerns about [his] own lack of effort in this area." (RT 2155; Pet. at 74.) Petitioner alleges that had counsel "developed a victim outreach plan, and implemented this plan in a timely fashion, these efforts could have plausibly changed their penalty phase presentation in ways that would have provided jurors with yet another compelling reason to spare Ochoa's life." (Pet. at 75.)

The California Supreme Court may have reasonably denied the claim as speculative. *Cf. West v. Ryan*, 608 F.3d 477, 490 n.12 (9th Cir. 2010) (holding evidence failed to establish petitioner's entitlement to a federal evidentiary hearing because it was "speculative in nature"); *Gonzalez v. Knowles*, 515 F.3d 1006, 1014 (9th Cir. 2008) (denying evidentiary hearing where petitioner's claims of ineffective assistance of counsel were "grounded in speculation"); *Phillips v. Woodford*, 267 F.3d 966, 986-87 (9th Cir. 2001) (holding petitioner's *Brady* claims were "without merit" because they were "mere suppositions"). Even with the benefit of investigative time since trial, Petitioner offers no evidence to show what evidence counsel could have presented or what counsel could have done differently after contacting the victims' families. The California Supreme Court may have reasonably held that Petitioner has not demonstrated prejudice from any deficient performance by counsel. Claim 1(B)(5) is DENIED.

D. Presentation of Evidence and Argument

In Claim 1(C)(34), Petitioner challenges trial counsel's failure to argue adequately against the exclusion of defense evidence of prison conditions and to

object to the prosecution's admission of evidence and argument regarding the conditions of incarceration during life in prison without the possibility of parole. (Pet. at 112-13 (referring to Pet. at 376-82); Petr.'s Br. at 104.)

Defense counsel attempted to introduce testimony from a prison expert and correctional consultant and photographs depicting prison conditions and the adjustment of inmates sentenced to life without the possibility of parole. (RT 2553-55, 2661-62, 2671-77.) Defense counsel argued against the prosecution's objections to the evidence to no avail. (RT 2671-77.) On cross-examination of the expert's testimony on other matters, the prosecutor elicited testimony that inmates sentenced to life without possibility of parole can go to school; earn a high school diploma; have access to pens, pencils, and writing materials; purchase a color television, stereo, magazines, and books for their cells; communicate with family members and see their children; and have the opportunity for sexual relations with their spouses. (*See* RT 2666, 2714-16.) Defense counsel asked to approach the bench during the testimony and was denied. (RT 2715.) Defense counsel attempted to introduce evidence in rebuttal regarding the conditions of prisoners' cells and the prosecutor objected. (RT 2724.) As Petitioner acknowledges (Pet. at 379), the trial court denied defense counsel's request for a sidebar to discuss the prosecutor's objection. (RT 2724-25.)

The prosecutor went on to argue to the jury that life in prison for Petitioner would not be "such a terrible thing;" would be "life as usual . . . get[ting] to do all the things we cherish in life, except that they are confined;" and that "the privileges are enormous in relation to the types of crimes that these people have committed." (RT 2779, 2875.)

Petitioner does not specify what additional arguments constitutionally adequate defense counsel could and would have made in favor of the introduction of the defense evidence or against the introduction of the prosecution evidence. Moreover, as Petitioner acknowledges, "[d]efense counsel appropriately objected

to the[] arguments" the prosecutor made to the jury based on the evidence admitted. (Pet. at 380.) The California Supreme Court may have reasonably rejected the claim on the ground that Petitioner failed to show deficient performance by counsel.

Claim 1(C)(34) is DENIED.

E. Consular Assistance

In Claim 1(C)(2), Petitioner faults trial counsel for failing to "[e]nsure that Ochoa's rights under the VCCR [Vienna Convention on Consular Relations] were enforced, and fail[ing] to take advantage of the assistance the Mexican government would have provided . . . ." (Pet. at 84.) He maintains that "Mexican consular officers have spent considerable time, energy and resources on capital cases over the years" and "assisted many attorneys in capital cases in the years surrounding Ochoa's trial." (*Id.* at 118-19.) He asserts that Mexican consular officers "would have ensured that Ochoa received advice from competent counsel before speaking to police" and that the VCCR violation would have provided a basis for suppressing Petitioner's pretrial statement. (*Id.* at 122.) He alleges that consular officers would have provided support in persuading the State not to seek the death penalty. (*Id.* at 124.) Finally, he alleges that consular officers would have assisted in investigating and presenting mitigating evidence, because much of the investigation would have taken place in Mexico and because the consulate has assisted other capital defendants in explaining "the Mexican culture." (*Id.* at 123.)

The California Supreme Court may have reasonably determined that Petitioner failed to show prejudice from any deficient performance by counsel. *See Ayala v. Davis*, 813 F.3d 880, 881 (9th Cir. 2016) (applying the United States Supreme Court's decision in *Breard v. Greene*, 523 U.S. 371, 377 (1998) that "petitioner's claim that he would have accepted a guilty plea to avoid the death penalty if he had been given advice by the consulate was 'far more speculative than the claims of prejudice courts routinely reject' in ineffective assistance of counsel

cases"). In *Ayala*, for example, the Ninth Circuit held that the state court may have reasonably rejected petitioner's argument that "Mexican officials would have sought to persuade the district attorney to reconsider his decision to seek the death penalty and that these officials have sometimes had success in this regard in the past," on the basis that the petitioner "did not present any evidence suggesting that the Mexican Consulate would have succeeded in *this* case . . . ." *Id.* (emphasis in original). In addition, "neither the Vienna Convention itself nor [Supreme Court] precedents applying the exclusionary rule support suppression of [a defendant's] statements to police" for a violation of the VCCR. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350 (2006). Finally, as discussed above (in Claim 1(B)), the California Supreme Court may have reasonably determined that Petitioner failed to show a reasonable probability of a different penalty phase outcome based on the evidence he now presents.

Claim 1(C)(2) is, therefore, DENIED.

F. Voir Dire

1. Claim 1(C)(5)

In Claim 1(C)(5), Petitioner alleges that trial counsel failed to conduct adequate voir dire of jurors Raleigh J. and Louis R. and alternate jurors Antonia J. and Marilyn K. (Pet. at 86-87.)

"'The conduct of voir dire will in most instances involve the exercise of a judgment which should be left to competent defense counsel.'" *Hovey v. Ayers*, 458 F.3d 892, 909-10 (9th Cir. 2006) (holding counsel's performance was not deficient in asking voir dire questions generally limited to whether the juror could "follow the law," "be fair to both sides," and "wait until all the evidence is in" to form an opinion) (quoting *Gustave v. United States*, 627 F.2d 901, 906 (9th Cir. 1980)). A strategy "that in defending a capital case, the least voir dire is the best tactic, [and] . . . preferr[ing] to rely on nonverbal communication to make determinations about potential jurors because that avoids exposing potentially

favorable jurors to prosecutorial challenges" is a reasonable strategy. *Hovey*, 458 F.3d at 910 (internal quotation omitted). Counsel is not ineffective for relying on jurors' statements that they would be fair and follow the law as instructed. *Wilson v. Henry*, 185 F.3d 986, 991 (9th Cir. 1999) ("Counsel's choice to rely on such a commitment, without emphasizing his client's criminal history, merits deference as a tactical decision.").

As for prejudice, the state court may reasonably determine that a petitioner fails to make "the required showing of prejudice under *Strickland*" where he fails to "show[] that any juror who harbored an actual bias was seated on the jury as a result of counsel's failure to voir dire . . . ." *Ybarra v. McDaniel*, 656 F.3d 984, 1001 (9th Cir. 2011); *see also Fields v. Brown*, 503 F.3d 755, 768, 768 n.6 (2007) (observing that "the Supreme Court has not explicitly adopted (or rejected) the doctrine of implied bias" and at most there is the possibility of implying bias "when, for example, there is 'a revelation [that the juror is an actual employee of the prosecuting agency,] that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction"); *Davis v. Woodford*, 384 F.3d 628, 643 (9th Cir. 2004) ("Establishing *Strickland* prejudice in the context of juror selection requires a showing that, as a result of trial counsel's failure to exercise peremptory challenges, the jury panel contained at least one juror who was biased.").

a. Raleigh J.

Petitioner faults trial counsel for failing to ask juror Raleigh J. any questions on voir dire, when Raleigh J. stated on his questionnaire that he had had unspecified contact with the Los Angeles Police Department; that he was old, was impatient, had fair hearing and poor eyesight, had some difficulty being understood and understanding others when they speak, may tire, and may have trouble attending to and sitting through the trial; that his son had been assaulted, he or someone close to him had been arrested or charged with a crime, he had worked in

jail, and had visited inmates; that he was not sure if he would feel comfortable considering Petitioner's background, believed the death penalty was less cruel than life without possibility of parole, and believed the death penalty was used too seldom, explaining, "why prolong misery." (Pet. at 86 (citing Supp. II CT 2670-87).) Petitioner argues that Raleigh J.'s statements suggested that he would have difficulty being fair to Petitioner and performing his duties as a juror. (*Id.*)

The California Supreme Court may have reasonably determined that Petitioner failed to show deficient performance or prejudice from counsel's failure to question Raleigh J. The state court may have reasoned that Raleigh J. did not show bias toward Petitioner and that trial counsel strategically declined to question him. When asked if there was anything in his personal life that might cause him to hurry along the deliberations, Raleigh J. said there was not. (Supp. II CT 2676.) He said that the fact that he or someone close to him had been arrested would not have any effect on him. (Supp. II CT 2680.) He believed "education" was one of the most important causes of crime and sometimes wondered "if our laws aren't just." (Supp. II CT 2672.) When asked about serious criminal cases he followed in the media and whether he thought justice was served, he said he thought our laws are not perfect and "we do make mistakes." (Supp. II CT 2670.) He believed that there were "more humane ways of punishment" than an "eye for an eye." (Supp. II CT 2684.) The state court may have reasonably concluded, based on Raleigh J.'s defense-favorable views, that counsel may have followed a strategy of not examining him beyond his questionnaire, and that Petitioner failed to show that Raleigh J. was biased against Petitioner.

b. Louis R.

Petitioner faults trial counsel for failing to ask juror Louis R. any questions on voir dire, when Louis R. stated on his questionnaire that he would probably believe a gang member less than another witness; that his eyesight and hearing were fair; that he believed in an eye for an eye and was unsure whether he was

comfortable considering Petitioner's background; and that he had heard death row was overcrowded and believed that a death sentence in actuality probably meant a life sentence or many delays until execution. (Pet. at 87 (citing Supp. II CT 2982-99).) Petitioner alleges that Louis R.'s statements suggested that he would have difficulty being fair to Petitioner. (*Id.*)

Louis R. also stated, however, that he thought a gang member could be truthful "depend[ing] on the circumstances" and that he believed the death penalty was appropriate "if the defendant is guilty without a doubt and the crime is extremely serious." (Supp. II CT 2985, 2995, 3000.) Although he checked "not sure" when asked if he would feel comfortable considering Petitioner's background in deciding a sentence, he explained that he "would have to hear the case and background" and repeated that he would need to "know [Petitioner's] background to form an opinion." (Supp. II CT 2997-98.) He thought that death was "the ultimate sentence," but also that life without parole was a severe punishment because "[b]eing locked in a small cell for the rest of your life is mind boggling to me. Particularly for a young person." (Supp. II CT 2998.) Petitioner was 24 years old at the time of trial.

Reasonable jurists could disagree about the implications of Louis R.'s statements and the reasonableness of counsel's strategy not to question him. That he was skeptical of gang members' credibility may have been favorable to Petitioner, given the prosecution's use of gang members' testimony against him. Louis R.'s view that the death penalty was appropriate for "extremely serious" crimes may have also been favorable to Petitioner, given that Petitioner was not the shooter in the first killing and the prosecution did not argue premeditation in the second. (*See, e.g.*, RT 461 ("[T]here will be no evidence that the defendant planned to kill his victim or premeditated the killing of his victim.").) The possibility for disagreement over counsel's reasonableness in not examining Louis R. beyond his questionnaire does not entitle Petitioner to relief. *See Richter*, 562

U.S. at 101 ("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." (internal quotation omitted)). The California Supreme Court's conclusion that Petitioner failed to show that Louis R. was biased against him was likewise not objectively unreasonable.

c. Antonia J. and Marilyn K.

Petitioner faults trial counsel for failing to question alternate jurors Antonia J. and Marilyn K. (Pet. at 87.) The California Supreme Court may have reasonably held that Petitioner failed to show prejudice as to Antonia J. and Marilyn K. because they did not deliberate on Petitioner's jury.

Claim 1(C)(5) is, therefore, DENIED.

2. Claim 1(C)(6)

In Claim 1(C)(6), Petitioner alleges that trial counsel failed to investigate adequately the background of juror Cecil H. (Pet. at 87-88.) He alleges that Cecil H. failed to disclose that he had been arrested for lewd and lascivious conduct with a child under age 14 and pleaded guilty to statutory rape. (*Id.* at 87 (citing Pet. Ex. 160).) He alleges that had Cecil H. disclosed his conviction or had counsel discovered it, Cecil H. "would have been excluded from jury service" to Petitioner's benefit. (*Id.*; *see also* Petr.'s Br. at 82 (citing *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984) for the proposition that a party may obtain a new trial where a juror failed to disclose information during voir dire that "would have provided a valid basis for a challenge for cause" (internal quotation omitted)).)

Assuming the records Petitioner submits pertain to the same person as juror Cecil H. (*see* Opp. at 54; Reply at 26-27), Cecil H. was convicted of statutory rape under California Penal Code § 261.1 and sentenced to one year in county jail, suspended, with 60 days to be served. (*See, e.g.*, Pet. Ex. 160 at 3556.) Section 261.1 was a "wobbler" at the time of Cecil H.'s conviction. *See, e.g.*, *People v.*

Hannon, 5 Cal. 3d 330, 332-34 (1971) ("Penal Code section 261, subdivision 1, statutory rape . . . [is] a felony-misdemeanor offense . . . . [T]he court might have sentenced defendant to a term in county jail which would have rendered his crime a misdemeanor."); *see also People v. Valencia*, 3 Cal. 5th 347, 351 n.2 (2017) ("Wobblers are a special class of crimes involving conduct that varies widely in its level of seriousness, and may therefore be chargeable or punishable as either a felony or a misdemeanor." (internal quotations and alteration omitted)). Cecil H.'s sentence of one year in county jail shows that the crime was punished as a misdemeanor. Because those convicted of misdemeanors remain eligible for jury service in California, *see In re Boyette*, 56 Cal. 4th 866, 888 (2013); *Rubio v. Superior Court*, 24 Cal. 3d 93, 99 (1979), Petitioner fails to show that Cecil H. would have been subject to dismissal for cause as he asserts. The California Supreme Court may have reasonably denied Claim 1(C)(6) on the ground that Petitioner did not show prejudice from any deficiency by trial counsel in investigating Cecil H.'s criminal background. Claim 1(C)(6) is DENIED.

3. Claim 1(C)(8)

In Claim 1(C)(8), Petitioner asserts that "to the extent" the prosecutor was able to exercise peremptory challenges against jurors because defense counsel failed to investigate, object adequately, or rehabilitate them, counsel was ineffective. (Pet. at 89.) Petitioner does not specify what investigation counsel should have undertaken or what objections counsel should have made. The California Supreme Court reasonably held on direct appeal that the prosecution does not violate a defendant's constitutional rights by exercising peremptory challenges against prospective jurors based on their views on the death penalty, as Petitioner suggests. (Petr.'s Br. at 84); *Ochoa*, 26 Cal. 4th at 432-33; *cf. Ayala*, 135 S. Ct. at 2200 (holding that defense counsel's absence from hearing on *Batson* challenges was harmless because prosecutor permissibly exercised peremptory challenges against jurors based on his "concern that [they] might not have been

willing to impose the death penalty" and not on their race). Petitioner also fails to show a reasonable probability that had counsel rehabilitated the jurors' views on the death penalty the prosecutor would not have exercised peremptory challenges against them. The California Supreme Court may have reasonably rejected Claim 1(C)(8) on that basis. Claim 1(C)(8) is DENIED.

G. Expert Assistance

In Claim 1(C)(16), Petitioner alleges that counsel failed to obtain assistance from "[n]ecessary experts . . . includ[ing]: a gang expert (*see* Pet. Ex. 199); an identification expert; a fingerprint expert; a pathologist; and a criminalist." (Pet. at 101 (internal citation edited).) Petitioner does not make any more specific allegations in his Petition or merits brief. (*See id.*; Petr.'s Br. at 96.)

Petitioner's allegations regarding counsel's retention of a gang expert are addressed above. (*See supra* Claims 1(B)(4) and 1(C)(11).) Petitioner gives no explanation of how a fingerprint expert or a criminalist could have assisted the defense. The California Supreme Court may have reasonably rejected those allegations as conclusory.

Regarding an identification expert, Petitioner presents evidence from an eyewitness identification expert (Petr.'s Br. at 75-76) concluding that eyewitness David "Mandich's identification of Mr. Ochoa is unreliable due to poor visibility at the time of viewing, divided attention at the time of viewing, cross-racial identification, unconscious transference between photo and live line-ups, and Mr. Mandich's identification strategy at the live line[-]up." (Pet. Ex. 235 at 4580.) The expert also concluded that the silver jacket Petitioner was wearing when arrested would not have been mistaken for black as Mr. Mandich observed. (*Id.*); *Ochoa*, 26 Cal. 4th at 418.

The California Supreme Court may have reasonably concluded that Petitioner failed to show a reasonable probability of a different outcome at trial had Petitioner had the assistance of an expert to discredit Mr. Mandich's identification.

As stated below, the California Supreme Court reasonably observed on direct appeal that Mr. Mandich's testimony was consistent with statements given by Petitioner's former codefendants Oscar Montes and David Lozano. *Cf. Ochoa*, 26 Cal. 4th at 425 (discussing the consistency of Mr. Mandich's description with statements from Petitioner's former codefendants). The California Supreme Court on direct appeal reasonably rejected Petitioner's argument that "Mandich's incorrect description of the color of the jacket threatened to undermine the People's case." *Ochoa*, 26 Cal. 4th at 441-42; (*cf. infra* Claims 18 and 24(B)(2)).

Regarding assistance from a pathologist, by Petitioner's own allegations, the coroner's testimony at trial was helpful to the defense. (*See* Petr.'s Br. at 190-91.) Petitioner does not explain how a pathologist could have assisted the defense.

The California Supreme Court may have reasonably rejected Claim 1(C)(16) as conclusory and as failing to show prejudice. Claim 1(C)(16) is DENIED.

H. Removal of Vindictive Prosecutor

In Claim 1(C)(27), Petitioner alleges that trial counsel was ineffective to the extent that counsel failed to investigate and to seek the removal of the prosecutor based on her alleged "personal stake" in the outcome of the prosecution. (Pet. at 107.) He alleges that only after prosecutor Teri Schwartz was assigned to his case did the State allege special circumstances and seek the death penalty. (*Id.* at 437.) Petitioner contends that Ms. Schwartz sought a capital sentence against him to advance her political career and to help her win election as a judge. (*Id.* at 107.)

Petitioner contends that "Ms. Schwartz expressed extreme antipathy towards Ochoa as manifested in her extensive prosecutorial misconduct as detailed in [state] Claims 16, 17, and 25," *i.e.*, federal Claims 18, 11, and 24, respectively. (Pet. at 438.) Those prosecutorial misconduct claims are addressed, and denied, below. Beyond those allegations, Petitioner presents mere speculation that the State's decision to amend special circumstances and to seek a capital sentence were improperly motivated. "'[A]bsent facts to the contrary, it cannot be assumed that

prosecutors will be motivated in their charging decisions by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts.'" *Campbell v. Kincheloe*, 829 F.2d 1453, 1465 (9th Cir. 1987) (quoting *Gregg v. Georgia*, 428 U.S. 153, 225 (1976) (White, J., concurring)).

The California Supreme Court may have reasoned that because Petitioner did not show adequate support for a motion to recuse the prosecutor, counsel's failure to bring such a motion was not deficient. *See Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005) ("[T]rial counsel cannot have been ineffective for failing to raise a meritless objection."); *United States v. Molina*, 934 F.2d 1440, 1447 (9th Cir. 1991) (holding that because evidence was admissible, "the decision not to file a motion to suppress it was not prejudicial. . . . [I]t is not professionally unreasonable to decide not to file a motion so clearly lacking in merit."). Claim 1(C)(27) is, therefore, DENIED.

IV. Claims 4 and 1(C)(4): Questioning of Jurors outside Petitioner's Presence

In Claim 4,[3] Petitioner alleges that his right to be present was violated when thirteen prospective jurors, four of whom were empaneled, were questioned outside

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[3] In his Petition, Mr. Ochoa states that he raised Claims 4, 5, 7, 8, 12, 13, 18, 19, 26, 28, and 29 in both appellate and state habeas proceedings. (Pet. at 133, 140, 183, 209-10, 255, 274, 301, 318, 382, 410, 418.) In his merits brief, he states only that he raised the claims on appeal. (Petr.'s Br. at 105, 110, 122, 135, 168, 173, 185, 197, 238, 253, 257.)

Mr. Ochoa states in both his Petition and his merits brief that he raised Claims 9, 21, 24, 31, 33, and 34 in appellate and state habeas proceedings. (Pet. at 223, 334, 345, 425, 439, 446; Petr.'s Br. at 144, 203, 220, 263, 267, 270.)

This Court has considered the claims as pleaded in the federal First Amended Petition. The Court has concluded that the California Supreme Court's decisions on the claims on direct appeal survive review under § 2254(d). To the extent Petitioner raised the claims again in his state habeas petition(s), even if those pleadings presented substantially improved evidence, the state court's habeas decisions survive review under § 2254(d) on the same grounds as its appellate decisions. *Cf. Wilson*, 138 S. Ct. at 1192; *Dickens v. Ryan*, 740 F.3d 1302, 1319 (9th Cir. 2014) (where "new evidence . . . clearly places [the] claim in a significantly different and substantially improved evidentiary posture," the state court "did not have a fair opportunity to evaluate [the] altered . . . claim").

his presence. (Pet. at 132-40.) The jurors were examined at the bench about items on their juror questionnaires to which they responded, "confidential." (*Id.* at 137-38.) The jurors were questioned on the record and in the presence of defense counsel.

Petitioner asserts that his "absence must give rise to a presumption of prejudice because of the ephemeral nature of the information he might have gathered which makes it impossible to assess the extent of actual prejudice he suffered." (*Id.* at 139.) The California Supreme Court rejected Petitioner's claim on direct appeal, holding, in part, that the alleged benefit of Petitioner's presence at the sidebar conferences was "based on undue speculation." *Ochoa*, 26 Cal. 4th at 433.

The California Supreme Court's rejection of the claim was reasonable. "'[T]he presence of a defendant,'" including "'at the examination of jurors,'" "'is a condition of due process *to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only*.'" *United States v. Reyes*, 764 F.3d 1184, 1196 (9th Cir. 2014) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 106-08 (1934); emphasis added by source). "[T]he exclusion of the defendant from a portion of voir dire violates the Constitution only if 'his absence might frustrate the fairness of the proceedings.'" *Id.* (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)). The Ninth Circuit held in *Reyes* that defendant's "exclusion from a short conversation between the court and a prospective juror that was witnessed by counsel and transcribed does not threaten the integrity of the judicial system." *Id.* at 1195. Here, too, the bench examinations at issue were transcribed and witnessed by counsel. Because Petitioner fails to show that the state court's rejection of the claim was unreasonable, Claim 4 is DENIED.

In Claim 1(C)(4), Petitioner faults "[t]rial counsel's failure to request Ochoa's presence at bench-conducted jury voir dire and their failure to cite Ochoa's absence as a constitutional violation" as ineffective assistance of counsel.

(Pet. at 85.) The California Supreme Court may have reasonably held on habeas review that Petitioner did not demonstrate prejudice from any ineffective assistance of counsel. Claim 1(C)(4) is DENIED.

V. Claims 5 and 1(C)(7): Prosecutor's Hypothetical during Voir Dire

In Claim 5, Petitioner alleges that during voir dire, the prosecutor "used a hypothetical set of facts that provided a grossly less blameworthy scenario than that involved in this case in order to test the jurors' resolve to impose the death penalty if such facts were proved." (*Id.* at 143.) He alleges that as a result of the improper hypothetical, the prosecution successfully brought challenges for cause against seven prospective jurors. (*Id.* at 145-76.) Petitioner alleges that the trial court's excusal of the jurors for cause violated his rights under *Wainwright v. Witt*, 469 U.S. 412 (1985) and *Witherspoon v. Illinois*, 391 U.S. 510 (1968) because the record does not support findings that the jurors were substantially impaired in their abilities to impose the death penalty. (Pet. at 140-42, 176-78.)

In *Witherspoon*, the United States Supreme Court:

> recognized that the Sixth Amendment's guarantee of an impartial jury confers on capital defendants the right to a jury not 'uncommonly willing to condemn a man to die.' *Witherspoon*, 391 U.S. at 521. But the Court with equal clarity has acknowledged the State's 'strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes.' *Uttecht v. Brown*, 551 U.S. 1, 9 (2007). To ensure the proper balance between these two interests, only '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.' *Id.* . . . Reviewing courts owe deference to a trial court's ruling . . . . As a result, [under AEDPA,] federal habeas review of a *Witherspoon-Witt* claim . . . must be doubly deferential.

White v. Wheeler, 136 S. Ct. 456, 460 (2015) (per curiam) (internal citations edited; internal quotation omitted).

The California state-law framework provides death as an available penalty for felony murder where the defendant was the actual killer or intended to kill.

(*See, e.g.*, RT 2083-84.) It also provides death as an available penalty for multiple murder where the defendant has been convicted of at least one first degree murder and one first or second degree murder. (*See, e.g.*, RT 2085.)

A. Gertrude W.

The attorneys questioned prospective jurors in groups. Of the seven prospective jurors at issue here, only one, Gertrude W., was in the first group of prospective jurors questioned. (*See, e.g.*, Pet. at 145, 147, 151.)

1. Prosecutor's Hypothetical

During voir dire of the first group, the prosecutor told the prospective jurors that in one charged homicide, Petitioner was not the shooter. (RT 449.) She discussed aiding and abetting and explained that it applied to people who planned together to commit a crime. (RT 450-52.) She then discussed a situation in which the gun of a bank robber accidentally discharges during a struggle with a security guard, and the robber is guilty of first degree murder under the felony murder rule even though the robber did not intend to kill. (RT 452-53.) She explained that aiders and abettors of that robber could be guilty of first degree murder too under certain circumstances, even if they and the robber agreed that no one was to be hurt. (RT 454.)

The circumstances of the aiders and abettors of the accidental shooting in the prosecutor's hypothetical were, indeed, less blameworthy than the allegations against Petitioner. The prosecution alleged that Petitioner intended to kill Mr. Navarette although Petitioner was not the shooter. The prosecution also alleged that Petitioner was the actual shooter in the attempted robbery murder of Mr. Castro. There was no accidental, aiding and abetting felony murder alleged in Petitioner's case.

Nevertheless, the prosecutor did explain that in Petitioner's case, "[w]e have murder one where the defendant is not the trigger man, and we have another murder committed the during [sic] the commission of an attempted robbery where I

don't have to prove that the defendant planned and premeditated the killing of his victim." (RT 454-55.) She immediately proceeded to say that two special circumstances were alleged, that a murder was committed during the commission of an attempted robbery and that there were multiple murders. (RT 455.) She did not say that any or all of the participants in her hypothetical bank robbery scenario could be eligible for the death penalty. (RT 459-60.) Even if a reasonable jurist could hold that the prosecutor had a duty to clarify that a defendant who was not the actual shooter and who did not intend to kill (as in her hypothetical) would not be death-eligible under the felony murder special circumstance, another could hold that the prosecutor's use of the hypothetical was sufficiently limited to explaining the felony murder rule and aiding and abetting and did not require clarification. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Richter*, 562 U.S. at 101 (internal quotation omitted).

2. Special Circumstance Questioning

Petitioner faced a special circumstance allegation as to the Castro murder, along with a multiple murder special circumstance allegation. There was no special circumstance allegation as to the Navarette murder. When discussing the special circumstance allegations, the prosecutor failed to specify that it was alleged that Petitioner intended to kill when he was the non-shooter. At the end of the questioning of the first group, the trial court expressed concern that:

> [W]e got off a little on asking the jurors if they would return a death verdict in a felony murder case where there was an unintentional killing. And I think at some point the jury lost sight of the second murder and multiple murder circumstance. [¶] I don't want to lose jurors on felony murder questions when they're not considering the second murder potential here.

(RT 478); *see also Ochoa*, 26 Cal. 4th at 428 ("The court . . . cautioned the prosecutor not to ask prospective jurors if they could impose the death penalty for

an unintentional felony murder, since there was a second, intentional murder charged.").

The trial court addressed that problem as to Gertrude W., however. It questioned Gertrude W. on her ability to consider the death penalty on the multiple murder special circumstance allegation as it applied to Petitioner's case. The trial court's questions followed the prosecutor's. The prosecutor asked the prospective jurors as a group:

> The special *circumstance* alleged in this case. *One of them* is that a murder, a killing, occurred during the commission of an attempted robbery, and it does not require any evidence, and there will be no evidence that the defendant planned to kill his victim or premeditated the killing of his victim.
>
> But yet the law states a person that kills during the commission of an attempted robbery or robbery is subject to death. [¶] What I need to know from you is can you consider the death penalty in a case such as this? . . .
>
> I know when you filled out the questionnaire you knew nothing about the charges. So I think it's only fair to ask you again if you all feel that the death penalty is an option. [¶] Yes?
>
> [Gertrude W.]: I feel it could be an option according to the evidence. [¶] I believe in the death penalty when somebody deliberately goes out, you know, premeditated and –
>
> Ms. Schwartz [the prosecutor]: You're [Gertrude W.]?
>
> [Gertrude W.]: Uh-huh.
>
> Ms. Schwartz: That is what most people think when they think about the death penalty. That's why I'm asking you these questions. [¶] Because there are some people that simply would not consider the death penalty if they found that the defendant did not plan and premeditate and deliberate this killing.
>
> [Gertrude W.]: I think I feel that way.

> Ms. Schwartz: So in this case, given the nature of the special *circumstance* involved, are you saying that the death penalty would not be an option?
>
> [Gertrude W.]: God, that's hard. I think I have to hear the evidence. . . .
>
> Ms. Schwartz: [W]hat is important for me to find out is if you're open. [¶] If it's a possibility, given the nature of the special *circumstances* involved, that one murder the defendant did not pull the trigger, and the other murder he killed someone. It's alleged he killed someone during the commission of an attempted robbery. No premeditation or planning to the murder is involved. [¶] Is this a case where you can tell me that the death penalty, based upon the evidence presented, is an option? . . . [¶] [Y]ou [Gertrude W.] . . . mentioned this would not be an option for you in this case, the death penalty wouldn't?
>
> [Gertrude W.]: Right. . . .

(RT 461-68 (emphasis added).) The prosecutor asked Gertrude W. if in "sum" she could not consider the death penalty in a case such as this, and she agreed. (RT 469.)

The trial court then questioned Gertrude W. on her ability to consider the death penalty for the multiple murder special circumstance allegation in Petitioner's case:

> I just want to follow up with one or two questions just to make sure I understand. [¶] [Gertrude W.], in particular. [¶] There are questions asked about whether you would consider the death penalty in a case and I think the questions leading up to that talked about the robbery/murder or felony/murder situation.
>
> What if the jury were to return guilty verdicts on both counts of murder *so they are talking about two murders now*. [¶] Under those circumstances, would you be open to the possibility of imposing death, even if *one was a felony/murder case*?

> [Gertrude W.]: No. I think I would go more for life in prison without parole.
>
> The Court: You say you would go more for that. [¶] Does that mean that you would never consider voting for death in the case?
>
> [Gertrude W.]: I don't think I would consider voting for death.

(RT 469-70 (emphasis added).)

The California Supreme Court's conclusion that "[s]ubstantial evidence . . . supports the exclusion" of Gertrude W. was not based on an unreasonable determination of the facts or an unreasonable application of federal law. *Ochoa*, 26 Cal. 4th at 432. The California Supreme Court accurately observed that Gertrude W. "confirmed she would not impose the death penalty in a case, like the instant one, where the defendant did not personally commit one of the murders, and did not plan or premeditate the other. She told the court, 'I don't think I would consider voting for death.'" *Id.* at 428. It was not unreasonable for the California Supreme Court to determine that Gertrude W.'s substantial impairment in considering the death penalty for a non-premeditated murder extended to the multiple murder special circumstance. The record also supports the conclusion that Gertrude W. was substantially impaired in her ability to impose the death penalty under the state-law framework, notwithstanding the prosecutor's failure to mention that the State would introduce other aggravating evidence beyond the circumstances of the crimes. (*See* RT 530-31 (trial judge's concern later in voir dire that jurors may not be considering the possibility of other aggravating evidence when responding to the prosecutor's narrow questions).)

B. Patrice V. and Alicia B.

Patrice V. and Alicia B. were in the second group of prospective jurors questioned. (*See* Pet. at 147, 151.) When questioning the second group, the prosecutor presented the hypothetical scenario discussed above. (RT 509-15.) She

again did not specify that it was alleged that Petitioner intended to kill when he was the non-shooter.

1. Patrice V.

The California Supreme Court accurately observed that Patrice V. "confirmed she considered the death penalty 'state sanctioned murder.' Patrice V. agreed she 'would not consider the death penalty in this type of case.'" *Ochoa*, 26 Cal. 4th at 429; (RT 522-23). It reasonably concluded "[s]ubstantial evidence . . . support[ed] [her] exclusion . . . ." *Ochoa*, 26 Cal. 4th at 432. It is a reasonable conclusion from the record that Patrice V. was substantially impaired in her ability to impose the death penalty under the state-law framework, even considering the prosecutor's failure to clarify that there were two murders, one of which was allegedly intentional, and failure to mention that the State would introduce other aggravating evidence beyond the circumstances of the crimes.

2. Alicia B.

The California Supreme Court accurately observed that Alicia B. "confirmed she did not really agree with the death penalty. She did not feel she would consider death as a possible penalty, as this was not 'the right kind of case' for capital punishment." *Ochoa*, 26 Cal. 4th at 429; (RT 524). After defense counsel argued against her excusal for cause, the trial court followed up with Alicia B. to see if the consideration of aggravating evidence would make her open to the death penalty for Petitioner's crimes, and it clarified that only one of the two murders was not alleged to be intentional. (RT 536-37.) The trial court asked:

> The last statement you made was you would not consider the death penalty in this case.
>
> That was when you were asked the question about penalty in light of the fact if *one of the crimes* was a robbery/murder and *may not be an intentional murder, and the other one the defendant was an aider and abetter* so he wasn't the actual killer.

> If in addition to that you heard evidence about, let's say, he had a prior record, say he had a prior felony conviction, and say you heard evidence that he did something else bad before where he wasn't prosecuted but it amounted to a crime of violence.
>
> If you had heard that, would you then be open to the possibility of voting for death or would it still be your position where this is a case you could not consider voting for death?
>
> [Alicia B.]: This is my position. That this case is not the case for death penalty.
>
> The Court: So no matter what the prosecutor presented at the penalty phase, that still couldn't get you to come over to her position and vote for death?
>
> [Alicia B.]: That's right.

(RT 536-37 (emphasis added).) The California Supreme Court reasonably concluded that Alicia B. was substantially impaired in her ability to impose the death penalty under the state-law framework. *See Ochoa*, 26 Cal. 4th at 432.

C. Linda H.

Linda H. was in the seventh group of jurors questioned. (*See* Pet. at 160.) When questioning the seventh group, the prosecutor's hypothetical bank robbery scenario included a shooting that was a "spur of the moment thing . . . a reflex." (RT 798; *see* Pet. at 161.)

The California Supreme Court accurately observed that the prosecutor asked Linda H. about her questionnaire comment that "'when a jury sentences someone to death, it's murder.' Ms. H. confirmed her opposition, stating, 'I'm against the death penalty always.' She stated she could not vote for death 'in any case.'" *Ochoa*, 26 Cal. 4th at 430; (RT 813-14). The California Supreme Court reasonably concluded that "Linda H.'s comments revealed her unambiguous opposition to the death penalty, and the trial court properly excused her." *Ochoa*, 26 Cal. 4th at 432. The state court reasonably concluded based on the record that Linda H. was

substantially impaired in her ability to impose the death penalty under the state-law framework, regardless of the potential clarifications the prosecutor did not make.

D. Martha C., Arthur R., and Lynn J.

Martha C., Arthur R., and Lynn J. were in the ninth group of jurors questioned. (*See* Pet. at 164, 167, 170.) When questioning the ninth group, the prosecutor used the hypothetical bank robbery scenario with an accidental shooting, limited to felony murder and not aiding and abetting. (RT 929.)

1. Martha C.

The California Supreme Court accurately observed that Martha C. "told the prosecutor she did not think she could impose a sentence of death 'regardless of the evidence in this case.'" *Ochoa*, 26 Cal. 4th at 430; (RT 932). She told the trial judge she did not think she could envision any set of circumstances in which she would be open to the possibility of voting for death. (RT 886.) After further questioning by the court and an explanation of the charges, she said there was a slight possibility she could be convinced to vote for death. (RT 886-87.) Later, the prosecutor asked the prospective jurors:

> Because there's a lot of people, I'm sure, sitting here that say 'I'm in favor of the death penalty' but when it comes right down to it could not bring themselves to actually vote to condemn Mr. Ochoa, the defendant, to death. [¶] And I need to know if there's anybody sitting in this group that feels that way, that personally feels that they could not morally vote to impose a sentence of death on this defendant. [¶] [Martha C.] and . . . [Arthur R.], okay. [¶] Then [Martha C.], are you saying that you personally could not personally and morally vote to impose a sentence of death regardless of the evidence in this case?
>
> [Martha C.]: I don't think I can.
>
> Ms. Schwartz: You don't think you can?
>
> [Martha C.]: No.

(RT 932.)

The California Supreme Court reasonably concluded that Martha C. was substantially impaired in her ability to impose the death penalty under the state-law framework, regardless of the potential clarifications the prosecutor did not make. *See Ochoa*, 26 Cal. 4th at 432 ("Substantial evidence . . . supports the exclusion of the . . . jurors.").

2. Arthur R.

The California Supreme Court accurately observed that when asked whether he "could vote for death 'if you felt it was appropriate,' he [Arthur R.] thought he would 'not [be] able to follow through.'" *Ochoa*, 26 Cal. 4th at 430; (RT 933-34). When the prosecutor asked the group if anyone felt he or she morally could not vote for a death sentence, Arthur R. said:

> I'm not sure. And I rather feel that I would be inclined to not.
>
> Ms. Schwartz: Your inclination would be not to impose a sentence of death?
>
> [Arthur R.]: Even though I believe in the death penalty under appropriate situations.
>
> Ms. Schwartz: Okay. And that's really the key here. That's what all of this questioning about the death penalty is really designed to discover about each of you is whether or not when it really comes right down to it and you're one of 12, knowing that your vote could be the deciding vote which could result in the death of this defendant, that's what I need to know. . . . [¶] Can you realistically see yourself imposing a sentence of death in this case if you felt it was appropriate?
>
> [Arthur R.]: I understand what you said and I rather doubt it.
>
> Ms. Schwartz: You doubt your ability?
>
> [Arthur R.]: I don't know.
>
> Ms. Schwartz: There's a difference between you doubt, your ability

> [sic] and –
>
> [Arthur R.]: Because if I sat in and the case concluded and everything and I had to make that decision, I don't know. [¶] I'm being honest. I don't know how I would – knowing myself, I rather doubt that I could follow through with it.
>
> Ms. Schwartz: Even if you felt it was appropriate, you doubt whether or not you could actually sit as one of twelve and make that decision, knowing that it would result in the death of the defendant?
>
> [Arthur R.]: I'm being honest with you. Knowing myself, I feel I would be not able to follow through.

(RT 933-34.)

The California Supreme Court reasonably concluded based on the record that Arthur R. was substantially impaired in his ability to impose the death penalty under the state-law framework, regardless of the potential clarifications the prosecutor did not make. *See Ochoa*, 26 Cal. 4th at 432.

3. Lynn J.

Lynn J. said that he could carry out voting for a death sentence if he felt it was appropriate. (RT 936.) He thought the death penalty was appropriate where the crime involved mass murders, unusual cruelty, or torture or murder in prison. (RT 935.) He said, "I don't think knowing what I do about this case, that that [death] would be the appropriate sentence." (RT 935-36.) The prosecutor asked:

> Knowing that this is not a case involving one of the things that you listed in your questionnaire [as appropriate for the death penalty], are you open to considering both possibilities?
>
> [Lynn J.]: Yes, if it is a circumstance that has those elements in it I feel, elements that make it a terrible crime, one of the worst crimes. [¶] If it involves torture or some activity that's at the highest level of crime.
>
> Ms. Schwartz: One of the special circumstances in this case is an

> allegation or special circumstance of murder during the commission of an attempted robbery, and that doesn't come under the categories that you listed in your questionnaire. [¶] So I am wondering if that's the type of case – if this is the type of case where you could consider the death penalty?
>
> [Lynn J.]: No, it's not one of those circumstances. . . .
>
> Ms. Schwartz: The other special circumstance is that the defendant committed two murders. One of them is a murder where as we discussed where he's not the actual shooter, and the other one if you find that one to be true is a murder during the commission of attempted robbery. [¶] Is that the kind of case where you feel that you could consider imposing a death penalty?
>
> [Lynn J.]: No, I don't believe it is.

(RT 936-38.) Later in voir dire, the prosecutor asked if anyone else would:

> have a difficult time personally imposing a sentence of death now, knowing what you know about in case [sic]?
>
> [Lynn J.]: I would.
>
> Ms. Schwartz: [Lynn J.], you have had time to think about that?
>
> [Lynn J.]: I don't think this is the kind of case where I think the death penalty is the appropriate sentence.
>
> Ms. Schwartz: Like I just asked . . . , again, you don't know what's going to be presented in the penalty phase, but in addition to the special circumstances themselves and the evidence surrounding those allegations there may be other evidence shown in the penalty phase that tends to show that the person is a bad person who may have done other things, and the defense is going to have an opportunity to present evidence showing he is a good person. [¶] Even adding all that into what we have already talked about, do you still feel the same way, that this is not a case where you could consider the penalty of death?

[Lynn J.]: Yes, I do.

(RT 947.)

The California Supreme Court accurately observed that Lynn J. "agreed that neither murder in the commission of an attempted robbery nor murder by aiding and abetting met his standards for imposing death. Accordingly, he did not believe he could consider voting for death in this case." *Ochoa*, 26 Cal. 4th at 430-31; (*see* RT 936-38). The California Supreme Court reasonably concluded based on the record that Lynn J. was substantially impaired in his ability to impose the death penalty under the state-law framework, based on the limitations he described. *See Ochoa*, 26 Cal. 4th at 432.

Claim 5 is DENIED.

E. Ineffective Assistance of Counsel

In Claim 1(C)(7), Petitioner alleges that "[t]o the extent" the jurors' excusals for cause "were based upon defense counsel's failure to investigate, adequately object and/or rehabilitate the prospective jurors," counsel provided ineffective assistance. (Pet. at 88.) Petitioner specifies that trial counsel failed to object to the prosecutor's hypothetical during the first two groups of prospective jurors questioned. (Petr.'s Br. at 83.) He alleges that had counsel timely objected and had counsel rehabilitated the jurors, there is a reasonable probability the jurors would not have been removed. (*Id.* at 83-84.)

The California Supreme Court may have reasonably rejected as speculative Petitioner's claims that there is a reasonable probability that counsel's investigation and rehabilitation of the jurors would have spared them. *Cf. West*, 608 F.3d at 490 n.12; *Gonzalez*, 515 F.3d at 1014; *Phillips*, 267 F.3d at 986-87. As to Petitioner's allegation that trial counsel should have objected to the prosecutor's hypothetical, the California Supreme Court may have reasonably held that prospective jurors Gertrude W., Patrice V., and Alicia B. were substantially impaired in their ability to impose the death penalty unrelated to the prosecutor's

hypothetical. It may have reasonably denied that portion of the claim for lack of prejudice.

Claim 1(C)(7) is DENIED.

VI. Claim 7: Jury Vicinage and Fair Cross-Section of the Community

In Claim 7, Petitioner explains that his trial was transferred from the Central District of the Los Angeles Superior Court, in downtown Los Angeles near his home and near the scene of the crimes, to the Northwest District in Van Nuys. (Pet. at 183.) He alleges that the jury panel of the Central District would contain a large number of Latino prospective jurors, while the panel of the Northwest District would contain few Latino prospective jurors. (*Id.*) Petitioner is a citizen of Mexico and identifies as Hispanic. (*Id.* at 83, 110.)

A. Vicinage

First, Petitioner alleges that the transfer of his trial violated his right to a jury drawn from the vicinage of the crime. (*Id.* at 183-201.) The Ninth Circuit held in *Stevenson v. Lewis*, 384 F.3d 1069, 1072 (9th Cir. 2004):

> [T]he Supreme Court has not decided whether the Sixth Amendment's vicinage clause applies to the states. Nor has the Court defined the scope of a state defendant's federal vicinage rights, such as what constitutes the 'district' in the state context . . . . The California Court of Appeal's decision was not contrary to, or an unreasonable application of, clearly-established Supreme Court law, simply because no such law exists.

Stevenson, 384 F.3d at 1072. Petitioner acknowledges that "*Stevenson* is the law of the Circuit," but he "maintains that it was wrongly decided. He thus preserves his claim for review . . . ." (Petr.'s Br. at 134.) Because this portion of Claim 7 lacks support in clearly established federal law, it is DENIED.

B. Fair Cross-Section of the Community

Second, Petitioner alleges that the transfer violated his right to a jury drawn from a fair cross-section of the community. (Pet. at 201-09.) To establish a prima

facie violation of that right, Petitioner must show:

> (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979).

On direct appeal, Petitioner presented evidence that "although 13 percent of the jury-eligible population of the Northwest Judicial District was Hispanic, only 7.7 percent of the district's jury pool in May and June 1992 was Hispanic. This resulted in an 'absolute disparity' of 5.3 percent, and a 'comparative disparity' of approximately 40.8 percent." *Ochoa*, 26 Cal. 4th at 427. He showed that Los Angeles County compiled its jury pools using voter registration lists and Department of Motor Vehicles records, the latter of which were added "to provide a more representational list." *Id.* Petitioner argued that "the county's failure to supplement these two lists with other 'readily available lists' demonstrates the systematic exclusion required by *Duren*." *Id.* The California Supreme Court denied Petitioner's claim in part because "the failure of a particular group to register to vote in proportion to its share of the population cannot constitute improper exclusion attributable to the state." *Id.*

The California Supreme Court's rejection of the claim does not show an unreasonable determination of the facts or an unreasonable application of federal law. First, the evidence in the record does not support Petitioner's conclusory assertion that other lists would be "more representative" or "solutions." (Pet. at 208.) Petitioner's expert did not go so far. He testified, for example:

> In my opinion, use of the state income tax names and addresses would probably be quite effective. But you'd have to – *you'd actually have to conduct a test or a study to see that for California*. But I believe that in New York that's shown to have been quite effective. . . .

> Q. And one of the ways I believe you testified and correct me if I'm wrong – that L.A. County could get going as other jurisdictions have would be to add such lists as utility lists, state income lists and so on and so forth?
>
> A. What I would recommend doing is before you add these lists, and then as they did here and add the driver list and then we're discussing the results of it ten years later, is to do a small pilot study that's very cost effective, and *find out whether adding list A or B is doing anything. And if it isn't, why. Rather than experimenting with the whole system*, just do a small pilot study. . . . In that way you can sort this problem out. Is it that people aren't responding, is it that DMV lists are under-representative of Hispanics. These issues can be addressed on the basis of a small scale pilot study, and you can solve the problem rather than jumping ahead . . . and then find out it didn't make any difference.

(RT 146, 190 (emphasis added).) The trial court asked Petitioner's expert directly:

> The Court: . . . The cases say under *Duren* there's a three-part test, and that third part is the disparity is due to a systematic exclusion. And I'm trying to find out if there is an exclusion in the system and identify it. So if the under-representation, if there is under-representation, is simply due to the fact that people are electing not to be part of the process, and if that's the case, then I don't think there's a violation of *Duren* in any case.
>
> A. The problem I have as an expert is that people are sitting on top of that data and money isn't being provided to analyze it. And so that the answer is there, but access to the data to find out is denied.

(RT 188.)

Petitioner has not demonstrated that the additional lists he proposes are adequate or necessary to avoid systematic exclusion of Latinos, and he has not presented evidence to rule out social and economic factors as the cause of Latinos' underrepresentation in Van Nuys jury venires. To the contrary, Petitioner's expert offered socioeconomic and social factors as his best explanation for that underrepresentation. (RT 185 ("The Court: Why are other minorities, blacks and

Asians, over-represented in Van Nuys? A. One reason could be – let's take Asians. That Asians as a group are in a higher socioeconomic class than Hispanics."), RT 187 ("What I would tend to conclude here, without actually doing a study, is that for some reason Hispanics are more likely to not register to vote and to not have driver licenses.").) The United States Supreme Court has "never 'clearly' decided . . . whether the impact of social and economic factors can support a fair-cross-section claim." *Berghuis v. Smith*, 559 U.S. 314, 323, 333 n.6 (2010) (rejecting petitioner's fair cross-section claim where petitioner, among other things, "introduced the testimony of an expert in demographics and economics, who tied the underrepresentation to social and economic factors . . . [that] made African-Americans less likely than whites to receive or return juror-eligibility questionnaires, and more likely to assert a hardship excuse").

Because Petitioner has failed to show that the California Supreme Court unreasonably determined the facts or unreasonably applied clearly established federal law in denying his fair cross-section claim, this portion of Claim 7 is DENIED.

VII. Claims 8, 1(C)(1), and 1(C)(3): Joinder of Navarette and Castro Homicides

In Claim 8, Petitioner alleges that his constitutional rights were violated because the Navarette and Castro homicides were improperly joined. (Pet. at 209-23.) He argues that while an improper denial of a motion to sever "does not in itself violate the federal constitution, misjoinder rises to the level of a constitutional violation when the prejudice to the defendant is so great as to deny him his fundamental Fifth Amendment right to a fair trial and due process." (*Id.* at 210 (citing *United States v. Lane*, 474 U.S. 438, 446 n.8 (1986)).)

The Ninth Circuit has held since *Lane* that the Supreme Court's language that misjoinder rises to the level of a constitutional violation if it results in the denial of a fair trial under the Fifth Amendment "is dicta." *Collins v. Runnels*, 603

F.3d 1127, 1132 (9th Cir. 2010) (rejecting state habeas petitioner's claim that denial of motion to sever trial from codefendant violated his right to a fair trial). The Circuit explained:

> The language upon which [petitioner] [relies] is dicta. *Lane* dealt with the joinder of standards under Federal Rules of Criminal Procedure 8 and 52; no constitutional issue was before the Court. [T]he phrase 'clearly established Federal law, as determined by the Supreme Court of the United States' refers to the holdings, *as opposed to the dicta*, of [the Supreme] Court's decisions as of the time of the relevant state-court decision. . . . The footnote upon which [petitioner] relies did not set forth the governing legal principle in *Lane*. It was merely a comment.

Id. (internal quotation omitted; emphasis in original); *see also Runningeagle v. Ryan*, 686 F.3d 758, 776-77 (9th Cir. 2012) (holding same). Petitioner attempts to distinguish *Collins* as applying only to jointly tried defendants (Reply at 34), but the analysis in *Lane* itself is inextricable from its jointly tried defendants. Petitioner presents no other clearly established federal law to support his claim.

In Claim 1(C)(1), Petitioner faults trial counsel for failing to argue, in seeking to sever the Navarette and Castro charges: (a) that the misjoinder violated the federal constitution because the prejudice was so great as to deny Petitioner a fair trial and due process; and (b) that the arbitrary deprivation of a State-created right under California Penal Code § 954 amounted to an additional due process violation. (Pet. at 83.) In Claim 1(C)(3), Petitioner alleges, without any further specification, that "[t]o the extent" the trial court's denial of defense counsel's motion to sever "was based upon counsel's failure to investigate, present adequate evidence, and competently argue the facts and law," counsel's performance was deficient. (*Id.* at 84.)

The California Supreme Court may have reasonably determined that the arguments Petitioner would have had counsel make in Claim 1(C)(1) were meritless. *See Ochoa*, 26 Cal. 4th at 422-25 (holding that joinder was proper under

Cal. Penal Code § 954); *see also Juan H.*, 408 F.3d at 1273; *Molina*, 934 F.2d at 1447. The state court may have also reasonably determined that Petitioner's vague assertion of incompetence in Claim 1(C)(3) did not warrant habeas relief. *See Pinholster*, 563 U.S. at 188 n.12 (explaining that when determining whether a habeas petition states a prima facie case for relief, the California Supreme Court "does not accept wholly conclusory allegations" (internal citations omitted)); *see also Greenway v. Schriro*, 653 F.3d 790, 804 (9th Cir. 2011) ("[Petitioner's] cursory and vague claim cannot support habeas relief."); *Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995) ("[Petitioner's] conclusory suggestions . . . fall far short of stating a valid claim of constitutional violation."); *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief.").

Claims 8, 1(C)(1), and 1(C)(3) are, therefore, DENIED.

VIII. Claims 9 and 1(C)(9): Petitioner's Statements to Police

A. Time between *Miranda* Waiver and Statements

Petitioner was arrested on an unrelated charge on January 21, 1990. *See Ochoa*, 26 Cal. 4th at 442. On January 22, 1990 at 9:00 a.m., Detective Berchem advised Petitioner of his *Miranda* rights and Petitioner waived them. (Pet. Ex. 94; *see* RT 1048.) Detective Berchem questioned Petitioner about the unrelated charge. Detective Bercham told Detective Paul Coulter,[4] who was investigating the Jose Castro murder and another 18th-Street-Gang-related murder, that Petitioner had waived his *Miranda* rights. (RT 1046-48.) At 11:00 a.m. that morning, Detective Coulter questioned Petitioner for 30 to 60 minutes. (Pet. at 227 (citing RT 1048-50, 1055).) He did not advise Petitioner of his *Miranda* rights. (RT 1049.)

[4] The spelling of the detective's name appears as "Coulter" and "Colter" alternatively throughout the state court record and throughout the parties' filings in this Court. The Court has used "Coulter" for consistency with the state court's decision on direct appeal.

At 9:00 p.m. that night, Detective Coulter and the night watch detective drove while Petitioner showed them the home of one of the suspects in the other 18th-Street-Gang-related murder. (RT 1050, 1056, 1058-60.) When they returned to the jail, at approximately midnight, Detective Coulter questioned Petitioner again for about one hour. (RT 1056, 1059-60; Pet. Ex. 233 at 4530, 4558.) He did not inform Petitioner of his *Miranda* rights. (*See* RT 1021.) Petitioner's statements during that interview were admitted at trial over his objection. *Ochoa*, 26 Cal. 4th at 436.

Petitioner alleges that his statements and any evidence derived from them were inadmissible because the advisement of his *Miranda* rights was not reasonably contemporaneous with his interrogation fifteen hours later. (Pet. at 223.) He raised the claim on direct appeal and in state habeas proceedings. (*See id.*; Petr.'s Br. at 144.) On direct appeal, the California Supreme Court held that Petitioner's midnight "conversation" with police was not an interrogation, so no *Miranda* advisement was required. *Ochoa*, 26 Cal. 4th at 437 n.8. As a result, it observed that it "need not evaluate the trial court's determination that the morning advisement sufficed." *Id.*

Petitioner fails to show clearly established federal law to support his argument that a readvisement of his *Miranda* rights was necessary. *See United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1128 (9th Cir. 2005) ("[Defendant] contends that the officers were required to re-advise him of *Miranda* warnings before beginning the second day of questioning. But he does not cite a Supreme Court or Ninth Circuit decision – and we are aware of none – holding that statements made after *Miranda* warnings are administered are nonetheless inadmissible if the warnings become 'stale.'"). Neither the lapse of time between the waiver and Petitioner's statement nor the change in the offense in question shows a violation of Petitioner's *Miranda* rights. *See Colorado v. Spring*, 479 U.S. 564, 573-74 (1987) (holding that a statement is not compelled in violation of a

defendant's *Miranda* rights because investigators fail to inform the defendant that they will question him or her about a different crime, after the defendant has waived *Miranda* rights).

Petitioner alleges that trial counsel was ineffective for failing to establish the number of hours between Petitioner's *Miranda* warning and his midnight statement, "[t]o the extent" counsel failed to do so in arguing the motion to suppress. (Pet. at 229.) The California Supreme Court may have reasonably concluded that Petitioner failed to show a reasonable probability that his statement would have been suppressed had counsel done so. The California Supreme Court held in an earlier case that a span of 36 hours between defendant's *Miranda* waiver and his requestioning in a different location did not violate his *Miranda* rights. *People v. Mickle*, 54 Cal. 3d 140, 169-71 (1991). While Petitioner may have been less acquainted with the legal system, with his *Miranda* rights, or with the questioning officer than was the defendant in *Mickle*, Petitioner fails to show that *Mickle*'s reasoning cannot reasonably apply to his situation.

B. Voluntariness

On February 13, 1990, Petitioner gave an additional statement to police that was admitted at trial. He was advised of and waived his *Miranda* rights before giving that statement. (Petr.'s Br. at 146; RT 1295-96.) He argues that the waivers that preceded his statements were not knowing, intelligent, and voluntary as a result of his "mental deficits," the conditions of his custody, and the conduct of the State. (Pet. at 230-31; Petr.'s Br. at 151-54.) He adds in Claim 1(C)(9) that trial counsel was ineffective for failing to argue that the statements and waivers were involuntary in his motion to suppress. (Pet. at 90.) He asserts that counsel was "ill-equipped to make a voluntariness challenge" because of his deficient investigation and understanding of Petitioner's "personal history and circumstances." (*Id.*)

"The voluntariness of a suspect's waiver – like the voluntariness of a subsequent confession – is assessed by examining both the police methods used to produce the waiver and the individual characteristics of the suspect to determine whether the suspect's will was overborne." *Rodriguez v. McDonald*, 872 F.3d 908, 922, 923-25 (9th Cir. 2017) (finding coercion where police suggested that "cooperating was the only way to 'save [his] life,'" both before and after the fourteen-year-old suspect asked for a lawyer) (citing, *inter alia*, *Colorado v. Connelly*, 479 U.S. 157, 170 (1986)). "The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word." *Connelly*, 479 U.S. at 170 (concluding that petitioner's mental state did not render invalid his *Miranda* waiver because the "sole concern . . . is governmental coercion"). A petitioner's "perception of coercion flowing from the 'voice of God,'" for example, "however important or significant such a perception may be in other disciplines, is a matter to which the United States Constitution does not speak." *Id.* at 170-71.

Here, as to allegations of police conduct, Petitioner lists "Colter's and his associates' marathon use of Ochoa, from 9:00 a.m. on January 22 to just before 1:00 a.m. on January 23, to information-gathering after a two-day period of custody in unfamiliar surroundings, without access to counsel; . . . [and] law enforcement officers' failure to apprise him of his rights and the dangers of waiving those rights prior to questioning, and the intervening actions they took to dilute the effect of the 9:00 a.m. warnings . . . ." (Pet. at 230-31.) Petitioner overstates the supposed "marathon" duration of his questioning. By his own allegations, Petitioner was questioned for at most four hours out of a sixteen-hour period. His claim that he was "without access to counsel" omits the fact that Petitioner did not request counsel. As discussed above, the lapse of approximately fifteen hours between Petitioner's advisement of his rights and his midnight statements does not inherently show that the warnings were impermissibly diluted,

and Petitioner does not identify intervening actions that contributed to their erosion.

Petitioner raised these portions of the claim in state habeas proceedings. (*See* Petr.'s Br. at 144.) The California Supreme Court may have reasonably rejected them on the basis that Petitioner failed to show police overreaching. It may have reasoned that an argument from trial counsel that the statements and waivers were involuntary would have been meritless on the same ground. *See Juan H.*, 408 F.3d at 1273; *Molina*, 934 F.2d at 1447. Claims 9 and 1(C)(9) are, therefore, DENIED.

IX. Claims 10, 11, 1(C)(10), and 1(C)(17): Third Party Statements

A. Factual Background

Petitioner's former codefendant Walter Aguilar was interviewed by police three times before trial and gave statements to police. (*See* Pet. at 240-41; Opp. at 139-40); *cf. Ochoa*, 26 Cal. 4th at 456 n.16 (all defendants charged in the instant crimes other than Petitioner pleaded guilty prior to Petitioner's trial). The prosecutor said in her opening argument:

> I wish I could stand up here and tell you what they are going to say here in court. I can't. I don't know what they are going to say here in court. I only know what they have said before they have come into court. And all of the witnesses, I anticipate, if they were to tell the truth here in court, would tell you essentially the same thing. [¶] And that is that they all gave statements to the police and all their statements are consistent with each other, that the defendant was the driver of the truck that was involved in the drive by shooting of Pedro Navarette, that the defendant was the main instigator in the attempted robbery of Jose Castro, and that the defendant shot and killed Jose Castro because Mr. Castro would not give up his car.

(RT 1084.)

The prosecution called Mr. Aguilar as a witness at trial. Although Mr. Aguilar repeatedly said he did not remember who was driving (*see, e.g.*, RT 1257, 1260), he also testified:

> Q. When Spooky [Petitioner] showed up, was he in a car or on foot?
>
> A. He was in a car, I think. . . .
>
> Q. Do you remember telling the detectives when they interviewed you, Detective Gilbert and Detective Escoto on February 14, 1990 that when Spooky showed up he was saying that a Crazy Rider was around and he saw him.
>
> Do you remember telling the detectives that?
>
> A. I remember telling him that.
>
> Q. Is that true?
>
> A. I was half asleep. I wasn't like I was answering to anything they were telling me. . . .
>
> Q. Do you remember what you did after Spooky arrived and told you about the Crazy Rider?
>
> A. I grabbed my gun.
>
> Q. What kind of gun?
>
> A. Shotgun double barrel.
>
> Q. Where was it?
>
> A. In my car.
>
> Q. What did you do after you grabbed your gun?
>
> A. I took off.

> Q. Where did you go?
>
> A. To look for him.
>
> Q. With who?
>
> A. I don't know. Four guys in the car. I don't remember exactly. . . .
>
> Q. Do you remember telling the detectives that Spooky drove eastbound on Pico and that Cyco, you, Shadow, and Scorpio were in the truck?
>
> A. I think I did. . . .
>
> Q. Do you remember coming up behind that car [the victim's car]?
>
> A. I was side by side to him. . . .
>
> Q. When you told the detectives Spooky was driving, was that the truth?
>
> A. I was too sleepy. I was answering to anything that came up. I thought I was going to get back home like they did before.

(RT 1255-56, 1258, 1260.) The statements Mr. Aguilar made to police in his February 14, 1990 interview were admitted into evidence. (RT 1361-62.) The prosecutor thus impeached Mr. Aguilar, the State's own witness, with his prior inconsistent statements. (*See* Petr.'s Br. at 159 ("The prosecution played portions of the tape of this [February 14, 1990] interview for the jury." (citing RT 1361-62)), 162 (explaining that the prosecutor confronted Petitioner with his February 14, 1990 statement to police).)

B. Admission of Involuntary Statements

Petitioner raised Claims 10 and 11 in state habeas proceedings. (*See* Pet. at 238, 252.) In Claim 10(b)(1), Petitioner alleges that Mr. Aguilar's pretrial statements were involuntary and unreliable. (Pet. at 240-43; Opening Br. at 162.)

In Claims 10(b)(5) and 11, Petitioner alleges that the "investigating officers' willingness to do whatever was necessary to obtain the statements they sought was repeatedly demonstrated by their continued questioning" of Mr. Aguilar after he invoked his *Miranda* rights. (Pet. at 254; *see also id.* at 247.) Petitioner argues that the statements should have been excluded "[b]ecause an involuntary confession is not admissible for any purpose at trial, including for impeachment purposes . . . ." (*Id.* at 247.) He contends that the admission of the statements prejudiced him at both the guilt and penalty phases of trial. (*Id.* at 248.)

Petitioner's claim lacks support in clearly established federal law. Petitioner asserts that he "has standing to challenge the admission of third parties' involuntary statements as a violation of his own right to due process," citing a 42 U.S.C. § 1983 case, *Clanton v. Cooper*, 129 F.3d 1147, 1157-58 (10th Cir. 1997), *overruling recognized by Harte v. Bd. of Comm'rs of Johnson*, 864 F.3d 1154, 1163 (10th Cir. 2017), and a pre-AEDPA habeas case, *Williams v. Woodford*, 384 F.3d 567, 593 (9th Cir. 2004). (Petr.'s Br. at 158.) Petitioner's reliance on those authorities is misplaced. The Tenth Circuit "implicitly overruled *Clanton* to the extent it suggests that a plaintiff may bring a Fourteenth Amendment claim under these circumstances." *Papadakos v. Norton*, 663 Fed. Appx. 651, 657-58 (2016) ("Papadakos had no substantive due process right under the Fourteenth Amendment to remain free from being arrested for, or charged with, a crime based on the allegedly coerced statements of a third party."); *cf.* 10th Cir. R. 32.1(a) (permitting citation of unpublished decisions as persuasive authority). *Williams v. Woodford*, as a pre-AEDPA case, did not require clearly established federal law as determined by the United States Supreme Court as a basis for relief, and there is no clearly established federal law to show that a defendant's due process rights can be violated by the admission of a third party's involuntary statements.

As the Ninth Circuit explained in *Holley v. Yarborough*:

> Although the [Supreme] Court has been clear that a writ should be issued when constitutional errors have rendered the trial fundamentally unfair, *see Williams v. Taylor*, 529 U.S. 362, 375 (2000), it has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ. Absent such clearly established Federal law, we cannot conclude that the state court's ruling was an unreasonable application.

Holley, 568 F.3d 1091, 1101 (9th Cir. 2009) (internal citation edited; internal quotation omitted); *see also Zapien v. Davis*, 849 F.3d 787, 794 (9th Cir. 2015) ("Because there is no Supreme Court case establishing the fundamental unfairness of admitting multiple hearsay testimony, *Holley* prohibits us from finding in [petitioner]'s favor on this due process claim."). Petitioner's challenge to the admission of Mr. Aguilar's statements lacks support in clearly established federal law.

Moreover, the California Supreme Court may have reasonably determined that any error in the admission of Mr. Aguilar's statements was harmless. Under California law, a defendant has a right to exclude coerced third party statements from admission at trial if their admission would deprive the defendant of a fair trial. *See People v. Badgett*, 10 Cal. 4th 330, 344, 350 (1995). Admission of even the defendant's own coerced statement is subject to harmless error review under California and federal law, however. *See Arizona v. Fulminante*, 499 U.S. 279, 295 (1991) ("[H]armless-error analysis applies to coerced confessions"); *People v. Cahill*, 5 Cal. 4th 478, 509 (1993) ("overrul[ing] the line of California decisions holding that the erroneous admission of a coerced confession is reversible per se under California law"). Here, the California Supreme Court may have held that the

admission of Mr. Aguilar's statements, even if coerced, was harmless in light of Mauricio Soriano's statements.[5]

Petitioner argues that the prosecutor used Mr. Aguilar's out of court statement to establish that Petitioner "'was the driver, and the plan was to get the guy in the white Toyota because . . . he was a Crazy Rider . . . .'" (Petr.'s Br. at 162 (quoting RT 1895).) Mr. Soriano was cross-examined at trial with the transcript of his responses to questioning by the prosecutor at his plea hearing. (RT 1519-25.) At that hearing, he answered that he thought Petitioner said to him and his friends at Pico and Wilton that Petitioner just saw Pompis[6] in the white Toyota; that he and his friends got in the truck, drove down Pico, and saw a small white car in front of them; that Petitioner drove the truck alongside the car; and that after the shot was fired, Petitioner drove the truck away from the area. (RT 1521-22.) The California Supreme Court may have reasonably held that the admission of Mr. Aguilar's statement was harmless in light of Mr. Soriano's statements. (*Cf.* RT 1896 (prosecutor's argument that "Mauricio Soriano, . . . his statement initially to the police was similar to the statement of Walter Aguilar, that the defendant drove up, had just seen the Crazy Riders, had told his home boys they just saw the Crazy Riders, they piled in the truck and off they went to do their murder.").)

C. Introduction through Impeachment

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[5] Petitioner's challenge to the admission of Mr. Soriano's statements as involuntary and unreliable was untimely. (*See* Order Granting in Part and Denying in Part Motion to Dismiss, Docket No. 134, at 5, 15.)

[6] "[D]efendant's 18th Street Gang was in a 'war' with a rival gang, Crazy Riders. On December 15, 1989, defendant was walking . . . when a white Toyota . . . pulled up beside them. A Crazy Riders member named 'Pompis' exited the car and shot three times at defendant . . . . On January 3, 1990, at approximately 5:00 p.m., 18th Street Gang members Jacinto Alonzo, and Walter Aguilar and his brother . . . were driving . . . . The white Toyota pulled up and Pompis shot [Mr. Aguilar's brother] in the forehead." *Ochoa*, 26 Cal. 4th at 416.

Petitioner alleges in Claim 10(b)(6) that the prosecutor committed misconduct by referring to Mr. Aguilar's statements in her opening argument and by introducing them through impeachment. (Pet. at 248.)

In California, impeaching prior statements are admissible for the truth of the matter, not just the credibility of the witness. *See People v. Rices*, 4 Cal. 5th 49, 85 (2017) ("Because defendant had the opportunity to confront [the witness], that [prior inconsistent] statement was admissible both as impeachment and for its truth." (citing Cal. Evid. Code § 1235; *People v. Rodriguez*, 58 Cal. 4th 587, 633 (2014))).

The prosecutor's actions with regard to Mr. Aguilar's prior statements did not violate Petitioner's constitutional rights. The Ninth Circuit has rejected the argument that a violation of the Confrontation Clause, the "right to due process [or] equal protection occur[s] when the trial court decide[s] to permit a calling party to impeach its own witness by introducing prior inconsistent statements as substantive proof of the matters asserted while refusing the same right to the opposing party." *Skinner v. Cardwell*, 564 F.2d 1381, 1390-91 (9th Cir. 1977); *see also California v. Green*, 399 U.S. 149, 164 (1970) (finding no invalidity in California Evidence Code § 1235, on the ground that "the Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements, and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories"); *Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1118 (9th Cir. 2001) ("[I]t is not always improper for a prosecutor . . . to call to the stand a recalcitrant witness whose testimony in some respects will not be truthful . . . . We have in mind . . . a witness [who] makes a pretrial statement that would appear to be truthful, but then discards that truthful position in contemplation of an appearance in court . . . . The constitutionality of the admission of such evidence as substantive evidence of guilt

was determined in *Green*, 399 U.S. 149." (internal citation edited)). The California Supreme Court may have reasonably determined that Petitioner had an opportunity to cross examine Mr. Aguilar as to the truthfulness of his prior statements to police and that those statements were admissible as evidence of Petitioner's guilt. (*See, e.g.*, RT 1255-56, 1260.)

D. Ineffective Assistance re: Opening Argument and Admission of Statements

Petitioner alleges in Claims 10(b)(6) and 1(C)(10) that trial counsel was ineffective for failing to object to the admission of Mr. Aguilar's statements as involuntary and unreliable, failing to move to exclude them before trial, and failing to object to the prosecutor's reference to them during opening argument. (Pet. at 90-92, 248.)

The California Supreme Court may have reasoned that counsel's failure to object to the prosecutor's opening argument was not prejudicial because Mr. Aguilar's statements ultimately were properly admissible. As to counsel's actions in not objecting to or moving to exclude Mr. Aguilar's statements, the California Supreme Court may have reasonably determined that counsel was not deficient because any objection would have been meritless, that counsel chose not to object or move to exclude out of reasonable trial strategy, or that Petitioner failed to show prejudice from counsel's inaction. As defense counsel argued to the jury, Mr. Aguilar "had as much motive or more motive [to kill] than anybody," because "[i]t was his brother who had been shot" earlier that day. (RT 1941, 1944); *see also Ochoa*, 26 Cal. 4th at 416. Defense counsel argued that the killing may have been Mr. Aguilar's idea, that without Mr. Aguilar's gun the killing would not have occurred, and, by implication, that Petitioner had no knowledge of the gun and did not aid and abet the killing. (*See* RT 1942-43 ("Miss Schwartz asked him [Mr. Aguilar], 'Whose idea was it to follow the white car?' His answer: 'Who knows.'"), 1943-44 ("Miss Schwartz told you that killing would never have

occurred if Sergio Ochoa hadn't came up in the truck. [¶] I suggest there was no gun until S[n]eezer [Mr. Aguilar] went over and got it from his car. They could have done all of the driving by they wanted to, but without a gun that killing would not have occurred."), 1954 (emphasizing another former codefendant's testimony that Mr. Aguilar asked Petitioner "for a ride. The shotgun was not shown to Spooky [Petitioner] and no one told him about it."), 1955 (emphasizing Petitioner's statement that he did not know the shooter had a shotgun and the prosecutor's acknowledgment that she must prove Petitioner's knowledge that the former codefendants were going to do a drive by shooting).) It is a reasonable argument that counsel performed adequately in allowing Mr. Aguilar's pretrial statements to be admitted into evidence. *See Richter*, 562 U.S. at 105 ("When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard."). Likewise, the California Supreme Court may have reasonably determined that Petitioner was not prejudiced by their introduction.

E. Withholding of Evidence

Petitioner contends in Claims 10(b)(1), 10(b)(6), and 11 that the prosecution withheld material exculpatory evidence and impeachment evidence by failing to disclose the contents of Mr. Aguilar's police interviews and the alleged coercion that produced his statements. (Pet. at 241-42, 247-48, 252.) He alleges in Claims 10(b)(6), 1(C)(10), and 1(C)(17) that trial counsel was ineffective for failing to investigate the undisclosed portions of the statements. (*Id.* at 90-92, 101-02, 248.) Petitioner adds in Claim 11 that the "Los Angeles County District Attorney's Office obstructed Ochoa's efforts to develop claims on habeas corpus by their refusal to allow Ochoa's state habeas counsel to view and obtain copies of the police reports in Ochoa's case. (Exs. 89-93.)" (*Id.* at 254.)

The California Supreme Court may have reasoned that Petitioner's claims regarding the nondisclosed portions of Mr. Aguilar's interviews are without merit

because they are speculative. *See Phillips*, 267 F.3d at 986-87 (holding petitioner's *Brady* claims were "without merit" because they were "mere suppositions"). The state court may have rejected as conclusory Petitioner's allegation that the District Attorney's Office refused to allow state habeas counsel to obtain police reports, as Petitioner fails to specify when the police reports were refused or what obstruction he suffered as a result.

Claims 10, 11, 1(C)(10), and 1(C)(17) are DENIED.

X. Claims 12, 13, 1(C)(11), 1(C)(12), 1(C)(32), and 1(C)(33): Admission of Evidence

In Claim 12, Petitioner challenges the admission of evidence regarding the "187" tattoo he acquired over his right eye after the killings and Detective Berchem's testimony that the tattoo was significant because 187 was the California Penal Code section on murder. (Pet. at 254-73); *Ochoa*, 26 Cal. 4th at 437-39. In Claim 1(C)(11), Petitioner alleges that in arguing his motion to exclude that evidence, trial counsel failed to present witnesses to support Petitioner's contrary interpretation of the tattoo's significance and failed to argue that admission of the evidence would violate Petitioner's state and federal constitutional rights. (Pet. at 92-93.)

In Claim 13, Petitioner challenges the jury's exposure during voir dire to "irrelevant and otherwise unduly prejudicial evidence" that:

> (1) [he] had committed other bad acts, (2) had a prior felony conviction, (3) had committed a crime of violence, (4) that there was 'all kinds of bad evidence about' Ochoa, 'a lot of other bad things,' and (5) there was 'evidence to show that he was a very bad person.'

(Pet. at 287 (quoting trial court's statements to jurors at RT 551, 616, 828); *see also id.* at 273-89.) He argues that the evidence was reinforced by Detective Berchem's speculation that Mr. Ochoa had been tattooed in prison, implying that Petitioner had served a prior prison term. (*Id.* at 287.) In Claim 1(C)(12),

Petitioner faults trial counsel for failing to object to the "prosecutorial jury indoctrination" during voir dire. (*Id.* at 93-94.)

In Claim 1(C)(32), Petitioner alleges that trial counsel was ineffective for failing to object adequately to the admission of autopsy and crime scene photographs and other unspecified exhibits. (*Id.* at 111-12 (citing People's Exs. 3-A, 25, 26); Petr.'s Br. at 103.) In Claim 1(C)(33), Petitioner alleges that trial counsel failed to object adequately to "inflammatory, irrelevant, cumulative, and more prejudicial than probative testimonial evidence . . . , including the testimony of David Mandich." (Pet. at 112.)

Petitioner's challenges to the admission of evidence lack support in clearly established federal law. *See Holley*, 568 F.3d at 1101 ("[T]he [Supreme] Court . . . has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ.").

As to Petitioner's allegations of ineffective assistance of counsel, the California Supreme Court reasonably held on direct appeal that evidence of the "187" tattoo and Detective Berchem's testimony about its meaning were properly admitted. *Ochoa*, 26 Cal. 4th at 437-39. The state court reasonably held that any evidence to contradict Detective Berchem would go to the weight of his testimony, not its admissibility. *Id.* at 438. The state court on habeas review may have reasonably rejected Claim 1(C)(11) for lack of prejudice on the same grounds.

On direct appeal, the California Supreme Court reasonably held that the trial court's statements on voir dire about Petitioner's bad acts were "carefully explained [to be] hypothetical" and did not prejudicially inform the jury that Petitioner had committed prior bad acts. *Id.* at 439; *see also id.* at 440 (holding that trial court properly clarified Detective Berchem's implication that Petitioner acquired a tattoo during an earlier prison sentence). The court on habeas review may have likewise reasonably rejected Claim 1(C)(12) for lack of prejudice, on the

ground that the jury was not indoctrinated, by the trial court or the prosecution, during voir dire.

The California Supreme Court may have reasonably held on habeas review that Petitioner was not prejudiced from any failure by counsel to object to the autopsy and crime scene photographs. To the extent those exhibits were, in fact, admitted, the state court may have reasonably determined that their admission was proper. (*See* RT 1738-40 (counsel's objection to photograph of Mr. Navarette depicting bullet wound (People's Ex. 3-B, not admitted) but not to photograph without wound (People's Ex. 3-A, admitted)), RT 1747-49 (counsel's lack of objection to autopsy photographs of Mr. Castro that did not show his face (People's Exs. 25 and 26, admitted)).) The court may have held on habeas review that Petitioner was not prejudiced from any failure by counsel to object to Mr. Mandich's testimony, because the testimony was properly admitted. *Cf. Ochoa*, 26 Cal. 4th at 425 (discussing the consistency of Mr. Mandich's description with statements from Petitioner's former codefendants).

Claims 12, 13, 1(C)(11), 1(C)(12), 1(C)(32), and 1(C)(33) are DENIED.

XI. Claims 16 and 1(C)(13): Continuous Trial

In Claim 16, raised in state habeas proceedings, Petitioner alleges that the ten-day recess during trial, near the close of the prosecution's guilt phase case, denied him due process. (Pet. at 294-97.) He faults trial counsel for failing to object to the delay in Claim 1(C)(13). (*Id.* at 94-96.)

Before the beginning of *voir dire*, the prosecutor requested a one-week break on specified dates and asked that the trial not begin until after that week. (*See id.* at 294.) The court instead proceeded with trial, adjourned on a Thursday, and resumed on the Monday after the one-week period the prosecutor requested. (*See id.* at 295.)

Petitioner relies on *United States v. Hay*, 122 F.3d 1233, 1235-36 (9th Cir. 1997) as "finding [a] multi-day recess in trial to 'involve[] such a probability that

prejudice will result' that it must be deemed 'inherently lacking in due process.'" (Petr.'s Br. at 180 (quoting *Hay*, 122 F.3d at 1236 (internal quotation omitted)); *see also* Pet. at 294.)[7] Petitioner fails to include *Hay*'s caution that it was the "unprecedented length of the separation" that called for the presumption of prejudice. *Hay*, 122 F.3d at 1236. "A forty-eight-day jury separation during a criminal trial is unprecedented. . . . Ordinarily, a defendant must show actual prejudice in order for the separation to constitute reversible error." *Id.* The Ninth Circuit in Hay distinguished "[t]he eleven-day and eighteen-day separations" it had upheld in earlier cases as "not comparable." *Id.*

Petitioner does not show clearly established federal law, as determined by the United States Supreme Court, establishing that a recess during trial has violated a defendant's due process rights. Even under Ninth Circuit precedent, on direct review without the deference afforded by AEDPA, Petitioner must show actual prejudice from the recess. *See id.* Here, Petitioner alleges only that "the jury was given 10 days to dwell on the prosecution's case" without having heard defense evidence challenging its reliability, that the jurors had "prolonged exposure . . . to outside influences" and their recollections of the evidence and admonitions would suffer, and that the "pattern of orderly deliberation" was subverted. (Pet. at 296; Petr.'s Br. at 180.) The California Supreme Court may have reasonably determined that Petitioner did not show actual prejudice resulting from the delay such that he was denied due process or that there was a reasonably likelihood of a different outcome at trial had defense counsel objected to the recess.

Claims 16 and 1(C)(13) are DENIED.

XII. Claims 17 and 1(C)(15): Conflict of Interest

During guilt phase closing argument, defense counsel told the jury:

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[7] Petitioner further alleges that the "cumulative error that resulted from the jury's 10-day separation warrants relief as well." (Pet. at 294.) That allegation is considered below as part of Petitioner's broader cumulative error claim, Claim 21.

> All . . . of those guys in that truck . . . are guilty either as a shooter or an aider and abetter unless they did not have knowledge it [the shooting that killed Mr. Navarette] was going to happen. [¶] The only evidence you have that somebody didn't have knowledge is Spooky [Petitioner]. And that's by his statement. [¶] If you accept that, then you would have to find him not guilty of the Navarette shooting. [¶] *If you don't accept it – and nobody asked you to throw your common sense away when you go into the jury room, if the facts in your mind point up to the fact that he knew that, then he can accept that and I can accept that.* [¶] That is not the problem. The real request here is to follow the law, follow the law and that's all we're asking you to do. [¶] So if you believe that he had the knowledge, then you should find him accordingly [sic]. [¶] If you find he did not have the knowledge, you should also find that accordingly.

(RT 1956 (emphasis added).)

In Claim 17, raised in state habeas proceedings, Petitioner alleges that defense counsel:

> acknowledged that his client had denied knowledge of the intent of the shooter, but in the next breath told the jury not to abandon their common sense and that he and his client could accept their conclusion that Ochoa in fact had that knowledge. [¶] Defense counsel completely undermined Ochoa's credibility and created a conflict of interest. Defense counsel's clear communication to the jury not to abandon their common sense when assessing Ochoa's out of court statements and counsel's statement that he and Ochoa could accept their conclusion that Ochoa knew what his codefendants intended manifested a blatant conflict of interest.

(Pet. at 301; *see also* Pet. at 298.) Petitioner alleges that he was not advised of the issue of conflict, that he did not waive it, and that the trial court failed to investigate and remedy the conflict. (*Id.* at 301.) In Claim 1(C)(15), Petitioner alleges that trial counsel provided ineffective assistance, failed to present certain evidence in support of Petitioner's defense, abandoned Petitioner at a critical stage of trial, and failed to function in any meaningful sense as the State's adversary as a result of the conflict. (*Id.* at 98-100.) He alleges that counsel lacked the authority

to waive Petitioner's "fundamental right to have the jury decide whether Ochoa committed the Navarette murder" and that the conflict caused a break down in the adversarial system. (*Id.* at 100-01.)

The California Supreme Court may have reasonably determined that counsel's argument did not amount to a concession of guilt or a refusal to pursue a strategy of arguing Petitioner's innocence. While counsel's remarks may have acknowledged the weakness of the defense evidence, counsel left it to the jury to decide the extent of Petitioner's knowledge of his former codefendants' intentions. Although Petitioner may not have been informed in advance that counsel would make the arguments he did, and thus may not have had the opportunity to object, the California Supreme Court may have reasonably determined that counsel's arguments did not rise to the level of an admission of guilt. *Compare McCoy v. Louisiana*, 138 S. Ct. 1500, 1509 (2018) ("When a client expressly asserts that the objective of his defen[s]e is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." (internal quotation and emphasis omitted)) (decided after the California Supreme Court's consideration of Petitioner's claim).

Where the defendant's disagreement with counsel is not over the objective of the defense but merely the best way of pursuing that objective, there is "no clearly established Supreme Court precedent holding that this kind of disagreement amounts to an actual conflict of interest." *Stenson v. Lambert*, 504 F.3d 873, 886 (9th Cir. 2007); *see also Plumlee v. Masto*, 512 F.3d 1204, 1210-11 (9th Cir. 2008) (en banc) (holding that clearly established federal law on conflicts between counsel and defendants is limited to active representation of conflicting interests and failure to "function[] in the active role of an advocate" (internal quotation omitted)); *cf. McCoy*, 138 S. Ct. at 1508 (holding that "[t]rial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as what

arguments to pursue" and "how best to achieve a client's objectives" (internal quotation and emphasis omitted)).

The California Supreme Court's denial of Petitioner's claims does not show an unreasonable application of clearly established federal law. The California Supreme Court may have reasonably determined that Petitioner failed to show deficient performance by counsel. Claims 17 and 1(C)(15) are DENIED.

XIII. Claims 18(B)(2), 18(B)(3), 18(B)(6), 24(B)(2), and 1(C)(14): Prosecutorial Misconduct

In Claims 18(B)(2), (3), and (6), and in Claim 24(B)(2), Petitioner alleges that the prosecutor committed misconduct in her guilt and penalty phase arguments by: (a) misstating the date of Petitioner's arrest; (b) vouching for David Mandich's honesty and value as a witness; and (c) arguing that Petitioner "put a gun to the head" of Jose Castro. (Pet. at 307-13, 355-58; Petr.'s Br. at 188-89.) In Claim 1(C)(14), Petitioner faults trial counsel for failing to object and present the issues in Claim 18 adequately. (Pet. at 97.)

A. Misstating Date of Arrest

As the California Supreme Court explained on direct appeal:

> Defendant first objects to the following statement: '[W]e know that the defendant was wearing a Raider's jacket [when he was arrested] on January 22. [¶] Whether Mr. Montes [Petitioner's former codefendant] believed it was a white jacket or silver jacket, it really doesn't matter. [¶] We also know that according to David Mandich, that the defendant or the shooter was wearing some kind of team jacket. Whether it was a silver jacket, a dark blue jacket or black jacket, I don't think really matters, because we don't know beyond any doubt really what color this jacket contained in People's [Exhibit] 16 looked like to David Mandich the night the murder happened. [¶] And we don't know whether the defendant was really wearing the jacket in People's 16 the night of the murder. [¶] We just know that [when he was arrested] two nights later he was wearing . . . [– objection by defense counsel].' The trial court overruled defendant's objection, and the prosecutor moved to a different subject.

> Defendant contends the prosecutor knowingly falsified facts to protect what defendant deems the Achilles' heel of the case – David Mandich's identification of defendant. . . . According to defendant, Mandich's incorrect description of the color of the jacket threatened to undermine the People's case. The prosecutor, defendant argues, therefore mischaracterized the time when defendant was arrested, stating it was two nights after the shooting, on January 22, rather than the afternoon of January 21.

Ochoa, 26 Cal. 4th at 441-42.

The California Supreme Court rejected the claim, reasoning, in part, that "whether the prosecutor characterized the date of defendant's arrest as January 21 or 22 had little bearing on the accuracy of Mandich's identification" and that "there is no reasonable probability that defendant would have received a more favorable result absent this isolated comment." *Id.* at 442.

The California Supreme Court's decision constitutes neither an unreasonable determination of the facts nor an unreasonable application of federal law. The prosecutor's argument emphasized the lack of certainty about the evidence, in a way that was as likely to benefit Petitioner's case as to harm it. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974) ("[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations."). The California Supreme Court on habeas review reasonably rejected Petitioner's claims that the argument so infected the trial with unfairness as to make the resulting conviction a denial of due process and that there was a reasonable probability of a different outcome had defense counsel objected. *See Parker v. Matthews*, 567 U.S. 37 (2012) (per curiam) ("The clearly established Federal law relevant here is [the United States Supreme Court's] decision in *Darden v. Wainwright*, 477 U.S. 168 (1986), which explained that a prosecutor's improper comments will be held to violate the Constitution only

if they so infected the trial with unfairness as to make the resulting conviction a denial of due process." (internal quotations omitted; internal citation edited)).

B. Vouching for Witness David Mandich

As the California Supreme Court relayed in its opinion on direct appeal:

> Defense counsel had argued Mandich displayed 'extreme bias' and that his 'credibility on that identification issue was ridiculous.' The prosecutor answered by arguing, '[Mandich] was about 90 percent certain [of his lineup identification] because he wanted to leave room for the possibility that the defendant had a twin brother standing in this lineup. So that's how careful he was. [¶] There is an honest man. This is one of the best witnesses you can ever have in a murder case. And the defense has to stoop to the level of calling this man, not only a liar, but a criminal himself is one of the most outrageous things I've ever heard in my career. And I don't think you should pay any attention to that.' 'And, Ladies and Gentlemen, that is the testimony of an honest witness, of a good witness, the kind of witness that I wish I had more of in these kind[s] of cases.'

Ochoa, 26 Cal. 4th at 443; (*see also* RT 1963-64, 1969-89 (defense counsel's argument that Mr. Mandich was "very contentious," "showed a lot of bias," "extreme bias," and had "contempt for the whole proceedings," and that defense counsel "will tell you why I don't believe Mr. Mandich is telling the truth, but now I want you to think")). The California Supreme Court on direct appeal reasonably held that "any possible misconduct was harmless." *Ochoa*, 26 Cal. 4th at 443.

As to Petitioner's claim of ineffective assistance of counsel, the California Supreme Court may have likewise held that because the statements were not significant in the scope of trial, Petitioner failed to show a reasonable probability of a different outcome had counsel objected to the prosecutor's statement. *See United States v. Young*, 470 U.S. 1, 12-13 (1985) ("[T]he reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo. . . . [I]f the prosecutor's remarks were 'invited,' and did no more than respond substantially in order to 'right the scale,' such

comments would not warrant reversing a conviction." (footnote omitted)); *see also Darden*, 477 U.S. at 181-82 (prosecutor's "comments . . . did not deprive petitioner of a fair trial. . . . Much of the objectionable content was invited by or was responsive to the opening summation of the defense. As we explained in *Young*, the idea of 'invited response' is used not to excuse improper comments, but to determine their effect on the trial as a whole." (internal citation omitted)); *Ybarra v. McDaniel*, 656 F.3d 984, 999 (9th Cir. 2011) (applying *Young* and denying habeas relief where state court "reasonably determined that most of the statements were invited by the defense's closing statement"); *Cheney v. Washington*, 614 F.3d 987, 997 (9th Cir. 2010) (applying *Young* and denying relief on habeas review where "the jury may have understood the remarks as invited by the defense's provocations and therefore discounted them or accorded them less significance, which further weighs against the holding of prejudice here").

C. Use of Gun against Jose Castro

Petitioner next challenges remarks the prosecutor made in her guilt and penalty arguments regarding Petitioner's use of a gun against Jose Castro. At the guilt phase of trial, the prosecutor argued:

> There was no reason for that gun to come back out and go to the head of Mr. Castro and for that gun to be fired, other than the fact that the defendant is a cold-blooded killer who didn't get what he wanted, when he wanted it, when he put a gun to the head of a man seated in a car that he wanted to take.

(RT 2050.) She returned to that argument at the penalty phase of trial, when she told the jury, "It was the defendant himself who walked up to the driver's side of that car, pointed the gun at the head of Mr. Castro and demanded he relinquish his car." (RT 2756; *see also* RT 2877 (prosecutor's penalty phase rebuttal argument that "we had the defendant pointing the gun at the head of Joe [sic] Castro and threatening to kill him if he didn't get out of the car. . . . Then you have the gun for some reason going back along the defendant's side, or he's holding it back in

some other position. It's not pointed at the head . . . . [H]e pulls it out again and that's when he fires the shot.").) At the penalty phase, defense counsel objected to the remarks as misstating the evidence. (*See* RT 2756; *see also* RT 2877-78.) Defense counsel raised no objection at the guilt phase of trial.

Petitioner claims that the prosecutor misstated the evidence because "[t]here was no evidence that the victim's head was the target. In fact, the bullet entered the victim's shoulder and the only testimony on the subject came from a codefendant who claimed Ochoa said that he shot the man in the leg." (Pet. at 356 (internal citations omitted).) The California Supreme Court denied Petitioner's guilt phase claim of prosecutorial misconduct on the merits on direct appeal, holding that "[t]he record supports the argument that (1) defendant placed a gun to Castro's head, and (2) he fired the gun. The prosecutor carefully argued nothing more than those facts." *Ochoa*, 26 Cal. 4th at 443; *see also id.* at 449-50 (rejecting Petitioner's claim regarding prosecutor's penalty phase opening argument).

The California Supreme Court's denial of Petitioner's guilt and penalty phase claims was reasonable. Mr. Montes testified that he did not remember Petitioner pointing a gun at the driver's (Jose Castro's) head, did not remember whether he told detectives that, and did not remember telling detectives that Petitioner shot the driver. (RT 1408, 1420-22.) Mr. Montes was impeached with his June 1, 1990 statements to detectives, which were admitted into evidence. (RT 1457-58.) As noted above, under California law, impeaching prior statements are admissible for the truth of the matter. *See Rices*, 4 Cal. 5th at 85. In his June 1, 1990 statements, Mr. Montes told detectives that Petitioner took out a gun, "put it in his face," said he was going to shoot the man, was showing the man the gun, and shot. (Lodg. A2 at 413-18.) Mr. Montes's statements to detectives support the prosecutor's guilt and penalty phase arguments.

The California Supreme Court also reasonably rejected Petitioner's claim of ineffective assistance for failing to object to the prosecutor's argument at the guilt

phase of trial. The court may have reasoned that counsel's performance was not deficient, because the prosecutor's argument was supported by the record, the lack of objection may have been strategic, and any objection would have been meritless.

Claims 18, 24(B)(2), and 1(C)(14) are DENIED.

XIV. Claims 19 and 1(C)(18): Requested Guilt Phase Jury Instructions

Defense counsel requested twenty-nine special instructions at the guilt phase of trial. (CT 614-41; Pet. at 321.) At issue here are the defense's requested Instruction Nos. 11, 13, 15, 18, 19, 21, and 23. Petitioner also challenges the trial court's failure to include CALJIC 2.02 and 2.03 in the written instructions given to the jury.

"The question in a collateral proceeding is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process, not merely whether the instruction is undesirable, erroneous, or even universally condemned." *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977) (internal quotations omitted); *see also Estelle v. McGuire*, 502 U.S. 62, 72 (1991). "An appraisal of the significance of an error in the instructions to the jury requires a comparison of the instructions which were actually given with those that should have been given." *Kibbe*, 431 U.S. at 154. Where the challenged instructional error is a failure to provide an instruction, the petitioner's burden is "especially heavy," because "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Id.* at 155.

A. Instructions Nos. 21 and 23

The defense's Instruction No. 21 stated, "The corroboration of the testimony of an accomplice required by law is not sufficient if it merely shows the commission of the offense or some or all of the circumstances thereof, or if it does no more than raise a suspicion of the guilt of the [d]efendant." (CT 634; Pet. at 321); *Ochoa*, 26 Cal. 4th at 446. The trial court denied the request for the instruction on the ground that the standard CALJIC instructions addressed the issue

adequately. *See Ochoa*, 26 Cal. 4th at 446. The California Supreme Court found no error on direct appeal, holding, "The trial court instructed the jurors with CALJIC Nos. 3.11 (Testimony of Accomplice Must be Corroborated) and 3.12 (Sufficiency of Evidence to Corroborate an Accomplice), and adequately advised them on how to evaluate accomplice testimony for purposes of corroboration. The trial court properly refused to read defendant's duplicative instruction." *Id.*

The trial court agreed to instruct the jury with a modified version of the defense's Instruction No. 23. (Pet. at 330; RT 1884-85.) The court agreed to instruct the jury, "The requirement of corroboration of the testimony of an accomplice is based on the notion that the testimony of an accomplice should be viewed with suspicion because it may have been given in the hope or expectation of leniency or immunity." (RT 1884-85.) The trial court failed to give the instruction to the jury, however. *Ochoa*, 26 Cal. 4th at 446. The California Supreme Court found no error on direct appeal, holding that "CALJIC 2.20 (Believability of Witnesses) and 3.18 (Testimony of Accomplice to be Viewed with Distrust) . . . properly informed the jury how to consider accomplice testimony." *Id.*

A defendant does not have a due process right to an instruction that accomplice testimony must be corroborated. *See United States v. Augenblick*, 393 U.S. 348, 352 (1969) ("When we look at the requirements of procedural due process, the use of accomplice testimony is not catalogued with constitutional restrictions."); *Caminetti v. United States*, 242 U.S. 470, 495 (1917) ("[T]here is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them."); *United States v. Galardi*, 476 F.2d 1072, 1075 (9th Cir. 1973) ("[To] abandon our time honored rule that the uncorroborated testimony of an accomplice is sufficient to convict . . . would require *in banc* consideration."); *compare Laboa v. Calderon*, 224 F.3d 972, 979 (9th Cir. 2000) ("As a state statutory rule, and *to the extent that the uncorroborated testimony is not incredible*

or insubstantial on its face, the rule [against convictions based only on uncorroborated accomplice testimony] is not required by the Constitution or federal law" (emphasis added; internal quotation omitted)). Even assuming, *arguendo*, that the facial credibility and substance of uncorroborated accomplice testimony are constitutionally mandated, the given instructions adequately addressed that requirement. The California Supreme Court's denial of the claims was not contrary to or an unreasonable application of clearly established federal law.

In Claim 1(C)(18), Petitioner alleges that trial counsel was ineffective for failing to recognize and object to the court's omission of the modified Instruction No. 23. (Pet. at 102.) The California Supreme Court may have reasonably held that because the given instructions were adequate, Petitioner failed to suffer prejudice from any deficient performance by counsel.

B. Instruction No. 11

The defense's Instruction No. 11 stated, "If you have any reasonable doubt as to the credibility or truthfulness of any statement made by any witness against the defendant, you must resolve that doubt in favor of the defendant and find such statement to be untrue." (CT 624; Pet. at 322-23); *Ochoa*, 26 Cal. 4th at 443. The trial court refused the instruction on the ground that it was addressed by other instructions on false statements of witnesses, willful falsity, and the presumption of innocence. *Ochoa*, 26 Cal. 4th at 443-44. Petitioner argues that the given instructions "did not address the more likely situation in this case where there may have been merely a reasonable doubt about the witness' credibility," as opposed to willful falsity. (Pet. at 323.) He asserts that the presumption of innocence instruction explained reasonable doubt "only in regard to whether Ochoa was guilty in general, and not to Ochoa's specific defense as to a witness' credibility." (*Id.* at 323-24.)

The California Supreme Court denied the claim on direct appeal, in part because "the existence of reasonable doubt concerning some aspect of a witness's statement does not require its negation. We have observed a trier of fact is permitted to credit some portions of a witness's testimony, and not credit others." *Ochoa*, 26 Cal. 4th at 444 (internal quotation omitted). Its denial of the claim was not contrary to or an unreasonable application of federal law. In *Cupp v. Naughten*, 414 U.S. 141, 142 (1973), for example, the prosecution's principal evidence consisted of witness testimony, and the defendant called no witnesses and did not testify himself. The United States Supreme Court found no constitutional violation where the jury was instructed that "*[e]very witness is presumed to speak the truth.* This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, or by a presumption." *Naughten*, 414 U.S. at 142 (internal quotation omitted). The Court held:

> The jury here was charged fully and explicitly about the presumption of innocence and the State's duty to prove guilt beyond a reasonable doubt. Whatever tangential undercutting of these clearly stated propositions may, as a theoretical matter, have resulted from the giving of the instruction on the presumption of truthfulness is not of constitutional dimension.

Id. at 149. Petitioner's argument that Instruction No. 11 was constitutionally required is foreclosed by *Naughten*.

C. Instruction Nos. 18 and 19

The defense's Instruction Nos. 18 and 19 addressed the credibility of out of court statements. Instruction No. 19 stated:

> With respect to testimony regarding an alleged statement or statements of a witness previously made at a time and place without the courtroom, you are to keep in mind that no class of evidence is more subject to error or abuses. Witnesses having the best motives are generally unable to state the exact language of a statement and are

> liable by the omission or changing of words to convey a false impression of the language used. No other class of testimony affords such temptations or opportunities for an unscrupulous witness or witnesses to torture facts or to commit open perjury, and it is often impossible to contradict their testimony.

(CT 632; Pet. at 326.) The trial judge refused the instruction, stating, "It's argumentative in the extreme, and I don't believe it's a correct statement of law." (RT 1881.)

Instruction No. 18 stated:

> You should view with extreme caution any purported out of court statement made by a witness that has been admitted as substantive evidence because they are not made under oath and if false are not subject to prosecution and perjury. Furthermore, in determining whether or not an out of court statement is true, you should consider the circumstances under which it was made, including the facts that you did not have a chance to see, [sic] the witness' demeanor at the time the out of court statement was made, and that the statement was not subjected to cross examination at the time it was made.

(CT 631; Pet. at 324); *Ochoa*, 26 Cal. 4th at 445. The trial court refused the instruction because the jury was already instructed to view accomplice testimony with caution and because the need for a cautionary instruction as to a defendant's own statement, from which Petitioner's request was adapted, did not extend to other witnesses' statements. (*See* Pet. at 324-25); *Ochoa*, 26 Cal. 4th at 445. The California Supreme Court found no error, reasoning that the "prior inconsistent statements of a witness . . . are trustworthy," satisfying the requirement that extrajudicial statements of a nonparty witness must "bear some indicia of trustworthiness" to be admissible, and that the witnesses were present in court for cross-examination. *Ochoa*, 26 Cal. 4th at 445.

The California Supreme Court's rejections of Petitioner's claims were not contrary to or unreasonable applications of federal law. (*See supra* p. 60); *Green*, 399 U.S. at 164; *Bowie*, 243 F.3d at 1118; *Skinner*, 564 F.2d at 1390-91.

D. Instruction Nos. 13 and 15

The defense's Instruction No. 13 stated, "Proof which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and is not sufficient for an inference of fact." (CT 626; Pet. at 327.) The defense's Instruction No. 15 stated:

> You have no right to convict the defendant of a crime upon mere suspicion, however strong, nor simply because there may be a preponderance of all of the evidence in the case against him, nor merely because there is or may be strong reason to suspect that he is guilty. Before you can lawfully convict you must be convinced of the defendant's guilt beyond a reasonable doubt.

(CT 628; Pet. at 327.) Petitioner argues that the instructions were necessary because:

> the jury naturally would have been suspicious of Ochoa's guilt of one or the other homicide by the mere fact that he had been charged with both. Ochoa appropriately requested these instructions to guard against the jury's tendency to improperly assume his guilt based on the joinder of these charges. The requested instructions properly advised the jury to exercise skeptical caution in assessing the out-of-court statements of accomplices and guided them in understanding the quantum of corroboration required before placing any reliance on the statements or testimony of accomplices.

(Pet. at 328.) The trial court refused the instructions because they were addressed by CALJIC 2.90, given to the jury. (*See* RT 1876-77.)

CALJIC 2.90 instructed the jurors:

> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

(CT 599; RT 2068-69.)

The United States Supreme Court in *Victor v. Nebraska*, 511 U.S. 1 (1994) unanimously approved of the identical jury instruction given at Petitioner's trial, CALJIC 2.90 (4th ed. 1979), holding that its "reference to moral certainty, in conjunction with the abiding conviction language, impressed upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused . . . based on the evidence in the case." *Victor*, 511 U.S. at 9, 15-16 (internal quotation omitted). The California Supreme Court reasonably rejected Petitioner's argument that his trial on consolidated charges required additional instruction on proof beyond a reasonable doubt. *Ochoa*, 26 Cal. 4th at 444-45 ("Assuming, arguendo, that the proposed instructions correctly described the law, a defendant has no right to restatement of the reasonable doubt standard expressed in CALJIC 2.90.").

E. CALJIC 2.02 and 2.03

The trial court read aloud to the jury CALJIC 2.02, regarding circumstantial evidence of specific intent or mental state, and CALJIC 2.03, regarding consciousness of guilt, but the court failed to include them in the written instructions provided to the jury. *Ochoa*, 26 Cal. 4th at 446. The California Supreme Court found no error on direct appeal, holding, in part, that "[a]lthough providing written instructions is generally beneficial and to be encouraged, defendant has no federal or state constitutional right to instructions in writing . . . ." *Id.* (internal quotation omitted).

Petitioner presents no clearly established federal law to the contrary. "While providing the jury with written instructions has become increasingly common in the past decades, it is not automatically required." *United States v. Jones*, 353 F.3d 816, 819 (9th Cir. 2003) (finding no abuse of discretion where trial judge refused to provide written jury instructions in addition to oral instructions). The California Supreme Court's denial of Petitioner's claim was not contrary to or an unreasonable application of federal law.

In Claim 1(C)(18), Petitioner alleges that trial counsel was ineffective for failing to recognize and object to the court's omission of CALJIC 2.02 and 2.03 from the written instructions. (Pet. at 102.) The California Supreme Court reasonably held on direct appeal that "defendant has not shown it is reasonably probable that the jury would have reached a result more favorable to defendant had it received a written copy of CALJIC Nos. 2.02 and 2.03." *Ochoa*, 26 Cal. 4th at 447.

Claims 19 and 1(C)(18) are DENIED.

XV. Claims 23 and 1(C)(21): Evidence of Makeshift Handcuff Key

At the penalty phase of trial, the prosecutor presented testimony from Deputy Sheriff David Mertens that he "searched defendant one evening [July 22, 1992] and found a piece of metal concealed in defendant's wristband. The instrument, which the deputy considered a makeshift handcuff key, easily opened the handcuffs just like the ones restraining defendant when he traveled to court." *Ochoa*, 26 Cal. 4th at 447; (RT 2330-31). Deputy Mertens also said at one point on cross-examination that the piece of metal could have been used as a toothpick. (*Compare* RT 2360 *with* RT 2362.) He testified that in his presence on the night of July 22, 1992, Deputy Sheriff Hall searched Petitioner's property and discovered a shank. (RT 2335-36); *see also Ochoa*, 26 Cal. 4th at 447.

In Claim 23, Petitioner alleges that the admission of the evidence "was improper because it did not constitute aggravating evidence under California Penal Code Section 190.3(b)." (Pet. at 341-42 (citing RT 2172-73, 2301).) Petitioner argues that the evidence was not admissible under § 190.3(b) because the prosecution's theory that the piece of metal was linked to a plan to escape was speculative and because there was no evidence linking the piece of metal to an implied threat to use force or violence. (Petr.'s Br. at 214-15.) He argues that the piece of metal constituted evidence of future dangerousness, inadmissible under California law unless offered in rebuttal. (Pet. at 345.) Finally, he alleges that

admission of the evidence violated his "right to due process by allowing the jury to rest its sentencing decision on evidence and considerations beyond the scope of its statutory discretion," citing *Hicks v. Oklahoma*, 447 U.S. 343 (1980). (Pet. at 345.)

Defense counsel objected to the evidence at the time of trial. (Pet. at 103 (citing RT 2168-70, 2327-28).) In Claim 1(C)(21), Petitioner alleges that defense counsel was ineffective because he did not "specifically base his objections on constitutional provisions . . . ." (*Id.* at 104.)

The California Supreme Court on direct appeal rejected Petitioner's challenge to the admission of the evidence. *Ochoa*, 26 Cal. 4th at 447-48. The court held that "there was no error under Penal Code section 190.3, . . . [and] no constitutional violation." *Id.* at 448.

The United States Supreme Court held in *Hicks* that a criminal defendant "has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." *Hicks*, 447 U.S. at 346 (internal citation omitted). The high Court has since clarified, however, that the presentation of a "non-statutory aggravating circumstance" at the penalty phase of a capital trial does not, in itself, violate a defendant's constitutional rights:

> Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did [defendant's] jury in determining the truth of the alleged special circumstance, the jury then is free to consider a myriad of factors to determine whether or not death is the appropriate punishment. [¶] We have never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing of statutory aggravating factors.

Barclay v. Florida, 463 U.S. 939, 949, 950 (1983) (finding no federal constitutional violation where the trial court considered the "non-statutory

aggravating circumstance of racial hatred") (internal quotation omitted); *see also Turner v. Calderon*, 281 F.3d 851, 871 (9th Cir. 2002) (holding that consideration of nonstatutory aggravating evidence does not show a constitutional violation); *Babbitt v. Calderon*, 151 F.3d 1170, 1178, 1178 n.3 (9th Cir. 1998) ("Nothing in the Constitution limits the consideration of nonstatutory aggravating factors."). Petitioner points to no authority to show that the nature of the testimony at issue here was constitutionally impermissible. Thus, even if evidence of the piece of metal were inadmissible under California Penal Code § 190.3, that error does not constitute a federal constitutional violation.

The California Supreme Court on habeas review may have reasonably rejected Petitioner's claim that trial counsel was deficient for failing to argue against the evidence on constitutional grounds on the basis that any such argument would have been meritless. *See Juan H.*, 408 F.3d at 1273; *Molina*, 934 F.2d at 1447.

Claims 23 and 1(C)(21) are, therefore, DENIED.

XVI. Claims 24 and 1(C)(22): Penalty Phase Prosecutorial Misconduct

A. Claim 24(C)(1): Lack of Remorse

As the California Supreme Court summarized and held on direct appeal:

> The prosecutor argued defendant expressed no remorse for his behavior, and was proud of the killings. 'The interesting thing about this defendant's behavior that night [of the Castro murder] is that he felt absolutely no remorse for what he had done. He ran back to the car. He told his friends "Hey, I just shot the guy." [¶] There is some evidence according to the statement of Oscar [Montes] he was bragging about the fact that after he shot the guy, or as he was shooting the man, Joe Castro, that Joe Castro said, [q]uote "Oh, shit." This was something the defendant was bragging about to his friends. [¶] He was bragging to his friends about the fact that he shot the guy. That he shot Joe Castro. [¶] It shows the type of person that the defendant is and shows the type of murder that this was, and that's why under factor (a) these are things that you should, and I ask you to

> consider now, in determining the defendant's moral responsibility and the punishment that he deserves.'
>
> This argument was proper. Section 190.3, factor (a), to which the prosecutor expressly referred, authorizes the jury to consider the circumstances of the crime. The jury may consider the defendant's refusal to show any remorse in the context of the murder as an aggravating factor.
>
> The prosecutor further emphasized defendant's failure to show remorse in the two years following the murders. '[Section 190.3], [f]actor (k) evidence would have permitted that evidence [of remorse] to be presented to you if it existed. If the defendant wrote a letter to his mother saying "I'm sorry, so sorry for the pain I've caused you and the pain I've caused the victims' families." If he called his sister and said that, you would have heard that. [¶] I think we have more than enough evidence that not only is the defendant a cold-blooded murderer, but he is really proud, proud of what he has done.'
>
> This argument was also proper. Although defendant characterizes this argument as an invitation to the jury to consider this fact aggravating, the prosecutor expressly referred to section 190.3, factor (k), which is available only to mitigate the murders. The prosecutor properly argued defendant's lack of remorse showed the potential mitigating factor was inapplicable.

Ochoa, 26 Cal. 4th at 448-49 (internal citations omitted; alterations in original). Petitioner contends that the prosecutor's argument improperly relied on non-statutory aggravating evidence and that "unless Ochoa testified, there was no way for the defense to present a defendant's sense of remorse unless i[t] came under the cover of some artistic expression . . . ." (Pet. at 354-55.)

The Court has addressed Petitioner's argument regarding non-statutory aggravating evidence above. (*See supra* Claim 23.) To the extent Petitioner pleads a violation of his Fifth Amendment right to silence, the United States Supreme Court held in *White v. Woodall* that a court may not extend as clearly established federal law its "express reservation" of the question in *Mitchell v. United States* of

"'[w]hether silence bears upon the determination of a lack of remorse' . . . ." *Woodall*, 134 S. Ct. 1697, 1703 (2014) (quoting *Mitchell*, 526 U.S. 314, 330 (1999)). "*Mitchell* disapproved a trial judge's drawing of an adverse inference from the defendant's silence at sentencing 'with regard to factual determinations respecting the circumstances and details of the crime.'" *Woodall*, 134 S. Ct. at 1702 (quoting *Mitchell*, 526 U.S. at 327-30). Even assuming, *arguendo*, that "factual determinations respecting the circumstances and details of the crime" applies to California Penal Code § 190.3(a), the prosecutor here did not rely on Petitioner's "silence at sentencing." She did not "'enlist the defendant in th[e] process'" of "'*proving facts relevant to the crime* . . . at the expense of the self-incrimination privilege.'" *Woodall*, 134 S. Ct. at 1703 (quoting *Mitchell*, 526 U.S. at 330 (emphasis in original)). The California Supreme Court reasonably determined that the prosecutor's arguments were based on record evidence and not on Petitioner's silence. The California Supreme Court may have reasonably extended its stated reasoning to the other portions of the prosecutor's argument that Petitioner cites in his Petition.

B. Claim 24(B)(3): Argument regarding Life in Prison

In a portion of Claim 24(B)(3) ¶ 875,[8] Petitioner challenges the prosecutor's argument that:

> [F]or this defendant, I don't think that life in prison is such a terrible thing. The reason I say this is that prison really is an intolerable place for people that abide by the law. But for people that don't, for people that live by no laws at all, prison can be a very tolerable place.

[8] The California Supreme Court found untimely the claim now raised as Claim 25 (Claim 50 of Petitioner's second state habeas petition), and this Court dismissed it. (Docket No. 134 at 15.) Claim 24(B)(3) nearly duplicates Claim 25. (*Compare* Pet. at 358-63 *with* Pet. at 376-82.) The Court failed to identify in its Order Granting in Part and Denying in Part Motion to Dismiss those portions of Claim 24(B)(3) incorporating the Claim 25 allegations and themselves filed untimely. The Court now dismisses those allegations as procedurally barred. (*Cf.* Docket No. 116 at 24 (moving to dismiss as untimely Claim 24).) The Court addresses here the portion of Claim 24(B)(3) timely raised on direct appeal. (Lodg. B1 at 243.)

(Pet. at 361 (quoting RT 2779).) The California Supreme Court rejected Petitioner's claim on direct appeal on the ground that it had "approved similar comments that life imprisonment is an insufficient penalty given an individualized assessment of the defendant. This argument was proper." *Ochoa*, 26 Cal. 4th at 450 (internal citations omitted).

Petitioner has not demonstrated that the California Supreme Court's denial of the claim was contrary to or an unreasonable application of clearly established federal law. *Cf. Darden*, 477 U.S. at 180 n.11, 180 n.12 (holding prosecutor did not render trial fundamentally unfair by arguing that "as far as I am concerned, . . . [the defendant is] an animal" and "I wish [the decedent] had a shotgun in his hand . . . and blown [the defendant's] face off. I wish that I could see him sitting here with no face, blown away by a shotgun.").

C. Claim 24(B)(4): Propriety of Death Penalty in Petitioner's Case

The California Supreme Court summarized and held on direct review:

> Defendant argued his crimes were not the 'worst of the worst.' During argument, defense counsel asked 'what kinds of heinous crimes are we talking about that justify the death penalty?' He then described in vivid detail the murders committed by infamous serial murderers . . . . Although the defense counsel conceded, '[Y]ou don't have to be a mass murderer to get the death penalty,' he argued, 'I am trying to show you also that it takes more. [¶] It takes the worst of the worst or it should for a death penalty. . . . [Defendant] is not the worst of the worst. He is not in the category of people that should get the death penalty.'
>
> The prosecutor attempted to answer the question defense counsel posed. 'What kind of cases do we have a death penalty for. . . . [¶] The death penalty isn't sought in every case where special circumstances are alleged.' The defense objected . . . [and] [t]he court overruled the objection, finding the People's argument responded fairly to the defense argument[, and stating,] . . . '[W]hen you make the argument only the worst of the worst get the death penalty, and you give a laundry list of all the cases, giving the jury the impression that only those people are appropriate for death, it's proper for the

> prosecutor to point out there are cases involving special circumstances that are not appropriate for death.'
>
> The trial court properly overruled the objection. The prosecutor continued, explaining the numerous special circumstances that could support a death sentence. 'Not all of those cases, not in every case where there is an allegation of special circumstances . . . do we even seek the death penalty. . . . [¶] [Defense counsel] said you will see the death penalty . . . in only the worst of the worst. I submit to you that's not correct. [¶] I'm not going to give you names or specifics of cases, but there are cases where the death penalty is imposed . . . where there is one count of murder committed. . . . And these people do receive the death penalty.' Finally, the prosecutor directed the jury's attention to defendant's individual circumstances. 'It's not an appropriate function to speculate as to what other cases involve in terms of the evidence and the factors. . . . [Y]our sole function in this case [is] to determine what those circumstances or factors are, the good and the bad, and weigh and balance them.' . . .
>
> The prosecutor's argument neither implied any governmental establishment had determined the propriety of a death sentence in this case nor infringed upon the jury's discretion. Furthermore, the prosecution offered a fair response to the defense argument that capital punishment was properly limited to serial killers. If the defense argued that only the 'worst of the worst' received a death sentence, the prosecutor was entitled to argue defendant was not among the 'best of the worst,' and a death sentence was therefore appropriate. This argument was proper.

Ochoa, 26 Cal. 4th at 450-52.

The California Supreme Court's decision was not an unreasonable application of federal law. The state court reasonably determined that the prosecutor's argument was a fair response to defense counsel's. *See Darden*, 477 U.S. at 181-82; *Young*, 470 U.S. at 12-13; *United States v. Nobari*, 574 F.3d 1065, 1078 (9th Cir. 2009) (denying on direct review defendants' argument that the prosecutor "vouched for her own credibility by referring to her oath of office," because it "qualified as an 'invited response'" under *Young*). The prosecutor's

argument did not render Petitioner's trial fundamentally unfair.

D. Claim 24(B)(5): Abstract Arguments in Favor of Death Penalty

In Claim 24(B)(5), Petitioner challenges a number of "abstract pro-death penalty arguments" by the prosecutor. (Pet. at 371.) To the extent Petitioner brought those challenges on direct appeal, the California Supreme Court did not address them in its reasoned decision. *See Ochoa*, 26 Cal. 4th at 448-52. The California Supreme Court may have reasonably concluded, after considering the remarks in context, that they did not deprive Petitioner of a fundamentally fair trial.

First, Petitioner faults the prosecutor's argument that "the decision as to whether or not the defendant lives or dies is a decision that the defendant himself has made." (RT 2773-74.) The prosecutor told the jury that the defense might "attempt to guilt-trip you into thinking you will be murdering, or you will be causing the death of another individual." (RT 2773.) She argued:

> I hope you will not feel in any way, shape, or form that should you choose the death penalty as the punishment in this case, that it's your fault, or you would be causing the death of Sergio Ochoa. [¶] He chose a path in his life that led him here today, and I think he alone is responsible for the choices that he has made. You would be simply following the law, the law the way it exists today, if you go through the three step process and determine that death is the appropriate punishment.

(RT 2774.) The California Supreme Court may have reasonably determined that the prosecutor's argument did not misstate the law and did not so infect the trial as to deny Petitioner due process.

Next, Petitioner challenges the prosecutor's response to a possible argument by the defense that "what makes our society so great is that we don't resort to the same level of violence that our criminals do. That to impose capital punishment or a death penalty on a person such as the defendant is nothing more than state sanctioned murder." (RT 2774-75.) The prosecutor said:

> I also believe that there really is a moral difference between the killing, the murder of innocent people, as occurred in this case, and the killing as a form of punishment of a convicted murderer. . . . [¶] I think that most people who tend to believe that the death penalty is nothing more than state sanctioned murder and it is wrong, I think a lot of people really think, and I think they are in denial about this, that most people think people are basically good. We all, I think, have to think that way. That human beings are basically good people. I think that *to say that capital punishment is state sanctioned murder is really denying the fact that in our society today there are some truly evil people*. There really are, and there are truly bad people that cause problems for the rest of us. [¶] There is a moral distinction, and the reality is that some people are evil, and the reality is some people cross the line by their conduct. Some people go too far, and some people quite frankly deserve to be punished by the death penalty. [¶] In this particular case I think this defendant is a prime example of a person that has gone too far, that has committed two vicious acts and does deserve as a form of punishment and nothing more the penalty of death.

(RT 2775-76 (challenged portion emphasized).) The California Supreme Court may have reasoned that although the prosecutor's use of "evil" and her expression of her own views were improper, they were not so harmful as to deny Petitioner a fundamentally fair trial. *See Darden*, 477 U.S. at 180 n.11, 180 n.12; *Young*, 470 U.S. at 18-19. The California Supreme Court may have reasonably determined that the "prosecutor's . . . expressing [her] personal opinion" did not "convey the impression that evidence not presented to the jury, but known to the prosecutor, support[ed] the charges against the defendant" and did not unfairly "carr[y] with it the imprimatur of the Government and . . . induce the jury to trust the Government's judgment rather than its own view of the evidence." *Young*, 470 U.S. at 18-19.

Petitioner further alleges:

> At the conclusion of the first part of her closing argument, the prosecutor . . . ma[de] extended, irrelevant, misleading, inflammatory, abstract pro-death penalty arguments as a reason for putting Ochoa to

> death. The prosecutor argued that: (1) the defense may argue that the death penalty won't bring the victims back, but the death penalty is necessary to keep people from taking vengeance into their own hands, satisfies societies [sic] need for justice, announces that murder is wrong, prevents the defendant from ever killing again, and brings justice and comfort to the victims; (2) the prosecutor 'thinks' the defense will argue that the death penalty is just revenge, but capital punishment is an expression of society's moral outrage at offensive conduct and we expect the state to protect us; and (3) while the prosecutor 'thinks' the defense will argue that a life without possibility of parole sentence is sufficient, [that sentence] would allow Ochoa 'everything life has to offer' . . . .

(Pet. at 371 (citing RT 2776-80) (internal numbering edited).) The California Supreme Court may have reasoned that the first and second arguments were not improper, and that none of the three arguments denied Petitioner a fair trial.

E. Claim 24(B)(6): Argument on Behalf of Victims

Finally, Petitioner challenges the prosecutor's statement:

> I want to speak on behalf of the victims who can't speak, because while the defendant ten years from now, if you give him life without parole, will be in prison. [sic] Pedro Navarette and Joe Castro will still be dead. And when the defendant's daughter is in high school and she hears about her father being executed, Joe Castro's son will still have a father that's dead.

(RT 2893.) To the extent Petitioner brought that challenge on direct appeal, the California Supreme Court did not address it in its reasoned decision. *See Ochoa*, 26 Cal. 4th at 448-52.

The California Supreme Court may have reasonably determined that the argument did not deprive Petitioner of a fair trial. *See Drayden v. White*, 232 F.3d 704, 711-13 (9th Cir. 2000) (when prosecutor in closing argument "sat in the witness chair and . . . delivered a soliloquy in the voice of the victim" he "inappropriately obscured the fact that his role is to vindicate the public's interest

in punishing crime, not to exact revenge on behalf of an individual victim," but trial was not fundamentally unfair primarily because the statements were supported by evidence in the record). The factual portions of the prosecutor's remarks were supported by the record, and in view of *Drayden*, a fairminded jurist could hold that they did not render Petitioner's trial fundamentally unfair.

F. Ineffective Assistance of Counsel

In Claim 1(C)(22), Petitioner alleges that "[t]o the extent" defense counsel failed to object to the prosecutor's arguments, counsel was ineffective. (Pet. at 105.) "Claim 24 ¶ 894 n.40 . . . restates the claim of ineffective assistance of counsel alleged in Claim 1(C)(22) of the First Amended Petition." (Docket No. 140 at 8 n.*.)

"Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the 'wide range' of permissible professional legal conduct." *United States v. Necoechea*, 986 F.2d 1273, 1281 (9th Cir. 1993) (quoting *Strickland*, 466 U.S. at 689). The California Supreme Court may have reasonably determined that the prosecutor's statements were not egregious and that counsel was not deficient for raising no objection, to the extent he did not. Claim 1(C)(22) and Claim 24 ¶ 894 n.40 are DENIED.

XVII. Claims 26(B)(1) and 1(C)(23): CALJIC 8.88

Petitioner's jury was instructed with CALJIC 8.88 as follows:

> It is now your duty to determine which of the penalties, death or confinement in the state prison for life without possibility of parole shall be imposed on the defendant.
>
> After having heard all the evidence and having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> Aggravating factor is any fact, condition, or event attending the

> commission of a crime which increases its guilt or enormity or adds to its injurious consequences above and beyond the elements of the crime itself.
>
> Mitigating circumstance is any fact, condition or event which as such does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing an of [sic] 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 the factors. You are permitted to consider. [sic]
>
> In weighing the various circumstances you 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 judgment of death each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. . . . In order to make a determination as to penalty, all 12 jurors must agree.

(RT 2937-40; CT 717-18.)

The California Supreme Court reasonably rejected on direct appeal, *see Ochoa*, 26 Cal. 4th at 452, Petitioner's allegations in Claim 26(B)(1) that CALJIC 8.88:

- failed to "inform the jurors that unless they found that the factors in aggravation outweighed the factors in mitigation, they could not impose a sentence of death," (Pet. at 385); *see Williams v. Calderon*, 52 F.3d 1465, 1482 (9th Cir. 1995) (holding that instruction to the jury that it was "not required to weigh aggravating and mitigating factors, and was not under obligation to find for life or

death based upon which factors predominated . . . violate[d] no right" of the petitioner);

- failed to "inform the jurors that if mitigation outweighed aggravation, they were required to impose a sentence of life without possibility of parole" and failed to "give any instruction at all on returning a life sentence," (Pet. at 385); *see Williams*, 52 F.3d at 1482;
- unconstitutionally mislead the jury that Petitioner "bore the burden of proof that death was not appropriate" by instructing that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole," (Pet. at 386-87 (emphasis added)); *see Boyde v. California*, 494 U.S. 370, 377 (1990) (rejecting the comparable argument that "the jury must have freedom to decline to impose the death penalty even if the jury decides that the aggravating circumstances 'outweigh' the mitigating circumstances. . . . [T]here is no such constitutional requirement of unfettered sentencing discretion in the jury . . . ."); *see also Walton v. Arizona*, 497 U.S. 639, 650 (1990) ("[A] defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency."), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002); and
- left jurors unclear about the meaning of the terms "aggravating circumstance" and "mitigating circumstance" and unclear that a mitigating circumstance is an "extenuating circumstance in determining the appropriateness of the death penalty," (Pet. at 387-89); *see Tuilaepa v. California*, 512 U.S. 967, 975, 978 (1994) (noting that a sentencing factor is not impermissibly vague where it has "some common-sense core of meaning that criminal juries should be capable of understanding," and finding "no constitutional difficulty where the jury had been told to consider 'all facts and circumstances presented in extenuation,

mitigation, and aggravation of punishment'" (internal quotations and alteration omitted)); *Pulley v. Harris*, 465 U.S. 37, 51, 52 n.14 (1984) (holding that, notwithstanding the fact that "[t]he statute does not separate aggravating and mitigating circumstances," it was not unconstitutionally arbitrary); *Williams*, 52 F.3d at 1484 (holding that statute's "failure to label aggravating and mitigating factors is constitutional").

The California Supreme Court reasonably rejected Petitioner's allegation in Claim 1(C)(23) that counsel was ineffective for failing to object to or seek clarification of CALJIC 8.88. The California Supreme Court may have reasoned that counsel's performance was not deficient, because the instructions were adequate and an objection would have been meritless. (Pet. at 105;) *see Juan H.*, 408 F.3d at 1273; *Molina*, 934 F.2d at 1447.

Claims 26(B)(1) and 1(C)(23) are DENIED.

XVIII. Claim 26(B)(2): Penalty Phase Requested Instructions

Petitioner requested twenty-eight special instructions at the penalty phase of trial. (*See* Pet. at 389.) He challenges the denial of Special Instruction Nos. 3, 4, 5, 6, 7, 15, 16, 24, and 28. (*See id.* at 389-407; *see also id.* at 401 (identifying Special Instruction No. 16 as No. 15 in a typographical error); CT 686.) The California Supreme Court reasonably rejected Petitioner's challenges on direct appeal. *See Ochoa*, 26 Cal. 4th at 452-57.

A. Special Instruction No. 3

Special Instruction No. 3 read:

> You may not consider as aggravation any evidence of unadjudicated acts allegedly committed by the [d]efendant unless you first determine beyond a reasonable doubt that (1) the defendant committed the acts; [and] (2) the acts involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

(CT 681.) The California Supreme Court noted, as the trial court did, that CALJIC 8.87 informed the jury that it could not consider the acts unless it found beyond a

reasonable doubt that they occurred. *Ochoa*, 26 Cal. 4th at 453. The California Supreme Court rejected Petitioner's argument under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) that the jury was required to find beyond a reasonable doubt that the evidence established the attempted, threatened, or actual use of force or violence. *Ochoa*, 26 Cal. 4th at 453-54.

In *Apprendi*, the United States Supreme Court held that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602 (discussing *Apprendi*). The Court applied *Apprendi* in *Ring* to hold that a state cannot "allow[] a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19; internal citation omitted). The Supreme Court distinguished California's death penalty statute from Arizona's and observed that California commits sentencing decisions to juries, while Arizona was one of only four states to "commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges." *Id.* at 608 n.6.

In California, "[s]pecial circumstances . . . make a criminal defendant eligible for the death penalty [and] operate as 'the functional equivalent of an element of a greater offense.'" *Webster v. Woodford*, 369 F.3d 1062, 1068 (9th Cir. 2004) (quoting *Ring*, 536 U.S. at 609). Once the jury has found a special circumstance to be true, unanimously and beyond a reasonable doubt, death is an authorized punishment. The jury need not make any additional findings beyond a reasonable doubt. *Cf. United States v. Mitchell*, 502 F.3d 931, 993 (9th Cir. 2007) (holding as to Federal Death Penalty Act that "the jury's task [at the penalty phase] is no longer to find whether [death-eligibility] factors exist . . . . [Defendant] does

not suggest how a beyond-reasonable-doubt standard could sensibly be superimposed upon this process, or why it must be in order to comport with due process, or to make his death sentence reliable, or to comply with the Sixth Amendment."). The California Supreme Court's decision to that end was reasonable.

B. Special Instruction No. 4

Special Instruction No. 4 read:

> The determination of punishment turns on the personal moral culpability of the Defendant. [¶] Such culpability is assessed in accordance with the specified factors of aggravation and mitigation upon which you also have received instruction. [¶] The circumstances of the crimes can be either aggravating or mitigating. Their character depends on the greater or lesser blameworthiness they reveal, ranging, for example, from the most intentional of willful, deliberate, and premeditated murder to the most accidental of felony murders.

(CT 681.) The California Supreme Court held, in part, on direct appeal that the given instructions were adequate and the requested instruction was duplicative. *Ochoa*, 26 Cal. 4th at 454-55.

Notwithstanding Petitioner's argument that the California Supreme Court erroneously reasoned in addition that "there was no evidence that the Castro murder was 'accidental,'" *id.* at 455; (Pet. at 394), the state court's decision that the given instructions were adequate is not contrary to or an unreasonable application of clearly established federal law.

C. Special Instruction No. 5

Special Instruction No. 5 read:

> Evidence has been introduced for the purpose of showing the specific harm caused by the Defendant's crimes. Such evidence was not received and may not be considered by you to divert your attention from your proper role of deciding whether the Defendant should live or die. You must face this obligation soberly and rationally, and you

> may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons for the Jury to show mercy to the Defendant.

(CT 682.) The California Supreme Court held on direct appeal that the instruction was duplicative of CALJIC 8.84.1 and was properly refused. *Ochoa*, 26 Cal. 4th at 455. Petitioner argues that the "CALJIC pattern instruction given did not caution the jury against basing their decision on an irrational, purely subjective response to emotional evidence and argument." (Pet. at 396.)

Pursuant to CALJIC 8.84.1, Petitioner's jury was instructed, "You must neither be influenced by bias or prejudice against the defendant nor swayed by public opinion or public feelings. Both the People and the defendant have a right to expect that you will consider all the evidence, follow the law, exercise your discretion conscientiously and reach a just verdict." (RT 2927; CT 704.) The California Supreme Court reasonably concluded that the given instructions were adequate.

D. Special Instruction No. 6

Special Instruction No. 6 read:

> In deciding whether death or life in prison without the possibility of parole is the appropriate sentence, you may not consider for any reason whatsoever the deterrent or non-deterrent effect of the death penalty or the monetary cost to the State of execution or maintaining a prisoner for life without the possibility of parole.

(CT 682.) As the California Supreme Court explained on direct appeal, although the trial court granted defendant's request to read the instruction, when it did so:

> it read the following version, 'In deciding whether life in prison without the possibility of parole or death is the appropriate sentence, you may not consider for any reason whatsoever whether or not there is a deterrent effect to the death penalty. [¶] Likewise, you may not consider for any reason whatsoever how much it may cost to keep the

> defendant in prison for life without the possibility of parole.' The most important difference between the instruction prepared and the instruction read was the latter did not warn the jurors not to consider the cost of execution.

Ochoa, 26 Cal. 4th at 455-56. The California Supreme Court held that "[t]he absence of evidence regarding these issues during the penalty phase precludes our finding prejudicial error." *Id.* at 456.

Petitioner argues that the given instruction "played on the common erroneous notion that it was cheaper to execute . . . . The court's instruction silently reaffirmed this common erroneous notion in violation of . . . [the] prohibition against consideration of non-statutory aggravation and improperly misled the jury as to the effect of its sentencing decision." (Pet. at 398.) The jury was instructed, however, that it "must determine what the facts are from the evidence received during the entire trial . . . . In determining which penalty is to be imposed on the defendant, you shall consider all the evidence which has been received . . . ." (RT 2927, 2930.) The California Supreme Court's decision that the jury would confine its decision to the evidence presented, and not to any speculative concerns at issue in the given instruction, is not unreasonable. *Cf. Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (recognizing the "almost invariable assumption of the law that jurors follow their instructions"). The given instruction, and the absence of Petitioner's requested instruction, did not so infect the trial as to deny Petitioner due process.

E. Special Instruction No. 7

Special Instruction No. 7 read:

> You may consider the fact that the Defendant's accomplices received more lenient sentences as a mitigating factor.

(CT 683.) Petitioner contends that the instruction was required under *Parker v. Dugger*, 498 U.S. 308 (1991). (Pet. at 398-99.)

The California Supreme Court on direct appeal explained, "[W]e have

adhered to our position that the jury need not be instructed to consider the sentences received by codefendants. We maintain that position here." *Ochoa*, 26 Cal. 4th at 456 (citing, *inter alia*, *People v. Mincey*, 2 Cal. 4th 408, 479-80 (1992); footnote omitted). In *Mincey*, the California Supreme Court concluded:

> [T]he high court in *Parker v. Dugger* did not hold that evidence of a codefendant's sentence must be introduced at trial as mitigating evidence or that a comparison between sentences given codefendants is required. In Florida, unlike California, a codefendant's sentence disposition is admissible. . . . Nothing in *Parker* supports the conclusion that California is constitutionally required to adopt the Florida rule.

Mincey, 2 Cal. 4th at 480 (internal citation omitted).

The United States Supreme Court's decision in *Parker* does not establish that a defendant has a constitutional right to have the jury consider evidence of codefendants' or former codefendants' sentences. *See Parker*, 498 U.S. at 315-16 (acknowledging only that a more lenient sentence given to the actual shooter was mitigating evidence). A state court may exclude penalty phase evidence "not bearing on the defendant's character, prior record, or the circumstances of his offense." *Lockett v. Ohio*, 438 U.S. 586, 604 n.12 (1978) (plurality opinion). Because evidence of Petitioner's former codefendants' sentences does not bear on Petitioner's character, record, or offense circumstances, the California Supreme Court reasonably concluded that the requested instruction was not constitutionally required.

F. Special Instruction No. 15

Special Instruction No. 15 read:

> After weighing all the aggravating and mitigating factors, it is up to you individually to decide which of the punishments, life without parole or death, should be imposed in this case. [¶] You must always keep in mind that each of you bears the ultimate moral responsibility to determine the appropriate penalty under all the circumstances of this case.

(CT 686.)

Petitioner argues that the instructions the jury received were inadequate because they failed to caution "that the sentencing decision was an individual decision, one for which . . . each juror bore the ultimate moral responsibility." (Pet. at 400.) Petitioner alleges that the requirement for an individual decision "came from *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), wherein the high court concluded: '[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." (Pet. at 400 (internal citation edited).) Petitioner also cites *Penry v. Lynaugh*, 492 U.S. 308, 319 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002), for the principle that "'the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime.'" (Pet. at 401 (quoting *Penry*, 492 U.S. at 319 (internal quotation and emphasis omitted)).)

As stated above, Petitioner's jury was instructed under CALJIC 8.88:

> It is now *your duty* to determine which of the penalties, death or confinement in the state prison for life without possibility of parole *shall be imposed* on the defendant. . . . [¶] 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 the factors. You are permitted to consider. [sic] [¶] In weighing the various circumstances *you 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.

(RT 2937-40; CT 717-18 (emphasis added).) The California Supreme Court reasonably concluded that the requested instructions were duplicative of those

given under CALJIC 8.88 and that the given instructions were adequate. *Ochoa*, 26 Cal. 4th at 456-57.

G. Special Instruction No. 16

Special Instruction No. 16 read:

> There is no requirement that all jurors unanimously agree on any matter offered in mitigation. Each juror must make an individual evaluation of each fact or circumstance offered in mitigation. Each juror must make his or her own individual assessment of the weight to be given such evidence. Each juror should weigh and consider such matters regardless of whether or not they are accepted by other jurors.

(CT 686.)

Petitioner challenged the denial of Special Instruction No. 16 on direct appeal (identifying the instruction in a typographical error as No. 15, as he does in his federal Petition). (*See* Lodg. B1 at 268-70; Pet. at 401.) The California Supreme Court did not issue a reasoned decision as to Special Instruction No. 16. The last reasoned decision was from the trial court, which denied the instruction because, *inter alia*, it was argumentative and it was addressed by CALJIC 8.88, reproduced above. (RT 2740.)

Petitioner argues that Special Instruction No. 16 was required under *McKoy v. North Carolina*, 494 U.S. 433 (1990) and *Mills v. Maryland*, 486 U.S. 367 (1988). (Pet. at 401-03.) *Mills* reversed a decision upholding a defendant's capital sentence because it found "a substantial probability that reasonable jurors, upon receiving the judge's instructions in th[e] case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Mills*, 486 U.S. at 384. "In *Mills*, the Court divided over the issue whether a reasonable juror could have interpreted the instructions in that case as allowing individual jurors to consider only mitigating circumstances that the jury unanimously found." *McKoy*, 494 U.S. at 444 n.8

(citations omitted). *McKoy* "present[ed] an even clearer case for reversal than *Mills*," because "the [*McKoy*] instructions and verdict form expressly limited the jury's consideration to mitigating circumstances unanimously found." *Id.*

The trial court reasonably determined that the jury instructions were adequate without the addition of Special Instruction No. 16. It is a reasonable conclusion that a reasonable juror could not have interpreted CALJIC 8.88, or the other instructions and verdict forms provided in Petitioner's case, as allowing individual jurors to consider only unanimously found mitigating circumstances. Even if Petitioner's requested instruction would have added clarity, he fails to show that its absence so infected the trial as to violate due process.

H. Special Instruction No. 24

Special Instruction No. 24 read:

> You must not consider as an aggravating factor the existence of any special circumstance if you have already considered the facts of the special circumstance as a circumstance of the crime for which the defendant has been convicted. [¶] In other words, do not consider the same facts more than once in determining the presence of aggravating factors.

(CT 676.) The California Supreme Court held on direct appeal that the requested instruction was "of uncertain validity," because a jury may consider a prior conviction of a violent felony under both California Penal Code § 190.3(b) and § 190.3(c), for example. *Ochoa*, 26 Cal. 4th at 457. It held that the trial court did not err in denying the instruction. *Id.* That decision was not contrary to or an unreasonable application of clearly established federal law. *See Brown v. Sanders*, 546 U.S. 212, 222 n.8 (2006) ("The possibility that the jury would count the nature of the crime twice if it were instructed to consider both the facts of the crime and the eligibility [or special] circumstances . . . [and] might have given greater weight to the facts underlying the eligibility circumstances . . . cannot fairly be regarded as

a constitutional defect in the sentencing process." (discussing *Zant v. Stephens*, 462 U.S. 862, 894 (1983); internal quotations and alterations omitted)).

I. Special Instruction No. 28

Special Instruction No. 28 read:

> Evidence has been presented of defendant's lifestyle or background. You cannot consider this evidence as an aggravating factor, but may consider it only as a mitigating factor.

(CT 678.) The California Supreme Court held on direct appeal that there was no error, because the trial court properly instructed the jury on aggravating and mitigating factors. *Ochoa*, 26 Cal. 4th at 457.

Petitioner argues here that without the requested instruction, there was an increased "risk that the jury would consider factors in aggravation unauthorized by statute . . . ." (Pet. at 405.) As discussed above (*see* supra Claim 23), the jury's consideration of nonstatutory aggravating evidence does not show a constitutional violation.

Claim 26(B)(2) is DENIED.

XIX. Cumulative Error

A. Allegations

In Claim 20, Petitioner seeks relief based upon the trial court's alleged guilt phase errors. (Pet. at 332-34.) In Claim 21, he seeks relief based upon the cumulative effect of errors at the guilt phase of trial. (*Id.* at 334-38.) In Claims 1(C)(19) and 1(C)(20), he alleges that trial counsel was ineffective in challenging the trial court's guilt phase errors and the cumulative guilt phase error. (*Id.* at 102-03.)

In Claim 28, Petitioner seeks relief based upon the cumulative effect of errors at the penalty phase of trial. (*Id.* at 410-17.) He adds that "the effect of guilt phase errors on the penalty phase of a capital trial must be considered as a matter of federal law." (*Id.* at 417.) In Claims 1(C)(24) and 1(C)(25), he alleges that trial

counsel was ineffective in challenging the trial court's penalty phase errors and the cumulative penalty phase error. (*Id.* at 105-06.)

B. Analysis

As a preliminary matter, the Court finds no prejudice from any ineffective assistance of counsel, considered cumulatively. (*See, e.g.*, *supra* Claims 1(B)(5) (outreach to victims' family members); 1(C)(2) (consular assistance), (4) (Petitioner's presence at sidebar voir dire), (5) (questioning on voir dire), (6) (investigation of Cecil H.), (7) (hypothetical during voir dire), (8) (rehabilitation on voir dire), (9) (Petitioner's statements), (10) (Walter Aguilar's statements), (11) ("187" tattoo), (12) (prior bad acts during voir dire), (13) (recess during trial), (14) (prosecutor's guilt and penalty phase arguments), (16) (eyewitness identification expert and pathologist), (18) (guilt phase jury instructions), (19) (trial court's guilt phase errors), (20) (cumulative guilt phase error), (24) (trial court's penalty phase errors), (25) (cumulative penalty phase error), (32) (autopsy and crime scene photographs), (33) (David Mandich's testimony).)

Likewise, the Court finds no reasonable likelihood that any prosecutorial misconduct, considered cumulatively, could have affected the judgment of the jury. (*See, e.g.*, *supra* Claims 10 and 11 (use and withholding of evidence concerning Walter Aguilar's statements); 18 and 24(B)(2) (misstatement of date of arrest and vouching for David Mandich in arguments); 24(B)(3), (4), (5), and (6) (penalty phase arguments).)

Beyond the cumulative effect of any ineffective assistance of counsel and prosecutorial misconduct, "prejudice may result from the cumulative impact of multiple deficiencies." *Harris v. Wood*, 64 F.3d 1432, 1438-39 (9th Cir. 1995). "[W]here the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors. This is simply the logical corollary of the harmless error doctrine which requires us to affirm a conviction if there is overwhelming evidence of guilt." *United States v. Frederick*, 78 F.3d 1370, 1381

(9th Cir. 1996) (internal citation and quotation omitted); *United States v. Nadler*, 698 F.2d 995, 1002 (9th Cir. 1983) (holding that when examining "the cumulative effect of several errors[, . . .] [w]hether the alleged errors prejudiced the [defendants'] rights to a fair trial depends in turn upon the strength of the Government's cases against them; the stronger the prosecution's case, the less likely that a defendant would be prejudiced by error or misconduct."). "[W]hile a defendant is entitled to a fair trial, he is not entitled to a perfect trial, 'for there are no perfect trials.'" *United States v. Payne*, 944 F.2d 1458, 1477 (9th Cir. 1991) (rejecting cumulative error claim based upon trial court errors) (quoting *Brown v. United States*, 411 U.S. 223, 231-32 (1973)).

Here, Petitioner fails to show that prejudice resulted from the cumulative impact of multiple deficiencies. Any guilt and penalty phase trial court errors, considered cumulatively with any ineffective assistance of counsel and prosecutorial misconduct, were constitutionally harmless in light of the evidence presented. (*See, e.g.*, *supra* Claims 16 (recess during guilt phase of trial), 26(B)(2) (denial of penalty phase instructions on consideration of cost of execution and consideration of mitigating circumstances)); *cf. Ochoa*, 26 Cal. 4th at 447, 458 (denying narrower cumulative error claims on direct appeal).

Claims 20, 21, 28, 1(C)(19), 1(C)(20), 1(C)(24), and 1(C)(25) are, therefore, DENIED.

XX. Claims 29 and 30: Intra-Case and Inter-Case Proportionality Review

In Claim 29, Petitioner alleges that his sentence is unconstitutionally disproportionate to the sentences of his former codefendants. (Pet. at 418-21.) In Claim 30, he alleges that his sentence is unconstitutional because he "received no inter-case or other meaningful proportionality review." (*Id.* at 421.)

Claims 29 and 30 lack support in clearly established federal law. *See Harris*, 465 U.S. at 43-44 (holding that a capital sentencing system need not incorporate "proportionality review" comparing a defendant's sentence to that

imposed on "others convicted of the same crime" or "in similar cases" to satisfy the Eighth Amendment); *Allen v. Woodford*, 395 F.3d 979, 1018 (9th Cir. 2005) ("[Petitioner's] due process argument is foreclosed by the Supreme Court's holding in *Harris* that neither the Eighth Amendment nor due process requires comparative proportionality review in imposing the death penalty" (internal citation omitted)). Claims 29 and 30 are DENIED.

XXI. Claims 31 and 1(C)(26): Motion for Modification of the Verdict

A. Allegations

In Claim 31, Petitioner alleges that in denying his motion to modify the verdict, the trial court failed to independently re-weigh the mitigating and aggravating evidence and relied on evidence not presented to the jury. (Pet. at 425-36.) Petitioner argues that the trial court "never acknowledged on the record that it had a statutory obligation to re-weigh the evidence independently" and instead said that it was "required to review the entire record and determine whether the jury's judgment of death is consistent with both the facts and the law." (*Id.* at 430; Opening Br. at 265 (internal quotation omitted).) He alleges that the trial court "erroneously relied on evidence" that: (1) Rodolfo Rivera's[9] life was threatened during the Navarette homicide, because "[t]here was no evidence that Ochoa intended to harm Rivera in any way: he was not the shooter in the Navarette homicide, and the state presented no evidence that Ochoa knew there was a second person in the car;" (2) Ochoa was the moving force behind the Navarette homicide, because "[t]he *weight* of the evidence suggested that Aguilar, rather than Ochoa, was the moving force;" and (3) Ochoa was the leader of the

[9] Rodolfo Rivera was Mr. Navarette's brother. (RT 1098 (reporting spelling as "Rodolfo")); *Ochoa*, 26 Cal. 4th at 420 (using spelling of "Rudolfo"). He was a passenger in Mr. Navarette's car when Mr. Navarette was shot. (RT 1098); *Ochoa*, 26 Cal. 4th at 420.

attack on Freddy Garcia,[10] because "Ochoa did not have a gun and was but one of the four individuals who kicked and punched [Garcia] during the robbery." (Pet. at 432; Opening Br. at 265-66 (emphasis added).)

In Claim 1(C)(26), Petitioner faults trial counsel "[t]o the extent trial counsel failed to investigate, obtain necessary experts, present adequate evidence, make and preserve objections, and competently argue the facts and law of this claim." (Pet. at 106.)

B. Legal Standard

In *Turner v. Calderon*, the Ninth Circuit rejected a habeas petitioner's contention that the trial court's "consider[ation] [of] non-statutory aggravating factors and fail[ure] to consider mitigating factors when reviewing [petitioner's] automatic application for modification of the death verdict" could state a federal constitutional violation. *Turner*, 281 F.3d at 871. The Circuit held that because petitioner showed "no legal authority to support his constitutional claim, and because the trial court made an individualized determination of whether death was the proper punishment, we agree with the district court that at most the trial court's error would be one of state law." *Id.* (denying certificate of appealability on the claim) (internal quotation and alteration omitted).

Similarly, in *Allen v. Woodford*, the Circuit held that the trial court had "erred *as a matter of state law* by considering in its review of the jury's verdict presentence reports that had not been considered by the jury . . . ." 395 F.3d at 1018 (emphasis added). Nevertheless, the circuit court considered whether

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[10] The California Supreme Court summarized the State's presentation of evidence as follows: "On January 20, 1990, at approximately 11:30 p.m., Freddie Garcia was at a gas station on La Brea Avenue. Defendant and three other males approached him. The males kicked Garcia to the ground; when he rose, defendant punched him. Defendant warned Garcia, 'Give up the car, otherwise I'm going to shoot you.' Another male put a gun to Garcia's stomach, although defendant did the talking. Defendant entered the car, and drove the other three males away. Defendant pleaded guilty to robbery with the allegation that a principal was armed with a firearm." *Ochoa*, 26 Cal. 4th at 420 (using spelling of "Freddie"); (*see also* RT 2233 (reporting spelling as "Freddy")).

petitioner was prejudiced by the trial court's consideration of the presentence reports and held that he was not. *Id.*

C. Analysis

Even assuming, *arguendo*, that Petitioner's claim states a violation of his federal constitutional rights, the California Supreme Court reasonably denied Petitioner's claim. On direct appeal, the California Supreme Court held, in relevant part:

> The court began by noting its statutory obligation 'to review the entire record and determine whether the jury's judgment of death is consistent with both the facts and the law.' After reviewing the evidence and the section 190.3 factors, the court observed, 'My duty then is to apply the same rules that the jury applied in determining whether the judgments of death were appropriate. [¶] . . . And I do specifically find that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that as to counts 1 and 3 the jury verdict was appropriate . . . .'
>
> [T]he trial judge's function is not to make an independent and de novo penalty determination, but rather to independently reweigh the evidence of aggravating and mitigating circumstances and then to determine whether, in the judge's independent judgment, the weight of the evidence supports the jury verdict. The above statements prove the trial court fulfilled its duty. . . .
>
> [Mr. Ochoa] assigns error to the court's finding that defendant was the leader of the attack on Freddie Garcia. The record reflects that of the four males who approached Garcia, defendant did all the talking and threatened to kill Garcia if he did not give up his car. When Garcia was able to stand up after being kicked repeatedly, defendant punched him again. Although Garcia saw another individual holding a gun, it was defendant who stated, 'Give up your car, otherwise I'm going to shoot you.' Defendant entered the car and drove it away, with the other males as passengers. The evidence supports the trial court's finding.
>
> Defendant also objects to the trial court's characterization of defendant as the 'moving force' behind the Navarette murder. The

> record shows the other 18th Street Gang members were simply loitering on the street until defendant arrived with his truck and told the others that he had just seen Crazy Riders driving eastbound on Pico Boulevard. At that point, Aguilar grabbed a weapon. While driving, defendant accelerated, changed lanes and maneuvered the truck to render possible Navarette's shooting. As David Alonzo[11] testified, the shooting would not have occurred but for defendant's involvement. The evidence supports the trial court's finding.
>
> Finally, defendant objects to the court's noting he also shot in the vicinity of Navarette's brother and passenger, Rudolfo Rivera, as there was no evidence showing defendant saw Rivera. The trial court properly considered this evidence, as . . . the number of victims exposed to the use of a firearm is relevant to the defendant's culpability. . . . Rivera's presence rendered the shooting more culpable even if defendant did not see Rivera. . . . [T]here is always the likelihood there will be a second person present in an occupied vehicle. . . . Accordingly, the trial court properly considered this evidence.

Ochoa, 26 Cal. 4th at 459-62 (internal quotations, citations, and footnote omitted).

Petitioner does not show that the California Supreme Court's decision rests on an unreasonable determination of the facts; that the trial judge failed to perform the required analysis; or that the trial court considered any extra-record evidence, let alone to his prejudice. *Cf. Allen*, 395 F.3d 979 at 1018. The California Supreme Court may have reasonably rejected Petitioner's claim of ineffective assistance of counsel on the basis that counsel was not deficient in connection with the motion for modification of the verdict.

Claims 31 and 1(C)(26) are DENIED.

XXII. Claims 33 and 1(C)(28): Narrowing the Class of Death Eligible Defendants

In Claim 33, Petitioner alleges that California's multiple murder and felony

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[11] This Court has not located a witness by the name of David Alonzo in the Reporter's Transcript. It appears that the California Supreme Court was referring to the testimony of David Lozano.

murder special circumstances fail to narrow the class of death eligible defendants adequately. (Pet. at 438-45.) The California Supreme Court denied the claim on direct appeal. *Ochoa*, 26 Cal. 4th at 462. In Claim 1(C)(28), Petitioner alleges that "[t]o the extent trial counsel failed to investigate, obtain necessary experts, present adequate evidence, make and preserve objections, and competently argue the facts and law of this claim, counsel's actions fell below the standard expected of competent counsel in capital cases." (Pet. at 108.)

Claim 33 lacks support in clearly established federal law. *See Bradway v. Cate*, 588 F.3d 990, 992 (9th Cir. 2009) (rejecting petitioner's challenge to California special circumstance of intentional killing by lying in wait and observing that the Supreme Court has not decided any "case that could reasonably support [petitioner's] due process claim . . . based on a failure to narrow the class . . . ."); *cf. Harris*, 465 U.S. at 53 ("By requiring the jury to find at least one special circumstance beyond a reasonable doubt, the [prior California] statute limits the death sentence to a small sub-class of capital-eligible cases."). The California Supreme Court may have reasonably rejected Petitioner's claim of ineffective assistance of counsel on the basis that counsel was not deficient for failing to argue that California's multiple murder and felony murder special circumstances fail to narrow the class of death eligible defendants adequately.

Claims 33 and 1(C)(28) are DENIED.

XXIII. Claims 34 and 1(C)(29): California Penal Code § 190.3(a)

In Claim 34, Petitioner alleges that "[a]lthough [California] Penal Code section 190.3(a) has survived a facial Eighth Amendment challenge (*Tuilaepa* [*v. California*], 512 U.S. 967 [(1994)]), it has been used in ways so arbitrary and contradictory as to violate the federal guarantee of due process of law." (Pet. at 447.) Petitioner alleges that "[p]rosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances,"

such as: the infliction of multiple wounds or a single blow, the pursuit of a heinous motive or no motive at all, the relationship with the victim or lack thereof, the attempt to conceal the killing or lack thereof, the victim's anticipation or struggle or lack of warning or struggle, the victim's youth and lack of opportunity to have children or the victim's agedness or need to care for children, killing in cold blood or during a frenzy, and killing during the day or the night. (*Id.* at 447, 447 n.56, 447 n.57.) Petitioner alleges that the vagueness of § 190.3(a) and its potential for arbitrary and capricious application were magnified in his case by its transfer to a different district of Los Angeles County (*see* Claim 7) and the risk of racial prejudice there. (*Id.* at 450-52.)

In Claim 1(C)(29), Petitioner alleges that "[t]o the extent trial counsel failed to investigate, obtain necessary experts, present adequate evidence, make and preserve objections, and competently argue the facts and law of this claim, counsel's actions fell below the standard expected of competent counsel in capital cases." (*Id.* at 108.)

In *Tuilaepa*, the United States Supreme Court explained that:

> petitioners' challenge to factor (a) is at some odds with settled principles, for our capital jurisprudence has established that the sentencer should consider the circumstances of the crime in deciding whether to impose the death penalty. We would be hard pressed to invalidate a jury instruction that implements what we have said the law requires. In any event, this California factor instructs the jury to consider a relevant subject matter and does so in understandable terms. The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances *is neither vague nor otherwise improper* under our Eighth Amendment jurisprudence.

512 U.S. at 976 (internal citation omitted; emphasis added). On a distinct but related issue, the Court rejected petitioners' challenge to the "equivocal" nature of the jury's consideration of the defendant's age at the time of the crime, observing

that "difficulty in application is not equivalent to vagueness." *Id.* at 977.

The California Supreme Court on direct appeal reasonably rejected Petitioner's arguments. *Ochoa*, 26 Cal. 4th at 462. Petitioner fails to show that the application of §190.3(a) in his case was significantly different from that in *Tuilaepa* such that *Tuilaepa* fails to govern his claim. The California Supreme Court on habeas review may have reasonably rejected Petitioner's claim of ineffective assistance of counsel on the basis that counsel was not deficient for failing to argue against §190.3(a).

Claims 34 and 1(C)(29) are DENIED.

XXIV. Claims 35 and 1(C)(30): Challenges to California's Sentencing Scheme

The California Supreme Court reasonably rejected on direct appeal, *see Ochoa*, 26 Cal. 4th at 458-59, 462,[12] Petitioner's allegations in Claim 35 that the California death penalty statutes and system:

- fail to perform the constitutionally required narrowing function. (Pet. at 453-56, 466 (challenging the death penalty's "use in California as a regular form of punishment")); *see Bradway*, 588 F.3d at 992 (observing, under AEDPA, that the Supreme Court has not decided any "case that could reasonably support [petitioner's] due process claim of unconstitutional vagueness based on a failure to narrow the class . . . .").
- fail to require written or other specific findings and deny meaningful appellate review. (Pet. at 456-57); *see Williams*, 52 F.3d at 1484-85 (holding that the "statute ensures meaningful appellate review, and need not require written jury findings in order to be constitutional" (internal citation omitted)).

[12] Although Petitioner states only that he raised Claim 35 in his 2003 state habeas petition (Pet. at 453; Petr.'s Br. at 273 (citing Lodg. D1 at 555-85)), the claim mirrors the allegations Petitioner brought in Claim 22 of his direct appeal. (*See* Lodg. B1 at 333-59.) The California Supreme Court may have reasonably rejected Petitioner's habeas claim on the same grounds stated in its decision on direct appeal.

- fail to instruct on a burden of proof (or that no burden of proof applies) and fail to require jury findings made unanimously and beyond a reasonable doubt (or at least by a preponderance of the evidence), including findings that at least one aggravating factor was proven, that aggravating factors outweigh mitigating factors, and that each of the unadjudicated acts introduced in aggravation was proven. (Pet. at 457-64); *see Walton*, 497 U.S. at 650 ("[A] defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency."); *Boyde*, 494 U.S. at 377 ("Petitioner suggests that the jury must have freedom to decline to impose the death penalty even if the jury decides that the aggravating circumstances 'outweigh' the mitigating circumstances. But there is no such constitutional requirement of unfettered sentencing discretion in the jury . . . ."); *Belmontes v. Ayers*, 529 F.3d 834, 876 (9th Cir. 2008) ("[C]onsideration of unadjudicated criminal conduct for purposes of sentencing does not violate defendant's constitutional due process rights. . . . [T]he maximum sentence authorized by the jury's guilt phase verdict was death."), *reversed on other grounds by Wong v. Belmontes*, 558 U.S. 15 (2009); *Mitchell*, 502 F.3d at 993 (holding as to Federal Death Penalty Act that "the jury's task [at the penalty phase] is no longer to find whether [death-eligibility] factors exist . . . . [Defendant] does not suggest how a beyond-reasonable-doubt standard could sensibly be superimposed upon this process, or why it must be in order to comport with due process, or to make his death sentence reliable, or to comply with the Sixth Amendment."); *Williams*, 52 F.3d at 1480 (holding that the "fail[ure] to instruct the jury that . . . it could consider any criminal activity only if proved beyond a reasonable doubt . . . is state law error, not cognizable on federal habeas").

- fail to instruct the jury regarding the elements of other criminal acts alleged. (Pet. at 458); *see Williams v. Vasquez*, 817 F. Supp. 1443, 1470-71 (E.D. Cal. 1993), *aff'd sub nom. Williams v. Calderon*, 52 F.3d at 1480-81.

- impermissibly use adjectives such as "extreme" (Cal. Penal Code § 190.3(d)) in the list of mitigating factors.[13] (Pet. at 464-65); *see Blystone v. Pennsylvania*, 494 U.S. 299, 308 (1990) (rejecting the argument that a jury instruction allowing consideration of whether defendant was affected by an "extreme" mental or emotional disturbance or duress "preclude[s] the jury's consideration of lesser degrees of disturbance, impairment, or duress" under another, broader instruction); *Hendricks v. Vasquez*, 974 F.2d 1099, 1109 (9th Cir. 1992) (applying *Blystone*).

- allow prosecutorial discretion in the pursuit of a capital sentence. (Pet. at 465); *see Campbell*, 829 F.2d at 1465 ("'[A]bsent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decisions by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts.'" (quoting *Gregg*, 428 U.S. at 225 (White, J., concurring))).

- are unconstitutional "inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment [and] . . . inasmuch as international law is a part of our law . . . ." (Pet. at 467; *see infra* Claim 39.)

Petitioner's claims relying on the following dissenting and non-controlling concurring opinions lack support in clearly established federal law:

- *Callins v. Collins*, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting), observing that "'the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness – individualized sentencing.'" (Pet. at 466-68 (quoting *Callins*, 510 U.S. at 1144 (internal citations omitted)).)

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[13] In Claim 1(C)(30), Petitioner faults trial counsel for failing to raise each of the issues above. (Pet. at 109-10.) The California Supreme Court may have reasonably determined that because the arguments would have been meritless, counsel was not deficient for failing to raise them. *See Juan H.*, 408 F.3d at 1273; *Molina*, 934 F.2d at 1447.

- "*Sawyer v. Whitley*, 505 U.S. 333, 357-60 (1992) (Blackmun, J., concurring), describing how the ever-increasing procedural barriers to meaningful federal habeas review undermine the very legitimacy of capital punishment itself . . . [because] the system of review of capital convictions and sentences [is] . . . more arbitrary and less reliable than is necessary for there to be meaningful postconviction review." (Pet. at 468-69 (internal citation edited).)
- "Judge Noonan's dissenting opinion in *Jeffers v. Lewis*, 38 F.3d 411, 425-27 (9th Cir. 1994)," on the basis that "[t]he circumstances of California's administration of the death penalty, especially as they exist now, are strikingly similar to those in Arizona discussed in the *Jeffers* dissent" and that the arbitrariness in the administration of California's death penalty is unconstitutional. (Pet. at 469.)

Claims 35 and 1(C)(30) are DENIED.

XXV. Claim 36: Political Considerations in State Review

In Claim 36, Petitioner alleges that California's capital sentencing scheme is unconstitutional because "the California Supreme Court has labored since 1986 under political and economic pressures that do not permit it to decide death penalty cases in a fair and impartial manner . . . ." (Pet. at 469-70.) He alleges that the California Supreme Court did not provide "meaningful appellate review" of his conviction and sentence. (Petr.'s Br. at 286.)

There is a "general presumption that judges are unbiased and honest." *Ortiz v. Stewart*, 149 F.3d 923, 938 (9th Cir. 1998) (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)), *overruled on other grounds as stated in Apelt v. Ryan*, 878 F.3d 800, 827-28 (9th Cir. 2017). Nothing in Petitioner's argument regarding the 1986 retention election and the ensuing shifts in capital affirmance rates suffices to overcome that general presumption. (*See* Pet. at 471-73.) Petitioner fails to allege with specificity any support in the record of his own case to demonstrate judicial bias. He has not demonstrated that the justices who considered his case were in

any manner influenced by a fear of future challenge and removal. Petitioner makes no specific allegation in Claim 36 of any observable impact on his own appellate proceedings.

Petitioner has failed to demonstrate that the California Supreme Court's rejection of Claim 36 was objectively unreasonable. Claim 36 is DENIED.

XXVI. Claim 37: Excessive Delay in Review

In Claim 37, Petitioner alleges that the excessive delay between the imposition and execution of sentence constitutes cruel and unusual punishment, citing *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting the denial of certiorari). (Pet. at 476-79; *see also* Petr.'s Br. at 286 ("Ochoa's Amended Petition alleges that his sentence constitutes cruel and unusual punishment . . . because he has been under a sentence of death for more than twenty years. Ochoa's claim was based on . . . *Lackey*." (internal citations omitted)).)

In his merits brief, Petitioner attempts to incorporate the District Court's decision in *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1053 (C.D. Cal. 2014) (Carney, J.), *rev'd sub nom. Jones v. Davis*, 806 F.3d 538, 541 (9th Cir. 2015), that systemic delay in the administration of California's death penalty renders any ensuing executions arbitrary, in violation of the Eighth Amendment. (Petr.'s Br. at 287-88.) The allegations in the Petition do not state such a claim, however. The Petition alleges "[a]n ordinary *Lackey* claim focuse[d] on the delay experienced by the petitioner personally, without regard to the fate of others." *Jones*, 806 F.3d at 548. The allegations in the Petition do not assert that "California's post-conviction review process [is] unconstitutionally arbitrary, because a capital prisoner's selection for execution will depend upon a factor largely outside an inmate's control . . . : how quickly the inmate proceeds through the State's dysfunctional post-conviction review process." *Id.* at 542 (internal quotations omitted). Petitioner does not allege here, and has not exhausted in state court, a claim based on the District Court's decision in *Jones*. *Cf. Alfaro v. Johnson*, 862 F.3d 1176,

1180-83 (9th Cir. 2017) (holding petitioner was not excused from failing to exhaust her *Jones* claim in state court).

Because "'[t]he Supreme Court has never held that execution after a long tenure on death row is cruel and unusual punishment,'" *Smith v. Mahoney*, 611 F.3d 978, 998 (9th Cir. 2010) (quoting *Allen v. Ornoski*, 435 F.3d 946, 958 (9th Cir. 2006)), Petitioner's *Lackey* claim is not supported by clearly established federal law. Claim 37 is DENIED.

XXVII. Claim 38: Lethal Injection

In Claim 38, Petitioner alleges that California's procedures for administering lethal injection violate the Eighth Amendment prohibition against cruel and unusual punishment. (Pet. at 479-82.) Petitioner stated in his merits brief that "[a]lthough California does not presently have execution procedures in place, Ochoa is entitled to renew this claim if and when California promulgates new regulations." (Petr.'s Br. at 288.) He also states that:

> [w]ithout a valid protocol to challenge and no current means for executing individuals in the State of California, Petitioner need not determine whether this Petition is the proper venue for this claim. It is entirely possible that Petitioner may, after examining the method and means of execution implemented by the State of California, realize that a more proper avenue of redress is a suit under 42 U.S.C. § 1983.

(Pet. at 481.)

The United States District Court, Northern District of California held in *Morales v. Tilton*, 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006) that California's then-existing lethal injection protocol, as administered, created an undue and unnecessary risk that an inmate would suffer pain in violation of the Eighth Amendment. Since that ruling, "there [has been] a de facto moratorium on all executions in California." *Morales v. Cate*, 623 F.3d 828, 830 (9th Cir. 2010). California promulgated a new lethal injection protocol effective March 1, 2018. Cal. Code Regs. tit. 15, §§ 3349-3349.9 (2018). On April 5, 2018, the district

court ordered the parties to address any "barriers to the implementation of the protocol and to what extent, if any, those warrant a continued stay of the proceedings." *Morales v. Kernan*, No. CV 06-219 RS, CV 06-926 RS (N.D. Cal. Apr. 5, 2018). The parties filed a joint statement on June 11, 2018, and the court ordered a status conference on September 7, 2018. *Id.* (N.D. Cal. June 12, 2018.)

In light of Petitioner's statements that he may renew his claim or may instead pursue relief under § 1983, and in light of the ongoing litigation in *Morales*, the Court DISMISSES WITHOUT PREJUDICE Claim 38. The Court will decide the merits of Petitioner's claim, if necessary, when Petitioner's execution is imminent.

XXVIII. Claims 39 and 1(C)(31): Violations of International Law

In Claim 39, Petitioner alleges violations of:

> customary international law as informed by the Universal Declaration of Human Right[s], the International Covenant on Civil and Political Rights (ICCPR), and the American Declaration of the Rights and Duties of Man (American Declaration). Additionally, Ochoa suffered racial discrimination during his guilt and penalty phase trials, which also constitutes violations of customary international law as evidenced by the equal protection provisions of the above-mentioned instruments and of the International Convention Against All Forms of Racial Discrimination.

(Pet. at 483; *see also id.* at 483-93.)

Petitioner's claims lack support in clearly established federal law as determined by the United States Supreme Court. Clearly established federal law does not recognize enforceable rights under international law to support Petitioner's claim. *See Sosa v. Alverez-Machain*, 542 U.S. 692, 734-35 (2004) ("[T]he [Universal] Declaration does not of its own force impose obligations as a matter of international law. . . . And, . . . the United States ratified the Covenant [the ICCPR] on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts."); *Nevius v.*

McDaniel, 218 F.3d 940 (9th Cir. 2000) (denying certificate of appealability because state court did not contradict or unreasonably apply federal law in denying petitioner's claim of a violation of "several instruments of international law, including the Universal Declaration of Human Rights"); *see also Buell v. Mitchell*, 274 F.3d 337, 370-76 (6th Cir. 2001) (rejecting as "wholly meritless" state habeas petitioner's contentions that capital punishment violates the American Declaration, the ICCPR, or customary international law); *Garza v. Lappin*, 253 F.3d 918, 923 (7th Cir. 2001) (holding that execution under federal death sentence would not violate the American Declaration because it "is merely an aspirational document that, in itself, creates no directly enforceable rights").

In Claim 1(C)(31), Petitioner alleges that trial counsel was ineffective for failing "to: (1) [e]nsure that Ochoa's rights under international law were enforced; (2) take advantage of the assistance the Mexican government would have provided; (3) investigate; (4) obtain necessary experts; (5) present evidence; (6) make and preserve objections; and (7) competently argue the facts and law of this claim . . . ." (Pet. at 111.) The Court has addressed above Petitioner's allegations in Claim 1(C)(2) that counsel failed to "[e]nsure that Ochoa's rights under the VCCR [Vienna Convention on Consular Relations] were enforced, and . . . to take advantage of the assistance the Mexican government would have provided . . . ." (*Id.* at 84.) Petitioner's further allegations in Claim 1(C)(31) are conclusory. *See Pinholster*, 563 U.S. at 188 n.12; *Greenway*, 653 F.3d at 804; *Jones*, 66 F.3d at 205; *James*, 24 F.3d at 26.

Claims 39 and 1(C)(31) are DENIED.

XXIX. Claim 40: State Review and Ineffective Assistance

First, Petitioner alleges in Claim 40 that the California Supreme Court "neglected to address numerous issues raised by Ochoa on direct appeal. The [c]ourt disposed of arguably meritorious issues without a written decision or without a statement of reasons, or by mischaracterizing the arguments

presented . . . ." (Pet. at 494.) Petitioner fails to specify here and failed to specify in his state habeas petition which issues the California Supreme Court neglected or mischaracterized on direct appeal. The California Supreme Court may have reasonably rejected Petitioner's allegations as conclusory. *See Pinholster*, 563 U.S. at 188 n.12; *Greenway*, 653 F.3d at 804; *Jones*, 66 F.3d at 205; *James*, 24 F.3d at 26.

Second, Petitioner alleges that undue delay in his direct appeal resulted in the loss of exculpatory evidence and "precluded [him] from proving his innocence." (Pet. at 494.) He alleges that it took more than five years for the record on appeal to be certified, "caused mainly by the non-cooperation of the Deputy District Attorney and the Deputy Attorney General" and delay in resolving Petitioner's requests for correction. (*Id.*) Appellate delay is not an independent ground for relief, however, and Petitioner does not specify what non-cooperation he experienced or what exculpatory evidence was lost as a result of the delay. *Cf. Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (to show a due process violation from the prosecution's failure to collect or preserve potentially exculpatory evidence, the defendant must demonstrate bad faith); *United States v. Bagley*, 473 U.S. 667, 681-82 (1985) (to show a constitutional violation from the prosecution's failure to disclose evidence, Petitioner must establish that the evidence was material); (Pet. at 494; Petr.'s Br. at 289-92). The California Supreme Court's denial of the allegations was not unreasonable.

Third, Petitioner alleges that appellate counsel and state habeas counsel were ineffective for failing to preserve evidence, inadequately presenting and arguing issues, and failing to prepare and present claims that should have been raised on appeal or in habeas proceedings. (*Id.* at 494-95.) Petitioner does not specify what evidence counsel failed to preserve and what issues counsel presented or argued inadequately. Although Petitioner in his merits brief specifies claims his appellate and first state habeas counsel did not plead, he did not do so in his second state

habeas petition or informal reply. (*See* Petr.'s Br. at 289-92; Lodg. D1 at 659-63; Lodg. D3 at 28.) The California Supreme Court may have reasonably rejected Petitioner's allegations as conclusory.

Fourth, Petitioner alleges that his state habeas review was not full, fair, and adequate because he was not authorized adequate funds for investigation. (Pet. at 495.) He argues that "[s]ince this [habeas] investigation was to be conducted concurrently with Ochoa's direct appeal, the denial of funds violated his rights to due process, equal protection, and effective assistance of counsel on appeal." (*Id.* (citing *Evitts v. Lucey*, 469 U.S. 387, 393-94 (1985)).)

Petitioner specifies that "[h]is final request, for $7,656.84 for services rendered by investigator Cheryl Nuss and Dr. Patricia Pérez-Arce was denied in part. The California Supreme Court disallowed $5,002.24 of this bill because it exceeded the $25,000 authorized for habeas investigation." (*Id.*) He does not explain whether or how any services Ms. Nuss or Dr. Pérez-Arce would have otherwise provided relate to claims available on appeal. In the absence of that clarification, the California Supreme Court reasonably rejected Petitioner's claim regarding the fairness of his appellate proceedings. Petitioner's claim regarding the fairness of his habeas proceedings is foreclosed by the lack of a constitutional right to counsel in state habeas proceedings. *See Ryan v. Gonzales*, 568 U.S. 57, 67 (2013) ("'[T]here is no constitutional right to counsel on habeas . . . .'" (quoting *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 810 (9th Cir. 2003))); *Martinez v. Ryan*, 566 U.S. 1, 8-9 (2012) (leaving "open . . . a question of constitutional law: whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial . . . [as] an exception to the constitutional rule that there is no right to counsel in collateral proceedings.").

Claim 40 is DENIED.

XXX. Claim 41: Discovery in State Habeas Proceedings

In Claim 41, Petitioner alleges that the denial of discovery and an evidentiary hearing in state habeas corpus proceedings "wrongfully impede[d] the right to petition for federal habeas corpus, in violation of Article I, section 9, of the United States Constitution." (Pet. at 497-98.) He relies on *Boumediene v. Bush*, 553 U.S. 723, 790 (2008) to argue a Suspension Clause violation. (Petr.'s Br. at 292-93.)

"Where a habeas statute 'contains no explicit provision barring habeas review,' habeas jurisdiction remains intact" and there is no Suspension Clause violation. *Crater v. Galaza*, 491 F.3d 1119, 1124 (9th Cir. 2007) (quoting *Demore v. Kim*, 538 U.S. 510, 517 (2003)); *cf. Boumediene*, 553 U.S. at 774 (finding a Suspension Clause violation where "no trial has been held," not where "criminal proceedings in state court have taken place"). No California statute explicitly bars habeas review, and Petitioner points to no other authority to support his claim. Claim 41 is, therefore, DENIED.

XXXI. Claim 42: Unconstitutional Execution

In Claim 42, Petitioner alleges that he "functions at a level that is equivalent to mental retardation and he is therefore ineligible for execution under *Atkins*, 536 U.S. 304." (Pet. at 498.) He alleges that his execution would violate the Eighth Amendment.[14] (*Id.* at 499.)

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[14] The current term "intellectual disability" "describe[s] the identical phenomenon" as the former term "mental retardation." *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014).

In his merits briefing, Petitioner does not pursue the argument that *Atkins* must be extended to apply to functioning at a level that is equivalent to, but is not, intellectual disability. That argument is foreclosed by *Woodall*, 134 S. Ct. at 1706 ("Section 2254(d)(1) . . . does not require state courts to extend [Supreme Court] precedent or license federal courts to treat the failure to do so as error."). Rather, Petitioner argues in his briefing that he is intellectually disabled within the meaning of *Atkins*. The Court considers that argument here.

Petitioner also alleges in his Petition, but does not argue in merits briefing, that "the execution of Ochoa, who has long suffered from mental impairments that are equivalent to mental retardation, at a time when the mentally retarded are exempt from execution, would violate the Fourteenth Amendment's guarantees of equal protection of law and due process." (Pet. at 499

(continued...)

Petitioner raised Claim 42 in his 2003 state habeas petition, denied on December 21, 2010. (*See* Pet. at 498; Petr.'s Br. at 293; Lodg. D1 at 684-88; Lodg. D7.)

A. Legal Standard

The California Supreme Court explained in 2005 that "'[m]entally retarded' means 'the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18.'" *In re Hawthorne*, 35 Cal. 4th 40, 47 (2005) (quoting Cal. Penal Code § 1376(a)); *see also Moore v. Texas*, 137 S. Ct. 1039, 1045 (2017) (identifying, primarily from medical standards published in 2010 and 2013, the "generally accepted, uncontroversial intellectual-disability diagnostic definition, which identifies three core elements: (1) intellectual-functioning deficits (indicated by an IQ score approximately two standard deviations below the mean – i.e., a score of roughly 70 – adjusted for the standard error of measurement; (2) adaptive deficits (the inability to learn basic skills and adjust behavior to changing circumstances); and (3) the onset of these deficits while still a minor." (internal quotations and citations omitted));[15] *Cain v. Chappell*, 870 F.3d 1003, 1024 n.9 (9th Cir. 2017) (cautioning that "*Moore* is not an AEDPA case and thus does not address the difficult burden [petitioner] bears to prove his entitlement to relief under AEDPA

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[14] (...continued)
n.86.) Petitioner presents no clearly established federal law in support of his argument. *Cf. Atkins*, 536 U.S. at 306 ("Because of their disabilities in areas of reasoning, judgment, and control of their impulses," people with intellectual disability "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.").

[15] Petitioner argues that the "cut-off of age 18" used in *Hawthorne* is outdated and the *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition ("DSM-5") now refers to the "developmental period" instead. (Petr.'s Br. at 313.) The DSM-5 was published in 2013, after the state court's denial of Petitioner's claim in 2010. In addition, *Moore* considered the standards of the DSM-5 and continued to refer to the period "while still a minor." *Moore*, 137 S. Ct. at 1045. In any event, the California Supreme Court may have reasonably determined, as discussed below, that Petitioner failed to show the requisite onset using either period.

standards. Moreover, having been decided just [last] spring, *Moore* itself cannot serve as 'clearly established' law at the time the state court decided [petitioner's] claim").

B. Evidence and Analysis

The California Supreme Court may have reasonably concluded that Petitioner failed to demonstrate the onset of intellectual functioning and adaptive deficits *while still a minor*, or *during his developmental period*.

Petitioner states that "[i]n 1983, at age 15, Sergio had a Wide Range Achievement Test score of 78, within the lowest ten percent of the population." (Petr.'s Br. at 301; *see also* Pet. Ex. 201 ¶ 19 (identifying Petitioner's score as within the lowest seven percent of the population).) Adjusted for the standard error of measurement, Petitioner's score of 78 yields a range of 73 to 83. *Cf. Moore*, 137 S. Ct. at 1049; *Hawthorne*, 35 Cal. 4th at 49 (citing authority that IQ scores are considered to have a five-point measurement error).

To show intellectual functioning and adaptive deficits during his developmental period, Petitioner points to evidence from Dr. Patricia Pérez-Arce that his:

> 'ability to problem solve and his general comprehension of social conventions were both in the mildly impaired range; his ability to analyze two or more pieces of information in order to understand their commonalities or similarities was in the borderline to low average range; and his non-verbal reasoning skills were in the mildly impaired to borderline range.' [Dr. Pérez-Arce] opined that 'Ochoa suffers from a persistent, life-long deficit in understanding the more complex and abstract mathematical concepts such as multiplication and division with 3-digit numbers, fractions, and decimals[, an] impairment plac[ing] significant limitations on Mr. Ochoa's capacity to perform a number of jobs.' She also found that Ochoa's 'visual acuity and visual-spatial memory are both significantly impaired and, thus, his ability to learn through observation and reasoning would have been significantly limited.' [¶] Based on her neuropsychological testing and clinical judgment, Pérez-Arce

> concluded that in real-life situations, Ochoa's significant cognitive deficits precluded him from being able to put together various aspects of social situations in a coherent manner, and understand how they related to each other.'

(Petr.'s Br. at 302-03 (quoting Pet. Ex. 201 ¶¶ 29, 30, 32).) Dr. Pérez-Arce provided those opinions in the context of Petitioner's "deficits in a number of . . . sub-tests" of the "Wechsler Adult Intelligence Scale III, [on which] Mr. Ochoa's Verbal I.Q. was 79, in the borderline to low average range of Intelligence" at an unspecified age. (Pet. Ex. 201 ¶ 29.) Adjusted for the standard error of measurement, Petitioner's score of 79 yields a range of 74 to 84.

Petitioner also relies on evidence that his:

> 'school records document that he was below grade level in most academic subjects in the fourth and sixth grades. In 1975, at age 8, Sergio needed improvement in listening and following directions. His cumulative record card for elementary school documented his need to develop math and language skills, and the fact that he was working below grade level but trying hard. Sergio had difficulty using time well unless directed and had very poor personal hygiene. Sergio had consistently failing grades from age 12 to age 14. In 1983, at age 15, Sergio had a Wide Range Achievement Test score of 78, within the lowest 7 percent of the population. At age 24, Sergio Ochoa had a verbal I.Q. of 74, in the low Borderline to Mildly Mentally Retarded/Extremely Low range.' . . .
>
> Adults with children contemporaries of Ochoa describe him as 'very slow' even as an eight[-]year-old child. Ochoa 'wasn't very smart in comparison to other kids his age. Even the way he walked was slow.' '[Sergio] was [always] very quiet, more than normal. He wasn't very alert.' Adults 'could see that he didn't understand a lot of things.[']' Ochoa 'was so slow, he was a boy that was easy to fool.'
>
> Children his own age thought Ochoa was 'slow.' As a child, Ochoa 'couldn't read.' When asked to read, Ochoa would get 'really nervous and tried to change the subject' or 'pretend[ed] he was reading but just made up things that weren't on the page. He would always avoid anything that involved reading[].' Ochoa 'couldn't spell either.' This

> was at an age when his cohorts knew how to read and write.
>
> Ochoa 'didn't do well in school because he didn't understand what was going on.' When other children would try to explain something like a math problem, Ochoa 'couldn't follow what [his cohorts were] talking about; he couldn't even do basic math, like adding.' . . .
>
> Ochoa's first and second grade teacher[] describes Ochoa as 'a well-mannered child who was prone to daydreaming; a follower, not a leader.' . . .
>
> As a child, Ochoa had 'a big problem with [. . .] personal hygiene. It seemed like [he] never bathed or brushed [his] teeth.' Ochoa was 'teased a lot at school because of how dirty' he was, and because he was 'mentally slow.' 'The kids at school made fun of [him] because of [his] dirty teeth and the[] way [he] smelled.' Ochoa was not only a bed wetter, he also peed on himself and his clothes sometimes 'smell[ed] like urine.'
>
> As a teenager, Ochoa had problems adding money. 'He might be able to add two plus two but if you asked him to add 13 and 17 he couldn't do it.' One 'could tell just by looking at [Ochoa] that he was slow or there was something wrong with him. His clothes never looked quite right. He looked messy[.]'

(Petr.'s Br. at 304-07 (quoting Pet. Ex. 9 ¶¶ 9-10, 25; Pet. Ex. 11 ¶¶ 14-17, 20; Pet. Ex. 86 ¶¶ 2-3, 8; Pet. Ex. 189 ¶ 8; Pet. Ex. 201 ¶ 19).)

Dr. Pérez-Arce found that Petitioner's:

> neuropsychological test results showed a significant pattern of brain dysfunction laterized [sic] to the right hemisphere of Mr. Ochoa's brain in which he scored within or above the normal range in a number of tests and in the borderline to moderate range of impairment in others. In interpreting these test results, mild levels of impairment denote significant impairments. For example, the great majority of mentally retarded individuals test in the mild range of mental retardation, yet mildly mentally retarded individuals fall within the lowest 2% of the population in terms of intelligence testing and suffer

> significant adaptive deficits that interfere with their normal functioning.
>
> The results of the neuropsychological measures administered to Mr. Ochoa revealed that he has significantly impaired abilities in auditory and tactile perception with the left side of his body, in visual-spatial memory functions, in non-verbal reasoning, and in verbally mediated conceptual thinking and problem solving. Using the terminology employed by the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision* ("DSM-IV-TR"), Mr. Ochoa suffers from Cognitive Disorder Not Otherwise Specified (294.9). In essence, Mr. Ochoa has difficulty perceiving, understanding, and recalling information received by the right hemisphere of his brain (from the left side of his body) through physical touch and auditory stimulation, in integrating visuospatial information, in understanding the meaning of abstract concepts, and in spontaneously analyzing and solving problems through reasoning. Mr. Ochoa's mathematical abilities are at the 5th grade level. He can divide up to 2-digit numbers in the numerator and 1-digit in the denominator. He cannot multiply by 2-digit numbers, nor he can perform computations involving decimals or fractions.

(Pet. Ex. 201 ¶¶ 24-25 (internal citation edited).)

Dr. Pérez-Arce concluded that Petitioner suffered from Cognitive Disorder Not Otherwise Specified (294.9 in the DSM-IV-TR). She did not conclude that Petitioner suffered from what was then called Mental Retardation (317, 318.0, 318.1, 318.2, or 319 in the DSM-IV-TR). *See* Am. Psychiatric Ass'n, DSM-IV-TR, Appendix F: Numerical Listing of DSM-IV-TR Diagnoses and Codes. She concluded that Petitioner's "neuropsychological test results showed a significant pattern of brain dysfunction laterized [sic] to the right hemisphere of Mr. Ochoa's brain in which he scored within or above the normal range in a number of tests and in the borderline to moderate range of impairment in others." (Pet. Ex. 201 ¶ 24.) Although she cautioned that "the great majority of mentally retarded individuals test in the mild range of mental retardation, yet mildly mentally retarded individuals fall within the lowest 2% of the population in terms of intelligence

testing and suffer significant adaptive deficits that interfere with their normal functioning," (*id.*), she did not identify Petitioner as falling within the lowest 2% of the population in intelligence testing with significant adaptive deficits before the age of 18 or during the developmental period.

Even in light of the evidence of adaptive deficits Petitioner presents, Petitioner's IQ score during his developmental period, especially taken in the context of Dr. Pérez-Arce's expert opinion concluding that Petitioner suffered not from intellectual disability but from Cognitive Disorder Not Otherwise Specified, provides a reasonable justification for the California Supreme Court to have found no onset of intellectual functioning deficits and adaptive deficits during Petitioner's developmental period or before the age of 18. Claim 42 is DENIED.

XXXII. Claim 43: Competency to be Executed

In Claim 43, Petitioner asserts that he is incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). (Pet. at 499-500.) Petitioner states that because no execution date is imminent, his claim is not yet ripe, and he presents it to preserve it for later review. (*Id.* at 500 (citing *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998)).)

Because Petitioner's "execution [is] not imminent and therefore his competency to be executed [can]not be determined at th[is] time," *Martinez-Villareal*, 523 U.S. at 644-45, Claim 43 is DISMISSED WITHOUT PREJUDICE.

XXXIII. Order

Claims 1, 4, 5, 7-9, 11-13, 16, 17, 18(B)(2), 18(B)(3), 18(B)(6), 19, 21-24, 26, 28-31, 33-37, 39, 41, 42, and the remaining portions of Claims 10, 20, and 40 are DENIED. Claims 38 and 43 are DISMISSED WITHOUT PREJUDICE. The Court DENIES the First Amended Petition for Writ of Habeas Corpus.

Pursuant to 28 U.S.C. § 2253(c)(2), the Court ISSUES a Certificate of Appealability as to Claims 5 and 1(C)(7), concerning the hypothethical the prosecutor used when questioning jurors on voir dire.

IT IS SO ORDERED.

Dated: 8/13/2018

s/ RONALD S.W. LEW

RONALD S. W. LEW

United States District Judge

APPENDIX C

JS-6

cc: Director of Courtroom Operations, Chief Deputy of Judical Services, Manager Legal Services Unit, Attorney Supervisor of the Legal Services Unit, Clerk of Court.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SERGIO OCHOA, Petitioner, v. RONALD DAVIS, Warden of California State Prison at San Quentin, Respondent.	CASE NO. CV 02-7774 RSWL **DEATH PENALTY CASE** JUDGMENT

Pursuant to the Order Denying First Amended Petition for Writ of Habeas Corpus issued simultaneously with this Judgment, IT IS HEREBY ORDERED AND ADJUDGED that Claims 1, 4, 5, 7-9, 11-13, 16, 17, 18(B)(2), 18(B)(3), 18(B)(6), 19, 21-24, 26, 28-31, 33-37, 39, 41, 42, and the remaining portions of Claims 10, 20, and 40 are denied, that Claims 38 and 43 are dismissed without prejudice, that the Petition is denied, and that judgment is entered in favor of Respondent and against Petitioner. The Order constitutes final disposition of the Petition by the Court.

The Clerk is ordered to enter this judgment.

IT IS SO ORDERED.

Dated: 8/13/201___, 2018.

s/ RONALD S.W. LEW

RONALD S. W. LEW
United States District Judge

The Clerk is ordered to enter this judgment.

IT IS SO ORDERED.

Dated: _____ ___, 2018.

RONALD S. W. LEW
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SERGIO OCHOA,

Petitioner,

v.

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

Respondent.

CASE NO. CV 02-7774 RSWL

DEATH PENALTY CASE

ORDER DENYING IN PART AND GRANTING IN PART MOTION FOR RECONSIDERATION

On September 9, 2014, Petitioner filed a Motion for Reconsideration regarding the Court's Order on Respondent's Motion to Dismiss. Petitioner asks the Court to reconsider its decision of July 8, 2014 dismissing Claims 2; 3; 6; 10(b)(2), (3), (4), (5) as to Montes, and (6) as to Montes and Soriano; 14; 15; 18(b)(1), (2) ¶¶ 739-41, (4), and (5); 20 (a)-(c), (e)-(h), (j)-(m), (p), (q), (s), (t), (v)-(x), (bb), (cc); 24(b)(1), (2), and (4), ¶¶ 892 and 894 as to prosecutorial misconduct in closing argument on lack of remorse, the shooter's intended target in the Castro homicide, and office standards for death penalty cases, and ¶ 894 n.40; 25; 27; 32; and 40 as to inadequate review of the first state habeas petition. (Order Granting in Part and Denying in Part Motion to Dismiss, July 8, 2014 ("Order") at 30.)

Petitioner argues that the Court:

> (a) "failed to consider material facts regarding the status of the state court proceedings at the time Ochoa moved for a stay," regarding Claims 2, 20(a), and 20(x) (Mot. for Reconsideration at 5, 5 n.3);
>
> (b) "failed to consider the interrelationship between Ochoa's claims of ineffective assistance of counsel and other claims for relief in the FAP," regarding Claims 6; 14; 15; 18(b)(1), (2) ¶¶ 739-41, (4), and (5); 20(bb)-(cc); and 25 (*id.* at 9); and
>
> (c) "failed to note that some of the[] claims [dismissed as untimely] were previously raised on direct appeal or in Ochoa's initial state habeas petition, where they were denied on the merits," regarding Claims 20(t), 20(v), and 24(B)(1), (2), (4), and the dismissed portions of ¶¶ 892 and 894. (*Id.* at 10.)

In addition, Petitioner argues regarding Claims 2; 20(a), (b), (c), (f), (h), (k)-(m), (s), (x); and 40 as to the adequacy of state habeas review, as a whole, that the Court should reconsider its previous Order and "find that Ochoa satisfies the *Rhines* standard because he had good cause for his failure to exhaust, his mixed petition contained at least one unexhausted, colorable federal claim, and he was diligent in presenting his then unexhausted claims to the state court." (*Id.* at 8 (citing *Rhines v. Weber*, 544 U.S. 269 (2005)).)

A. Status of the State Court Proceedings

First, Petitioner argues that the Court overlooked the material fact that:

> [i]n 2004, when Ochoa moved for a stay pending exhaustion, the California Supreme Court had not yet ruled on Ochoa's exhaustion petition. There was no state court decision on any of Ochoa's unexhausted claims. Accordingly, Ochoa would not have been able to

> demonstrate that any of his unexhausted claims were 'potentially meritorious under § 2254(d),' in 2004, before the state court acted on his exhaustion petition.

(Mot. for Reconsideration at 5.) Petitioner argues that "[n]othing in *Rhines* suggests, let alone holds, that a petitioner must meet § 2254(d) before he is entitled to a stay to exhaust state remedies." (*Id.*) Petitioner contends that as a result, Claims 2, 20(a), and 20(x) should not have been dismissed as plainly meritless. (*Id.*)

To the contrary, the Court was aware that Petitioner's exhaustion petition had not yet been decided in 2004. (*See* Order at 3-4 (discussing the California Supreme Court's decision on Petitioner's exhaustion petition on December 21, 2010, *In re Ochoa*, Case No. S121184, at 1 (Cal. Dec. 21, 2010)).) The Court held that Claims 2, 20(a), and 20(x) were not potentially meritorious because the Vienna Convention and other sources of international law upon which Petitioner relies in the claims "do[] not grant petitioners judicially enforceable rights." (Order at 25; *see id.* at 26-28 (collecting cases).) Claims based upon sources of international law that do not create judicially enforceable rights are not potentially meritorious, and a stay for exhaustion is not appropriate under *Rhines*. *See Rhines*, 544 U.S. at 277 (holding that when a petitioner's "unexhausted claims are plainly meritless," "the district court would abuse its discretion if it were to grant him a stay"). Petitioner has, therefore, failed to show that his unexhausted Claims 2, 20(a), and 20(x) should not be dismissed. *See Jackson v. Roe*, 425 F.3d 654, 656 (9th Cir. 2005) (holding that where the district court "failed to apply the standards regarding staying a mixed habeas petition enunciated in *Rhines* – quite understandably, as [the stay denial was issued] almost three years prior to the decision in *Rhines*," the court must do so in deciding a motion to dismiss).

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B. Ineffective Assistance of Counsel

Second, Petitioner argues that the Court failed to consider material facts in the form of allegations of ineffective assistance of counsel, which he contends are sufficient to excuse any procedural defaults. (Mot. for Reconsideration at 9-10.) Petitioner makes this argument regarding Claims 6; 14; 15; 18(b)(1), (2) ¶¶ 739-41, (4), and (5); 20(bb)-(cc); and 25.

1. Legal Standard

Prior counsel's failure to raise a claim does not, in itself, constitute cause to excuse a procedural default. Rather, "'cause' must be something *external* to the petitioner, something that cannot fairly be attributed to him. . . . [C]ounsel's 'ignorance or inadvertence' cannot constitute 'cause' under this rule." *Detrich v. Ryan*, 740 F.3d 1237, 1243 (9th Cir. 2013) (discussing standard applicable to procedural default of all claims other than ineffective assistance of counsel) (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991); emphasis in original; ellipsis omitted). Adequate cause for excusing a procedural default "must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). "[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it" does not excuse a procedural default, *Carrier*, 477 U.S. at 486, nor does "default of a constitutional claim by counsel pursuant to a trial strategy or tactical decision . . . ." *Id.* at 485 (discussing the implications of *Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977)).

Similarly, as the Supreme Court explained in *Smith v. Robbins*, 528 U.S. 259 (2000):

> [A]ppellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal. . . . [I]t is still possible to bring a *Strickland* claim based on counsel's failure to

> raise a particular claim, but it is difficult to demonstrate that counsel was incompetent. *See, e.g.*, *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986) ('Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome').

Id. at 288 (internal citation edited). "Appellate counsel will . . . frequently remain above an objective standard of competence . . . because she declined to raise a weak issue." *Miller v. Keeney*, 82 F.2d 1428, 1434 (9th Cir. 1989) (because petitioner "had only a remote chance of obtaining reversal [on the claim], . . . [a]ppellate counsel was not ineffective for failing to raise the issue").

2. Analysis

As Respondent argues, Petitioner made no assertion in his Opposition to Respondent's Motion to Dismiss or in the above claims themselves that ineffective assistance of counsel should excuse any procedural default of the claims. (*See* Opp. to Mot. for Reconsideration at 5 ("Now, for the first time, Petitioner attempts to argue that claims of attorney ineffectiveness . . . should have been relied upon by this Court to establish cause. . . . Petitioner must actually make such a showing at the appropriate time – i.e., when he opposed the motion to dismiss").) As to Claim 6, Petitioner now cites his allegation before this Court at page 89 of his First Amended Petition. (*See* Mot. for Reconsideration at 9.) There, Petitioner makes the conclusory allegation that "*[t]o the extent* these excusals [of jurors by the prosecutor] were based upon defense counsel's failure to investigate, adequately object and/or rehabilitate the prospective jurors, trial counsel fell below the standard expected of competent counsel in capital cases." (First Am. Pet. at 89 (emphasis added).) Petitioner's speculative, conclusory allegation does not satisfy the standard set forth in *Coleman* and *Carrier*. It fails, for example, to exclude the possibility that defense counsel made a strategic or tactical decision not to challenge the prosecutor's excusal of the jurors at issue. The Court therefore

maintains its decision as to Claim 6.

Regarding Claim 18(b)(2) ¶¶ 739-41, Petitioner now points to his allegation before this Court in Claim 1(c)(14) of his First Amended Petition that trial counsel was ineffective for failing to object to prosecutorial misconduct in closing argument and rebuttal. (*See* Mot. for Reconsideration at 10; First Am. Pet. at 96-97.) There, Petitioner makes a more detailed claim of ineffective assistance of counsel than that discussed above. Although the Court declines to hold that Petitioner's allegations show good cause for his procedural default of Claim 18(b)(2) ¶¶ 739-41, in the interest of judicial economy the Court will consider the issue when deciding the merits of Claim 1(c)(14) itself.

Regarding Claims 14, 15, 18(b)(1), (4), and (5), 20(bb)-(cc), and 25, Petitioner now relies upon the allegation in his First Amended Petition that:

> appellate counsel herein rendered ineffective assistance of counsel in unreasonably failing to investigate, research, prepare or present numerous issues which could have, and should have, been raised on appeal hereto, or been raised pursuant to the state appellate and habeas corpus proceedings. Appellate counsel inadequately presented and argued issues and failed to recognize and raise several valid constitutional issues apparent from the record, or apparent upon reasonable an adequate investigation. [¶] *To the extent* that appellate counsel failed to raise any of the claims presented in this petition, that failure fell below the recognized standard of care and prejudiced Ochoa.

(First Am. Pet. at 494-95 (emphasis added).) Petitioner fails to make a detailed allegation of how and why appellate counsel was ineffective for failing to raise each claim at issue, however. The speculative, blanket allegation Petitioner makes regarding a number of diverse claims and subclaims does not demonstrate ineffective assistance of appellate counsel, and the Court maintains its prior decision as to those claims.

C. Claims Previously Raised

Third, Petitioner argues that the Court "failed to note that some of the[] claims [dismissed as untimely] were previously raised on direct appeal or in Ochoa's initial state habeas petition, where they were denied on the merits." (Mot. for Reconsideration at 10.) Petitioner addresses that argument toward Claims 20(t), 20(v), and the dismissed portions of 24(b). (*Id.* at 10-12.)

Petitioner contends that he raised Claim 20(t) as Claim 8 in his first state habeas petition, filed February 20, 2001. (*Id.* at 3, 11); *see* Docket, *In re Ochoa*, Cal. Case No. S095304. The record shows otherwise. By his own statement in the First Amended Petition, "Ochoa fairly presented this claim to the California Supreme Court in Claim Twenty of his [second] state habeas corpus petition filed on December 15, 2003." (First Am. Pet. at 332.) Claim 8 in Petitioner's first state habeas petition alleges that "[a]s a result of defense counsel's omissions, the prosecutor had free rein to portray Petitioner in a false light." (Pet. for Writ of Habeas Corpus, Case No. S095304, at 131.) Neither Claim 8 nor the claims it incorporates (*see id.* at 130) alleges any trial court error, as does Claim 20(t) in the First Amended Petition. (*See* First Am. Pet. at 332-34.) The Court thus maintains its decision on Claim 20(t).

Next, Petitioner argues that he raised "[a]spects" of Claim 20(v) in his first state habeas petition. (Mot. for Reconsideration at 11.) Again, by Petitioner's own statement in his First Amended Petition, he "fairly presented this claim to the California Supreme Court in Claim Twenty of his [second] state habeas corpus petition filed on December 15, 2003." (First Am. Pet. at 332.) Petitioner's assertion that he previously presented only "aspects" of the claim does no more to change the Court's decision on Claim 20(v).

As to the subclaims of Claim 24 at issue, Petitioner cites portions of his opening brief on appeal that fairly present the claims. Petitioner failed to bring this information to the Court's attention in opposing Respondent's Motion to Dismiss.

(*See* Order at 6 ("Petitioner does not contest the identification of these claims as untimely (*cf.* Opp. at 28-29)"); Opp. to Mot. for Reconsideration at 6 ("Petitioner never made this argument when opposing the Motion to Dismiss").) Nevertheless, the prior presentation is stated in the First Amended Petition (*see* First Am. Pet. at 345 ("Ochoa fairly presented this claim to the California Supreme Court in Claim XIV of Appellant's Opening Brief")), and Petitioner is correct that Claim 14 fairly presents the claims.[*] (*See* Appellant's Opening Brief, *People v. Ochoa*, Case No. S030416, at 235-49 (Cal. May 20, 1999); First Am. Pet. at 346-58, 363-70, 373-75.) Indeed, Respondent acknowledges that "Claims 24(B)(1), (2), and (4), as well as paragraphs 892 and 892 of Claim 24, were all denied on appeal, as Petitioner contends." (Opp. to Mot. for Reconsideration at 6.) Thus, as the Court explained about other claims raised on appeal but later held by the California Supreme Court to be untimely, the state court's untimeliness bar does not preclude federal habeas review. (*See* Order at 4-5); *Ylst v. Nunnemaker*, 501 U.S. 797, 804 n.3 (1991) ("Since a later state decision based upon ineligibility for further state review neither rests upon procedural default nor lifts a pre-existing procedural default, its effect upon the availability of federal habeas is nil"). Respondent agrees to "include those subclaims in the court-ordered briefing of remaining claims under 28 U.S.C. § 2254(d)." (Opp. to Mot. for Reconsideration at 6.) Accordingly, the Court now denies Respondent's motion to dismiss Claim 24(b)(1), (2), and (4), and ¶¶ 892 and 894 as to prosecutorial misconduct in closing argument on lack of remorse, the shooter's intended target in the Castro homicide, and office standards for death penalty cases.

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[*] One exception is found in Claim 24 ¶ 894 n.40, which is not presented in Claim 14 of Appellant's Opening Brief. That footnote restates the claim of ineffective assistance of counsel alleged in Claim 1(c)(22) of the First Amended Petition. As explained in the Court's prior Order, the Court will give further consideration to any exhaustion and/or procedural bar issues as to Claim 1 (and Claim 24 ¶ 894 n.40) when considering the merits of the claim. (*See* Order at 30-31.)

D. Reconsideration of Other Claims

Finally, as to Claims 2; 20(a), (b), (c), (f), (h), (k)-(m), (s), and (x); and Claim 40 as to the adequacy of state habeas review, Petitioner asks the Court to exercise its discretion to reconsider its Order even if "the requirements of Local Rule 7-18 have not been satisfied . . . ." (Mot. for Reconsideration at 7-8; *see* Local R. 7-18 (providing grounds on which a party may make a motion for reconsideration).) The Court declines to alter its dismissal of Claims 2; 20(a), (b), (c), (f), (h), (k)-(m), (s), and (x); and Claim 40.

E. Order

The Court will consider whether Petitioner's allegations of ineffective assistance of counsel show good cause for his default of Claim 18(b)(2) ¶¶ 739-41 when deciding the merits of the related ineffective assistance claim. The Court will also consider any exhaustion and/or procedural bar issues as to Claim 24 ¶ 894 n.40 when considering the merits of the claim. In addition, Respondent's motion to dismiss Claim 24(b)(1), (2), and (4), and ¶¶ 892 and 894 as to prosecutorial misconduct in closing argument on lack of remorse, the shooter's intended target in the Castro homicide, and office standards for death penalty cases is now DENIED. In all other respects, Petitioner's Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

Dated: 9/29/2014.

RONALD S.W. LEW

HON. RONALD S. W. LEW
Senior U.S. District Judge

APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SERGIO OCHOA,

Petitioner,

v.

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

Respondent.

CASE NO. CV 02-7774 RSWL

DEATH PENALTY CASE

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

Respondent filed a Motion to Dismiss Identified Grounds of First Amended Petition for Writ of Habeas Corpus, seeking to dismiss (1) claims that are procedurally barred because they are untimely; (2) claims that are procedurally barred because no objection was made at the time of trial; (3) claims that are procedurally barred because they could have been, but were not, raised on appeal; and (4) claims that were unexhausted at the time they were filed in Petitioner's 2003 "mixed" petition. (Mot. to Dismiss, Docket No. 116, at 21-29.) The Court has reviewed the parties' briefing and the claims at issue. Respondent's Motion to Dismiss is granted in part and denied in part for the reasons set forth below.

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I. Procedural Bars

"A federal habeas court will not review a claim rejected by a state court if the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Walker v. Martin*, 131 S. Ct. 1120, 1127 (2011) (internal quotation and alteration omitted). The state law ground may be "a procedural barrier to adjudication of the claim on the merits." *Id.* "Accordingly, absent showings of cause and prejudice, federal habeas relief will be unavailable when (1) a state court has declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement, and (2) the state judgment rests on independent and adequate state procedural grounds." *Id.* (internal quotations and alteration omitted). The state procedural ground is independent if it is not "interwoven with federal law" or dependent upon a federal constitutional ruling, and the "state court makes clear that it is resting its decision" on state law. *La Crosse v. Kernan*, 244 F.3d 702, 704 (9th Cir. 2001) (internal quotation omitted); *Coleman v. Thompson*, 501 U.S. 722, 735 (1991) (holding that a state procedural ground is independent where it does not "fairly appear[] to rest primarily on federal law, or to be interwoven with the federal law" and its non-reliance upon federal law is "clear from the face of the opinion" (internal quotation omitted)). An adequate procedural ground is a state rule that is "firmly established and regularly followed." *Martin*, 131 S. Ct. at 1127 (internal quotation omitted).

A. Untimeliness

1. Legal Standard

Under California law:

> a habeas corpus petition is not entitled to a presumption of timeliness if it is filed more than 90 days after the final due date for the filing of appellant's reply brief on the direct appeal. In such a case, to avoid the bar of untimeliness with respect to each claim, the petitioner has

> the burden of establishing (i) absence of substantial delay, (ii) good cause for the delay, or (iii) that the claim falls within an exception to the bar of untimeliness.

In re Robbins, 18 Cal. 4th 770, 780 (1998).

The United States Supreme Court in *Martin* considered the adequacy of California's timeliness requirement as "framed . . . for habeas petitioners in a trilogy of cases," 131 S. Ct. at 1128, namely, *In re Clark*, 5 Cal. 4th 750 (1993), *Robbins*, 18 Cal. 4th 770, and *In re Gallego*, 18 Cal. 4th 825 (1998). The Supreme Court held in *Martin* that California's timeliness requirement qualifies as an adequate state ground to bar federal habeas relief. The Ninth Circuit held in *Bennett v. Muller* that California's untimeliness procedural bar was independent of federal law. 322 F.3d 573, 582-83 (9th Cir. 2003) ("[T]he California Supreme Court's post-*Robbins* denial of [petitioner's] state petition for lack of diligence (untimeliness) was not interwoven with federal law and therefore is an independent procedural ground").

2. Procedural Background

Because Petitioner's second state habeas petition was filed in 2003, and his reply brief on direct appeal was due and filed in 2000, *see* Docket, *People v. Ochoa*, Case No. S030416 (Cal. Oct. 27, 2000; Nov. 8, 2000), the petition was not entitled to a presumption of timeliness.

Respondent asserts that the California Supreme Court found untimely state claims 2, 3, 5-8, 10 (to the extent it claims the statements of Montes, Maurice Soriano, and Magallanes-Martinez were improperly obtained), 11-13, 15, 16, 18 (to the extent it alleges Petitioner is factually innocent of the Castro murder), 19, 20 (subclaims b, c, e-h, j-m, o-y, bb, and cc), 24-26, 27 (to the extent there are new allegations of ineffective assistance of counsel that could have been raised in the first petition), 28 (subclaims a-d, h, i, and w), 31-33, 41 (except to the extent it alleges prior habeas counsel was ineffective, or the California Supreme Court did

not conduct proper review of the first habeas corpus petition), and 48-50. (Mot. at 24;) *see also In re Ochoa*, Case No. S121184, at 1 (Cal. Dec. 21, 2010).

In the same order, however, the California Supreme Court held that a number of those claims were "raised and rejected on appeal," citing, *inter alia*, *In re Waltreus*, 62 Cal. 2d 218, 225 (1965). *In re Ochoa*, Case No. S121184, at 1 (Cal. Dec. 21, 2010). The court so held as to state claims 2, 3, 6-8, 11-13, 16 (to the extent it alleges the prosecutor committed misconduct by falsifying facts about the Castro homicide and authenticating the veracity of Mandich), 19, 20 (subclaims b, c, f, h, k-m, and s), 24, 25 (except to the extent it alleges ineffective assistance of counsel and that the prosecutor committed misconduct during closing argument by arguing petitioner lacked remorse, falsely stating the shooter's intended target in the Castro homicide, and improperly suggesting the case met her office's higher standards for cases in which the death penalty is sought), 26, 28 (subclaims b, d, and h), 31, and 32.

When the California Supreme Court:

> impose[s], as to a given claim or subclaim, *both* the bar of *Waltreus and* the bar of untimeliness, this signifies that [it has] determined that the claim or subclaim was raised and rejected on appeal, but that its re-presentation in the petition for a writ of habeas corpus also is untimely. [The court's] imposition of the bar of *Waltreus*, in this context, signals that the claim has been exhausted in timely fashion on appeal.

Robbins, 18 Cal. 4th at 814 n.34 (emphasis in original; citation omitted). Thus, "*Waltreus* merely bars relitigation in state habeas proceedings of claims already litigated on direct appeal. If the claim barred from relitigation by *Waltreus* has already been decided by the California Supreme Court, that claim is properly exhausted for federal habeas corpus review" and is not barred from federal consideration. *Carter v. Giurbino*, 385 F.3d 1194, 1198 (9th Cir. 2004) (internal citations omitted); *see also Ylst v. Nunnemaker*, 501 U.S. 797, 804 n.3 (1991)

(holding that a rule "preventing the relitigation on state habeas of claims raised on direct appeal . . . [does not] rest[] upon procedural default . . . , [and] its effect upon the availability of federal habeas is nil").

Accordingly, the following state claims, and their corresponding First Amended Petition Claims (*see* Reply at 1-2), are at issue as untimely for purposes of federal habeas review:

State Claim	**First Amended Petition Claim**
5	3
10, to the extent it claims the statements of Montes, Maurice Soriano, and Magallanes-Martinez were improperly obtained	10(B)(2), (3), (4), (5) as to Montes, (6) as to Montes and Soriano
15	"not included in the FAP" (Reply at 1.)
16, except to the extent it alleges the prosecutor committed misconduct by falsifying facts about the Jose Castro homicide and authenticating the veracity of David Mandich	18(B)(1), (4), (5)[1]
18, to the extent it alleges Petitioner is factually innocent of the Castro murder	"not included in the FAP" (Reply at 2.)
20 e, g, j, o-r, t-w, bb, cc[2]	20(e), (g), (j), (p), (q), (t), (v), (w), (bb), (cc). (State claims 20 d, o, r, u, y, and z are not included in the FAP.)

[1] As Respondent recognizes, the California Supreme Court addressed the claim now pleaded as 18(B)(2) on direct appeal. (*See* Mot. to Dismiss at 28; Reply at 11.) Claim 18(B)(2) is discussed below. (*See infra* pp. 18-21.)

[2] The California Supreme Court explicitly excluded 20 x from its denial of claims as untimely. *In re Ochoa*, Case No. S121184, at 1 (Cal. Dec. 21, 2010) ("All claims are denied as untimely except claims . . . 20 (subclaim[] . . . x . . .)").

25, to the extent it alleges ineffective assistance of counsel, and to the extent it alleges that the prosecutor committed misconduct during closing argument by arguing petitioner lacked remorse, falsely stating the shooter's intended target in the Castro homicide, and improperly suggesting this case met her office's higher standards for cases in which the death penalty is sought	24[3](B)(1), (2), and (4); ¶¶ 892 and 894 to the extent they allege the prosecutor committed misconduct during closing argument by arguing petitioner lacked remorse, falsely stating the shooter's intended target in the Castro homicide, and improperly suggesting this case met her office's higher standards for cases in which the death penalty is sought; and ¶ 894 n.40.
27, to the extent there are new allegations of ineffective assistance of counsel that could have been raised in the first petition	1, to the extent there are new allegations of ineffective assistance of counsel that could have been raised in the first petition
28 a, c, i, w	27
33	32
41, except to the extent it is alleged prior habeas corpus counsel was ineffective, or the California Supreme Court did not conduct proper review of the first habeas corpus petition	40, except to the extent it is alleged prior habeas corpus counsel was ineffective, or the California Supreme Court did not conduct proper review of the first habeas corpus petition
48	14
49	15
50	25

Petitioner does not contest the identification of these claims as untimely (*cf.* Opp. at 28-29), but argues that (a) California's untimeliness bar discriminates against federal claims and claimants (*id.* at 29-42); (b) the bar is not independent

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[3] Respondent's identification of FAP Claim 25 appears to be a typographical error. (*See* Reply at 2.) State Claim 25 is pleaded as FAP Claim 24. (*See* First Am. Pet. ("Pet.") at 345; *see also id.* at 346-76.)

of federal law (*id.* at 42-47); and (c) Petitioner shows cause and prejudice for his procedural default (*id.* at 47-53).

3. Discrimination against Federal Claims

Petitioner first argues that California's untimeliness bar discriminates against federal claims because it serves no substantial state interest. (*Id.* at 33-41.) Petitioner asserts that the "California Supreme Court's nearly uniform practice of adjudicating the merits and procedural bars of capital habeas petition[s] serves no purpose other than to deter the federal courts from reviewing the merits of capital habeas claims." (*Id.* at 35 (citing *Gallego*, 18 Cal. 4th at 852 (Brown, J., concurring and dissenting)).) He contends that upholding the state procedural bar would "[a]llow[] the California Supreme Court to thwart federal review through the imposition of superfluous defaults on claims denied on the merits . . . ." (*Id.* at 39.) Petitioner further argues that "[i]f the federal courts' purpose in honoring state procedural bars in habeas corpus cases is to advance comity, it makes little sense for federal courts to refrain from reaching the merits of federal constitutional claims in capital habeas proceedings, when the California Supreme Court almost always reaches the merits itself." (*Id.* at 42.)

Writing for the court in *Robbins*, a capital habeas case, Chief Justice George responded to Justice Brown's opinion in *Gallego*, upon which Petitioner relies:

> Justice Brown's concurring and dissenting opinion in *In re Gallego* observes that our denial orders frequently address the merits 'even when procedural bars may apply' and that because 'the additional time necessary to discuss possible defaults and to formulate corresponding orders advances institutional goals marginally, if at all, [that practice] can usefully be eliminated from the process.' This statement is flawed in fundamental respects.
>
> First, . . . [i]n capital habeas corpus matters, although our orders frequently resolve claims both on procedural

> grounds and on the merits, we have on occasion denied claims solely on procedural grounds. . . .
>
> Second, and most significantly, imposition of procedural bars substantially advances important institutional goals, which are overlooked by the concurring and dissenting opinion in *In re Gallego*. The concurring and dissenting opinion suggests that our bars exist merely as a means of promoting finality by insulating our judgments from federal court review. The basis and continuing import of our procedural bars are something quite different, however. Decades before development of the federal case law discussed in the concurring and dissenting opinion, we recognized and imposed procedural bars as a means of protecting the integrity of our own appeal and habeas corpus process. Imposition of these procedural bars, including the untimeliness bar, continues to advance, among other institutional goals, the integrity of our appeal and habeas corpus process. *With specific regard to the bar of untimeliness in capital litigation*, imposition of the bar has had the documented and salutary effect of promoting compliance with state habeas corpus procedures calling for prompt investigation and submission of habeas corpus claims. Clearly, that institutional interest would suffer were the timeliness requirement to be ignored, as urged by the concurring and dissenting opinion.

Robbins, 18 Cal. 4th at 778 n.1 (emphasis altered; citations omitted). The court in *Robbins* was thus clear that the imposition of the untimeliness procedural bar in capital habeas matters serves significant state interests, as it does in non-capital habeas matters.

Likewise, the Supreme Court held in *Martin* that:

> a state procedural bar may count as an adequate and independent ground for denying a federal habeas petition even if the state court had discretion to reach the merits despite the default. Guided by that decision, we hold that

> California is not put to the choice of imposing a specific deadline for habeas petitions . . . or preserving the flexibility of current practice, but only at the cost of undermining the finality of state court judgments.

Martin, 131 S. Ct. at 1125 (internal quotation omitted). Although the Court observed that petitioner Martin "has not alleged that California's time bar, either by design or in operation, discriminates against federal claims or claimants," 131 S. Ct. at 1125, the Court also noted that:

> [t]oday's decision, trained on California's timeliness rule for habeas petitions, leaves unaltered this Court's repeated recognition that federal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights. . . . *On the record before us, . . . there is no basis for concluding that California's timeliness rule operates to the particular disadvantage of petitioners asserting federal rights.*

Martin, 131 S. Ct. at 1130-31 (emphasis added). Similarly, at the same time that the Court cited the concurrence in *Beard v. Kindler*, 130 S. Ct. 612 (2009) for the proposition that "a state procedural ground would be inadequate if the challenger shows 'a purpose or pattern to evade constitutional guarantees,'" *Martin*, 131 S. Ct. at 1131 (quoting *Beard*, 130 S. Ct. at 620 (Kennedy, J., concurring)), the Court held that California's untimeliness procedural ground was, indeed, adequate. *Id.*

Petitioner has presented no authority to suggest that simply because the state court regularly chooses to exercise its discretion to reach the merits, concerns of comity are no longer compelling. Without federal recognition of state procedural bars, "habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court." *Martin*, 131 S. Ct. at 1127 (internal quotation omitted); *see also Coleman*, 501 U.S. at 731 ("[P]rinciples of comity . . .

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[dictate that] the States should have the first opportunity to address and correct alleged violations of state prisoner[s'] federal rights").

Petitioner has, therefore, failed to show that California's untimeliness bar discriminates against federal claims.

4. Independence

Next, Petitioner argues that the untimeliness bar is not independent of federal law because it "involve[s] judgments about the merits of the underlying claims" in deciding (a) whether a fact is sufficient to state a prima facie claim, such that the claim must be pleaded without substantial delay; (b) whether petitioner was conducting a bona fide investigation of a potentially meritorious claim to justify the delay; and (c) whether ineffective assistance of prior counsel justifies the delay. (Opp. at 44-47.) Petitioner cites *Clark*, 5 Cal. 4th at 780-81, *In re Sanders*, 21 Cal. 4th 697, 717-19 (1999), and *Gallego*, 18 Cal. 4th at 833-34, as establishing these standards in California's timeliness analysis. (*Id.* at 44-47.)

The Ninth Circuit held in *Bennett*, after these decisions by the state court, that California's untimeliness procedural bar was independent of federal law. *Bennett*, 322 F.3d at 582-83. The circuit court observed that "[o]n August 3, 1998, in *Robbins*, the California Supreme Court made clear that it would no longer consider federal law in denying a petition on untimeliness grounds." *Id.* at 581. The Ninth Circuit noted that although the state court "previously considered the federal constitutional merits of the petitions in determining whether the petitions qualified for an exception to the rule of procedural default," it would, going forward, apply federal constitutional law only when deciding "[t]he fourth *Clark* exception, 'that the petitioner was convicted or sentenced under an invalid statute . . . .'" *Id.* at 581, 582 n.1. The Circuit held in *Bennett* that because the petitioner did not argue that the fourth exception applied to him, the state court's practice of considering federal law in that exception was "not relevant to this case." *Id.* at 582 n.1. Petitioner Ochoa similarly makes so such argument here.

The Ninth Circuit was cognizant in *Bennett* that the state court measures delay "'from the time the petitioner or counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim.'" *Bennett*, 322 F.3d at 581 (quoting *Robbins*, 18 Cal. 4th at 787, and *Clark*, 5 Cal. 4th at 765 n.5). The determination thus considers whether petitioner was aware of the basis for alleging a prima facie case for relief:

> Substantial delay is measured from the time the petitioner or counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim. . . . When a petitioner or counsel representing a petitioner actually is aware of information that is sufficient to state a prima facie claim for relief on habeas corpus, that claim should be presented to a court without substantial delay.

Gallego, 18 Cal. 4th at 832-33. Notwithstanding the principle that the state court must consider whether petitioner was aware of facts to state a prima facie case for relief to find delay, the Ninth Circuit held in *Bennett* that the state court applied its procedural bar without being interwoven with federal law. *See Bennett*, 322 F.3d at 581-82.

The standard for determining whether a petitioner was investigating "potentially meritorious" claims is even less exacting than that for determining whether a petitioner possessed information necessary to state a prima facie case for relief. *See Gallego*, 18 Cal. 4th at 833 (explaining that an ongoing investigation should be conducted when "a petitioner or counsel knows or should know . . . of triggering facts – i.e., facts sufficient to warrant further investigation, but *insufficient to state a prima facie case for relief*" (emphasis added)). The Ninth Circuit in *Bennett* held California's untimeliness bar to be independent of federal law notwithstanding its consideration of a petitioner's ability to state a prima facie case for relief. *See Bennett*, 322 F.3d at 581-82. Since that

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determination is not interwoven with federal law, by extension, neither is the less exacting determination of whether petitioner was aware of triggering facts.

Finally, when considering whether a petitioner could show ineffective assistance of counsel to justify his delay, the state court has begun by looking for a prima facie case of ineffective assistance. *See Robbins*, 18 Cal. 4th at 810 ("Without deciding whether, and to what extent, ineffective assistance of prior counsel may establish good cause for substantially delayed presentation of claims, we find no such basis of good cause for the delay here, because petitioner fails to state a prima facie case of constitutionally ineffective assistance of prior counsel with regard to the [claim]" (internal citation omitted)). The California Supreme Court's analysis of good cause is not, therefore, any more interwoven with federal law than is its determination of substantial delay, approved of in *Bennett*. *See Bennett*, 322 F.3d at 581-82.

Petitioner's arguments, therefore, fail to raise any concerns about the independence of California's untimeliness bar that go beyond the issues decided in *Bennett*. Petitioner has not shown the bar to be dependent upon federal law.

5. Cause and Prejudice

Finally, Petitioner alleges ineffective assistance of his appellate and first state habeas counsel as cause for his untimeliness defaults. (Opp. at 47-53.)

Ineffective assistance of counsel can be cause for a procedural default. *See Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). "Not just any deficiency in counsel's performance will do, however; the assistance must have been so ineffective as to violate the Federal Constitution." *Id.*; *see also Coleman*, 501 U.S. at 752 ("So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, [466 U.S. 668 (1984)], we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default" (internal quotation omitted)). "[C]ause for a procedural default must ordinarily turn on

whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Coleman*, 501 U.S. at 753 (internal quotation omitted). To show prejudice, a petitioner must demonstrate "not merely that the errors . . . created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage . . . ." *Nguyen v. Curry*, 736 F.3d 1287, 1292 (9th Cir. 2013) (internal quotation and alteration omitted; emphasis in original); *Detrich v. Ryan*, 740 F.3d 1237, 1243 (9th Cir. 2013) (en banc) (W. Fletcher, J., plurality opinion).

The Ninth Circuit in *Detrich* considered the implications of two recent Supreme Court decisions for the "normally applicable 'cause' and 'prejudice' rule for excusing state-court procedural default on federal habeas." *Detrich*, 740 F.3d at 1243. The Circuit explained that the Supreme Court in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013) "created an exception" to the typical cause and prejudice rule where appellate or state collateral review counsel, in certain circumstances, fail to raise claims of ineffective assistance of counsel. *Detrich*, 740 F.3d at 1243-44. The court emphasized that the *Martinez*/*Trevino* exception applies only to ineffective assistance claims and to no others. *See id.* at 1244; *see also Martinez*, 132 S. Ct. at 1320 ("The rule of *Coleman* governs in all but the limited circumstances recognized here. . . . [T]he limited nature of the qualification to *Coleman* adopted here reflects the importance of the right to the effective assistance of trial counsel"); *Nguyen*, 736 F.3d at 1292 ("The centerpiece of the Court's analysis in *Martinez* is the fundamental importance of effective assistance of counsel guaranteed by the Sixth Amendment"). The Circuit held in *Nguyen* that the *Martinez/Trevino* exception applies to claims of ineffective assistance of appellate counsel as well as trial counsel. 736 F.3d at 1289.

All other claims are governed by "the usual rule," under which "'cause' must be something *external* to the petitioner, something that cannot fairly be

attributed to him. . . . [C]ounsel's 'ignorance or inadvertence' cannot constitute 'cause' under this rule." *Detrich*, 740 F.3d at 1243 (quoting *Coleman*, 501 U.S. at 753; emphasis in original; ellipsis omitted).

Although Petitioner attempts to extend the rule of *Martinez* to govern "all claims Respondent alleges are procedurally barred" (Opp. at 48), his only potentially procedurally barred claims alleging ineffective assistance of counsel are Claims 1 and 40 (to the extent set forth by the state court's order). (*See supra* p. 6.) Regarding all other claims, Petitioner makes only the conclusory statement that "state habeas counsel was unable to conduct a constitutionally adequate investigation and presentation of claims on direct appeal and state habeas due to California's chronic under funding of collateral proceedings . . . ." (Opp. at 50; *see also id.* at 7-9 (explaining that Petitioner was represented in his appellate and first state habeas proceedings by the same attorney and discussing alleged under-funding).) Petitioner makes no specific allegations of prejudice to show how counsel's allegedly inadequate investigation prevented him from presenting any certain claims or evidence. Petitioner has, therefore, failed to establish cause and prejudice for his default of claims other than Claims 1 and 40. *See Nguyen*, 736 F.3d at 1292; *Detrich*, 740 F.3d at 1243.

As for the potentially defaulted portions of Claims 1 and 40, the Court holds that it may be more judicially economical to address their merits than to decide at this time whether Petitioner has successfully shown cause and prejudice. *See Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) (noting that judicial economy might favor resolving claims on grounds other than procedural bar if "the procedural-bar issue involve[s] complicated issues of state law"); *Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002) ("Procedural bar issues are not infrequently more complex than the merits issues . . . , so it may well make sense in some instances to proceed to the merits if the result will be the same"). Should

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the Court decide that the defaulted portion of Claim 1 or Claim 40 satisfies 28 U.S.C. § 2254(d), the Court will address cause and prejudice at that time.

6. Conclusion

Claims 3; 10(B)(2), (3), (4), (5) as to Montes, and (6) as to Montes and Soriano; 14; 15; 18(B)(1), (4), and (5); 20 (e), (g), (j), (p), (q), (t), (v), (w), (bb), (cc); 24(B)(1), (2), and (4), ¶¶ 892 and 894 as to prosecutorial misconduct in closing argument on lack of remorse, the shooter's intended target in the Castro homicide, and office standards for death penalty cases, and ¶ 894 n.40; 25; 27; and 32 are DISMISSED as procedurally barred.

B. Lack of Contemporaneous Objection

Where a petitioner "failed to object to [the alleged error] at trial, his forfeiture under California law constitutes a procedural default." *Xiong v. Felker*, 681 F.3d 1067, 1075 (9th Cir. 2012). Here, Respondent argues that the California Supreme Court applied the contemporaneous objection bar to claims pleaded in the First Amended Petition as Claims 5, 6, and 18(B)(2). (Mot. to Dismiss at 26-29; Reply at 11.)

Petitioner argues in opposition, first, that the California Supreme Court applied a number of procedural bars to the claims on habeas review but did not apply the contemporaneous objection bar. (Opp. at 22.) This is true, but it does not address the court's imposition of the bar on direct appeal. Second, Petitioner argues that the rule was not adequate at the time of Petitioner's trial in 1992. (*Id.* at 23-24.) The Ninth Circuit has held otherwise, however, consistently holding the bar to be adequate from at least as early as 1981 to the present. *See, e.g.*, *Xiong*, 681 F.3d at 1075 (noting that procedural rule must be firmly established and regularly followed and holding that contemporaneous objection rule barred review of petitioner's claim); *Melendez v. Pliler*, 288 F.3d 1120, 1125 (9th Cir. 2002) ("We held more than twenty years ago that the rule is consistently applied when a party has failed to make any objection to the admission of evidence" (citing

Garrison v. McCarthy, 653 F.2d 374, 377 (9th Cir. 1981); emphasis omitted)); *Hines v. Enomoto*, 658 F.2d 667, 673-74 (9th Cir. 1981) (applying rule to limitation on exercise of peremptory challenges); *Garrison*, 653 F.2d at 377-79 (applying rule to in-court and photographic identification evidence). Third, Petitioner argues that the rule was not independent of federal law until 1998, when the California Supreme Court issued its clarifying decision in *Robbins*, 18 Cal. 4th 770. Even if so, because the independence of the rule had been established before the California Supreme Court's imposition of the procedural bar here in 2001, the rule serves to bar federal habeas review. *See Bennett*, 322 F.3d at 582-83; *cf. Fairbank v. Ayers*, 650 F.3d 1243, 1256-57 (9th Cir. 2011) (holding that "the California Supreme Court applied an independent and adequate state procedural rule that bars federal review" based upon the lack of objection at trial); *Vansickel v. White*, 166 F.3d 953, 958 (9th Cir. 1999) (holding petitioner's claim was "procedurally barred by an adequate and independent state ground" by California's contemporaneous objection rule).

Petitioner makes no allegations of cause and prejudice for his default of these claims beyond the general allegations addressed, and rejected (apart from Claims 1 and 40), above. (*See supra* pp. 12-15.)

1. Claim 5

Claim 5 alleges that seven prospective jurors were improperly removed for cause based upon their views on capital punishment, citing, *inter alia*, *Wainwright v. Witt*, 469 U.S. 412 (1985) and *Witherspoon v. Illinois*, 391 U.S. 510 (1968). (Pet. at 140-78.)

At the time of trial, after the excusal of the first two prospective jurors, "the defense expressed its concern" about the questions that were asked. *Ochoa*, 26 Cal. 4th at 429. Although the trial court noted that the prosecutor questioned the

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prospective jurors "without timely objection," it responded to counsel's concern. *Id.* On direct appeal, the California Supreme Court held that:

> the trial court correctly found defendant had waived any challenge to the prosecutor's questioning by failing to offer a timely objection. Even after receiving the court's advice about the need for timely objection, defendant failed to object [to the prosecutor's hypothetical questioning]. . . . Where defendant offered a proper objection, the trial court sustained it.

Id. at 431 (internal citation omitted). Nevertheless, the California Supreme Court did not invoke, as it did for other claims, the contemporaneous objection bar set forth in *People v. Champion*, 9 Cal. 4th 879, 907 (1995) ("Neither defendant . . . objected to the trial court's removal of any of the 14 prospective jurors [for hardship] . . . . Defendants thus have not preserved this issue for appeal"), *overruled on other grounds as stated in People v. Combs*, 34 Cal. 4th 821, 860 (2004), or *People v. Hart*, 20 Cal. 4th 546, 619 (1999) ("We perceive no reason why a prompt objection and admonition could not have cured the asserted harm of the prosecutor's remarks and perhaps averted many of the references by the prosecutor. Therefore, we conclude that defendant did not properly preserve this claim for appeal" (internal citations omitted)). (*See infra* pp. 18, 20.) The court only ruled on the merits of Petitioner's claim:

> We uphold both the questioning and the excusals. If a juror's responses are equivocal or conflicting, the trial court's determination of the juror's fitness to serve is binding. If there is no inconsistency, we uphold the determination below if it is supported by substantial evidence. . . . [One] [p]rospective juror['s] comments revealed her unambiguous opposition to the death penalty, and the trial court properly excused her. Substantial evidence likewise supports the exclusion of other jurors. To the extent their responses could support

> multiple inferences, we defer to the trial court's determination of their unfitness to serve.

Ochoa, 26 Cal. 4th at 432 (internal citations omitted).

Because the California Supreme Court did not apply the contemporaneous objection bar to Claim 5 of the Petition, Respondent's Motion to Dismiss the claim is DENIED.

2. Claim 6

As the California Supreme Court stated on direct appeal, the allegations pleaded in Claim 6 allege that "the prosecutor . . . exercis[ed] peremptory challenges against four prospective jurors who expressed skepticism about capital punishment, even though they were qualified to serve in accordance with *Witherspoon* and *Wainwright*." *Ochoa*, 26 Cal. 4th at 432 (internal citations edited); (*see* Pet. at 178-79). The California Supreme Court held that "[d]efendant did not object to these challenges, and thus failed to preserve the issue for appeal. *Champion*, 9 Cal. 4th at 907." *Ochoa*, 26 Cal. 4th at 432 (internal citation edited). Although the court also went on to address the merits of the claim, its application of the contemporaneous objection bar is clear. *See Evans v. Chavis*, 546 U.S. 189, 194 (2006) (holding that when "the California Supreme Court had clearly ruled" that a claim was procedurally barred, "that would be the end of the matter," even where the court ruled on the merits as well; "the California Supreme Court might have decided to address the merits" despite the bar to show "that it was not merely a procedural technicality that precluded . . . relief"). Claim 6 is, therefore, DISMISSED as procedurally barred.

3. Claim 18(B)(2)

In Claim 18(B)(2), Petitioner alleges misconduct during the prosecutor's guilt phase closing argument and rebuttal. (Pet. at 307-09.) Specifically,

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Petitioner alleges:

(a) misstatements of fact regarding David Mandich's identification of a jacket Petitioner or the shooter was wearing (*id.* at 308 ¶ 738);[4]

(b) improper vouching on behalf of Mandich's credibility (*id.* at 308-09 ¶¶ 739-40); and

(c) misstatements of fact regarding the shooting of Jose Castro and Petitioner's "put[ting] a gun to the head of a man seated in a car that he wanted to take" (*id.* at 309 ¶ 741 (internal quotation omitted)).

a. Misstatements Regarding Identification of Jacket

Regarding Petitioner's first allegation, the California Supreme Court held on direct appeal:

> Defendant first objects to the following statement: '[W]e know that the defendant was wearing a Raider's [sic] jacket on January 22. [¶] Whether Mr. Montes believed it was a white jacket or silver jacket, it really doesn't matter. [¶] We also know that according to David Mandich, that the defendant or the shooter was wearing some kind of team jacket. Whether it was a silver jacket, a dark blue jacket or black jacket, I don't think really matters, because we don't know beyond any doubt really what color this jacket contained in People's 16 looked like to David Mandich the night the murder happened. [¶] And we don't know whether the defendant was really wearing the jacket in People's 16 the night of the murder. [¶] We just know that two nights later he was wearing . . . .' [Elipsis in original.] The trial court *overruled*

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[4] Petitioner explains, by way of background:

> In the second case involving Jose Castro, the People's theory was that Ochoa shot the victim after he refused to give up his car in an attempted robbery. The defense at trial was misidentification. David Mandich, the only non-participant witness, was 25 feet from the shooter, and identified the shooter as an African-American man in a black or dark blue jacket. Ochoa is Hispanic and, when arrested a few hours later on another matter, was wearing a silver jacket.

(Pet. at 36) (internal citations omitted).

> *defendant's objection*, and the prosecutor moved to a different subject.

Ochoa, 26 Cal. 4th at 441-42 (emphasis added). The court went on to analyze the merits of the claim and did not invoke the contemporaneous objection bar. *See id.* at 442. To the contrary, the court noted the timely objection by the defense.

Because the court did not invoke the contemporaneous objection bar as to this portion of Claim 18(B)(2) (¶ 738), Respondent's Motion to Dismiss this portion of the claim is DENIED.

b. Improper Vouching

Regarding Petitioner's second allegation, the California Supreme Court held on direct appeal:

> Defense counsel had argued Mandich displayed 'extreme bias' and that his 'credibility on that identification issue was ridiculous.' The prosecutor answered by arguing, '[Mandich] was about 90 percent certain [of his lineup identification] because he wanted to leave room for the possibility that the defendant had a twin brother standing in this lineup. So that's how careful he was. [¶] There is an honest man. This is one of the best witnesses you can ever have in a murder case. And the defense has to stoop to the level of calling this man, not only a liar, but a criminal himself is one of the most outrageous things I've ever heard in my career. And I don't think you should pay any attention to that.' 'And, Ladies and Gentlemen, that is the testimony of an honest witness, of a good witness, the kind of witness that I wish I had more of in these kind[s] of cases.' Defendant now objects to this argument, but *failed to do so at trial, and therefore has waived this claim on appeal*. *Hart*, 20 Cal. 4th at 619.

Ochoa, 26 Cal. 4th at 101-02 (alterations in original; emphasis added; internal citation edited). Thus, although the court went on to consider the merits of the claim, its invocation of the contemporaneous objection bar was clear. *See Chavis*, 546 U.S. at 194. This portion of Claim 18(B)(2) (¶¶ 739-40) is, therefore,

DISMISSED as procedurally barred.

c. Misstatements Regarding Castro Shooting

Finally, regarding Petitioner's third allegation, the California Supreme Court held:

> Defendant . . . challenges the prosecutor's remark, 'There was no reason for that gun to come back out and go to the head of Mr. Castro and for that gun to be fired, other than the fact that the defendant is a cold-blooded killer who didn't get what he wanted, when he wanted it, when he put a gun to the head of a man seated in a car that he wanted to take.' *Defendant failed to object and preserve this claim for appeal. Hart*, 20 Cal. 4th at 619.

Ochoa, 26 Cal. 4th at 442-43 (emphasis added; internal citation edited). The court went on to consider the merits of this claim, but had clearly invoked the contemporaneous objection bar. *See Chavis*, 546 U.S. at 194. This portion of Claim 18(B)(2) (¶ 741) is, therefore, DISMISSED as procedurally barred.

C. Claims Petitioner Failed to Raise on Appeal

The California Supreme Court applies the procedural bar set forth in *In re Dixon*, 41 Cal. 2d 756, 759 (1953), to claims that could have been, but were not, raised on direct appeal. The Ninth Circuit has not decided the adequacy of the current *Dixon* bar in a published decision. In *Jackson v. Roe*, 425 F.3d 654, 657 n.2 (9th Cir. 2005), the Circuit held that the issue would be governed by the burden-shifting analysis set forth in *Bennett*, 322 F.3d at 584-85, but did not decide whether the *Dixon* bar was adequate to prohibit federal review. In a 2007 unpublished decision,[5] the Circuit applied the *Dixon* bar to foreclose federal review, where the petitioner "failed to carry th[e] burden" of showing its inadequacy. *Flores v. Roe*, 228 Fed. Appx. 690, 691 (9th Cir. 2007).

[5] "Unpublished dispositions and orders of [the Ninth Circuit] issued on or after January 1, 2007 may be cited . . . in accordance with Federal Rule of Appellate Procedure 32.1" for their persuasive value. 9th Cir. R. 36-3 (internal citation edited).

Respondent here argues that portions of state claims 14, 25, 48, 49, and 50; 16 (to the extent it alleges the prosecutor knowingly used an impermissibly suggestive identification of petitioner and committed misconduct when she met with Montes and Magallanes-Martinez); 20 g, n, p, bb, and cc; and 28 c and w are *Dixon*-barred. (Mot. to Dismiss at 21-24; Reply at 1-2, 6 n.2); *In re Ochoa*, Case No. S121184, at 2 (Cal. Dec. 21, 2010). The claims correspond to First Amended Petition Claims 14, 15, 17, 18(B)(1) (¶¶ 729-30), 18(B)(5), 25, 27(c) and (w), and 20(g), (n), (p), (bb), and (cc). (*See* Reply at 1-2, 6 n.2.) Of those claims, only Claims 17 and 20(n) have not already been dismissed above as procedurally barred.

Petitioner, in response, has placed the adequacy of the *Dixon* bar at issue. (*See* Opp. at 17-22 (analyzing percentage of cases in which the California Supreme Court invoked the *Dixon* bar in late 1999, and identifying cases in which the court could have invoked the bar but did not)); *compare Cree v. Sisto*, No. CV 08-487 AK, 2011 WL 66253, at *1-2 (E.D. Cal. Jan. 7, 2011) (applying *Dixon* rule where petitioner "hasn't alleged that the rule is unclear, disputed that it's well-established or cited a single state case showing that it's been inconsistently applied") (Kozinski, C.J., sitting by designation); *Sanchez v. Ryan*, 392 F. Supp. 2d 1136, 1139 (C.D. Cal. 2005) (applying *Dixon* rule "[b]ecause [petitioner] ha[d] not placed the adequacy of the *Dixon* rule in issue;" "[p]etitioner offer[ed] nothing in response to [r]espondent's allegation, much less any specific factual allegations demonstrating inconsistent application of the *Dixon* rule"). In light of Petitioner's contentions, the Court holds that addressing the merits of Claims 17 and 20(n) may be more judicially economical than deciding the adequacy of the procedural bar. *See Lambrix*, 520 U.S. at 525; *Franklin*, 290 F.3d at 1232. Should the Court decide that Claim 17 or 20(n) satisfies § 2254(d), the Court will address any procedural bars at that time.

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II. Lack of Exhaustion

A. Legal Standard

A federal court may only proceed upon a habeas petition if all claims in the petition have been exhausted in state court. *See* 28 U.S.C. § 2254(b)(1)(A); *Rhines v. Weber*, 544 U.S. 269, 274 (2005); *Rose v. Lundy*, 455 U.S. 509, 510 (1982). Where a petition contains both exhausted and unexhausted claims, the United States Supreme Court has held:

> [I]t likely would be an abuse of discretion for a district court to deny a stay and to dismiss [the] mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics. In such circumstances, the district court should stay, rather than dismiss, the mixed petition.

Rhines, 544 U.S. at 278.

If the petitioner is unable to demonstrate "good cause" for his failure to exhaust, or if "his unexhausted claims are plainly meritless," staying the mixed petition is inappropriate. *Id.* at 277. In that case, the petitioner may "delete the unexhausted claims and [] proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain federal relief." *Id.* at 278; *see also Kelly v. Small*, 315 F.3d 1063, 1070 (9th Cir. 2003) (discussing process of "staying the petition after dismissal of unexhausted claims"), *overruled on other grounds as stated in Robbins v. Carey*, 481 F.3d 1143, 1148-49 (9th Cir. 2007).

Petitioner Ochoa's federal habeas proceedings were stayed on February 27, 2004, prior to the Supreme Court's decision in *Rhines*. This Court, accordingly, did not decide whether Petitioner demonstrated good cause under *Rhines* for staying the mixed petition, and the Court must do so now. *See Jackson*, 425 F.3d at 656 ("Because the district court in this case failed to apply the standards

regarding staying a mixed habeas petition enunciated in *Rhines* – quite understandably, as Jackson's petition was dismissed almost three years prior to the decision in *Rhines* – we vacate and remand to allow the district court the opportunity to do so"); *see also Rhines*, 544 U.S. at 279 (remanding for a determination, "consistent with this opinion," of whether the denial of a stay for the mixed petition constituted an abuse of discretion); *Valdovinos v. McGrath*, 598 F.3d 568, 574 (9th Cir. 2010) (holding that "the district court did not abuse its discretion in [later] finding Valdovinos satisfied the elements of *Rhines*," where "the Supreme Court decided *Rhines* after the district court here issued the stay").

B. Analysis

Of the claims and subclaims not dismissed above as procedurally barred, Respondent contends that First Amended Petition Claims 1, 2, 40, 42, and the remaining portions of Claim 20[6] were unexhausted when they were first filed in 2003 (as federal claims 27, 1, 41, 45, and 20, respectively). (*See* Mot. to Dismiss at 9-13, 18-20; Reply at 1-2.) Petitioner conceded in 2003 that Claims 2, 20, 40, and 42 were unexhausted. (Joint Statement on Exhaustion, Nov. 18, 2003, at 2.) Petitioner also apparently conceded that 21 of the 24 subclaims of Claim 1 were unexhausted. (*See* Reply to Petr.'s Opp. to Respt.'s Mot. to Dismiss Pet. for Writ of Habeas Corpus, Feb. 27, 2004, at 7.)

Petitioner argues that he has good cause for his failure to exhaust as a result of appellate and state habeas counsel's ineffectiveness. Ineffective assistance " by post-conviction counsel can be good cause for a *Rhines* stay . . . ." *Blake v. Baker*, 745 F.3d 977, 983-84 (9th Cir. 2014) (holding that "good cause under *Rhines*, when based on [ineffective assistance of counsel], cannot be any more demanding

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[6] The California Supreme Court held that Claims 20 i and n were "raised and rejected in petitioner's first petition for writ of habeas corpus (S095304)," filed February 20, 2001 and denied August 21, 2002. *In re Ochoa*, Case No. S121184, at 1 (Cal. Dec. 21, 2010). They were thus exhausted at the time of Petitioner's 2003 federal filing. Respondent's Motion to Dismiss is DENIED as to Claim 20(i). Claim 20(n) is addressed above. (*See supra* p. 22.)

than a showing of cause under *Martinez* to excuse state procedural default"); (*see supra* p. 13). To show good cause under *Rhines*, Petitioner must show "a reasonable excuse, supported by sufficient evidence," for his failure to exhaust. *Blake*, 745 F.3d at 982-83 (finding good cause where petitioner presented readily available evidence that "state post-conviction counsel failed to discover, investigate, and present to the state courts").

1. Claim 1

Claim 1 alleges ineffective assistance of trial counsel. (Pet. at 47-113.) The Court will consider whether Petitioner has shown good cause under *Rhines* for his failure to exhaust Claim 1, should the claim appear potentially meritorious under § 2254(d). *See Martinez*, 132 S. Ct. at 1315; *Blake*, 745 F.3d at 983-84; (*cf. supra* pp. 14-15.)

2. Claim 2

Claim 2 alleges that Petitioner was denied consular assistance, in violation of the Vienna Convention. (Pet. at 113-24.) Petitioner's Vienna Convention claim lacks support in clearly established federal law and is not potentially meritorious. A claim must be potentially meritorious for Petitioner to be entitled to a stay. *Rhines*, 544 U.S. at 277-78.

The Vienna Convention does not grant petitioners judicially enforceable rights. *See Garcia v. Texas*, 131 S. Ct. 2866 (2011); *Madellín v. Texas*, 554 U.S. 759 (2008) ("*Madellín II*"); *Madellín v. Texas*, 552 U.S. 491 (2008) ("*Madellín I*"); *Cornejo v. County of San Diego*, 504 F.3d 853, 854-55 (9th Cir. 2007) (holding that foreign nationals arrested and detained without being advised of their right under the Vienna Convention to have a consular officer notified lacked "judicially enforceable rights"). In *Madellín I*, the Supreme Court "concluded that neither the President nor the International Court of Justice (ICJ) has the authority to require [the State] to determine whether its violation of the Vienna Convention prejudiced petitioner." *Madellín II*, 554 U.S. at 761 (Stevens, J., dissenting) (discussing

Madellín I). In *Madellín II*, the Court declined to issue petitioner a stay of execution on the "remote" possibility of congressional or state legislative action to create enforceable rights under the Vienna Convention. 554 U.S. at 759-60. The Court emphasized that "[i]t is up to Congress whether to implement obligations undertaken under a treaty which (like this one) does not itself have the force and effect of domestic law sufficient to set aside the judgment or the ensuing sentence . . . ." *Id.* at 760. The Court reached the same decision in *Garcia*, observing that "[i]t has now been seven years since the ICJ ruling and three years since our decision in *Madellín I*, making a stay based on the bare introduction of [a] bill in a single house of Congress even less justified." 131 S. Ct. at 2868.

Because Petitioner's claim lacks support in clearly established federal law and is not potentially meritorious, Claim 2 is DISMISSED.

3. Claim 20

Claim 20 alleges that a number of claims, pleaded as independent bases of relief, also demonstrate prejudicial trial court error. Claim 20 does not itself allege any new facts or legal arguments to demonstrate good cause for Petitioner's failure to exhaust. The Court may, however, look to the underlying claims in the First Amended Petition for such allegations. *Cf. Blake*, 745 F.3d at 982 n.4 ("Blake sufficiently set forth good cause in his motion for a stay and in his federal habeas petition, which he incorporated into his motion").

Claim 20(a) pleads trial court error based upon the denial of consular assistance, in violation of the Vienna Convention (Pet. at 113-24 (Claim 2), 333), as discussed above. Claim 20(a) lacks support in clearly established federal law and is not potentially meritorious. Claim 20(a) is DISMISSED.

Claims 20(b), (c), (f), (h), (k)-(m), and (s) (Pet. at 333-34) are all dependent on the trial record itself and do not show any new supporting evidence or legal arguments to establish good cause for Petitioner's failure to exhaust. (*See* Pet. at 209-23 (alleging "[i]mproper joinder of the Navarette and Castro charges," pleaded

in Claims 8 and 20(b)); 183-209 (alleging "[i]mproper transfer of the trial from the Central to the Northwest Judicial District," pleaded in Claims 7 and 20(c)); 140-78 (alleging "[f]ailure to properly monitor voir dire questioning and rule on challenges for cause," pleaded in Claims 5 and 20(f)); 132-40 (alleging "[e]xclusion of Ochoa from sidebar conferences," pleaded in Claims 4 and 20(h)); 254-73 (alleging "[f]ailure to exclude references to Ochoa's '187' tattoo," pleaded in Claims 12 and 20(k)); 273-89 (alleging "[i]mproper admission of testimony regarding Ochoa's prior bad acts," pleaded in Claims 13 and 20(l)); 294-97 (alleging "[i]mproper granting of a mid-trial continuance," pleaded in Claims 16 and 20(m)); 318-32 (alleging "[f]ailure to properly charge the jury," pleaded in Claims 19[7] and 20(s)).) Because the claims do not show any new evidence or legal arguments to demonstrate good cause for Petitioner's failure to exhaust, Claims 20(b), (c), (f), (h), (k)-(m), and (s) are DISMISSED.

Claim 20(x) alleges that the trial court failed to enforce Petitioner's "international law rights" as pleaded in Claim 39. (Pet. at 334.) The claim lacks support in clearly established federal law. Claim 39 alleges violations of "customary international law as informed by the Universal Declaration of Human Right[s], the International Covenant on Civil and Political Rights (ICCPR) . . . , the American Declaration of the Rights and Duties of Man[,] . . . [and] the International Convention Against All Forms of Racial Discrimination." (Pet. at 483.) Clearly established federal law does not hold the death penalty to violate enforceable rights under international law. *See Sosa v. Alverez-Machain*, 542 U.S. 692, 734-35 (2004) ("[T]he [Universal] Declaration does not of its own force impose obligations as a matter of international law. . . . And, . . . the United States ratified the Covenant [the ICCPR] on the express understanding that it was not

[7] Claim 20(s) lists Claim 20 as the source of Petitioner's allegations regarding the purported failure to charge the jury properly. (Pet. at 334.) The designation of Claim 20 appears to be a typographical error. Claim 19 alleges that "the trial court denied Ochoa applicable and essential jury instructions in the guilt phase of his capital trial." (Pet. at 318.)

self-executing and so did not itself create obligations enforceable in the federal courts"); *Nevius v. McDaniel*, 218 F.3d 940, 946 (9th Cir. 2000) (denying certificate of appealability where state court did not contradict or unreasonably apply federal law in denying petitioner's claim of a violation of "several instruments of international law, including the Universal Declaration"); *see also Buell v. Mitchell*, 274 F.3d 337, 370-76 (6th Cir. 2001) (rejecting as "wholly meritless" state habeas petitioner's contentions that capital punishment violates the American Declaration, the ICCPR, or customary international law); *Garza v. Lappin*, 253 F.3d 918, 923 (7th Cir. 2001) (holding that execution under federal death sentence would not violate the American Declaration because it "is merely an aspirational document that, in itself, creates no directly enforceable rights"); John Quigley, Toward More Effective Judicial Implementation of Treaty-Based Rights, 29 Fordham Int'l L.J. 552, 574-75 (2006) ("When the Senate gave consent to ratification of . . . the International Convention on the Elimination of All Forms of Racial Discrimination, it declared that the[] rights-guarantee provision[] w[as] not to be self-executing"). Because Claim 20(x) is not potentially meritorious, it is DISMISSED.

Claim 20(aa) alleges trial court error based upon Claim 42, addressed below. (Pet. at 334; *see infra* p. 30.) Because Petitioner appears to have shown good cause for his failure to exhaust Claim 42, Respondent's Motion to Dismiss is DENIED as to Claim 20(aa). The Court expresses no opinion at this time on whether Petitioner may show trial court error based upon facts developed, and a Supreme Court decision decided, only after Petitioner's trial was concluded.

4. Claim 40

The portion of Claim 40 alleging that the California Supreme Court did not conduct proper review of the first state habeas petition is not potentially meritorious. (Pet. at 493, 495.) Petitioner alleges that the state habeas review was insufficient because the California Supreme Court did not authorize "adequate

investigative funds," by disallowing $5,002.24 of a $7,656.84 bill for investigative funds as "exceed[ing] the $25,000 authorized for habeas investigation." (*Id.* at 495.) Petitioner alleges that "[b]ecause of the California Supreme Court's arbitrary restriction on available funds for investigation and expert assistance, Ochoa was denied a complete investigation of available grounds for his state habeas petition" by habeas counsel. (*Id.*) Petitioner fails, however, to make any specific allegations of prejudice from the purportedly inadequate investigation, claiming only that it impaired "all of Ochoa's constitutional rights as alleged in these claims . . . ." (*Id.*)

Because Petitioner fails to allege specific facts counsel could have discovered to show harm resulting from the disallowed portion of the investigator's bill, his allegations are not potentially meritorious. *See Greenway v. Schriro*, 653 F.3d 790, 804 (9th Cir. 2011) (denying petitioner's claim that "counsel had not done enough background investigation" and so did not adequately prepare expert witness to testify, where petitioner did not "allege what specific facts or information counsel should have provided to [the witness]. . . . [Petitioner] has never alleged, much less demonstrated, what more counsel should have known or discovered. [His] cursory and vague claim cannot support habeas relief"); *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) (denying petitioner's claim that counsel failed to present evidence that petitioner was not the shooter, where "petitioner does not identify what evidence counsel should have presented . . . . Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief"). The portion of Claim 40 regarding the adequacy of the state habeas review is, therefore, DISMISSED.

As for the portion of Claim 40 alleging ineffective assistance of counsel, the Court will consider whether Petitioner has shown good cause under *Rhines* for his failure to exhaust the claim, should it appear potentially meritorious under

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§ 2254(d). *See Blake*, 745 F.3d at 983-84; *Nguyen*, 736 F.3d at 1289; (*cf. supra* pp. 14-15.)

5. Claim 42

Claim 42 alleges that Petitioner "functions at a level that is equivalent to mental retardation and he is therefore ineligible for execution under *Atkins* [*v. Virginia*], 536 U.S. 304 [(2002)]." (Pet. at 498.) *Atkins* was decided in 2002, after Petitioner filed his first state habeas petition in 2001. In addition, Petitioner bases his claim upon a declaration from Patricia Pérez-Arce, Ph.D., reviewing Petitioner's educational and medical records, completed September 15, 2003. (*See id.* at 30 (discussing Pet. Ex. 201 ¶ 19, in Claim 1), 499 (referring in Claim 42 to Claim 1).) Because Petitioner presents a newly available legal basis and evidence for his claim, he appears to satisfy *Rhines*' good cause requirements as discussed in *Blake*. Petitioner shows "a reasonable excuse, supported by sufficient evidence," for his failure to exhaust the claim before filing his first federal petition on September 19, 2003. *Blake*, 745 F.3d at 982. Accordingly, Respondent's motion to dismiss Claim 42 is DENIED.

III. Order

Claims 2; 3; 6, 10(B)(2), (3), (4), (5) as to Montes, and (6) as to Montes and Soriano; 14; 15; 18(B)(1), (2) ¶¶ 739-41, (4), and (5); 20 (a)-(c), (e)-(h), (j)-(m), (p), (q), (s), (t), (v)-(x), (bb), (cc); 24(B)(1), (2), and (4), ¶¶ 892 and 894 as to prosecutorial misconduct in closing argument on lack of remorse, the shooter's intended target in the Castro homicide, and office standards for death penalty cases, and ¶ 894 n.40; 25; 27; 32; and 40 as to inadequate review of the first state habeas petition are DISMISSED.

Respondent's Motion to Dismiss is DENIED as to Claims 5; 18(B)(2) ¶ 738; 20(i) and (aa); and 42.

The Court will consider whether Petitioner has shown good cause under *Rhines* for his failure to exhaust Claim 1 and the remaining portions of Claim 40,

should the claims appear potentially meritorious under § 2254(d). The Court will also decide any procedural bars to Claims 1, 17, and 20(n), and the remaining portions of Claim 40, should the Court find that the claim(s) satisfy 28 U.S.C. § 2254(d).

The parties shall proceed to brief the merits of Petitioner's remaining claims under § 2254(d). Petitioner shall file an opening merits brief no later than 90 days from the date of this Order. Respondent shall file a merits opposition brief no later than 90 days from the filing of Petitioner's opening brief. Petitioner shall file a merits reply brief no later than 30 days from the filing of Respondent's opposition brief.

IT IS SO ORDERED.

Dated: July 8, 2014

s/ RONALD S.W. LEW

RONALD S. W. LEW
Senior U.S. District Judge

APPENDIX F

SUPREME COURT
FILED
DEC 21 2010
Frederick K. Ohlrich Clerk
Deputy

S121184

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re SERGIO OCHOA on Habeas Corpus.

The "Petition for Writ of Habeas Corpus" filed December 15, 2003, is denied. Claims 39 and 46 are denied as premature. (*People v. Lawley* (2002) 27 Cal.4th 102, 169, fn. 25.) All remaining claims are denied on the merits.

All claims are denied as untimely except claims 1, 20 (subclaims a, x, y, z, and aa), 28 (subclaims g, j, k, l, n, o, p, q (to the extent petitioner alleges former habeas corpus counsel was ineffective, or this court did not conduct proper post-conviction review), s, t, u, and v), 30, 34, 35, 36, 38, 39, 40, 41 (to the extent it is alleged prior habeas corpus counsel was ineffective, and this court did not conduct proper review of the first habeas corpus petition), 43, 44, 45, 46, and 47. (*In re Robbins* (1998) 18 Cal.4th 770, 780-781.)

Claims 2-3, 6, 7, 8, 9 (to the extent it challenges the lack of a contemporaneous warning pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 before petitioner's January 1990 evening statement to Detective Coulter), 11-13, 16 (to the extent it alleges the prosecutor committed misconduct by falsifying facts about the Jose Castro homicide and authenticating the veracity of David Mandich), 19, 20 (subclaims b, c, f, h, i (to the extent it challenges the lack of a contemporaneous *Miranda* warning before petitioner's January 1990 evening statement to Detective Coulter), k, l, m, and s), 24, 25 (except to the extent it alleges ineffective assistance of counsel, and to the extent it alleges that the prosecutor committed misconduct during closing argument by arguing petitioner lacked remorse, falsely stating the shooter's intended target in the Castro homicide, and improperly suggesting this case met her office's higher standards for cases in which the death penalty is sought), 26, 28 (subclaims b, d, and h), and 31-32 are also denied on the ground that they were raised and rejected on appeal. (*In re Harris* (1993) 5 Cal.4th 813, 829-841; *In re Waltreus* (1965) 62 Cal.2d 218, 225.)

Claims 4, 9, 10 (to the extent it alleges Walter Aguilar's statement was improperly obtained and that the District Attorney's Office interfered with the habeas corpus investigation), 14, 17, 18 (to the extent it alleges petitioner is factually innocent of the murder of Pedro Navarette), 20 (subclaims d, i, and n), 22, 23 (except to the extent it relies on the declaration of Dr. Francisco Gomez), 27 (to the extent it alleges the same subclaims raised and rejected in the first petition), 37, 40, and 42 are also denied as repetitive because they were raised and rejected in petitioner's first petition for writ of habeas corpus (S095304). (*In re Miller* (1941) 17 Cal.2d 734, 735.)

Claims 14, 16 (to the extent it alleges the prosecutor knowingly used an impermissibly suggestive identification of petitioner and committed misconduct when she met with Oscar Montes and Luis Magallanes-Martinez), 20 (subclaims g, n, p, bb (except to the extent it alleges ineffective assistance of counsel), and cc (except to the extent it alleges ineffective assistance of counsel)), 25 (except to the extent it alleges ineffective assistance of counsel, and to the extent it alleges that the prosecutor committed misconduct by precluding petitioner from accurately portraying the hardship of prison life, eliciting testimony regarding prison conditions, capitalizing on improperly introduced evidence by arguing petitioner should be executed because prison conditions were so favorable for the incarcerated, making an irrelevant, misleading, inflammatory abstract pro-death penalty argument, and asking for vengeance on behalf of the victims), 28 (subclaims c and w), 48 (except to the extent it alleges ineffective assistance of counsel), 49 (except to the extent it alleges ineffective assistance of counsel), and 50 (except to the extent it alleges ineffective assistance of counsel) are also denied on the ground that they could have been, but were not, raised on appeal. (*In re Harris*, supra, 5 Cal.4th at pp. 825, fn. 3, 829-841; *In re Dixon* (1953) 41 Cal.2d 756, 759.)

Claims 2, 3, 5, 6, 7, 8, 10 (to the extent it claims the statements of Montes, Maurice Soriano, and Magallanes-Martinez were improperly obtained), 11, 12, 13, 15, 16, 18 (to the extent it alleges petitioner is factually innocent of the Castro murder), 19, 20 (subclaims b, c, e, f, g, h, j, k, l, m, o, p, q, r, s, t, u, v, w, x, y, bb, and cc), 24, 25, 26, 27 (to the extent there are new allegations of ineffective assistance of counsel that could have been raised in the first petition), 28 (subclaims a, b, c, d, h, i and w), 31, 32, 33, 41 (except to the extent it is alleged prior habeas corpus counsel was ineffective, or this court did not conduct proper review of the first habeas corpus petition), 48, 49, and 50 are also denied on the ground that they are successive because they could have been, but were not, raised in petitioner's first petition for writ of habeas corpus. (*In re Robbins, supra,* 18 Cal.4th at p. 788, fn. 9; *In re Horowitz* (1949) 33 Cal.2d 534, 546-547.)

George, C.J., and Werdegar, J., were absent and did not participate.

BAXTER

Acting Chief Justice

APPENDIX G

FILED
CLERK, U.S. DISTRICT COURT
FEB 27 2004
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

Priority ✓
Send ✓
Enter ✓
Closed
JS-5/JS-6
JS-2/JS-3
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DEATH PENALTY

ENTERED
CLERK, U.S. DISTRICT COURT
MAR 1 2004
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SERGIO OCHOA,

Petitioner,

v.

JEANNE WOODFORD, Warden of California State Prison at San Quentin,

Respondent.

CASE NO. CV 02-7774 RSWL

DEATH PENALTY CASE

ORDER GRANTING PETITIONER'S MOTION TO STAY AND DENYING WITHOUT PREJUDICE RESPONDENT'S MOTION TO DISMISS

DOCKET ENTRIES 28, 33

On November 14, 2003, Respondent filed a Motion to Dismiss the Petition for Habeas Corpus on the grounds that Petitioner failed to exhaust available state court remedies for certain claims asserted in his petition. On February 9, 2004, Petitioner filed a Motion to Stay Federal Proceedings Pending Resolution of State Habeas Proceedings, seeking to employ the "stay and abey" procedure for "mixed" petitions, endorsed recently by the Ninth Circuit in Kelly v. Small, 315 F.3d 1063, 1070 (9th Cir. 2003), cert. den., 123 S.Ct. 2094 (2003), and Hunt v. Plier, 336 F.3d 839, 847 (9th Cir. 2003).

Commendably, Respondent has opted not to contest Petitioner's motion to

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

MAR 1 2004

36

SCANNED

stay, and, on February 23, 2004, filed a Statement of Non-Opposition to the motion. Therein Respondent agreed to a stay during the pendency of the state court proceedings and reserved her right to oppose or object to any subsequent attempt by Petitioner to add new claims to or otherwise amend the petition.

The Court endorses the parties' agreement to the imposition of a stay pending a decision by the California Supreme Court on Petitioner's state habeas petition, filed December 15, 2003. In his motion, Petitioner represented that the California Supreme Court is awaiting the filing of an Informal Response to the petition by the Respondent. Accordingly, it appears to this Court that the state action is proceeding properly, and the interests of judicial economy will be served by the imposition of a stay.

Petitioner's motion for a stay of further proceedings is GRANTED. Respondent's motion to dismiss the petition is DENIED as moot; the denial is without prejudice to her right to file a subsequent motion to dismiss, if necessary. Petitioner is to file a report with the Court on the status of the consideration of the state habeas petition on a quarterly basis, starting three months from the date of this Order. Petitioner is to inform the Court immediately of any decision by the California Supreme Court on his state habeas petition. All other proceedings in this Court are hereby STAYED pending further Order of this Court.

IT IS SO ORDERED.

Dated: 2-27-04

RONALD S.W. LEW

The Honorable Ronald S.W. Lew
United States District Judge

NOTICE PARTY SERVICE LIST

Case No. CV02-7774 RSWL **Case Title** Ochoa v. Woodford

Title of Document Order granting Pet'rs motion to Stay

	Atty Sttlmnt Officer
	BAP (Bankruptcy Appellate Panel)
	Beck, Michael J (Clerk, MDL Panel)
	BOP (Bureau of Prisons)
	Calderon, Arthur - Warden, San Quentin
	CAAG (California Attorney General's Office - Keith H. Borjon, L.A. Death Penalty Coordinator)
	CA St Pub Defender (Calif. State PD)
	Case Asgmt Admin (Case Assignment Administrator)
	Catterson, Cathy (9th Circuit Court of Appeal)
	Chief Deputy Adm
	Chief Deputy Ops
	Clerk of Court
X	Death Penalty H/C (Law Clerks)
	Dep In Chg E Div
	Dep In Chg So Div
	Fiscal Section
	Intake Supervisor
	Interpreter Section
	PIA Clerk - Los Angeles (PIALA)
	PIA Clerk - Santa Ana (PIASA)
	PIA Clerk - Riverside (PIAED)
	PSA - Los Angeles (PSALA)
	PSA - Santa Ana (PSASA)
	PSA - Riverside (PSAED)
	Schnack, Randall (CJA Supervising Attorney)
	Statistics Clerk
	Stratton, Maria - Federal Public Defender

	US Attorneys Office - Civil Division -L.A.
	US Attorneys Office - Civil Division - S.A.
	US Attorneys Office - Criminal Division -L.A.
	US Attorneys Office - Criminal Division -S.A.
	US Bankruptcy Court
	US Marshal Service - Los Angeles
	US Marshal Service - Santa Ana
	US Marshal Service - Riverside
	US Probation Office
	US Trustee's Office

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Address:	
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*Fax No.:	

* For CIVIL cases only

	JUDGE / MAGISTRATE JUDGE (list below):

Initials of Deputy Clerk VL

APPENDIX H

SUPREME COURT
FILED
AUG 21 2002
Frederick K. Ohlrich Clerk
DEPUTY

2003 SEP 23 AM 11:29
CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
BY

S095304

01XH0203

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re SERGIO OCHOA on Habeas Corpus

The petition for writ of habeas corpus, filed February 20, 2001, is denied. All claims are denied on the merits. Claim VII is denied on the additional ground that it could and should have been, but was not, raised on appeal. (*In re Dixon* (1953) 41 Cal.2d 756, 759.)

George
Chief Justice

APPENDIX I

25D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

April 29, 2002

RECEIVED
MAY - 6 2002
CLERK SUPREME COURT

Clerk
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-3600

Re: Sergio Ochoa
v. California
No. 01-8782
(Your No. S030416)

Dear Clerk:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter

William K. Suter, Clerk

APPENDIX J

CV 02-07774 RSWL

B 5

SUPREME COURT
FILED

AUG 6 2001

Frederick K. Ohlrich Clerk

DEPUTY

COPY

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SERGIO OCHOA,

Defendant and Appellant.

S030416

Los Angeles County
Super. Ct. No. BA020873

A jury convicted defendant Sergio Ochoa of two counts of first degree murder (Pen. Code, § 187; all further statutory references are to this code unless otherwise indicated) and one count of attempted second degree robbery (§§ 664, 211). The jury also found true the allegations that a principal was armed with respect to all three offenses (§ 12022, subd. (a)(1)) and that defendant personally used a firearm with respect to one of the murders and the attempted robbery (§ 12022.5). Having found true the special circumstance allegations that defendant committed multiple murders (§ 190.2, subd. (a)(3)), and that a murder was committed while defendant was engaged in robbery (§ 190.2, subd. (a)(17)(A)), the jury set the penalty at death. The trial court denied defendant's motion to modify the sentence (§ 190.4, subd. (e)). This appeal is automatic. (Cal. Const., art. VI, § 11; Pen. Code, § 1239).

For the reasons stated below, we conclude the judgment should be affirmed in its entirety.

SEE CONCURRING OPINION

I. FACTS

A. Guilt Phase

1. The People's Case

a) The gang rivalry

In late 1989 and early 1990, defendant's 18th Street Gang was in a "war" with a rival gang, Crazy Riders. On December 15, 1989, defendant was walking with "Pollo" near Pico Boulevard and Fourth Avenue in Los Angeles[1] when a white Toyota with license plate number "2MTV878" pulled up beside them. A Crazy Riders member named "Pompis" exited the car and shot three times at defendant and Pollo. Defendant and Pollo ran to Fifth Avenue, where they were shot at twice more.

The next day, the Crazy Riders Gang shot Luis Magallenes, an 18th Street Gang member nicknamed "Bandit." Later that same day, an 18th Street Gang member nicknamed, "Flacko," fatally shot Crazy Rider Nelson Mauricio Donis to retaliate for the shooting of Magallenes.

On January 3, 1990, at approximately 5:00 p.m., 18th Street Gang members Jacinto Alonzo, and Walter Aguilar and his brother, Oscar Quijada, were driving near 12th Avenue and Venice Boulevard. The white Toyota pulled up and Pompis shot Quijada in the forehead. He was taken to the hospital and survived.

b) The Navarette murder

At approximately 8:00 p.m. on January 3, 1990, Aguilar and Alonzo were assembled at Pico Boulevard and Wilton Avenue with fellow gang members Juan Velasquez and Mauricio Soriano. Defendant, driving a red truck, arrived and stated he had just seen the Crazy Riders' white Toyota on Pico Boulevard.

---

1 All of the events described occurred in the City of Los Angeles.

Aguilar, Alonzo, Velasquez and Soriano entered defendant's truck. Aguilar brought a double-barreled shotgun with him, and the 18th Street Gang members set off to find the Crazy Riders.

Defendant drove eastward on Pico Boulevard. Defendant stated, "There they are." Defendant accelerated and changed lanes so his truck was adjacent to the Toyota, on its left. Two shots were fired from the shotgun. After the shooting, defendant turned the truck and drove northbound on Kingsley Drive.

The white car in question was not the Toyota belonging to the Crazy Riders, but a Datsun driven by decedent Pedro Navarette, whose passenger at the time was his brother, Rudolfo Rivera. Navarette was not a rival gang member. The beginning of Navarette's license plate number read "2MTY." Navarette fell on the steering wheel after the second shot was fired; the car drove onto the sidewalk and crashed into a wall. Rivera heard the truck passengers' voices after the second shot, but he could not understand what they were saying. The cause of death was a shotgun wound to the head.

Defendant was first questioned on January 22, 1990. He stated he had heard nothing about a shooting at Pico Boulevard and Kingsley Drive of a car with a license plate beginning with "2MTY." On February 13, 1990, defendant signed a statement in which he admitted he drove the truck during the shooting. Defendant stated Velasquez requested a ride to Normandie Avenue, and defendant obliged; Soriano, Alonzo and Aguilar also traveled as passengers. A car resembling the one that belonged to the Crazy Riders was also driving eastbound on Pico Boulevard. Defendant suddenly heard a loud bang, and the car window cracked. Defendant stated he looked in his mirror and saw Velasquez holding a shotgun. Defendant had not formerly known that Velasquez was armed.

Detective Michael Bercham described defendant as a "hard-core" gang member. Defendant had 18th Street Gang tattoos all over his body. After his

arrest on January 21, and interview on January 22, 1990, he added a tattoo over his eye that depicted the number "187," the California Penal Code section proscribing murder.

c) The Castro attempted robbery and murder

On the evening of January 20, 1990, defendant, Soriano, Velasquez, and fellow 18th Street Gang members Oscar Montes and David Lozano were assembled at Pico Boulevard and Wilton Avenue. Defendant said, "Let's go do a jack." When Lozano stated he did not want to go, defendant told Lozano to "do something for the neighborhood," meaning the 18th Street Gang. Lozano agreed to participate.

Lozano drove the other 18th Street Gang members in his car past a white Trans Am that was parked on St. Andrews Place between Fifth and Sixth Streets. Soriano commented it was a nice car. Defendant agreed it "was a nice car to get." Lozano parked the car. His four passengers exited the car and approached the Trans Am.

Jose Castro was sitting in his Trans Am. Defendant and Soriano went to the left side of the car; Montes and Velasquez went to the right side of the car. Defendant, the only assailant with a gun, placed it in Castro's face and ordered him to leave the car. Montes and Velasquez, anticipating Castro's flight, entered the car. Castro refused to exit. Defendant stated, "I'm gonna' shoot him." Castro held on to the wheel.

David Mandich was driving on St. Andrews Place from Sixth Street toward Fifth Street. He saw four males, in their mid-teens to early 20's, standing around a white Trans Am. Two of the four were on the left and two were on the right. The tallest of the four talked to a person in the driver's seat. The tall one then pulled a

gun from his jacket and shot the driver. All four males began running toward Fifth Street.

Lozano was surprised to see the four return, as he expected them to drive away in the Trans Am. Defendant stated he had shot the man in the leg. Defendant further stated the man had cried, "Oh, shit, oh shit." Defendant wore a silver Raiders jacket with black lettering.

Mandich described the incident to a police officer that evening. He described the shooter as a Black or dark-complected Hispanic male between five feet ten inches and six feet tall, wearing a dark athletic jacket with white letters in a semicircle on the back. Detective Paul Coulter testified that the shiny "satiny" jacket could have appeared darker than its actual color due to the lighting conditions in the area.

Mandich was unable to select anyone from a photographic lineup. On September 4, 1990, he selected defendant from a live lineup that included six males. Mandich had no doubt that he was correct, unless defendant "had a twin brother." At trial, Mandich again identified defendant as the perpetrator.

Defendant was taken into custody for an unrelated matter on January 21, 1991. He was wearing a silver Raiders jacket, which had letters in a semicircle on the back. Defendant stands six feet tall; the other individuals involved in the Castro robbery were five feet six inches tall or shorter.

Ruben Sanchez, an expert on latent fingerprints, took fingerprints from the Trans Am. Gilbert Aguilar, a Los Angeles Police Department fingerprint expert, testified these prints matched the samples of Soriano and Velasquez.

Dr. Irwin Golden, a deputy medical examiner coroner, performed the autopsy of Jose Castro, who died from a gunshot to the chest. The bullet entered through the victim's left shoulder, passed through his chest and lung, and exited on the right side of his chest. The wound was consistent with the scene described

by Mandich: the shot was fired by an assailant standing outside the driver's side door.

2. The Defense Case

Los Angeles Police Officer Jason Loya interviewed David Mandich on the night of the shooting. Mandich indicated four males, three Black and one Hispanic, all ranging in age from 17 to 22, had surrounded a Trans Am on St. Andrews Place. The shooter was a Black male, approximately five feet ten inches to six feet tall. He wore a dark blue or black jacket with letters on the back.

Los Angeles Police Officer Frank Bolan helped prepare a photographic display in March 1990, from which Mandich was unable to identify defendant. Officer Bolan also participated in the staging of an in-person lineup on September 4, 1990. Jose Castro's sister, his widow, the widow's sister and her son were present, seated in the back row. Officer Bolan warned them not to have any contact with anyone else. After making his selection, Mandich asked if he had selected the right person. Officer Bolan stated he could not answer that question. Mandich told the officer he was positive of his selection. Mandich again sought confirmation, and Officer Bolan again refused.

B. Penalty Phase

1. The People's Case

On August 11, 1986, 14-year-old Lionel Fricks was walking on Exposition Boulevard, carrying a "semi-big" radio. Defendant and another male punched Fricks several times. Once Fricks had fallen to the ground, one of the two males took Fricks's radio. Defendant pleaded guilty to second degree robbery.

On July 10, 1989, defendant pleaded guilty to driving or taking a vehicle without the owner's consent in violation of Vehicle Code section 10851.

On January 20, 1990, at approximately 11:30 p.m., Freddie Garcia was at a gas station on La Brea Avenue. Defendant and three other males approached him. The males kicked Garcia to the ground; when he rose, defendant punched him. Defendant warned Garcia, "Give up the car, otherwise I'm going to shoot you." Another male put a gun to Garcia's stomach, although defendant did the talking. Defendant entered the car, and drove the other three males away. Defendant pleaded guilty to robbery with the allegation that a principal was armed with a firearm.

On the evening of April 5, 1992, defendant participated in a fight between Black and Hispanic inmates of the North County Correctional Facility. Even after officers had separated the combatants, defendant tried to provoke the Black inmates into further conflict.

On July 22, 1992, defendant was transported from court to the North County Correctional Facility. Deputy Sheriff David Mertens searched defendant and found a makeshift handcuff key in a small incision inside his wristband. Deputy Mertens tested the key and found it easily opened a pair of Smith and Wesson handcuffs, the kind most commonly used to control inmates being transported back from court. Another deputy later searched defendant's property bag and found a shank.

Rudolfo Rivera, Navarette's brother and his passenger on the night of the murder, testified he and Navarette were living in their family home when Navarette was murdered. Navarette worked six days a week, not returning home until 11:00 p.m., to help support the family. Navarette's death was especially difficult for his mother, who was still taking pills for her high blood pressure in September 1992, nearly three years after the shooting.

Maria Mastrocinque, Jose Castro's older sister, testified he was loving, peaceful and sensitive. After finishing high school, Castro volunteered for the

Marines, in which he served for two and a half years. The family used to get together every week. Now, Castro's mother is "a walking wound that will never heal."

Gladys Castro, the youngest sister, testified Castro always helped and was there for her and that her mother is "lost" and "not all there." Gladys further stated that she is afraid to sleep at night.

Martha and Jose Castro were high school sweethearts who married in 1979. Castro was a very giving and loving man, who had a close relationship with their 15-year-old son, Joey. Joey keeps his feelings to himself and has been attending counseling. After Castro's death, Joey began misbehaving in school. He has since improved his behavior, but does not want to talk about the murder. He wants to be like his dad. He often asks his mother "what would Daddy do" in certain situations.

2. The Defense's Case

Leland Bradford was with defendant when Lionel Fricks was robbed. The robbery was the idea of Juan Lombrero, who first hit Fricks and grabbed his radio. Bradford admitted that before he was arrested, defendant had the radio and gave it to Lombrero because the police were looking for it.

Besides participating in the fight and possessing the handcuff key and shank, on one occasion defendant possessed food and United States currency in excess of permitted limits and "roamed" (entered a jail tier other than his own) on another. These incidents were the extent of defendant's documented infractions while in custody.

Deputy Sheriff Dennis Parker and Deputy Sheriff Robert Thomasser observed the April 5, 1992, jail fight. The two inmates who resumed fighting after officers had separated the two groups were inmates Rene Munoz and Christopher

Wood. Rosendo Florentin, a registered nurse, treated defendant after the fight. Defendant suffered a one-inch laceration on his eyebrow. Nurse Florentin treated three other inmates that night; defendant was the only inmate sent to an outside hospital for his injuries.

Rosalba Gallegos, defendant's older sister, and Eduardo Ochoa, defendant's father, described defendant's childhood. Defendant was the fourth of five children born to a shoemaker and a homemaker. The family lived in Tijuana when defendant was born, and moved to San Diego three years later. A few months later, the family moved to Figueroa Street in Los Angeles. It took defendant's father six months to find work as a shoemaker; defendant's mother worked as a housecleaner. Neither was home during the day.

Some of the neighborhood children mistreated the Ochoa children, pouring water on their backs while calling them "wetbacks," cutting up their clothes and throwing away their food. When defendant's parents spoke to the other children's parents, they responded by threatening to report the Ochoa family to immigration authorities. When defendant was in kindergarten the family moved to Welcome Avenue, where defendant had no problems in school. About seven years later, the family moved to a Black neighborhood near Arlington Avenue. Some neighborhood kids threw rocks and bottles every night at the Ochoa door. Gallegos called the police but they never came. The home was also burglarized. When defendant was approximately 16 years old, his sister was severely beaten.

Defendant had done well in elementary school, but he began missing school and dressing differently once he was in high school. Dr. Michael Maloney, a clinical psychologist and professor at University of Southern California School of Medicine, evaluated defendant and reviewed his school records. In fourth grade, defendant was described as "capable," maybe even "bright." In sixth grade, defendant was "working hard," and performing "adequately." His grades

plummeted after sixth grade, when he became involved with gang activity, and he received D's and F's in junior high school. In the eighth grade, defendant scored in the 26th percentile in reading and in the 27th percentile in mathematics. By the time Dr. Maloney evaluated defendant, he registered an IQ of 74. This placed him in the fifth percentile of society, although that ranking was "probably a low estimate of his ability." Defendant read at an eighth grade level, and his arithmetic skills equaled those of a fifth grade student.

Lisa Martinez was defendant's girlfriend from 1984 until 1987, and she is the mother of defendant's daughter, Claudia. Defendant loved and played with Claudia. Defendant had studied with Lisa to become a dental technician. He earned his diploma but was unable to find work in the field.

Defendant has maintained close ties with his sister's children. They visit him in prison and get excited when he telephones.

Defendant's performance on the Minnesota Multiphasic Personality Inventory did not indicate he was schizophrenic or psychotic. "There is some suggestion he has always been somewhat insecure, but not grossly disturbed." The doctor concluded that defendant "knows right from wrong."

James Park, a correctional consultant and former corrections officer, testified that prisoners serving life without possibility of parole terms are automatically sent to maximum security "level-four" facilities, from which there has never been an escape.

II. DISCUSSION

A. Guilt Phase

1. Joinder of the Navarette and Castro Charges

Defendant moved to sever counts 1 and 2 (the Castro homicide and attempted robbery) from count 3 (the Navarette homicide). The trial court denied

the motion. Defendant now contends the denial was erroneous and deprived him of a fair trial and due process of law.

The law prefers consolidation of charges. (*People v. Ochoa* (1998) 19 Cal.4th 353, 409.) Where, as here, the offenses charged are of the same class, joinder is proper under section 954. (*People v. Kraft* (2000) 23 Cal.4th 978, 1030 (*Kraft*); *People v. Bradford* (1997) 15 Cal.4th 1229, 1315 (*Bradford*).) Defendant can predicate error in the denial of the motion only on a clear showing of potential prejudice. (*Kraft*, at p. 1030; *Bradford*, at p. 1315.) We review the denial of defendant's motion for an abuse of discretion, that is, whether the denial fell " 'outside the bounds of reason.' " (*Ochoa*, at p. 408, quoting *People* v. *DeSantis* (1992) 2 Cal.4th 1198, 1226.) We find the trial court properly exercised its discretion in denying the severance motion.

We have developed criteria to guide evaluations of trial court decisions on severance motions. "Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case." (*Kraft*, *supra*, 23 Cal.4th at p. 1030.)

Cross-admissibility of evidence is sufficient but not necessary to deny severance. (*Bradford*, *supra*, 15 Cal.4th at p. 1316.) As the four-part test is stated in the conjunctive, joinder may be appropriate even though the evidence is not cross-admissible and only one of the charges would be capital absent joinder. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1244-1246 (*Musselwhite*).) Even where the People present capital charges, joinder is proper so long as evidence of

each charge is so strong that consolidation is unlikely to affect the verdict. (*People v. Arias* (1996) 13 Cal.4th 92, 130, fn. 11 (*Arias*); *People v. Lucky* (1988) 45 Cal.3d 259, 277-278 (*Lucky*).) As in those cases, the strength of the People's evidence warrants our conclusion that the trial court properly joined the charges.[2]

Defendant contends the evidence of the Navarette homicide tended to inflame the jury to defendant's detriment concerning the Castro charges. Defendant argues a jury trying the Castro charges separately would not have learned about defendant's heavy gang involvement. Without expressing our agreement or disagreement with this assertion, we note it is doubtful that the evidence on the Navarette charge was so much more inflammatory than that supporting the Castro charge. The evidence supporting the former charge indicated defendant assisted Aguilar in shooting the individual who, in their minds, had shot Aguilar's brother three hours earlier, and had shot at defendant on several occasions a few weeks before. By contrast, the evidence supporting the latter charge showed defendant was the instigator and perpetrator of a killing for which the only motive was punishing Jose Castro for refusing to abandon his car on defendant's demand. We find defendant has failed to meet his burden of showing the evidence supporting either charge was so inflammatory as to create prejudice regarding the other.

We also find the People's case on both charges was sufficiently strong to render joinder proper. (*Lucky*, *supra*, 45 Cal.3d at p. 278.) Defendant contends the People's case on the Castro charges was weak, emphasizing the favorable

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2 Because we do not find that either charge was unusually likely to inflame the jury or that the evidence of either or both of the charges was "weak," we need not determine whether and to what extent the evidence of the two homicides would have been cross-admissible.

dispositions granted to the witnesses and the alleged unreliability of Mandich's identification. Contrary to defendant's argument, we find the evidence of the Castro homicide to be comparable to, if not stronger than, the evidence of the Navarette homicide.

Defendant contends "Castro evidence" was tainted by the favorable dispositions received by the witnesses. None of the evidence inculpating defendant on the Castro charges could have been the dubious product of favorable prosecutorial treatment. David Lozano was allowed to plead guilty to voluntary manslaughter and received a maximum sentence of 11 years, but his testimony echoed his June 4, 1990, pretrial statement, which he offered prior to his arrest and disposition in this case. Oscar Montes pleaded guilty to voluntary manslaughter pursuant to an agreement that he would receive no more than four years imprisonment. But Montes's trial testimony was of minimal value to the People; his value as a witness derived from his tape-recorded interview of June 1, 1990, which preceded his plea. Moreover, due to the disposition accepted by two of the witnesses on the Navarette count, Walter Aguilar and Mauricio Soriano, we cannot find the dispositions to be a meaningful basis for distinguishing the strength of the evidence on the two charges.

The People actually presented more evidence corroborating the gang members' testimony with respect to the Castro charges. The People tied both Velasquez and Soriano to the shooting through their fingerprints; no such physical corroboration supported the Navarette charge. Furthermore, David Mandich, a disinterested witness, identified defendant as the shooter, both in court and at a lineup. Although defendant naturally challenges these identifications, observing Mandich failed to identify defendant from photographs, initially identified the perpetrator as a Black male, and described the shooter's jacket as being black, Mandich's description was consistent with the statements of Montes and Lozano.

Mandich correctly described the number and positioning of Castro's assailants (two, including the shooter, at the left front of the car and two at the right front), he described the location where the car was parked, he described how the shooter was talking to the driver, and then, after the shooting, how all four assailants began running. He further identified defendant's jacket, although, according to Montes, it was silver with black lettering; someone else in the party wore the black Raiders jacket. Mandich correctly described defendant's height in both absolute and relative terms. Considering the evidence as a whole, we find the evidence supporting the Castro charges was sufficiently strong to support the denial of the motion.[3]

Defendant cannot show that the evidence supporting either charge was unusually likely to inflame the jury or impermissibly weak. (*Musselwhite*, *supra*, 17 Cal.4th at pp. 1244-1247.) We find the trial court properly exercised its discretion in joining the charges, and defendant received his due process right to a fair trial.

2. Transfer to the Northwest Judicial District

Defendant challenges the trial court's transfer of the case from the Central Judicial District of the Los Angeles Superior Court to the Northwest Judicial District. He contends the transfer denied him his rights both to vicinage and a jury chosen from a fair cross-section of the community. We reject both claims.

On April 16, 1992, Judge Stephen Czuleger announced he would transfer the case from the Central Judicial District to the Northwest Judicial District on

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3 The evidence supporting the Navarette charge was also convincing. Both defendant's statement and those of his passengers showed he drove the truck. The testimony of disinterested witnesses Rudolfo Rivera and Carlos Montes further confirmed the driver accelerated and maneuvered the truck in a way that facilitated the shooting and escape.

April 21. Defendant moved to impanel prospective jurors from the Central Judicial District to provide him with a jury drawn from a representative cross-section of the community. Defendant further moved to quash the Northwest Judicial District jury panel, alleging a systematic exclusion of minority jurors.

Defendant based the motion to quash on demographic evidence, including the testimony of Juanita Blankenship, the administrator of litigation support services for Los Angeles County Superior Court, and social demographer Dennis Willigan. The trial court rejected the motion. The court found transfer was authorized by *Hernandez v. Municipal Court* (1989) 49 Cal.3d 713 (*Hernandez*). The trial court rejected defendant's allegation of systematic exclusion, basing its analysis on *Duren v. Missouri* (1979) 439 U.S. 357 (*Duren*). The trial court properly denied the motion.

As the trial court correctly observed, *Hernandez* authorizes intracounty transfer of cases. In *Hernandez*, we held the boundaries of vicinage are coterminous with the boundaries of the county. (*Hernandez*, *supra*, 49 Cal.3d at p. 729.) Accordingly, *Hernandez* decided "there is no violation of the vicinage requirement when a criminal defendant is tried in Los Angeles County by a jury drawn from Los Angeles County" (*id.* at p. 722), and we decline defendant's request to reconsider that conclusion. Furthermore, as we recently held in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1065, the Sixth Amendment right to vicinage was not incorporated by the Fourteenth Amendment against the states, and thus the transfer implicates no federal constitutional right.

The trial court also properly concluded defendant failed to establish a prima facie violation of his right to a jury drawn from a fair cross-section of the community. " 'In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of

this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.' " (*People v. Howard* (1992) 1 Cal.4th 1132, 1159, quoting *Duren*, *supra*, 439 U.S. at p. 364.) The trial court determined defendant satisfied only the first prong of this test.

We have recognized that Hispanics are a cognizable group. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1154 (*Ramos*); *People v. Sanders* (1990) 51 Cal.3d 471, 491 (*Sanders*).)

Whether defendant satisfies the second prong is less certain. The evidence presented revealed that although 13 percent of the jury-eligible population of the Northwest Judicial District was Hispanic, only 7.7 percent of the district's jury pool in May and June 1992 was Hispanic. This resulted in an "absolute disparity" of 5.3 percent, and a "comparative disparity" of approximately 40.8 percent.[4] Neither we nor the United States Supreme Court has decided which test better measures alleged violations of the cross-section right or what degree of disparity is impermissible. (*Ramos*, *supra*, 15 Cal.4th at p. 1155.) We need not decide either question here, because defendant clearly failed to satisfy *Duren's* third prong.

The third prong requires defendant to show the state selected the jury pool in a constitutionally impermissible manner that was the probable cause of the

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[4] Courts calculate the "absolute disparity" by subtracting the proportion of the underrepresented group in the pool (figure B) from the underrepresented group's proportion of the population (figure A). (*People v. Breaux* (1991) 1 Cal.4th 281, 297, fn. 3.) In this case, subtracting 7.7 percent from 13 percent yields 5.3 percent. Courts calculate the comparative disparity by dividing the absolute disparity by figure A and multiplying the result by 100. (*Ibid.*) In this case, dividing 5.3 percent by 13 percent yields .4077, which produces a comparative disparity of 40.77 percent.

disparity. (*People v. Bell* (1989) 49 Cal.3d 502, 524 (*Bell*).) The evidence presented below showed Los Angeles County had formerly relied on voter registration lists to compile its jury pools, and added Department of Motor Vehicles (DMV) records in the early 1980's to provide a more representational list. We have observed that Code of Civil Procedure section 197 prescribes that a list derived from voter and driver records " 'shall be considered inclusive of a representative cross-section of the population' " where it is properly nonduplicative. (*Sanders*, *supra*, 51 Cal.3d at p. 496, fn. 9.)

Defendant now contends the county's failure to supplement these two lists with other "readily available lists" demonstrates the systematic exclusion required by *Duren*. This claim fails because the United States Constitution "forbids the *exclusion* of members of a cognizable class of jurors, but it does not require that venires created by a neutral selection procedure be supplemented to achieve the goal of selection from a representative cross-section of the population." (*Bell*, *supra*, 49 Cal.3d at p. 530.) As the United States Fourth Circuit Court of Appeals has explained, the failure of a particular group to register to vote in proportion to its share of the population cannot constitute improper exclusion attributable to the state. (*United States v. Cecil* (4th Cir. 1988) 836 F.2d 1431, 1448-1449.) So long as the state uses criteria that are neutral with respect to the underrepresented group, a defendant cannot satisfy *Duren*'s third prong by showing the state could have adopted other measures to improve further the group's representation. (*People v. Currie* (2001) 87 Cal.App.4th 225, 235-237.) The challenged state action must be the probable *cause* of the disparity (*Bell*, at p. 524); defendant has pointed only to the state's inability to provide a *remedy*. Without more, defendant's claim challenging the Los Angeles County Northwest Judicial District jury pool must fail.

3. Voir Dire Questions and Challenges for Cause

Defendant contends the prosecutor offered misleading descriptions of the case on voir dire, which led to the erroneous exclusion of jurors for cause. He contends these jurors offered responses that appeared to call into question their ability to keep an open mind as to penalty only because the prosecutor characterized the facts of the case as being relatively benign for a capital case. The result of this allegedly improper characterization, defendant argues, was a jury predisposed to impose death under the particular circumstances of this case. We conclude both the questioning and the excusals were proper.

a) Prospective Jurors Gertrude W., Patrice V. and Alicia B.

After the court asked the panel some questions, the defense commenced its voir dire by noting some people believe only individuals like Adolf Hitler or Jeffrey Dahmer deserve death. The trial court sustained the prosecutor's objection to defense counsel's asking a prospective juror whether she could vote to execute Hitler or Dahmer. The prosecutor used her voir dire to explain, without objection, the concepts of accomplice liability and the felony-murder doctrine. When asked, Prospective Juror Gertrude W. confirmed she would not impose the death penalty in a case, like the instant one, where the defendant did not personally commit one of the murders, and did not plan or premeditate the other. She told the court, "I don't think I would consider voting for death." The court excused Prospective Juror Gertrude W. for cause.

At the conclusion of the first panel's voir dire, the trial court remarked the first questioning went very smoothly. Neither party disagreed with this characterization. With respect to future panels, the court warned the defense not to ask whether jurors would favor the death penalty for individuals such as Jeffrey Dahmer or Charles Manson, but instead to limit its inquiry to the facts of the instant case. The court likewise cautioned the prosecutor not to ask prospective

jurors if they could impose the death penalty for an unintentional felony murder, since there was a second, intentional murder charged.

Thereafter, the court questioned Prospective Juror Patrice V., who noted on her questionnaire her belief that "the death penalty was state sanctioned murder." She stated that "[i]t would be very difficult" for her to sentence someone to death. She thought she could set aside her personal feelings if she received "very clear instructions about what my obligation was." Prospective Juror Alicia B. stated she did not "fully agree with the death penalty." The prosecutor described the general principles of accomplice liability and felony murder. She asked prospective jurors whether they could return a death verdict if, in one of the charged murders, defendant did not personally shoot the victim, and, in the other, defendant neither planned nor premeditated the murder.

Upon inquiry, Prospective Juror Patrice V. confirmed she considered the death penalty "state sanctioned murder." Patrice V. agreed she "would not consider the death penalty in this type of case." Prospective Juror Alicia B. confirmed she did not really agree with the death penalty. She did not feel she would consider death as a possible penalty, as this was not "the right kind of case" for capital punishment. The court later followed up the prosecutor's questions by asking whether Alicia B. would consider voting for death if she heard about defendant's prior violent misconduct during the penalty phase. Prospective Juror B. answered, "This is my position. That this case is not the case for [the] death penalty," no matter what evidence the People presented during the penalty phase. The trial court excused both Prospective Jurors Alicia B. and Patrice V. for cause.

After a brief recess, the defense expressed its concern that the court precluded defense questions about capital punishment in the Dahmer or Manson cases, yet allowed the prosecutor to use a "misleading nonegregious hypothetical when questioning those same jurors." The court reiterated its ban on the defense's

Hitler/Dahmer/Manson inquiries, and noted the prosecutor had offered her hypotheticals without timely objection. The court found it "fair for the prosecutor to point out [that a felony] murder may be accidental, nonintentional or it may be intentional as well." For future questioning, the court granted the defense some "rebuttal" voir dire after the prosecutor had finished. The defense announced its intention to ensure the hypotheticals accurately described the evidence in the case.

Because there had been no objection, the court refused to revisit any of the excusals the court had already allowed. The court stated its belief, however, that "almost all of [the jurors excluded on the People's motion] were what we would call *Witherspoon* [*v. Illinois* (1968) 391 U.S. 510] excludables. Most, if not all, were those that were adamantly opposed and would not impose [the death penalty under] any circumstances."

b) Prospective Jurors Linda H., Martha C., Arthur R. and Lynn J.

During the trial court's inquiry, Prospective Juror Linda H. announced, "I'm against the death penalty." She agreed, however, she could set aside her personal opinion in serving as a juror. After describing the aiding and abetting and felony-murder doctrines, the prosecutor asked about Linda H.'s questionnaire comment that "when a jury sentences someone to death, it's murder." Ms. H. confirmed her opposition, stating, "I'm against the death penalty always." She stated she could not vote for death "in any case." The court excused her for cause.

During the trial court's inquiry of a later panel, the court asked Prospective Juror Martha C. about her questionnaire comment that, given the choice, she would always vote for life imprisonment without possibility of parole. She answered she did not think she could envision any set of circumstances that would prompt her to vote for death. Ms. C. also confirmed her questionnaire remark that if she sentenced someone to death, she would feel guilty for the rest of her life.

She later told the prosecutor she did not think she could impose a sentence of death "regardless of the evidence in this case."

After hearing the prosecutor's description of aiding and abetting liability, Prospective Juror Arthur R. volunteered he would have a difficult time finding an aider and abettor guilty of first degree murder, and he could do so only where it was "pretty clear that the person was really connected." Mr. R. admitted he was not sure whether he could vote for death, "regardless of the evidence in this case." He stated, "I rather feel that I would be inclined to not [impose a death sentence]." When asked further whether he could vote for death "if you felt it was appropriate," he thought he would "not [be] able to follow through."

Prospective Juror Lynn J. volunteered he thought it might be best to limit capital punishment to premeditated and deliberate murders. When later questioned, Mr. J. confirmed his questionnaire statement that the death penalty should be limited to cases of mass murder, unusual cruelty, torture or murder while in prison. When asked if he could nevertheless vote for death in the instant case, which did not involve such factors, he answered affirmatively. When the prosecutor asked whether he could consider death as a penalty considering "what you know about this case," the trial court sustained defendant's objection. Mr. J. averred he could vote for death "if it involves torture or some activity that's at the highest level of crime." Upon further inquiry, Mr. J. agreed that neither murder in the commission of an attempted robbery nor murder by aiding and abetting met his standards for imposing death. Accordingly, he did not believe he could consider voting for death in this case. The trial court excused Prospective Jurors Martha C., Arthur R. and Lynn J. for cause.

c) Analysis

Trial courts excuse for cause a juror whose views on capital punishment would " ' "prevent or substantially impair" ' " the performance of the juror's duties. (*Morgan v. Illinois* (1992) 504 U.S. 719, 728; *Wainwright v. Witt* (1985) 469 U.S. 412, 424 (*Wainwright*); *Bradford*, *supra*, 15 Cal.4th at p. 1318.) The real question is " ' "whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror*." ' " (*Bradford*, at pp. 1318-1319, quoting *People v. Hill* (1992) 3 Cal.4th 959, 1003.) A juror is subject to exclusion for cause if she "would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances . . . ." (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005 (*Kirkpatrick*).)

To facilitate the intelligent exercise of both peremptory challenges and those for cause, parties may inform prospective jurors of the general facts of the case. (*People v. Ervin* (2000) 22 Cal.4th 48, 70 (*Ervin*); *Kirkpatrick*, *supra*, 7 Cal.4th at pp. 1004-1005.) A prosecutor may therefore inquire whether a juror will be able to impose the death penalty on a defendant who commits felony murder (*People v. Pinholster* (1992) 1 Cal.4th 865, 916-918), or on a defendant who did not personally kill the victim. (*Ervin*, at pp. 70-71.) The trial court properly exercised its broad discretion in allowing the prosecutor's voir dire. (*Pinholster*, at p. 918.) To the extent a more accurate characterization of the case was possible, defendant had the opportunity to provide it. The trial court correctly found defendant had waived any challenge to the prosecutor's questioning by failing to offer a timely objection. (*People v. Medina* (1995) 11 Cal.4th 694, 740 (*Medina*).) Even after receiving the court's advice about the need for timely objection, defendant failed to object to ensure that the prosecutor offered a more

accurate description of the case. Where defendant offered a proper objection, the trial court sustained it. Furthermore, the trial court expressly indicated it would not dismiss for cause a prospective juror who based her stated inability to impose the death penalty on a description of the case that the court deemed misleading.[5]

We uphold both the questioning and the excusals. If a juror's responses are equivocal or conflicting, the trial court's determination of the juror's fitness to serve is binding. (*People v. Cooper* (1991) 53 Cal.3d 771, 809.) If there is no inconsistency, we uphold the determination below if it is supported by substantial evidence. (*Ibid.*) In other words, only if the record discloses no evidence from which a rational trier of fact could find a juror was qualified to serve will we find error. Prospective Juror Linda H.'s comments revealed her unambiguous opposition to the death penalty, and the trial court properly excused her. Substantial evidence likewise supports the exclusion of the other jurors. To the extent their responses could support multiple inferences, we defer to the trial court's determination of their unfitness to serve. (*Ibid.*)

4. Peremptory Challenges Against Death Penalty Skeptics

Defendant contends the prosecutor committed reversible error in exercising peremptory challenges against four prospective jurors who expressed skepticism about capital punishment, even though they were qualified to serve in accordance

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5 The prosecutor asked Prospective Juror Doris K., "Knowing what you know now about this case . . . it doesn't necessarily involve premeditation and deliberation, especially with respect to the robbery murder. [¶] . . . [W]ould it be fair to say that as you sit here today you don't see yourself actually imposing a sentence of death." Defendant objected. The court reminded the prosecutor the People alleged the Navarette murder was premeditated. The court further found the prosecutor had omitted any reference to any aggravating evidence. Although the court declined to restrict the prosecutor's voir dire, the court thrice stated it would not dismiss Prospective Juror Doris K. for cause on this record.

with *Witherspoon v. Illinois*, *supra*, 391 U.S. 510 and *Wainwright*, *supra*, 469 U.S. 412. Defendant did not object to these challenges, and thus failed to preserve the issue for appeal. (*People v. Champion* (1995) 9 Cal.4th 879, 907 (*Champion*).)

Furthermore, these challenges were proper. We have distinguished between the impermissible practice of excluding jurors based on their membership in a racial or ethnic group and the permissible practice of excluding jurors based on their attitudes or viewpoints. (*People v. Turner* (1984) 37 Cal.3d 302, 313-315, overruled on another ground in *People v. Anderson* (1987) 43 Cal.3d 1104, 1115.) Because both parties may exercise peremptory challenges to remove jurors with unfavorable attitudes, the practice does not produce a jury biased toward death. (*Turner*, at p. 315.) We therefore permit prosecutors to exercise peremptory challenges against prospective jurors who express skepticism about capital punishment. (*People v. Bolin* (1998) 18 Cal.4th 297, 317 (*Bolin*); *Champion*, *supra*, 9 Cal.4th at p. 907.)

5. Defendant's Absence from Sidebar Conferences

The trial court inquired of 12 prospective jurors who had marked on their juror questionnaires "confidential" regarding specific questions. Two of these jurors, Raymond F. and Cecil H., eventually served on the jury. The prosecutor and both counsel were present at these sidebar conversations. Defendant neither asked to participate nor objected to his absence. He now contends his absence deprived him of his right to be present at trial, which is protected by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, article I, section 15 of the California Constitution, Penal Code sections 977 and 1043, and common law.

a) Constitutional law

A criminal defendant's federal constitutional right to be present at trial, largely rooted in the confrontation clause of the Sixth Amendment, also enjoys protection through the due process clause of the Fifth and Fourteenth Amendments (*United States v. Gagnon* (1985) 470 U.S. 522, 526 (*Gagnon*)) " 'whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge,' " but not " 'when presence would be useless, or the benefit but a shadow.' " (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745, quoting *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-107.) Article I, section 15 of the California Constitution applies the same standard. (*People v. Waidla* (2000) 22 Cal.4th 690, 742 (*Waidla*).)

Defendant has not indicated any way in which his presence at the sidebar conferences bore a reasonably substantial relation to his opportunity to defend himself. He admits the impossibility of knowing what sudden impressions and unaccountable prejudices he might have formed. Because there must be a "reasonably substantial relation" to defendant's ability to defend himself, and not a mere "shadow" benefit, we must reject such claims based on undue speculation. (*Waidla*, *supra*, 22 Cal.4th at p. 742; *People v. Johnson* (1993) 6 Cal.4th 1, 19 (*Johnson*).)

In *Johnson*, the trial court held a sidebar conference during trial to determine whether a juror should have been dismissed. Evidence showed the juror had (1) nodded and " 'consistently smiled' at defendant, 'to the extent that [his] teeth [were] showing' "; (2) frequently greeted defendant before lunch breaks; (3) concealed a prior arrest for narcotics possession; and (4) apparently failed to pay attention or slept during proceedings. (*Johnson*, *supra*, 6 Cal.4th at pp. 16-17.) After the in camera hearing, which neither the prosecutor nor defense counsel attended, the court excused the juror for the latter two reasons. In *Johnson*, unlike

the instant case, some of the questions raised at the conversation from which the defendant was absent concerned activity in which he was personally involved and would have personal, possibly exclusive knowledge.[6] We rejected Johnson's allegation that he was improperly excluded (even though Johnson both objected to the hearing on the juror's fitness and requested to be present) because we deemed his claim that he "might have helped his counsel" too speculative to show his presence bore a reasonably substantial relation to his ability to defend against the charges. (*Johnson*, at pp. 18-19.) A fortiori, we must reject defendant's instant contention.

b) Statutory law

Defendant further contends his absence deprived him of his statutory and common law rights. We have observed that both the United States Constitution and the California Penal Code do not follow the common law on this subject. (*People v. Grant* (1988) 45 Cal.3d 829, 845.) Insofar as the statutory right is concerned, we have recognized its relation to the constitutional right. In *Ervin*, *supra*, 22 Cal.4th at page 74, we stated that where the proceeding bears no reasonable relation to defendant's ability to defend against the charges, sections 977 and 1043 do not *require* defendant's presence. In *Waidla*, *supra*, 22 Cal.4th at page 742, we stated those sections do not *entitle* a defendant to be present where

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6 The confidential sidebar conferences here concerned past criminal behavior on the part of the prospective jurors, their friends or relatives, the criminal victimization of a relative, the possible professional hardship imposed by jury service, participation in Overeaters Anonymous, psychological issues regarding whether a prospective juror was a leader or follower, the Rodney King case, religious questions concerning capital punishment, and concern about the confidentiality of identities of jurors and their posttrial security. The one prospective juror who commented on defendant personally, indicating his failure to look at jurors suggested his guilt, was excused for cause by the court on its own motion, which was at the defendant's "request."

the constitutional standard has not been met. Although we find the constitutional standard has not been met here, we analyze the issue to place our prior statements in their proper context.

We have long recognized a hierarchy of proceedings concerning the need for the defendant's presence. In *People v. Jackson* (1980) 28 Cal.3d 264, we cited section 977's provisions that a defendant could not waive presence for certain fundamental proceedings (arraignment, plea, preliminary hearing, the taking of evidence by the trier of fact, and sentencing), but could waive presence for " 'all other proceedings.' " (*Jackson*, at p. 309.) We further observed a third category; unlike the first two categories, the fundamental and " 'all other' " proceedings, for which a defendant was entitled to be present, we noted "the accused is not entitled to be personally present either in chambers or at bench discussions which occur outside of the jury's presence on questions of law or other matters in which defendant's presence does not bear a ' "reasonably substantial relation to the fullness of his opportunity to defend against the charge." ' " (*Ibid.*)

We reiterated these categories in *People v. Holt* (1997) 15 Cal.4th 619, 706 (*Holt*). We recalled that section 977 requires a defendant to be present at the five fundamental proceedings and entitles him to be present at all others. We added, however, "that neither [section 977] nor the constitutional right to be present at trial extends to chambers or bench discussions outside the presence of the jury when those matters do not bear a reasonably substantial relation to the opportunity to defend." (*Holt*, at p. 706.) We evaluated the sidebar and in-chambers discussions at issue in *Holt*, and concluded, "Since his presence at [those] proceedings was not necessary to protect his interests, assure him a fair and impartial trial, or assist counsel in defending the case, there was no error" in excluding Holt from the proceedings. (*Id.* at pp. 706-707.)

Holt and *Jackson* illuminate our statements in *Ervin* and *Waidla*. In proceedings that are not in chambers or at sidebar, a defendant is entitled (but not required) to be present (*Ervin*, *supra*, 22 Cal.4th at p. 74.)[7] On the other hand, for those proceedings that are beyond the scope of section 977, defendants do not have a right to be present unless the constitutional standard has been met. (*Waidla*, *supra*, 22 Cal.4th at p. 742.)

There are sound public policy reasons why a defendant has a lesser interest in personal presence when the jury is also not present. (Cf. *People v. Hovey* (1988) 44 Cal.3d 543, 573.) When a prospective juror seeks a confidential exchange with the court, allowing the defendant to be present "could well undermine the confidence and cooperation" necessary. (*Ibid.*) In light of one juror's concern about posttrial safety, allowing defendant to be present would have been "counterproductive" (*Gagnon*, *supra*, 470 U.S. at p. 527); the juror may have declined to share his concerns, remained on the jury, and allowed his concerns to incline him toward finding defendant guilty. Instead, the juror candidly acknowledged that his security concerns made him "partial towards the prosecution," and was dismissed from jury service. We therefore follow *Holt* and decline to extend the statutory right to personal presence to such confidential proceedings.

6. The Motion to Suppress

Detective Coulter interviewed defendant on the morning of January 22, 1990, after Detective Bercham had advised defendant of his *Miranda* rights. (*Miranda v. Arizona* (1966) 384 U.S. 436.) Detective Coulter considered

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7 Of course, if the defendant's presence does not bear a reasonable relationship to his ability to defend, an erroneous exclusion may well be harmless. (*People v. Medina* (1990) 51 Cal.3d 870, 902-903.)

defendant to be a possible witness but not a suspect in either the Navarette or Castro murders. Later that evening, Detective Coulter asked defendant to show him the residence of a suspect in a different case. The detective did not remind defendant of his *Miranda* rights. The detective taped their evening conversation, which disclosed evidence of the gang warfare between the 18th Street Gang and the Crazy Riders, but did not establish anything regarding the Navarette or Castro murders. When asked if the shooting of the white car with license plate number "2MTY" (Navarette) was in retaliation for a Crazy Riders shooting, defendant answered, "I know that they could have probably confused them, but I have heard nothing about it."

Defendant moved to suppress the evening statement as the unlawful product of a custodial interrogation that was not preceded by *Miranda* advisement. Defendant contended the detective was already aware of the gang rivalry between the 18th Street Gang and the Crazy Riders and of defendant's involvement with the 18th Street Gang. The trial court denied the motion to suppress. It held that Detective Coulter considered defendant to be only a possible witness on the Navarette and Castro murders, and the interview was not a custodial interrogation for *Miranda* purposes. The court further found the morning advisement adequately informed defendant of his constitutional rights, and no readvisement was necessary.

We accord deference to the trial court's factual findings, upholding all that are supported by substantial evidence. We independently determine from the facts whether the challenged statement was unlawfully obtained. (*Johnson*, *supra*, 6 Cal.4th at p. 25.) Substantial evidence supports the conclusion that the evening interview was not an interrogation for *Miranda* purposes. Other than the question cited above, the interview did not concern the Castro or Navarette murders. Detective Coulter questioned defendant about other suspects, asking defendant,

"Who *else* besides you has the license number of this white Toyota that [Crazy Riders] had been driving . . . ." We find the evening interview was not reasonably likely to elicit an incriminating response. (*People v. Wader* (1993) 5 Cal.4th 610, 637.)[8]

Furthermore, any error was harmless beyond a reasonable doubt. (*People v. Cahill* (1993) 5 Cal.4th 478, 510.) The statement had minimal value to the People's case on the Navarette count and no value on the Castro counts, whereas the People offered compelling cases for conviction with their other evidence. In short, we find beyond a reasonable doubt that the exclusion of the challenged statement would not have affected the outcome at trial.

7. Defendant's 187 Tattoo

Detective Bercham testified about defendant's tattoos. He explained the extent of defendant's 18th Street Gang tattoos signified his "hard-core" member status. The detective further testified defendant had on his forehead a tattoo of the number "187," the California Penal Code section proscribing murder, which had been added after the charged homicides occurred. After an Evidence Code section 402 hearing, the trial court overruled defendant's objections that evidence of the tattoo was unduly prejudicial within the meaning of Evidence Code section 352 and that Detective Bercham was not qualified to offer an expert opinion about the tattoo's significance. The trial court found the "187" tattoo highly probative, as it could be viewed as an admission of defendant's guilt. The court found it highly unlikely that an innocent person would obtain such a tattoo, and ruled the jury

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8 Because we find defendant's conversation was not an interrogation, and thus no advisement was necessary, we need not evaluate the trial court's determination that the morning advisement sufficed.

could conclude defendant displayed the tattoo as a badge of honor. Defendant reiterates his objection on appeal.[9]

Trial courts exercise discretion in determining both the admissibility of evidence under Evidence Code section 352 (*People v. Kipp* (1998) 18 Cal.4th 349, 371) and a witness's expert status (*Bolin*, *supra*, 18 Cal.4th at pp. 321-322). The exercise of discretion is not grounds for reversal unless " 'the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125 (*Rodrigues*), quoting *People v. Jordan* (1986) 42 Cal.3d 308, 316.) We find the trial court properly exercised its discretion both in admitting the tattoo into evidence and in permitting Detective Bercham to provide expert testimony describing the tattoo's significance.

The trial court properly found the tattoo represented an admission of defendant's conduct and a manifestation of his consciousness of guilt. The court reasonably considered the tattoo highly probative, as it would be unlikely that an innocent person would so advertise his connection to murder. Defendant contends the admission was ambiguous, as he could have been highlighting his connection to the 18th Street Gang's Seventh Street subgroup. Such argument concerns only the weight of this evidence, not its admissibility, which does not require complete unambiguity. In *Kraft*, *supra*, 23 Cal.4th at pages 1032-1036, we approved the admission of a coded list that arguably referred to a series of homicides committed

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9 Defendant now raises numerous state and federal constitutional grounds for error. The Attorney General contends these grounds were not preserved for appeal. As our analysis of alleged evidentiary error generally does not depend on whether the defense attaches the violation to the federal Constitution (see *People v. Cudjo* (1993) 6 Cal.4th 585, 611-612), we need not determine whether defendant preserved these grounds.

by the defendant. We rejected the defense claim that the evidence was unduly speculative in that it "required interpretation to be understood by a reader." (*Id.* at p. 1035.) We further found any error in admitting the list harmless, as the jury would not accord weight to the list unless it found it was an admission of guilt as argued by the People. (*Ibid.*) Our analysis in *Kraft* leads us to reject defendant's Evidence Code section 352 objection to the admission of his "187" tattoo.

We likewise find the trial court properly exercised its discretion in permitting Detective Bercham to testify as an expert concerning defendant's gang-related tattoos, including the "187" mark. The Evidence Code authorizes a witness to testify as an expert "if he has special knowledge, skill, experience, training, or education sufficient" to qualify as an expert, "[r]elated to a subject that is sufficiently beyond common experience that the [expert] opinion . . . would assist the trier of fact." (Evid. Code, §§ 720, 801.) The detective testified he received training on gangs when he attended the police academy, and has since attended gang awareness school. He further testified that for most of the past 11 years and all of the past seven he has investigated street gangs and the crimes they commit.

The detective noted "187" was the California Penal Code section that proscribed murder. We have observed the culture and habits of criminal street gangs are not matters within common knowledge for Evidence Code section 801 purposes (*People v. Gardeley* (1996) 14 Cal.4th 605, 617), and have therefore approved expert testimony to describe the significance of gang graffiti and hand signs. (*Champion, supra*, 9 Cal.4th at pp. 919-924.) Just as the expert witness in *Champion* could testify as to the significance of specific symbols of graffiti without ascertaining the subjective intent of the graffiti's author, Detective Bercham could testify as to the significance of the "187" tattoo without obtaining defendant's statement on the subject. Furthermore, considering the tattoo itself

was admissible, and the strength of the People's overall case, we conclude any error in admitting the detective's expert opinion was surely harmless.

8. Defendant's Prior Bad Acts

Defendant contends the trial court committed reversible error (1) by informing the jury, and permitting the People to inform the jury, of defendant's prior bad acts; and (2) by allowing Detective Bercham to imply defendant had served time in prison. Defendant contends these errors deprived him of a myriad of constitutional rights, including the right to a fundamentally fair trial. The record belies these claims.

The trial court and the People examined several prospective jurors on voir dire to determine whether they could impose a death sentence. The court sought to ascertain whether the prospective jurors' minds would remain open until the penalty phase, when both the People and the defense could introduce evidence about defendant's background. Accordingly, the court asked prospective jurors whether they would consider such information. Defendant cites, for instance, the following examination: "Would you take into account the background information in determining whether or not the punishment was appropriate[?] [¶] The background information may be, on the one hand, bad things about the defendant. Say a prior conviction or prior act of violence, something like that. [¶] On the other hand, it might be something favorable. Good deeds he's done, people he's helped, things he can do within the prison system that might be beneficial to others. [¶] Would you be willing to consider that and give it whatever weight you thought was appropriate?" The court later inquired: "So if you heard evidence of two murders – I'm not saying any of this is going to happen, but if there was evidence of two murders and the prosecutor had all kinds of bad evidence about the defendant, and you conclude this guy is a rotten apple

and we are better off without him, you couldn't vote for death under any circumstances?" When the juror responded, "No," the court reiterated the hypothetical nature of the inquiry: "I don't want the jurors to get the wrong idea. I have no idea what evidence would be presented in the penalty phase. I'm just throwing these things out for purposes of the question."

The court carefully explained the inquiry was hypothetical, and the court had no knowledge of any specific misconduct on defendant's part. We therefore reject defendant's contention that this and similar inquiries prejudicially informed the jury that defendant had committed prior bad acts.

Defendant's assignment of reversible error to Detective Bercham's testimony is likewise meritless. When the prosecutor asked the detective to describe a particular tattoo of defendant's, Detective Bercham noted it was very common, and people often obtained it while in prison. After the defense objected, the court ruled, "Why don't we just clarify that. [¶] You don't have any reason to believe that was done in prison?" Detective Bercham agreed, "No, I don't know where this was done." The trial court properly restricted the detective from implying defendant had served time in state prison. No error occurred.

9. The Continuance

In July 1992, the prosecutor requested not to have any court proceedings during the week of August 17-21, 1992, apparently because she had a planned vacation. Although the prosecutor preferred to delay the start of trial until August 24, the trial court ruled that a delay would impede the court's retention of jurors. The court instead preferred to begin on August 10, allowing the jury a break in the middle of an expected three-week trial. The defense did not object to this schedule.

Defendant now contends this break of five court days, and nine total days,[10] violated numerous constitutional provisions.[11] In *People v. Johnson* (1993) 19 Cal.App.4th 778, another capital case,[12] the parties agreed to give the jury a recess, for nine court days and 17 calendar days, for the December holiday season. (*Id.* at p. 792.) The Court of Appeal, following *People v. Harris* (1977) 73 Cal.App.3d 76, 83, held the defense's failure to object waived the issue on appeal. (*Johnson*, at p. 794.) Defendant's failure to object likewise waives the instant claim.

Defendant cites *People v. Santamaria* (1991) 229 Cal.App.3d 269 (*Santamaria*), which includes a footnote indicating "the court's abuse of discretion was of such magnitude that whether or not appellant objected is irrelevant." (*Id.* at p. 279, fn. 7.) The *Santamaria* opinion, however, did not purport to abrogate the duty to object generally. On its facts, it found the court's abuse was so great as to warrant appellate relief notwithstanding the absence of objection. The facts of *Santamaria* differ markedly from those here, and it therefore does not govern our analysis.

The *Santamaria* trial court adjourned the trial during jury deliberations for 10 calendar days, six of which would have otherwise been court days.

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10 The court adjourned on Friday, August 14, to give the defense additional preparation time.

11 Specifically, defendant alleges violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and violations of article I, sections 1, 7, 15, 16, and 17 of the California Constitution. With the exception of *Hicks v. Oklahoma* (1980) 447 U.S. 343, which he cites in support of "an additional due process violation," defendant's argument relies entirely on California cases.

12 The jury convicted defendant and returned a death sentence, but the trial court modified the punishment to life imprisonment without possibility of parole. (*People v. Johnson*, *supra*, 19 Cal.App.4th at p. 780.)

(*Santamaria*, *supra*, 229 Cal.App.3d at p. 275.) The court planned to be away that week, and refused the People's request to transfer the matter to another judge, who could have presided over the deliberations, as provided by section 1053. (*Santamaria*, at p. 278.) The Court of Appeal, in finding the trial court abused its discretion, emphasized the timing of the delay. "It cannot be overemphasized that this prolonged and unwarranted interruption came at the most critical period in the trial. . . . [¶] Had the adjournment occurred in midtrial, [counsel's] recapitulation of the evidence during argument might have nullified or minimized the effect of the delay on the jurors' recall." (*Id.* at pp. 281-282.) The timing of the delay, and the disregard for the requested alternative of a substitute judge, distinguish *Santamaria* from the instant case.

Defendant also relies on *People v. Engelman* (1981) 116 Cal.App.3d Supp. 14, 20. Although the opinion does not fully record the procedural facts, it indicates the court shut down for three weeks, rather than one. The *Engelman* trial court also ignored section 1053. Accordingly, *Engelman* is likewise inapposite. We therefore conclude the defense's acquiescence in the continuance has waived this issue on appeal. (*People v. Johnson*, *supra*, 19 Cal.App.4th at pp. 792-794.)

10. The Prosecutor's Closing Argument

Defendant alleges three instances of prosecutorial misconduct during closing argument, which he contends violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution. We reject all three allegations.

a) The jacket

Defendant first objects to the following statement: "[W]e know that the defendant was wearing a Raider's jacket on January 22. [¶] Whether Mr. Montes believed it was a white jacket or silver jacket, it really doesn't matter. [¶] We also

know that according to David Mandich, that the defendant or the shooter was wearing some kind of team jacket. Whether it was a silver jacket, a dark blue jacket or black jacket, I don't think really matters, because we don't know beyond any doubt really what color this jacket contained in People's 16 looked like to David Mandich the night the murder happened. [¶] And we don't know whether the defendant was really wearing the jacket in People's 16 the night of the murder. [¶] We just know that two nights later he was wearing . . . ." The trial court overruled defendant's objection, and the prosecutor moved to a different subject.

Defendant contends the prosecutor knowingly falsified facts to protect what defendant deems the Achilles' heel of the case—David Mandich's identification of defendant. Oscar Montes testified that defendant wore a white or silver Raiders jacket both on the night of the Castro murder and the day he was arrested. Mandich initially told Detective Coulter the shooter wore a dark athletic jacket with lettering on the back. According to defendant, Mandich's incorrect description of the color of the jacket threatened to undermine the People's case. The prosecutor, defendant argues, therefore mischaracterized the time when defendant was arrested, stating it was two nights after the shooting, on January 22, rather than the afternoon of January 21. This mischaracterization, defendant asserts, weakened the inference that Mandich had misidentified the shooter.

This allegation fails for several reasons. First, the obvious import of the prosecutor's statement was that Mandich's correct observation that the shooter wore a team jacket with lettering was more significant than his error regarding its color, especially considering Detective Coulter's testimony that the satin-like jacket could have looked darker on the night of the shooting. Second, whether the prosecutor characterized the date of defendant's arrest as January 21 or 22 had little bearing on the accuracy of Mandich's identification. If defendant had access to only one Raiders jacket, Mandich's description was no more accurate if the date

of the arrest were January 22 instead of January 21. If defendant had a second Raiders jacket, he could have just as easily worn it on January 21 as he could have worn it on January 22. Furthermore, there is no reasonable probability that defendant would have received a more favorable result absent this isolated comment. (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057 (*Stansbury*).)

b) Defendant's placement of the gun

Defendant also challenges the prosecutor's remark, "There was no reason for that gun to come back out and go to the head of Mr. Castro and for that gun to be fired, other than the fact that the defendant is a cold-blooded killer who didn't get what he wanted, when he wanted it, when he put a gun to the head of a man seated in a car that he wanted to take." Defendant failed to object and preserve this claim for appeal. (*People v. Hart* (1999) 20 Cal.4th 546, 619 (*Hart*).) Defendant's claim also founders on its merits. The record supports the argument that (1) defendant placed a gun to Castro's head, and (2) he fired the gun. The prosecutor carefully argued nothing more than those facts. Finally, any possible misconduct was harmless. (*Stansbury*, *supra*, 4 Cal.4th at p. 1057.)

c) Mandich's credibility

Defendant's third allegation of misconduct concerns the prosecutor's characterization of David Mandich. Defense counsel had argued Mandich displayed "extreme bias" and that his "credibility on that identification issue was ridiculous." The prosecutor answered by arguing, "[Mandich] was about 90 percent certain [of his lineup identification] because he wanted to leave room for the possibility that the defendant had a twin brother standing in this lineup. So that's how careful he was. [¶] There is an honest man. This is one of the best witnesses you can ever have in a murder case. And the defense has to stoop to the level of calling this man, not only a liar, but a criminal himself is one of the most

outrageous things I've ever heard in my career. And I don't think you should pay any attention to that." "And, Ladies and Gentlemen, that is the testimony of an honest witness, of a good witness, the kind of witness that I wish I had more of in these kind[s] of cases." Defendant now objects to this argument but failed to do so at trial, and therefore has waived this claim on appeal. (*Hart*, *supra*, 20 Cal.4th at p. 619.) Furthermore, there is no merit to the allegation. The prosecutor exhorted the jury to credit Mandich's account based on matters within the record, not matters within her personal knowledge. (*Stansbury*, *supra*, 4 Cal.4th at p. 1059, distinguishing *People v. Gates* (1987) 43 Cal.3d 1168, 1187.) Finally, any possible misconduct was harmless. (*Stansbury*, at p. 1057.)

11. Jury Instructions

The trial court refused to instruct the jury with many of defendant's proposed special instructions.

a) Instruction No. 11

Defendant asked the court to instruct the jury that "[i]f you have any reasonable doubt as to the credibility or truthfulness of any statement made by any witness against the defendant, you must resolve that doubt in favor of the defendant and find such statement to be untrue." The trial court deemed the instruction duplicative of other instructions concerning false statements of witnesses, willfully false witnesses, and the presumption of innocence. Defendant now contends that whereas CALJIC No. 2.90 instructed the jury on reasonable doubt generally, it did not inform them of the need to find each witness's testimony true by that standard. To the extent defendant's proposed instruction went beyond CALJIC No. 2.90, it was incorrect and properly denied.

Contrary to defendant's requested instruction, the existence of reasonable doubt concerning some aspect of a witness's statement does not require its

negation. We have observed "a trier of fact is permitted to credit some portions of a witness's testimony, and not credit others." (*People v. Williams* (1992) 4 Cal.4th 354, 364.) In the instant case, for instance, the possibility that a witness falsely minimized his own involvement does not preclude the possibility that the rest of his description of an event was true. Furthermore, " 'It is . . . established that each fact in a chain of circumstances need not be proved beyond a reasonable doubt.' " (*People v. Van Winkle* (1999) 75 Cal.App.4th 133, 147, quoting *People v. Naughton* (1969) 270 Cal.App.2d 1, 8.)

Defendant's authority, *People v. Hidalgo* (1947) 78 Cal.App.2d 926, 936, does not hold otherwise. The trial court there read the instruction defendant here requested, and rejected a defense request to read a similar instruction. (*Ibid.*) The Court of Appeal found the trial court's rejection of the other instruction was not error as it duplicated the instruction actually read. (*Ibid.*) The Court of Appeal nowhere stated the instruction was a correct statement of law, let alone one defendant was entitled to have read.[13]

The trial court properly refused to read defense instruction No. 11.

b) Instruction Nos. 13 and 15

Defendant requested instruction No. 13: "Proof which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence. It merely raises a possibility and is not sufficient for an inference of fact." Defendant also requested instruction No. 15: "You have no right to convict the defendant of a crime upon mere suspicion however strong nor

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13 It would be correct to instruct that the People must prove every element of the offense beyond a reasonable doubt, but a defendant is not entitled to that instruction. (*People v. Reed* (1952) 38 Cal.2d 423, 430; *People v. Orchard* (1971) 17 Cal.App.3d 568, 577.)

simply because there may be a preponderance of all of the evidence in the case against him nor merely because there is or may be strong reason to suspect that he is guilty. [¶] Before you can lawfully convict, you must be convinced of the defendant's guilt beyond a reasonable doubt." The trial court found both instructions repeated the substance of CALJIC No. 2.90, and refused defendant's request. This was proper. Assuming, arguendo, that the proposed instructions correctly described the law, a defendant has no right to restatement of the reasonable doubt standard expressed in CALJIC No. 2.90. (§ 1096a; *People v. Wright* (1988) 45 Cal.3d 1126, 1134.)

c) Instruction No. 18

Defendant requested instruction No. 18: "You should view with extreme caution any purported out-of-court statement made by a witness that has been admitted as substantive evidence because they are not made under oath, and, if false, are not subject to prosecution [for] perjury. [¶] Furthermore, in determining whether or not an out-of-court statement is true, you should consider the circumstances under which it was made including the fact that you did not have a chance to see the witness'[s] demeanor at the time the out-of-court statement was made, and that the statement was not subject to cross-examination at the time it was made." Defendant based the request on *People v. Lopez* (1975) 47 Cal.App.3d 8, 13. *Lopez* concerned a defendant's admission, but defendant argued *Lopez*'s rationale extends to other witnesses' extrajudicial statements also. In denying this request, the trial court correctly recognized the distinction between the extrajudicial statements of a party and those of a nonparty witness.

A party's extrajudicial statement may be offered against a party under Evidence Code section 1220 due to the declarant's identity. By contrast, the extrajudicial statements of a nonparty witness are not admissible unless they bear

some indicia of trustworthiness. In this case, the People offered extrajudicial statements that were admissible under Evidence Code section 1235, which renders admissible the prior inconsistent statements of a witness. As the Law Revision Commission comments note, such prior inconsistent statements are trustworthy. "The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court." (Cal. Law Revision Com. com., Deering's Ann. Evid. Code (1986 ed.) foll. § 1235, pp. 389-390.) Accordingly, trial courts provide cautionary instructions only for extrajudicial statements made by a party. (*People v. Sims* (1976) 64 Cal.App.3d 544, 556.)

The trial court properly refused to read defense instruction No. 18.

d) Instruction No. 21

Defendant requested instruction No. 21: "The corroboration of the testimony of an accomplice required by law is not sufficient if it merely shows the commission of the offense or some or all of the circumstances thereof, or if it does no more than raise a suspicion of guilt of the defendant." The trial court refused to read the instruction, finding the standard CALJIC instructions adequately conveyed its substance. The trial court instructed the jurors with CALJIC Nos. 3.11 (Testimony of Accomplice Must be Corroborated) and 3.12 (Sufficiency of

Evidence to Corroborate an Accomplice), and adequately advised them on how to evaluate accomplice testimony for purposes of corroboration. The trial court properly refused to read defendant's duplicative instruction. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1079-1080 (*Berryman*).)

e) Instruction No. 23

The trial court agreed to read a modified version of defendant's instruction No. 23. The court agreed to instruct the jury: "The requirement of corroboration of the testimony of an accomplice is based on the notion that the testimony of an accomplice should be viewed with suspicion because it may have been given in the hope or expectation of leniency or immunity." It appears, however, the trial court inadvertently failed to read this instruction to the jury. The People now contend defendant's failure to object waived the issue. Without deciding whether defendant adequately preserved the issue for appeal, we find no error in its omission. The trial court properly instructed the jury on CALJIC Nos. 2.20 (Believability of Witnesses) and 3.18 (Testimony of Accomplice to be Viewed with Distrust). These instructions properly informed the jury how to consider accomplice testimony. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 881; *People v. Castro* (1979) 99 Cal.App.3d 191, 197.) Even where an omitted instruction concerns an "essential element," its absence may be cured by other instructions. (*Musselwhite, supra*, 17 Cal.4th at p. 1248.) No error appears.

f) The omitted written instructions

The trial court read CALJIC Nos. 2.02 and 2.03 orally, but inadvertently omitted these instructions from the written set with which the jury was provided. Defendant assigns error to this failure. The Attorney General contends defendant has waived this issue by failing to object at trial. Without deciding whether defendant preserved the issue, we find it fails on the merits. Although providing

written instructions is "generally beneficial and to be encouraged," defendant has no federal or state constitutional right to instructions in writing (*People v. Samayoa* (1997) 15 Cal.4th 795, 845 (*Samayoa*)), and the statutory right depends on an express request. (§ 1093, subd. (f).) Furthermore, defendant has not shown it is reasonably probable that the jury would have reached a result more favorable to defendant had it received a written copy of CALJIC Nos. 2.02 and 2.03. (*People v. Cooley* (1993) 14 Cal.App.4th 1394, 1399; *People v. Blakely* (1992) 6 Cal.App.4th 1019, 1023.)

12. Cumulative Error

Defendant contends the cumulative error that occurred during the guilt phase compels reversal. Consistent with our review of defendant's individual claims, we find no cumulative error occurred. (*Bradford, supra*, 15 Cal.4th at p. 1344.)

B. Penalty Phase

1. Admission of Defendant's Possession of a Handcuff Key

Deputy Sheriff David Mertens searched defendant one evening and found a piece of metal concealed in defendant's wristband. The instrument, which the deputy considered a makeshift handcuff key, easily opened the handcuffs just like the ones restraining defendant when he traveled to court. Deputy Sheriff Hall searched defendant's property and discovered a shank. Defendant now contends the trial court erroneously admitted this evidence.

Section 190.3, factor (b) permits the trier of fact to consider the defendant's criminal activity that "involved the use or attempted use of force or violence or the express or implied threat to use force or violence." In *People v. Mason* (1991) 52 Cal.3d 909 and *People v. Gallego* (1990) 52 Cal.3d 115, we upheld the admission under section 190.3, factor (b) of evidence showing the defendant possessed

weapons in jail and attempted to escape. (*Mason*, at pp. 954-957; *Gallego*, at pp. 155, 196.) In *People v. Howard* (1988) 44 Cal.3d 375, 428, we found that even possession of a handcuff key by itself could evince an express or implied threat to use force or violence. We did not conclusively decide the question in *Howard*, however, because we found the abundant additional evidence presented of violent activity rendered any error in admitting the handcuff key evidence harmless. (*Ibid.*) The People in the instant case also presented abundant additional evidence of violent activity. We find *Mason*, *Gallego* and *Howard* persuasive, and find the trial court did not commit prejudicial error in admitting the evidence in question.

Defendant cites *People v. Boyd* (1985) 38 Cal.3d 762, 776, where we found the defendant's removing a metal grating from an air vent was not admissible under section 190.3. In that case, "the Attorney General argue[d] that the presumably violent removal of the grate [was] sufficient to justify admission of the evidence." (*Boyd*, at p. 776.) We rejected the contention that the violent injury *to the property* satisfied section 190.3. We had no occasion to consider the proposition, described in *Howard*, that "the possession of the handcuff key and its implied intended use to permit defendant to free himself from handcuffs, normally worn during defendant's transportation in the custody and presence of law enforcement personnel, constituted criminal activity which posed an 'implied threat' to use force or violence." (*People v. Howard*, *supra*, 44 Cal.3d at p. 428.) The *Boyd* decision therefore does not lead us to find the trial court prejudicially erred in admitting the key evidence.

Defendant also asserts the admission of the key violated the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 15, 16 and 17 of the California Constitution. He acknowledges, however, that the same analysis governs both the constitutional claim and the allegation of error under Penal Code section 190.3, factor (b), because the

statutory claims underlying defendant's motion "to exclude evidence about the purported handcuff key are the same arguments that support the constitutional issues. The trial court's resolution of one effectively resolved the other." In light of our finding that there was no error under Penal Code section 190.3, we find no constitutional violation.

2. Prosecutorial Argument

Defendant alleges violation of these same federal and state constitutional provisions by four instances of prosecutorial misconduct during closing argument. We reject all four allegations.

a) Remorse

The prosecutor argued defendant expressed no remorse for his behavior, and was proud of the killings. "The interesting thing about this defendant's behavior that night [of the Castro murder] is that he felt absolutely no remorse for what he had done. He ran back to the car. He told his friends 'Hey, I just shot the guy.' [¶] There is some evidence according to the statement of Oscar [Montes] he was bragging about the fact that after he shot the guy, or as he was shooting the man, Joe Castro, that Joe Castro said, Quote 'Oh, shit.' This was something the defendant was bragging about to his friends. [¶] He was bragging to his friends about the fact that he shot the guy. That he shot Joe Castro. [¶] It shows the type of person that the defendant is and shows the type of murder that this was, and that's why under factor (a) these are things that you should, and I ask you to consider now, in determining the defendant's moral responsibility and the punishment that he deserves."

This argument was proper. Section 190.3, factor (a), to which the prosecutor expressly referred, authorizes the jury to consider the circumstances of the crime. The jury may consider the defendant's refusal to show any remorse in

the context of the murder as an aggravating factor. (*Ramos*, *supra*, 15 Cal.4th at p. 1164; *People v. Sully* (1991) 53 Cal.3d 1195, 1249.)

The prosecutor further emphasized defendant's failure to show remorse in the two years following the murders. "[Section 190.3], [f]actor (k) evidence would have permitted that evidence [of remorse] to be presented to you if it existed. If the defendant wrote a letter to his mother saying 'I'm sorry, so sorry for the pain I've caused you and the pain I've caused the victims' families.' If he called his sister and said that, you would have heard that. [¶] I think we have more than enough evidence that not only is the defendant a cold-blooded murderer, but he is really proud, proud of what he has done."

This argument was also proper. Although defendant characterizes this argument as an invitation to the jury to consider this fact aggravating, the prosecutor expressly referred to section 190.3, factor (k), which is available only to mitigate the murders. (*People v. Frye* (1998) 18 Cal.4th 894, 1021 (*Frye*).) The prosecutor properly argued defendant's lack of remorse showed the potential mitigating factor was inapplicable. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1270-1271.)

b) The placement of the gun

The prosecutor argued, "It was the defendant himself who walked up to the driver's side of that car, pointed the gun at the head of Mr. Castro and demanded he relinquish his car. . . . I remember arguing at the guilt phase with regard to David Mandich's testimony that when the defendant was standing at the car, according to the accomplices, we had the defendant pointing the gun at the head of Joe Castro and threatening to kill him if he didn't get out of the car." As with her guilt phase argument, the prosecutor's argument correctly followed the record.

c) Inadequacy of imprisonment

The prosecutor argued prison was insufficient punishment for defendant. "The defendant, by [your] sending him to prison, isn't going to sit in prison for the rest of [his] life and think about how bad he feels and how sorry he is for what he's done. It will just be life for him, life as usual. . . . [¶] . . . [F]or this defendant, I don't think that prison is such a terrible thing. [¶] The reason I say that is that prison is really an intolerable place for people that abide by the law. But for people that don't, for people that live by no laws at all, prison can be a very tolerable place." Defendant contends the evidence did not support this argument. We have approved similar comments that life imprisonment is an insufficient penalty given an individualized assessment of the defendant. (*People v. Smithey* (1999) 20 Cal.4th 936, 997-999; *People v. Lucas* (1995) 12 Cal.4th 415, 496 [defendant's "brutality was such that he 'would not even see the bars' "].) This argument was proper.

d) Comparison to other special circumstance cases

Defendant argued his crimes were not the "worst of the worst." During argument, defense counsel asked "what kinds of heinous crimes are we talking about that justify the death penalty?" He then described in vivid detail the murders committed by infamous serial murderers, including Richard Ramirez, "the Night Stalker"; Lawrence Bittaker, who tortured, raped and murdered five teenage girls, and recorded their death screams; David Carpenter, "the Trailside Strangler," who raped and killed "eight or ten" women; and William Bonin, "the Freeway Killer," who murdered 14 teenagers. Although the defense counsel conceded, "[Y]ou don't have to be a mass murderer to get the death penalty," he argued, "I am trying to show you also that it takes more. [¶] It takes the worst of the worst or it should for a death penalty. . . . [Defendant] is not the worst of the worst. He is not in the category of people that should get the death penalty."

The prosecutor attempted to answer the question defense counsel posed. "What kind of cases do we have a death penalty for . . . . [¶] The death penalty isn't sought in every case where special circumstances are alleged." The defense objected, citing *Brooks v. Kemp* (11th Cir. 1985) 762 F.2d 1383 (*Brooks*). The court overruled the objection, finding the People's argument responded fairly to the defense argument. "I would never allow the prosecutor to stand up in the opening argument and give a laundry list of people in the State of California who committed one felony murder and were given the death penalty. I would never allow that. [¶] But when you make the argument only the worst of the worst get the death penalty, and you give a laundry list of all the cases, giving the jury the impression that only those people are appropriate for death, it's proper for the prosecutor to point out there are cases involving special circumstances that are not appropriate for death."

The trial court properly overruled the objection. The prosecutor continued, explaining the numerous special circumstances that could support a death sentence. "Not all of those cases, not in every case where there is an allegation of special circumstances . . . do we even seek the death penalty. . . . [¶] [Defense counsel] said you will see the death penalty . . . in only the worst of the worst. I submit to you that's not correct. [¶] I'm not going to give you names or specifics of cases, but there are cases where the death penalty is imposed . . . where there is one count of murder committed. . . . And these people do receive the death penalty." Finally, the prosecutor directed the jury's attention to defendant's individual circumstances. "It's not an appropriate function to speculate as to what other cases involve in terms of the evidence and the factors . . . . [Y]our sole

function in this case [is] to determine what those circumstances or factors are, the good and the bad, and weigh and balance them."

The Eleventh Circuit Court of Appeals found nonprejudicial error in the prosecutor's argument that the prosecution sought death in very few cases, which could " 'lead the jury to believe that the whole governmental establishment had already determined the appellant to be guilty . . . .' " (*Brooks*, *supra*, 762 F.2d at p. 1410, quoting *Hall v. United States* (5th Cir. 1969) 419 F.2d 582, 587.) The Eleventh Circuit expressed concern that "[t]he argument improperly suggested that the prosecutor had canvassed all murder cases and selected this one as particularly deserving of the death penalty, thus infringing upon the jury's decisionmaking discretion and improperly invoking the prosecutorial mantle of authority." (*Brooks*, at p. 1413, fn. omitted.)

The prosecutor's argument neither implied any "governmental establishment" had determined the propriety of a death sentence in this case nor infringed upon the jury's discretion. Furthermore, the prosecution offered a fair response to the defense argument that capital punishment was properly limited to serial killers. If the defense argued that only the "worst of the worst" received a death sentence, the prosecutor was entitled to argue defendant was not among the "best of the worst," and a death sentence was therefore appropriate. This argument was proper.

3. Jury Instructions

Defendant contends the trial court improperly instructed the jury and improperly denied defendant's proposed instructions. We reject each allegation of instructional error.

a) CALJIC No. 8.88

The trial court instructed the jury with CALJIC No. 8.88, both orally and with a written copy.[14] Defendant now alleges the instruction is defective in that (1) it failed to guide the jury's sentencing discretion; (2) the "so substantial" standard created a presumption for death; and (3) it failed to define "aggravating" and "mitigating" for the jury. We have repeatedly rejected the instant challenges to CALJIC No. 8.88, and do so again. (*Arias*, *supra*, 13 Cal.4th at pp. 170-171; *Rodrigues*, *supra*, 8 Cal.4th at pp. 1191-1192; *Johnson*, *supra*, 6 Cal.4th at p. 52.)

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14 "It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant. [¶] After having heard all the evidence and having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. [¶] An aggravating factor is any fact, condition, or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which as such does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty. [¶] 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 you are permitted to consider. In weighing the various circumstances you 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 judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. [¶] You shall now retire and select one of your number to act as foreperson, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree. [¶] Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom."

b) Defense special instruction No. 3

Defendant asked the court to read special instruction No. 3: "You may not consider as aggravation any evidence of unadjudicated acts allegedly committed by the Defendant unless you first determine beyond a reasonable doubt that (1) the Defendant committed the acts; [and] (2) the acts involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence." The trial court refused to read the instruction, finding it was duplicative of CALJIC No. 8.87, which informed the jury it could not consider the acts unless the jury found beyond a reasonable doubt that the acts occurred, but which did not invite the jury to determine for itself whether the acts involved the use, attempted use, or threat, of force or violence.

As the People note, we have upheld CALJIC No. 8.87 in the past. (*People v. Millwee* (1998) 18 Cal.4th 96, 162, fn. 33.) Defendant asserts, however, that *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) requires the jury to find beyond a reasonable doubt that the evidence established the attempted, threatened, or actual use of force or violence. We reject this contention, and conclude *Apprendi* does not extend to require a jury to find beyond a reasonable doubt the applicability of a specific section 190.3 sentencing factor.

In *Apprendi,* the United States Supreme Court decided which sentencing bases must be determined (1) beyond a reasonable doubt (2) by a jury. *Apprendi* itself excluded from its scope "state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." (*Apprendi*, *supra*, 530 U.S. at p. 496.) The *Apprendi* court cited as an example the sentencing scheme described in *Walton v. Arizona* (1990) 497 U.S. 639, whose holding compels rejection of defendant's instant claim. Arizona law provided that convicted first degree murderers were subject to a hearing in which the trial court decided

whether to sentence the defendant to death or life imprisonment. A finding of first degree murder in Arizona was thus the functional equivalent of a finding of first degree murder with a section 190.2 special circumstance in California; both events narrowed the possible range of sentences to death or life imprisonment.[15]

Walton held there was no constitutional right to a jury determination that death was the appropriate penalty. (*Walton v. Arizona*, *supra*, 497 U.S. at pp. 647-649.) As the *Apprendi* court explained, a death sentence is not a statutorily permissible sentence until the jury has found the requisite facts true beyond a reasonable doubt. In Arizona, the requisite fact is the defendant's commission of first degree murder; in California, it is the defendant's commission of first degree murder with a special circumstance. Once the jury has so found, however, there is no further *Apprendi* bar to a death sentence. " 'Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed . . . .' " (*Apprendi*, *supra*, 530 U.S. at p. 497, quoting *Almendarez-Torres v. U. S.* (1998) 523 U.S. 224, 257, fn. 2 (dis. opn. of Scalia, J.).)

As we observed in *People v. Anderson* (2001) 25 Cal.4th 543, once a jury has determined the existence of a special circumstance, defendant stands convicted of an offense whose maximum penalty is death. (*Id.* at p. 589, fn. 14.) Therefore, a penalty determination of death does not result in a sentence that exceeds the

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15 An Arizona defendant sentenced to life imprisonment for first degree murder would be eligible for parole after 25 years of imprisonment. (*Poland v. Arizona* (1986) 476 U.S. 147, 153, fn. 4.)

statutory maximum prescribed for the offense of first degree murder with a special circumstance. The Eighth Circuit Court of Appeals has upheld the Federal Death Penalty Act's sentencing provisions through this reasoning: "[T]he statutes at issue expressly authorize a maximum penalty of death and the sentencing factors of mental culpability and aggravating circumstances do not increase the sentencing range but rather provide the particularized standards for choosing which of the available sentences should be imposed." (*United States v. Allen* (8th Cir. 2001) 247 F.3d 741, 763.) Accordingly, *Apprendi* does not restrict the sentencing of California defendants who have already been convicted of special circumstance murder.

c) Defense special instruction No. 4

Defendant asked the court to read special instruction No. 4: "The determination of punishment turns on the personal moral culpability of the Defendant. [¶] Such culpability is assessed in accordance with the specified factors of aggravation and mitigation upon which you also have received instruction. [¶] The circumstances of the crimes can be either aggravating or mitigating. Their character depends on the greater or lesser blameworthiness they reveal, ranging, for example, from the most intentional of willful, deliberate, and premeditated murder to the most accidental of felony murders." The trial court properly refused to read this instruction because it was duplicative of other instructions, it was an inaccurate statement of law, and did not apply to the case.

The trial court properly refused defendant's request. CALJIC Nos. 8.85 and 8.88 adequately informed the jury about what to consider in determining the penalty. The requested instruction was therefore duplicative. (*Berryman*, *supra*, 6 Cal.4th at pp. 1103-1104.) Furthermore, as the court observed, there was no evidence that the Castro murder was "accidental." Finally, insofar as the proposed

instruction told the jury that premeditated murders supported a death sentence more than felony murders, it did not correctly describe California law. Both kinds of murder qualify as murder in the first degree. (§ 189.) Like other jurisdictions, California deems both to be among the most serious kinds of murder. (See *Schad v. Arizona* (1991) 501 U.S. 624, 640-641.) California has further categorized murder in the commission of an enumerated felony as a special circumstance, which supports a sentence of death or life imprisonment without possibility of parole. (§ 190.2, subd. (a)(17).) The proposed instruction would have incorrectly informed jurors that felony murders are less serious for the purpose of punishment than premeditated and deliberate murders. The trial court properly refused to read special instruction No. 4.

d) Defense special instruction No. 5

Defendant asked the court to read special instruction No. 5: "Evidence has been introduced for the purpose of showing the specific harm caused by the Defendant's crimes. Such evidence was not received and may not be considered by you to divert your attention from your proper role of deciding whether the Defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons for the Jury to show mercy to the Defendant." The trial court refused to read the proposed instruction, finding it was duplicative of CALJIC No. 8.84.1. The proposed instruction would not have provided the jury with any information it had not otherwise learned from CALJIC No. 8.84.1, and the trial court properly refused to read special instruction No. 5. (*Berryman, supra*, 6 Cal.4th at pp. 1103-1104.)

e) Defense special instruction No. 6

The trial court granted defendant's request to read the following instruction: "In deciding whether death or life in prison without the possibility of parole is the appropriate sentence, you may not consider for any reason whatsoever the deterrent or non-deterrent effect of the death penalty or the monetary cost to the State of execution or maintaining a prisoner for life without the possibility of parole." When the court read the instruction, it read the following version, "In deciding whether life in prison without the possibility of parole or death is the appropriate sentence, you may not consider for any reason whatsoever whether or not there is a deterrent effect to the death penalty. [¶] Likewise, you may not consider for any reason whatsoever how much it may cost to keep the defendant in prison for life without the possibility of parole." The most important difference between the instruction prepared and the instruction read was the latter did not warn the jurors not to consider the cost of execution.

The Attorney General asserts defendant has waived any challenge to the instruction by failing to object below. He further contends the error was beneficial to defendant, because the jury was permitted to consider cost as a reason to vote against, but not for, death. He argues defendant cannot complain the instruction implicitly told the jury do otherwise (consider the cost of life imprisonment), because defendant must have believed in the efficacy of the instruction, or else he would never have requested it.

We have held a trial court may refuse to read this instruction where neither deterrence nor cost is raised by the parties. (*People v. Benson* (1990) 52 Cal.3d 754, 806-807.) Moreover, so long as these issues are not raised, there can be no prejudice from the instruction's omission. (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 146; *People v. Thompson* (1988) 45 Cal.3d 86, 132.) The absence of

evidence regarding these issues during the penalty phase precludes our finding prejudicial error.

f) Defense special instruction No. 7

Defendant asked the trial court to read special instruction No. 7: "You may consider the fact that the Defendant's accomplices received more lenient sentences as a mitigating factor." The trial court ruled the instruction was contrary to California law as expressed in *People v. Beardslee* (1991) 53 Cal.3d 68, 111-112. Since *Beardslee*, we have adhered to our position that the jury need not be instructed to consider the sentences received by codefendants.[16] (*Rodrigues*, *supra*, 8 Cal.4th at pp. 1188-1189; *People v. Mincey* (1992) 2 Cal.4th 408, 479-480.) We maintain that position here.

g) Defense special instruction No. 15

Defendant asked the trial court to read special instruction No. 15: "After weighing all the aggravating and mitigating factors, it is up to you individually to decide which of the punishments, life imprisonment without parole or death, should be imposed in this case. [¶] You must always keep in mind that each of you bears the ultimate moral responsibility to determine the appropriate penalty under all the circumstances of this case." The trial court refused to read the instruction, ruling it was covered by CALJIC No. 8.88. The trial court properly refused the proposed instruction, which was duplicative of CALJIC No. 8.88. (*Berryman*, *supra*, 6 Cal.4th at pp. 1103-1104.)

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16 Of course, there were no codefendants in the instant trial. With the exception of Juan Velasquez, who fled the country, defendant's cohorts all pleaded guilty prior to defendant's trial.

h) Defense special instruction No. 24

Defendant asked the trial court to read special instruction No. 24: "You must not consider as an aggravating factor the existence of any special circumstance if you have already considered the facts of the special circumstance as a circumstance of the crime for which the defendant has been convicted. [¶] In other words, do not consider the same facts more than once in determining the presence of aggravating factors." The trial court refused to read the instruction in light of the standard instruction on aggravating factors.

The instruction is of uncertain validity. We have observed a prior felony conviction for a violent crime could fulfill both section 190.3 factors (b) (violent criminal activity) and (c) (prior felony conviction). (*People v. Melton* (1988) 44 Cal.3d 713, 764-765.) The jury may consider a prior conviction for a violent felony under both factors. (*Ibid.*; see also *People v. Price* (1991) 1 Cal.4th 324, 472.) In any event, the prosecutor did not urge the jury to "double count" and the possibility of prejudice is therefore " 'remote.' " (*Medina*, *supra*, 11 Cal.4th at p. 779.) We find no error.

i) Defense special instruction No. 28

Defendant asked the trial court to read special instruction No. 28: "Evidence has been presented of defendant's lifestyle or background. You cannot consider this evidence as an aggravating factor, but may consider it only as a mitigating factor." The trial court refused to read the instruction because it was confusing and a misstatement of law.

The Attorney General points out that insofar as defendant's lifestyle included gang-related criminal activity, it could be a proper factor in aggravation. Defendant's argument appears to use the term "background" in the context of his ethnic background, which is not a legitimate factor in aggravation or mitigation.

In any event, there was no error, as the trial court properly instructed the jury on aggravating and mitigating factors.

The trial court properly instructed the jury during the penalty phase.

4. Intercase Proportionality Review

Defendant contends California unconstitutionally imposes the death penalty without intercase proportionality review. There is no constitutional requirement of intercase proportionality review. (*Pulley v. Harris* (1984) 465 U.S. 37, 50-51; *People v. Marshall* (1996) 13 Cal.4th 799, 865-866.)

5. Intracase Proportionality Review

Defendant also contends his death sentence was arbitrary and disproportionate to the penalties imposed on his codefendants. This claim likewise fails. For one thing, there were no codefendants. We need not compare a death sentence with the plea bargain terms received by defendant's companions. "The exercise of prosecutorial discretion in obtaining evidence and making charging decisions is not pertinent to a review of a capital sentence." (*People v. Morris* (1991) 53 Cal.3d 152, 235, fn. 25.) Furthermore, defendant's sentence was not disproportionate to those received by his accomplices. With respect to the Castro murder, defendant was the actual killer, as well as the instigator of the carjacking. No one else sought to use lethal force to take the Trans Am. With respect to the Navarette murder, defendant was also primarily responsible for the offense. The gang did not set out to avenge past shootings of 18th Street Gang members until defendant arrived with his truck and facilitated the murder. As one witness explained, the shooting would not have occurred without defendant because he was the one whose vehicle enabled the gang to commit the murder. His greater involvement justifies his more severe sentence. (*People v. Douglas* (1990) 50 Cal.3d 468, 540.) Even if the involvement of any of defendant's

cohorts equaled that of defendant, his death sentence is not constitutionally suspect. (*Sanders*, *supra*, 51 Cal.3d at p. 530.)

6. Cumulative Error

Defendant contends the cumulative error that occurred during the penalty phase compels reversal. Consistent with our review of defendant's individual claims, we find no cumulative error occurred. (*Bradford*, *supra*, 15 Cal.4th at p. 1344.)

7. The Constitutionality of the Special Circumstances

Defendant contends neither special circumstance found below, the commission of multiple murders (§ 190.2, subd. (a)(3)) or the commission of murder in the commission of an attempted robbery (§ 190.2, subd. (a)(17)(A)), adequately narrows the class of first degree murders, and his death sentence is therefore unconstitutional. We reject this claim and continue to hold that section 190.2 and its enumerated special circumstances adequately perform the narrowing function compelled by the Eighth Amendment. (*Kraft*, *supra*, 23 Cal.4th at p. 1078.)

8. The Section 190.4, Subdivision (e) Motion

Defendant contends the trial court erred in denying the section 190.4 subdivision (e) motion to modify the verdict. Defendant contends (1) the court failed to reweigh independently the penalty phase evidence; (2) insufficient evidence supports the denial of the motion; and (3) the trial court erroneously considered impermissible factors in denying the motion to modify the verdict. These claims fail.

a) The trial court's reweighing the evidence

Defendant moved to modify the verdict in accordance with section 190.4, subdivision (e). After hearing argument, the trial court addressed the merits of the motion in great detail.

The court began by noting its statutory obligation "to review the entire record and determine whether the jury's judgment of death is consistent with both the facts and the law." After reviewing the evidence and the section 190.3 factors, the court observed, "My duty then is to apply the same rules that the jury applied in determining whether the judgments of death were appropriate. [¶] In this case I believe that the circumstances in aggravation are so strong, so overwhelming in contrast with the really minimal evidence of mitigation that the jury verdict was appropriate. [¶] It was consistent with the facts. It was consistent with the law. [¶] And I do specifically find that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that as to counts 1 and 3 the jury verdict was appropriate, and this court respectfully declines the opportunity to modify the jury's verdicts."

In reviewing defendant's automatic section 190.4, subdivision (e) motion, "the trial judge's function is not to make an independent and de novo penalty determination, but rather to independently reweigh the evidence of aggravating and mitigating circumstances and then to determine whether, in the judge's independent judgment, *the weight of the evidence supports the jury verdict.*" (*People v. Lang* (1989) 49 Cal.3d 991, 1045.) The above statements prove the trial court fulfilled its duty.

b) Evidence supporting the death verdict

In reviewing the trial court's decision, we simply review the trial court's determination after independently considering the record; we do not make a de

novo determination of penalty. (*People v. Mickey* (1991) 54 Cal.3d 612, 704.) We find the trial court properly denied the motion to modify the death verdict.

The trial court found the circumstances of both murders were aggravated. The court characterized the Castro murder as "cold-blooded," "absolutely [without] justification," and the result of a "planned affair." The court deemed defendant the "moving force" behind the Navarette murder, "the one who caused this entire incident to take place." The court also noted Navarette was an innocent person, not a gang member or anyone who had invited any form of retaliation. The court also found Navarette's brother, Rudolfo Rivera, was endangered by the attack, and had to watch the murder of his brother.

The court also discussed the other evidence presented by the People during the penalty phase. The court found "particularly horrendous" the robbery of Freddie Garcia. Only several hours after murdering Castro, defendant led an attack on Garcia, in which defendant punched, kicked and threatened to shoot his victim. The court further recalled the robbery of Lionel Fricks, defendant's possession of a shank and a makeshift handcuff key, and defendant's involvement in racial violence while incarcerated, although the court found little significance in that latter fact.

The court then reviewed the evidence offered in mitigation. The court recalled defendant had been mistreated by children in his neighborhood, and that his sister had been assaulted and hospitalized. The court noted defendant communicated with his sister's children and his own daughter. The court recalled the testimony of Dr. Maloney, who testified defendant had a "low-end IQ," but was neither retarded nor psychotic. The court described the testimony of defendant's father, Eduardo Ochoa. The court further noted defendant had only five incident reports while in jail, and two of those were trivial in nature. The court observed defendant did not personally kill Navarette, and it cited the

defense's position that defendant did not intend Castro's death. The court concluded its analysis by mentioning each of the statutory mitigating factors listed in section 190.3. The court stated defendant was relatively young (§ 190.3, factor (i)), and was an accomplice (§ 190.3, factor (j)), but that section 190.3, factors (d) through (h) did not apply to mitigate his crimes.

The court comprehensively recalled the evidence, and the evidence well supported the decision to deny the motion. (*Hart*, *supra*, 20 Cal.4th at p. 657.)

c) Reliance on improper evidence

Defendant contends the trial court based its decision on matters not supported by the record. He assigns error to the court's finding that defendant was the leader of the attack on Freddie Garcia. The record reflects that of the four males who approached Garcia, defendant did all the talking and threatened to kill Garcia if he did not give up his car. When Garcia was able to stand up after being kicked repeatedly, defendant punched him again. Although Garcia saw another individual holding a gun, it was defendant who stated, "Give up your car, otherwise I'm going to shoot you." Defendant entered the car and drove it away, with the other males as passengers. The evidence supports the trial court's finding.

Defendant also objects to the trial court's characterization of defendant as the "moving force" behind the Navarette murder. The record shows the other 18th Street Gang members were simply loitering on the street until defendant arrived with his truck and told the others that he had just seen Crazy Riders driving eastbound on Pico Boulevard. At that point, Aguilar grabbed a weapon. While driving, defendant accelerated, changed lanes and maneuvered the truck to render possible Navarette's shooting. As David Alonzo testified, the shooting would not

have occurred but for defendant's involvement. The evidence supports the trial court's finding.

Finally, defendant objects to the court's noting he also shot in the vicinity of Navarette's brother and passenger, Rudolfo Rivera, as there was no evidence showing defendant saw Rivera. The trial court properly considered this evidence, as "we have recognized that the number of victims exposed to the use of a firearm is relevant to the defendant's culpability." (*In re Tameka C.* (2000) 22 Cal.4th 190, 199-200.)

Furthermore, Rivera's presence rendered the shooting more culpable even if defendant did not see Rivera. In *People v. Hansen* (1994) 9 Cal.4th 300, 309-310, we held that shooting at an inhabited dwelling is an inherently dangerous felony. We found "there always will exist a significant likelihood that an occupant may be present." (*Id.* at p. 310.) Following *Hansen*, the Court of Appeal held that shooting into an occupied vehicle is also an inherently dangerous felony. (*People v. Tabios* (1998) 67 Cal.App.4th 1, 9-11.) Just as there is always a significant likelihood there will be someone present inside an inhabited dwelling, there is always the likelihood there will be a second person present in an occupied vehicle. (By definition, there will always be one person.) There was no evidence that defendant, who drove on the left side of Navarette's car, was in a position to dispel that possibility, or tried to do so. Furthermore, shooting into an occupied vehicle creates an even greater social danger than shooting at an inhabited dwelling. A driver who is shot may lose control of his vehicle, endangering many other drivers and pedestrians nearby.[17] Accordingly, the trial court properly considered this evidence.

---

17 In the instant case, Navarette lost control of his car, which proceeded onto the sidewalk before crashing into a wall.

9. Section 190.3, Factor (a)

Defendant contends factor (a) of section 190.3, which allows the jury to weigh "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1," is unconstitutionally vague. The United States Supreme Court has joined us in rejecting this claim. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975-977; *People v. Ray* (1996) 13 Cal.4th 313, 358-359; *Arias*, *supra*, 13 Cal.4th at p. 187.)

10. Miscellaneous Challenges to the Death Penalty

Defendant raises numerous challenges to the death penalty, all of which we have already rejected. We have upheld the death penalty law against the challenge that it (1) fails to narrow the class of death-eligible offenders (*Frye*, *supra*, 18 Cal.4th at p. 1029); (2) fails to require written findings of aggravating factors (*ibid.*); (3) fails to impose a reasonable doubt standard on the penalty determination (*ibid.*); (4) fails to require juror unanimity (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255-1256); (5) requires mental or emotional disturbance to be "extreme" to qualify under section 190.3, factor (d) (see *People v. Davenport* (1995) 11 Cal.4th 1171, 1230); (6) invests the prosecution with unbounded discretion (*Kraft*, *supra*, 23 Cal.4th at p. 1078); (7) violates international norms (*People v. Ghent* (1987) 43 Cal.3d 739, 778-779); (8) provides insufficient opportunity for postconviction relief (*Fairbank*, at p. 1255); and (9) applies in an unconstitutionally arbitrary manner (*People v. Crittenden* (1994) 9 Cal.4th 83, 156-158). These miscellaneous claims all fail.

11. Delayed Execution

Defendant contends there has been an unconstitutional delay since his trial and sentencing. We have already rejected the contention that the delay between sentencing and execution violates the Eighth Amendment's proscription of cruel

and unusual punishment. (*Frye*, *supra*, 18 Cal.4th at pp. 1030-1031.) Nevertheless, defendant recharacterizes this claim to assert execution after such delay is unconstitutional because it cannot serve any legitimate penological ends, citing Justice Stevens's dissent to the denial of certiorari in *Lackey v. Texas* (1995) 514 U.S. 1045. Defendant further observes Justice Breyer seemingly has endorsed this view in his dissent to the denial of certiorari in *Elledge v. Florida* (1998) 525 U.S. 944. We therefore evaluate this newly presented claim, and conclude the delay does not eliminate the legitimate penological purposes supporting the execution.

Both deterrence and retribution are legitimate purposes of punishment. (*Gregg v. Georgia* (1976) 428 U.S. 153, 183; *People v. Roberts* (1992) 2 Cal.4th 271, 316.) The delay of which defendant now complains does not prevent the fulfillment of either goal. Insofar as defendant complains of the extreme discomfort he suffers as a result of his uncertainty regarding execution, that discomfort would *enhance* the deterrent effect of the death penalty by increasing the penalty imposed for the commission of capital crimes. By contrast, an announcement by this court that any defendant whose automatic appeal has been pending for many years is exempt from subsequent execution would eviscerate any possible deterrent effect of a death sentence, for it would probably never be imposed.[18]

Similarly, executing defendant, notwithstanding the period that has elapsed since his conviction and sentencing, would further the retributive purpose of

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18 As Justice Clarence Thomas has observed, the only conduct such a holding would deter is prompt filing by petitioners and careful consideration by courts. (See *Knight v. Florida* (1999) 528 U.S. 990, 992 (conc. mem. opn. of Thomas, J., from denial of petn. for writ of cert.).)

capital punishment. Insofar as the "just deserts" theory holds certain murderers do not deserve a fate better than that inflicted on their victims, the passage of time and alteration of circumstances have no bearing on this retributive imperative. (Cotton, *Back With a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment* (2000) 37 Am. Crim. L.Rev. 1313, 1316, citing Kant, Political Writings, The Metaphysics of Morals (Hans Reiss ed. 1991) pp. 131, 156.) For these reasons, Nazi war criminals and church bombers motivated by racial hatred have been prosecuted for murders committed decades earlier. Furthermore, defendant, by delaying his execution for these past nine years, has already reduced the full retributive function of execution, and indefinitely rendered his status more like that of a life prisoner, his objective at trial. To bar his execution would further frustrate the retributive function of capital punishment.

Although we are cognizant of the significant stress faced by prisoners on death row, we cannot conclude their fate is worse than death, which we have long recognized as a constitutional punishment. As the Fifth Circuit of the United States Court of Appeals observed, "[defendant] made no effort to inform the Texas courts that their delay was detrimental to him or to ask for expedited review of his petition and we cannot fault them for assuming that [defendant] would be grateful for or, at least, indifferent to the delay." (*White v. Johnson* (5th Cir. 1996) 79 F.3d 432, 439.) We therefore conclude that execution notwithstanding the delay associated with defendant's appeals furthers both the deterrent and retributive functions; shielding defendant from execution solely on this basis would frustrate these two penological purposes.

12. Lethal Injection

Defendant contends lethal injection is an unconstitutional means of execution. We have rejected this claim before and do so again. (*Samayoa*, *supra*, 15 Cal.4th at p. 864; *Holt*, *supra*, 15 Cal.4th at p. 702.)

CONCLUSION

For the reasons stated herein, we conclude the judgment is affirmed.

BROWN, J.

WE CONCUR:

GEORGE, C.J.
BAXTER, J.
WERDEGAR, J.
CHIN, J.

COPY

PEOPLE v. SERGIO OCHOA

S030416

CONCURRING OPINION BY KENNARD, J.

I concur in the majority opinion except for its treatment of defendant's contention that the delay between sentencing and execution violates the Eighth Amendment's prohibition against cruel and unusual punishment. This court has in the past rejected such a claim, holding that "[a]s long as it is reasonable, the time required for our statutorily mandated review is not a violation of a criminal defendant's constitutional rights; it is essential to ensuring that those rights are and have been respected." (*People v. Ochoa* (1998) 19 Cal.4th 353, 477.) Because the delay here is reasonable, this court's holding in *Ochoa* is dispositive here. I would go no further.

KENNARD, J.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion People v. Ochoa

Unpublished Opinion
Original Appeal XXX
Original Proceeding
Review Granted
Rehearing Granted

Opinion No. S030416
Date Filed: August 6, 2001

Court: Superior
County: Los Angeles
Judge: Sandy R. Kriegler

Attorneys for Appellant:

Conrad Peterman, under appointment by the Supreme Court, for Defendant and Appellant.

Attorneys for Respondent:

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Assistant Attorney General, John R. Gorey, Robert S. Henry and Brad D. Levenson, Deputy Attorney General, for Plaintiff and Respondent.

Counsel who argued in Supreme Court (not intended for publication with opinion):

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Los Angeles, CA 90013
(213) 897-2693



APPENDIX K

JM

000774

DEPT. NW M

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

ate: DECEMBER 10, 1992

ONORABLE: SANDY KRIEGLER JUDGE | M. CRUZAT , Deputy Clerk

R. HARRISON Deputy Sheriff | J. KOTELES , Reporter

(Parties and counsel checked if present)

BA020873

PEOPLE OF THE STATE OF CALIFORNIA

VS

01)OCHOA, SERGIO

Counsel for Plaintiff: GIL GARCITTI , DISTRICT ATTY. BY
T. SCHWARTZ DEPUTY

Counsel for Defendant: J. HUD, 987.2 PUBLIC DEFENDER BY
R. ROSS, 987.2 DEPUTY

NATURE OF PROCEEDINGS PROBATION AND SENTENCE (Boxes checked if order applicable)

PROBATION DENIED, SENTENCE AS INDICATED BELOW.

Whereas the said defendant having BEEN duly FOUND guilty in this court of the crime of MURDER of the First Degree (Sec 187(a) PC) a Felony, as charged in Count 1 of the information. Use of allegation pursuant to section 1203.06(a)(1) PC, 12022.5 PC, 12022(a)(1) PC, plus special circumstance allegation 190.2(a)(17) PC is found to be TRUE. MURDER of the First Degree (Sec 187(a) PC) a Felony, as charged in Count 3 of the information. Use of allegation pursuant to section 12022(a)(1) PC is found to be TRUE. The offenses charged in Counts 1 and 3 are a special circumstance within the meaning of Penal Code Section 190.2(a)(3), to wit, that the defendant has in this proceeding been convicted of one offense of murder in the first degree and one offense of murder in the first or second degree, is found to be TRUE.

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the State Prison. The jury having found the defendant guilty of murder of the murders of Jose Arturo Castro and Pedro Navarette and having fixed the degree as that first degree; and having found the special circumstance allegations pursuant to Penal Code Section 190.2(a)(17) and 190.2(a)(3) to be true; and the jury having rendered a verdict that the penalty shall be death, it is the judgment of this court that the defendant shall suffer the death penalty, said penalty to be inflicted within the walls of the state prison at San Quentin, California, in the manner prescribed by law.

☐ Defendant is given credit for ..... days in custody (includes _____ days good time/work time).

It is further Ordered that the defendant be remanded into the custody of the Sheriff of the County of Los Angeles and delivered by him into the custody of the Director of Corrections at the California State Institution

☒ for Men at Chino, California

☐ for Women at Frontera, California

☐ .....

☐ Remaining count(s) dismissed in interests of justice.

☐ Bail exonerated.

ENTERED
12-11-92
JAMES H. DEMPSEY
EXECUTIVE OFFICER
COUNTY CLERK
AND CLERK OF THE
SUPERIOR COURT

JUDGMENT

2 76J805A (REV. 7-82) 4-85
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YELLOW COPY TO STATEWIDE DISTRIBUTION
GREEN COPY TO PROBATION EXPEDITER

JM

000775

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT. NW M

ate: DECEMBER 10, 1992				
ONORABLE: SANDY KRIEGLER	JUDGE	M. CRUZAT	Deputy Clerk
R. HARRISON	Deputy Sheriff	J. KOTELES	Reporter

(Parties and counsel checked if present)

BA020873
PEOPLE OF THE STATE OF CALIFORNIA
VS

Counsel for People: GIL GARCITTI, DISTRICT ATTY
DEPUTY DISTRICT ATTY: T. SCHWARTZ

Counsel for Defendant: J. HUD, 987.2
R. ROSS, 987.2

01)OCHOA, SERGIO

NATURE OF PROCEEDINGS SENTENCING

The defendant is deemed to have filed a Notice of Appeal in Propria Persona.

The District Attorney is directed to prepare the Death Warrant and submit same to the Court for signature. The Sheriff is ordered to transport the defendant to State Prison, to be held pending the decision upon his appeal.

As to Count 1, the defendant is sentenced to death. As to Count 2, 664/211 PC Second Degree, the defendant is sentenced to a midterm of 2 years, which is stayed pursuant to Penal Code Section 654; stay to become permanent upon completion of the sentence imposed in Count 1. As to Count 3, the defendant is sentenced to death, to run concurrent to Count 1.

MINUTES ENTERED
12-11-92
COUNTY CLERK

76M 413L C 120 1 88

APPENDIX L

FILED

MAR 7 2023

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SERGIO OCHOA, Petitioner-Appellant, v. RONALD DAVIS, Respondent-Appellee.	No. 18-99007 D.C. No. CV-02-07774-RSWL ORDER

Before: RAWLINSON, LEE, and VANDYKE, Circuit Judges

The full court has been advised of petitioner's petition for panel rehearing and rehearing en banc. The panel judges unanimously voted to deny the petition for panel rehearing and the petition for rehearing en banc, and no judge on the full court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Accordingly, petitioner's petition for panel rehearing and rehearing en banc, filed February 10, 2023 (ECF No. 79) is hereby DENIED.

APPENDIX M

SUPREME COURT
FILED
SEP 19 2001
Frederick K. Ohlrich Clerk
DEPUTY

S030416

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Respondent,

v.

SERGIO OCHOA, Appellant.

Petition for rehearing DENIED.

Chief Justice

APPENDIX N

A 5

CV 02-07774 RSWL

LODGED

DOCKET
CR LA.
No. LA93 X50007
Entered by N.S
Date 8/19/93

SUPREME COURT OF THE STATE OF CALIFORNIA

2003 SEP 23 AM 11:33

CLERK U.S. DISTRICT COURT
LOS ANGELES CALIF.

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF-RESPONDENT, VS. SERGIO OCHOA, DEFENDANT-APPELLANT.	SUPERIOR COURT NO. BA 020873

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE SANDY KRIEGLER, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

APPEARANCES:

FOR PLAINTIFF-RESPONDENT: DANIEL E. LUNGREN,
ATTORNEY GENERAL
3580 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA

FOR DEFENDANT-APPELLANT: IN PROPRIA PERSONA

COPY

ALEXANDRIA FENNER, CSR #4418,
APRIL SUNDERLAND, CSR #2824,
JOAN KOTELES, CSR #1911,
ANGELA DEVER, CSR #2919
OFFICIAL REPORTERS

VOLUME 22 OF 26 VOLUMES

PAGES 2368 THROUGH 2543 , INCL.

DOCKET
CR. LA.
No. LA93 XS0007
Entered by N.S
Date 8/19/93

SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF-RESPONDENT, VS. SERGIO OCHOA, DEFENDANT-APPELLANT.	SUPERIOR COURT NO. BA 020873

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE SANDY KRIEGLER, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

APPEARANCES:

FOR PLAINTIFF-RESPONDENT: DANIEL E. LUNGREN,
ATTORNEY GENERAL
3580 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA

FOR DEFENDANT-APPELLANT: IN PROPRIA PERSONA

COPY

ALEXANDRIA FENNER, CSR #4418,
APRIL SUNDERLAND, CSR #2824,
JOAN KOTELES, CSR #1911,
ANGELA DEVER, CSR #2919
OFFICIAL REPORTERS

VOLUME 22 OF 26 VOLUMES

PAGES 2368 THROUGH 2543 , INCL.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NW M HON. SANDY KRIEGLER, JUDGE

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF,
VS BA 020 873
SERGIO OCHOA,
DEFENDANT.

REPORTER'S DAILY TRANSCRIPT

VOLUME 22

WEDNESDAY, SEPTEMBER 9, 1992

PAGES 2368 THROUGH 2543

APPEARANCES:

FOR THE PEOPLE: IRA REINER, DISTRICT ATTORNEY
BY: TERI SCHWARTZ, DEPUTY

FOR THE DEFENDANT OCHOA: RICHARD ROSS
ATTORNEY AT LAW
AND
JOHN HUD,
ATTORNEY AT LAW

APRIL ADAMS, CSR 2824
OFFICIAL REPORTERS

A. YES.
Q. WHAT WERE THE AGES OF THE CHILDREN?
A. LIKE 14 TO 17, 18.
Q. AND YOU SAID, I BELIEVE, THAT SERGIO WAS APPROXIMATELY THREE AT THAT TIME?
A. YES.
Q. HOW OLD WAS GLORIA?
A. GLORIA WAS LIKE ABOUT FIVE OR SIX.
Q. AND WHAT ABOUT LISA?
A. LISA WAS LIKE ABOUT A YEAR.
Q. AND DURING, HOW LONG DID YOU LIVE AT 43RD AND FIGUEROA?
A. ABOUT FOUR YEARS.
Q. WHEN YOU FIRST ARRIVED IN LOS ANGELES AND LIVED AT THAT ADDRESS, DID YOUR FATHER, WAS HE WORKING AT THAT TIME?
A. NO.
Q. WAS HE ATTEMPTING TO FIND WORK AT THAT TIME?
A. YES.
Q. WHAT TYPE OF WORK WAS HE TRYING TO FIND?
A. A SHOEMAKER.
Q. AND DID HE EVENTUALLY FIND WORK?
A. HE FOUND WORK AFTER SIX MONTHS.
Q. DURING THAT SIX MONTH PERIOD, WAS YOUR MOTHER WORKING?
A. YES.
Q. WHERE WAS SHE WORKING?
A. SHE WAS WORKING WITH A NEIGHBOR.

Q. WHAT TYPE OF WORK WAS SHE DOING?
A. HOUSE CLEANING.
Q. WAS SHE GONE PRETTY MUCH DURING THE DAY?
A. ALMOST ALL DAY.
Q. WHAT ABOUT YOUR FATHER?
A. HE WAS ALL DAY LOOKING FOR A JOB.
Q. AND YOU WERE THE OLDEST CHILD?
A. YES.
Q. SO AT THAT POINT, DURING THAT PERIOD WHEN YOU INITIALLY MOVED TO LOS ANGELES, WHO WAS IT IN THE FAMILY THAT WAS PRIMARILY RESPONSIBLE FOR THE CARE OF THE CHILDREN?
A. I WAS.
Q. YOU WERE?
A. YES.
Q. AND DURING THAT PERIOD OF TIME DO YOU RECALL ANY INCIDENTS INVOLVING THE NEIGHBOR, THE CHILDREN OF THE NEIGHBORS THAT YOU SPOKE OF A FEW MOMENTS AGO?
A. YES.
Q. INCIDENTALLY, WERE THESE PEOPLE HISPANIC?
A. YES.
Q. AND FOR WHAT PERIOD OF TIME DID INCIDENTS OCCUR?
A. LIKE FOR FIVE, SIX MONTHS.
Q. WHAT TYPE OF INCIDENTS WERE THOSE?
A. LIKE THEY WOULD THROW HOT WATER AT US WHEN WE SIT ON THEIR STAIRS.
Q. WHEN YOU SAY AT US, WHO ARE YOU TALKING

ABOUT?

A. SERGIO, GLORIA, LISA AND ME.

Q. YOU SAID YOU WOULD BE SITTING ON THE STAIRS?

A. ON THEIR STAIRS.

Q. ON THEIR STAIRS?

A. YES.

Q. DID THEY LIVE ABOVE YOU?

A. NO, THEY LIVED LIKE IN FRONT OF US. APARTMENT IN FRONT OF OURS.

Q. AND WHEN YOU SAY STAIRS WHERE WERE THE STAIRS LOCATED?

A. LIKE IT WAS AN ALLEY. THE STAIRS WERE LIKE ON THE ALLEY.

Q. AND YOU SAID THEY DID WHAT?

A. THREW HOT WATER AT US.

Q. WHO DID THEY THROW HOT WATER ON?

A. ON OUR BACKS. ALL THE KIDS AND ME WHEN WE WERE SITTING THERE.

Q. WERE YOU ABLE TO FIGURE OUT WHY THEY DID THAT?

A. THEY WERE JUST CALLING US WETBACKS.

Q. HOW OFTEN DID THEY CALL YOU WETBACKS?

A. EVERY TIME THEY WOULD SEE US OUTSIDE.

Q. HOW MANY TIMES DID THEY THROW HOT WATER ON LISA AND SERGIO AND GLORIA?

A. A LOT OF TIMES. I CAN'T REMEMBER HOW MANY TIMES.

Q. MANY TIMES?

A. UH-HUH.
Q. WHAT OTHER TYPES OF THINGS DID THEY DO?
A. THEY WOULD TAKE THE FOOD AWAY FROM US AND THROW IT IN THE TRASH.
Q. DID YOUR, YOU SAID THEY TOOK YOUR FOOD AWAY?
A. UH-HUH.
Q. WHAT WAS THE -- HOW MUCH MONEY DID YOUR FAMILY HAVE IF YOU KNOW WHEN YOU ARRIVED IN LOS ANGELES?
A. WE HAD NONE.
Q. WHAT TYPE OF FOOD WAS IT THEY TOOK AWAY.
A. MAYBE LIKE A LOAF OF BREAD OR AN APPLE OR BANANA.
Q. AND IT WAS THE SAME NEIGHBOR KIDS?
A. YES.
Q. THE SAME ONES THAT WERE CALLING YOU WETBACKS?
A. YES.
Q. THE SAME ONES THROWING HOT WATER ON THE LITTLE KIDS?
A. YES.
Q. DID YOU HAVE ANY PROBLEMS WITH THESE PEOPLE AS TO YOUR CLOTHES?
A. WE USED TO HANG IT OUTSIDE TO DRY. THEY WOULD CUT IT IN PIECES AND THROW IT IN THE TRASH.
Q. WHEN YOU ARRIVED IN LOS ANGELES HOW MANY SETS OF CLOTHES DID YOU HAVE?
A. ABOUT TWO OR THREE.
Q. PER CHILD?

A. YES.
Q. AND WHAT WAS IT THEY WOULD DO?
A. CUT IT IN PIECES AND THROW IT IN THE TRASH.
Q. DID YOU EVER TELL YOUR PARENTS ABOUT THIS?
A. YES.
Q. WERE YOUR PARENTS ABLE TO DO ANYTHING ABOUT IT?
A. NO.
Q. DID YOUR FATHER EVER --
A. MY FATHER TALKED TO THEM, BUT THEY WOULD JUST SAY THEY WILL CALL IMMIGRATION.
Q. DID YOU START SCHOOL WHEN YOU ARRIVED IN LOS ANGELES?
A. I COULDN'T START SCHOOL RIGHT AWAY BECAUSE THEY WOULD TELL MY MOM IF SHE WOULD PUT ME TO SCHOOL THEY WOULD HAVE IMMIGRATION TAKE US OUT. SO SHE WAS AFRAID.
Q. SHE TOLD YOUR MOM THAT. WHO ARE YOU REFERRING TO?
A. THE MOTHER OF THOSE KIDS.
Q. HOW LONG DID YOU LIVE ON FIGUEROA STREET?
A. ABOUT THREE YEARS.
Q. WHERE DID YOU MOVE AFTER THAT?
A. WE MOVED TO WELCOME STREET.
Q. WHERE IS THAT?
A. ON WEST SIDE.
Q. AND HOW OLD WERE YOU WHEN YOU MOVED TO WELCOME STREET?
A. MAYBE ABOUT 17, 18.

A. YES.

Q. AND WERE ALL YOUR BROTHERS AND SISTERS ALSO ATTENDING SCHOOL?

A. YES.

Q. AND AFTER YOU LIVED AT WELCOME STREET FOR THAT PERIOD OF TIME, WHERE DID YOU MOVE AFTER YOU LEFT THERE?

A. WE MOVED TO 27TH STREET.

Q. IS THAT ON 27TH STREET NEAR ARLINGTON?

A. YES.

Q. AND HOW OLD WAS SERGIO WHEN YOU MOVED TO 27TH AND ARLINGTON?

A. HE WAS ABOUT MAYBE TEN.

Q. DO YOU REMEMBER WHAT GRADE HE WAS IN AT THAT TIME?

A. NO.

Q. DID SERGIO GO TO SCHOOL?

A. YES, HE WAS GOING TO SIXTH AVENUE SCHOOL.

Q. WAS THAT AN ELEMENTARY SCHOOL?

A. YES.

Q. WAS THAT NEIGHBORHOOD NEAR ARLINGTON AND 27TH, WAS THAT THE NEIGHBORHOOD YOU MOVED INTO -- AT THAT TIME WAS IT -- HOW CAN YOU DESCRIBE IT? WAS IT PRIMARY HISPANIC?

A. NO.

Q. WHAT WAS IT?

A. IT WAS A BLACK NEIGHBORHOOD.

Q. OKAY. WHEN YOU MOVED FROM WELCOME AVENUE,

DURING THE FIRST FEW MONTHS THAT YOU LIVED ON WEST 27TH STREET, DID ANY INCIDENTS OCCUR IN THAT NEIGHBORHOOD THAT YOU RECALL?

A. WHEN WE FIRST MOVED THEY THREW BOTTLES AT THE DOOR, THROWING ROCKS.

Q. AT THE WHAT?

A. AT OUR DOOR STEPS.

Q. ROCKS AND BOTTLES?

A. YES.

Q. WHO WAS THROWING THOSE THINGS?

A. THE KIDS FROM THE NEIGHBORHOOD.

Q. HOW LONG DID IS THAT CONTINUE?

A. THREE, FOUR MONTHS.

Q. HOW OFTEN DID IT HAPPEN?

A. EVERY NIGHT.

Q. DID YOU EVER ATTEMPT TO DO ANYTHING BIT?

A. YES, I CALLED THE POLICE.

Q. HOW MANY TIMES DID YOU CALL THE POLICE?

A. I CALLED THEM LIKE FOUR OR FIVE TIMES.

Q. DID THEY EVER COME?

A. NO.

Q. WERE ROCKS OR BOTTLES EVER THROWN INTO YOUR HOUSE?

A. YES.

Q. HOW MANY TIMES DID THAT HAPPEN?

A. MAYBE FOUR OR FIVE TIMES.

Q. AND DURING THIS PERIOD OF TIME, I THINK YOU SAID SERGIO WAS IN ELEMENTARY SCHOOL?

A. YES.
Q. DURING THAT TIME DID SERGIO HAVE ANY CLOSE FRIENDS?
A. NOT THAT I REMEMBER.
Q. WOULD HE GO TO SCHOOL?
A. HE WOULD GO TO SCHOOL WITH GLORIA AND LISA.
Q. WOULD THEY GO TO SCHOOL ALONE?
A. THEY WOULD GO STRAIGHT TO SCHOOL AND SOMETIMES I WOULD GO PICK THEM UP.
Q. AFTER SCHOOL?
A. YES.
Q. AND WALK HOME WITH THEM?
A. UH-HUH.
Q. AND YOU SAID SERGIO DIDN'T HAVE TOO MANY FRIENDS THEN?
A. NO.
Q. WHAT WOULD HE DO AFTER SCHOOL?
A. HE WOULD COME HOME AND READ BOOKS.
Q. DO YOU RECALL AN INCIDENT WHERE ONE DAY YOU WALKED GLORIA, SERGIO AND LISA HOME FROM SCHOOL AND SOMETHING HAD HAPPENED TO YOUR HOUSE?
A. THEY BROKE IN.
Q. WHEN DID THAT OCCUR IN RELATION TO THE TIME THAT YOU MOVED TO 27TH AND ARLINGTON?
A. I THINK IT WAS, I CAN'T REMEMBER IF IT WAS A MONTH AFTER WE MOVED THERE OR A FEW WEEKS.
Q. WHAT HAPPENED?
A. THEY BROKE INTO OUR HOUSE AND TOOK ALL THE

CLOTHES.

Q. WHOSE CLOTHES?

A. ALL SERGIO'S, LISA'S, EDUARDO'S AND MINE.

Q. THEY TOOK ALL OF YOUR CLOTHES?

A. UH-HUH.

Q. DID THEY TAKE ANYTHING ELSE?

A. THEY TOOK MY JEWELRY, STEREO, TV.

Q. DID YOU DO ANYTHING ABOUT THAT?

A. I CALLED THE POLICE RIGHT AFTER WE GOT INTO THE HOUSE AND WE SAW THE HOUSE, IT WAS ALL TURNED AROUND.

Q. DID THE POLICE COME?

A. THEY CAME LIKE ABOUT SIX HOURS AFTER WE CALLED.

Q. DID YOU EVER FIND OUT WHO BURGLARIZED YOUR HOUSE?

A. WE FOUND OUT AFTER LIKE TWO DAYS AFTER WHEN THE KIDS WENT TO SCHOOL AND THEY SAW THE CLOTHES, SOME KIDS WERE WEARING THE CLOTHES.

Q. SOME KIDS WERE WEARING -- WAS THIS AT SIXTH AVENUE ELEMENTARY?

A. NO, WALKING ABOUT THREE BLOCKS AWAY FROM OUR HOUSE.

Q. IF I UNDERSTAND YOU CORRECTLY, YOU WERE WALKING HOME FROM SCHOOL. SERGIO --

A. I WAS TAKING THEM TO SCHOOL.

Q. WHEN YOU SAY THEM, YOU MEAN, I ASSUME YOU MEAN SERGIO, GLORIA AND LISA?

A. YES.

Q. AND DURING THAT TIME YOU SAW KIDS WEARING THE CLOTHES THAT HAD BEEN STOLEN FROM YOUR HOUSE?

A. UH-HUH.

Q. DID YOU EVER GET THE CLOTHES BACK?

A. NO.

Q. WHY NOT?

A. THE POLICE NEVER TOLD US NOTHING. THEY NEVER CALLED US OR ANYTHING.

Q. WHEN SERGIO GOT OUT OF ELEMENTARY SCHOOL, WHAT SCHOOL DID HE GO TO AFTER THAT?

A. MT. VERNON.

Q. INCIDENTALLY, HOW DID HE DO IN ELEMENTARY SCHOOL?

A. HE DID WELL. HE WAS GETTING AWARDS FOR READING, MATH, HISTORY.

Q. THESE ARE TIMES WHEN HE WAS COMING HOME AFTER SCHOOL AND READING?

A. YES.

Q. AND WHEN HE WENT TO MT. VERNON, HOW OLD WAS HE THEN?

A. MAYBE ABOUT 14. I CAN'T REMEMBER.

Q. DID SERGIO CHANGE AFTER HE STARTED GOING TO MOUNT VERNON?

A. ABOUT A YEAR AFTER.

Q. WHAT TYPE OF CHANGE DID YOU SEE IN HIM?

A. WELL, HE WAS MISSING SCHOOL.

Q. IS THAT ALL?

A. HE WAS LIKE DRESSING DIFFERENT.

Q. AND MISSING SCHOOL?
A. MISSING SCHOOL A LOT.
Q. HAD HE MISSED SCHOOL A LOT WHEN HE WAS GOING TO ELEMENTARY SCHOOL?
A. NO.
Q. DURING THAT PERIOD OF TIME WHEN HE ENTERED JUNIOR HIGH SCHOOL, WAS YOUR FATHER STILL WORKING?
A. YES.
Q. AND YOUR MOTHER WAS STILL WORKING?
A. YES.
Q. AND AGAIN I ASSUME YOU WERE THE ONE AT HOME PRIMARILY RESPONSIBLE FOR THE YOUNGER CHILDREN?
A. YES.
Q. YOU MENTIONED YOUR SISTER GLORIA. HOW OLD IS GLORIA NOW?
A. ABOUT 27.
Q. WHAT IS THE AGE DIFFERENCE BETWEEN GLORIA AND SERGIO <KWROE>?
A. ABOUT TWO OR THREE YEARS.
Q. GLORIA, SERGIO AND LISA ARE THE THREE YOUNGER CHILDREN?
A. YES.
Q. THERE WAS AN INCIDENT THAT OCCURRED REGARDING GLORIA WHEN SHE WAS APPROXIMATELY 19?
A. YES.
Q. HOW OLD WAS SERGIO AT THAT TIME?
A. HE WAS MAYBE 17.
Q. WHAT'S THE AGE DIFFERENCE?

A. THREE OR TWO YEARS.
Q. SO SERGIO COULD HAVE BEEN 16?
A. MAYBE ABOUT.
Q. AND WHAT HAPPENED TO GLORIA?
A. SHE GOT BEAT UP.
MS. SCHWARTZ: I OBJECT AS NO FOUNDATION.
THE COURT: SUSTAINED.
MS. SCHWARTZ: MOVE TO STRIKE THE ANSWER.
THE COURT: LAST ANSWER WILL BE STRICKEN. LAY A FOUNDATION, PLEASE.
Q. BY MR. ROSS: WAS THERE A TIME WHEN GLORIA WAS ABOUT 19 THAT YOU HAD OCCASION TO VISIT HER AT THE HOSPITAL?
A. YES.
Q. HOW LONG WAS SHE IN THE HOSPITAL?
A. ABOUT TWO WEEKS.
Q. HOW MANY TIMES DID YOU VISIT HER THERE?
A. ALMOST EVERY DAY FROM THE TIME I RECEIVED THE CALL.
Q. ALMOST EVERY DAY?
A. UH-HUH.
Q. DID YOU VISIT HER THE FIRST DAY SHE WAS IN THE HOSPITAL?
A. YES, I RECEIVED A CALL FROM THE HOSPITAL.
Q. AND YOU WENT THERE?
A. UH-HUH.
Q. DID ANY OTHER MEMBERS OF YOUR FAMILY GO THERE?

A. MY MOM AND MY FATHER.
Q. WHO?
A. MY MOM AND MY FATHER.
Q. AND WHAT DID YOU OBSERVE WHEN YOU ARRIVED AT THE HOSPITAL?
A. WHEN I GOT THERE I COULDN'T RECOGNIZE MY SISTER.
Q. WHAT WAS WRONG WITH HER THAT YOU COULDN'T RECOGNIZE HER?
A. SHE WAS HOLDING HER EYE LIKE THIS IN A PAPER, AND HER FACE WAS ALL BEAT UP. SHE HAD TWO HAND FINGERPRINTS HERE. SHE HAD SOMETHING BROKE HERE. SHE GOT, HER HEAD WAS BROKE.
Q. DID YOU LATER HAVE CONVERSATIONS WITH GLORIA REGARDING WHAT HAD HAPPENED TO HER?
A. SHE COULDN'T TALK ABOUT IT FOR LIKE TWO DAYS. SHE COULDN'T TALK.
Q. DO YOU KNOW WHERE GLORIA WAS FOUND BEFORE SHE WAS TAKEN TO THE HOSPITAL.
THE COURT: OBJECTION, NO FOUNDATION.
THE COURT: SUSTAINED.
Q. BY MR. ROSS: HOW LONG AGO DID THAT INCIDENT OCCUR?
A. A FEW YEARS BACK, ABOUT FOUR YEARS OR FIVE YEARS.
Q. AND YOU SAID SERGIO WAS ABOUT 16 AT THAT TIME?
A. YES.

Q. IN FACT YOU ARE WHAT, TEN OR 11 YEARS OLDER THAN HE IS?
A. YES.
Q. YOU ARE 35 RIGHT NOW?
A. YES.
Q. AND EVER SINCE HE WAS BORN YOU WERE PRETTY MUCH LIKE A SURROGATE MOTHER TO HIM, WEREN'T YOU?
A. YES.
Q. AND YOU KNOW WHAT I MEAN BY SURROGATE MOTHER?
A. CLOSE TO HIM.
Q. AND ALSO YOU TOOK IT UPON YOURSELF WHILE YOUR FAMILY, YOUR PARENTS WERE WORKING, TO TAKE CARE OF NOT ONLY SERGIO, BUT TO ALSO LOOK AFTER THE OTHER CHILDREN AS WELL; IS THAT RIGHT?
A. YES.
Q. NOW, WHEN WAS IT THAT YOU LEFT THE HOME?
A. ABOUT FIVE YEARS AGO.
Q. SO THAT WOULD HAVE BEEN APPROXIMATELY 1987?
A. ABOUT THAT TIME.
Q. SO FROM THE TIME THAT SERGIO, THE DEFENDANT, WAS BORN, UP UNTIL APPROXIMATELY 1987 WHEN YOU LEFT THE HOME, YOU WERE, IN EFFECT, LIKE A MOTHER TO HIM, WERE YOU NOT?
A. YES.
Q. YOU LOOKED AFTER HIM IN ADDITION TO THE FACT THAT YOU HAD TWO PARENTS WHO ALSO LOOKED AFTER HIM; IS THAT RIGHT?

A. YES.

Q. AND IN FACT THROUGHOUT YOUR ENTIRE LIFE WOULD IT BE FAIR TO SAY THAT YOUR PARENTS WERE VERY HARD WORKING PEOPLE?

A. YES.

Q. IN FACT YOUR PARENTS, EVER SINCE YOU WERE BORN AT LEAST, ALWAYS TRIED TO BRING HOME ENOUGH MONEY TO TAKE CARE OF ALL OF YOU CHILDREN; IS THAT RIGHT?

A. YES.

Q. AND YOUR FATHER EVEN HAD TO WORK AT TIMES IN HIS LIFE TWO JOBS; IS THAT RIGHT?

A. YES.

Q. YOUR MOTHER ON THE OTHER HAND WAS WORKING PRIMARILY ONE JOB IN ADDITION TO TRYING TO RAISE THE KIDS AND RUNNING THE HOME; IS THAT RIGHT?

A. YES.

Q. BUT YOUR MOTHER WASN'T OUT OF THE HOME ALL DAY LONG, WAS SHE?

A. NO.

Q. IN FACT YOUR MOTHER WAS ONLY OUT OF THE HOME FROM EARLY IN THE MORNING TO MID AFTERNOON; IS THAT RIGHT?

A. YES.

Q. SHE WOULD ALWAYS BE HOME WHEN YOU KIDS WOULD COME HOME FROM SCHOOL?

A. YES.

Q. THERE REALLY WAS NEVER A TIME WHEN THE YOUNG CHILDREN, AND I'M NOT REFERRING TO YOU, BUT YOUR YOUNGER

SISTERS AND BROTHERS, WHEN THEY WERE REALLY LEFT ALONE TO FEND FOR THEMSELVES; WOULD THAT BE FAIR TO SAY?

A. YES.

Q. THERE WAS ALWAYS SOME ADULT SUPERVISION; IS THAT RIGHT?

A. YES.

Q. NOW YOUR BROTHER SERGIO, HE IS THE ONLY ONE OF THE FIVE OF YOU THAT HAS REALLY HAD SUBSTANTIAL PROBLEMS WITH THE LAW; IS THAT RIGHT?

A. YES.

Q. IN FACT HIS PROBLEMS WITH THE LAW STARTED A LONG TIME AGO, DIDN'T IT?

A. WHEN HE STARTED SCHOOL.

MR. HUD: COULD WE APPROACH, PLEASE.

THE COURT: LET'S GIVE THE JURY A BREAK. WE WILL TAKE A BREAK IN A FEW MINUTES ANYWAY.

LET'S PICK IT UP AT A QUARTER TO THREE. REMEMBER THE USUAL ADMONITIONS.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT OUTSIDE THE PRESENCE OF THE JURY:)

THE COURT: OUTSIDE THE PRESENCE OF THE JURY.

MR. HUD: YOUR HONOR IT WOULD SEEM THAT MISS SCHWARTZ IS TRYING TO, AT LEAST FROM WHAT I CAN TELL FROM THE QUESTIONS, IS TRYING TO GET INTO SERGIO OCHOA'S JUVENILE RECORD.

AS FAR AS I KNOW, IT'S NOT ANY OF THE FACTOR -- IT'S NOT UNDER ANY OF THE FACTORS THAT CAN BE

Q. IS THIS BEFORE ALL THE TROUBLE STARTED THAT HE WAS HAVING?

A. TO MY KNOWLEDGE YES.

Q. WHEN DID YOU START NOTICING THE VARIOUS TATOOS HE HAS PLACED UPON HIS BODY?

A. WHEN HE WAS -- I CAN'T REMEMBER EXACTLY THE TIME, BUT MAYBE WHEN HE WAS IN THE SECOND YEAR IN MOUNT VERNON.

Q. SO HE STARTED PUTTING TATOOS ON HIS BODY WHEN HE WAS VERY YOUNG?

A. YES.

Q. AND HE'S CONTINUED TO PUT TATOOS ON HIS BODY UP UNTIL RECENTLY?

A. YES.

Q. THE NEWEST TATOO HE PUT ON HIS BODY IS ON HIS FACE, THE NUMBERS 187; IS THAT RIGHT?

A. YES.

Q. WERE YOU TROUBLED BY THAT?

A. EXCUSE ME?

Q. DOES THAT UPSET YOU TO SEE YOUR BROTHER LIKE THAT.

A. YES.

Q. WOULD IT BE FAIR TO SAY THAT YOU AS THE OLDEST SISTER DID EVERYTHING YOU COULD TO HELP OUT YOUR YOUNGER BROTHER SERGIO DURING HIS LIFE TIME?

A. YES.

Q. WOULD IT BE FAIR TO SAY THAT BOTH OF YOUR PARENTS DID EVERYTHING THEY COULD WITHIN THEIR POWER TO

HAVE HIM TURN OUT RIGHT, TO GET HIM TO TURN OUT RIGHT?

A. YES.

Q. AND IN FACT I THINK YOU TOLD A DEFENSE INVESTIGATOR WHEN YOU WERE INTERVIEWED THAT YOUR PARENTS REALLY GAVE YOU KIDS EVERYTHING YOU NEEDED GROWING UP?

A. YES.

Q. YOU WERE NEVER REALLY IN WANT?

A. NO.

Q. IS THAT TRUE?

A. YES, THAT'S TRUE.

Q. IN FACT, THERE WERE TIMES WHEN YOUR PARENTS REALLY SACRIFICED A GREAT DEAL OF THEIR OWN LIVES JUST TO PROVIDE FOR YOU KIDS; IS THAT RIGHT?

A. YES.

Q. NOW, I TAKE IT THAT IT'S VERY HARD FOR YOU KNOWING THAT YOUR BROTHER HAS BEEN CONVICTED OF TWO COUNTS OF MURDER; IS THAT RIGHT?

A. YES.

Q. AND I ALSO TAKE IT IT'S SOMETHING YOU FIND VERY DIFFICULT TO BELIEVE?

A. YES.

MS. SCHWARTZ: THANK YOU. I HAVE NOTHING FURTHER.

THE COURT: MR. ROSS, ANY REDIRECT?

MR. HUD: IF WE COULD HAVE A MOMENT.

THE COURT: SURE.

MS. SCHWARTZ: YOUR HONOR, COULD I JUST ASK ONE OR TWO QUESTIONS I NEGLECTED TO ASK.

THE COURT: GO AHEAD.

Q. BY MS. SCHWARTZ: DO YOU KNOW WHO GEORGE VARGAS IS?

A. NO.

Q. YOU NEVER HEARD THAT NAME BEFORE?

A. THAT'S THE NAME MY BROTHER HAS ON THE RECORD.

Q. YOU DON'T KNOW IF GEORGE VARGAS IS RELATED TO, SOMEHOW TO YOUR BROTHER EDUARDO, OR NOT?

A. NO.

MS. SCHWARTZ: I HAVE NOTHING FURTHER.

MR. HUD: I OBJECT. BEYOND THE SCOPE OF DIRECT.

THE COURT: THE LAST QUESTION WILL BE DEEMED WITHDRAWN.

MR. ROSS: NO QUESTIONS, YOUR HONOR.

THE COURT: THANK YOU, VERY MUCH, MISS GALLEGOS, YOU ARE EXCUSED.

MR. ROSS, THE NEXT WITNESS.

ROBERT LAWRENCE THOMASSER

CALLED AS A WITNESS FOR THE DEFENSE, WAS SWORN AND TESTIFIED AS FOLLOWS:

THE CLERK: YOU DO SOLEMNLY SWEAR THAT THE TESTIMONY YOU MAY GIVE IN THE CAUSE NOW PENDING BEFORE THIS COURT SHALL BE THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO HELP YOU GOD.

THE WITNESS: I DO.

THE CLERK: THANK YOU. PLEASE BE SEATED.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NW M HON. SANDY KRIEGLER, JUDGE

PEOPLE OF THE STATE OF CALIFORNIA,

PLAINTIFF,

VS

SERGIO OCHOA,

DEFENDANT.

BA 020813
REPORTER'S
CERTIFICATE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)SS

I, APRIL ADAMS, CSR 2824, OFFICIAL REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING COMPRISES A TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS IN THE ABOVE MATTER TAKEN BY ME ON AUGUST 3, 4, 5, 6, 10, 11, 12, 13, 24, 25, 26, 27; SEPTEMBER 2, 3, 8, 9, 10, 11, 14, 1992

DATED THIS 2ND DAY OF MARCH, 1993.

CSR 2824

OFFICIAL REPORTER

APPENDIX O

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CV 02-07774 RSWL

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CR LA.
No. LA93 X50007
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Date 8/19/93

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CLERK U.S. DISTRICT COURT
LOS ANGELES CALIF.

SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

PLAINTIFF-RESPONDENT,

VS.

SERGIO OCHOA,

DEFENDANT-APPELLANT.

SUPERIOR COURT
NO. BA 020873

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE SANDY KRIEGLER, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

APPEARANCES:

FOR PLAINTIFF-RESPONDENT: DANIEL E. LUNGREN,
ATTORNEY GENERAL
3580 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA

FOR DEFENDANT-APPELLANT: IN PROPRIA PERSONA

COPY

ALEXANDRIA FENNER, CSR #4418,
APRIL SUNDERLAND, CSR #2824,
JOAN KOTELES, CSR #1911,
ANGELA DEVER, CSR #2919
OFFICIAL REPORTERS

VOLUME 22 OF 26 VOLUMES

PAGES 3368 THROUGH 3543 , INCL.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NW M HON. SANDY KRIEGLER, JUDGE

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF,
VS BA 020 873
SERGIO OCHOA,
DEFENDANT.

REPORTER'S DAILY TRANSCRIPT

VOLUME 22

WEDNESDAY, SEPTEMBER 9, 1992

PAGES 2368 THROUGH 2543

APPEARANCES:

FOR THE PEOPLE: IRA REINER, DISTRICT ATTORNEY
BY: TERI SCHWARTZ, DEPUTY

FOR THE DEFENDANT OCHOA: RICHARD ROSS
ATTORNEY AT LAW
AND
JOHN HUD,
ATTORNEY AT LAW

APRIL ADAMS, CSR 2824
OFFICIAL REPORTERS

Q. AND LOOKING AROUND FOR HISPANIC INMATES, AND DID HE IN FACT ATTACK THEM?

A. YES.

Q. WERE YOU, DID YOU REMAIN AT DORM 729 THROUGHOUT THIS INCIDENT.

A. NO, I DIDN'T.

Q. AT WHAT POINT DID YOU LEAVE IN REFERENCE TO THE OBSERVATIONS YOU HAVE JUST TESTIFIED TO?

A. THE OBSERVATIONS I WITNESSED WERE ALMOST IMMEDIATELY WHEN I ARRIVED. WHEN THE APPARENT SIZE OF THE DISTURBANCE WAS REALIZED, THEY ACTIVATED THE EMERGENCY RESPONSE TEAM, WHICH I WAS ON, SO I HAD TO LEAVE.

Q. YOU WENT TO GET ADDITIONAL EQUIPMENT?

A. THAT'S CORRECT.

Q. BUT YOU WERE AT DORM 729 WITH DEPUTY MATLOCK WHEN HE INITIALLY ARRIVED AT THE SCENE OF THAT INCIDENT?

A. THAT'S CORRECT.

MR. ROSS: NO FURTHER QUESTIONS.

MS. SCHWARTZ: NOTHING.

THE COURT: MAY THIS WITNESS BE EXCUSED?

MR. ROSS: YES.

THE COURT: YOU ARE FREE TO LEAVE.

LISA MARTINEZ

CALLED AS A WITNESS FOR THE DEFENSE, WAS SWORN AND TESTIFIED AS FOLLOWS:

Q. WHAT IS YOUR CURRENT OCCUPATION?
A. I AM A LEGAL SECRETARY.
Q. AND WHERE DO YOU WORK, OR WHAT KIND OF A FIRM DO YOU WORK FOR?
A. WE DO CRIMINAL DEFENSE.
Q. AND WHERE DO YOU WORK?
A. CENTURY CITY.
Q. HOW LONG HAVE YOU WORKED AS A LEGAL SECRETARY?
A. FIVE YEARS.
Q. WHEN DID YOU FIRST MEET SERGIO OCHOA?
A. YOU MEAN THE YEAR?
Q. YES.
A. 1984.
Q. HOW OLD WERE YOU THEN?
A. 17.
Q. AND HOW OLD WAS SERGIO?
A. 15.
Q. WHERE DID YOU MEET?
A. WE MET IN THE DOWNTOWN AREA OF LOS ANGELES.
Q. WHERE IN THE DOWNTOWN AREA?
A. 7TH AND BROADWAY.
Q. HOW DID YOU COME TO MEET IN THAT AREA?
A. MY SISTER AND I WERE SHOPPING AND WE WERE CROSSING A STREET, AND WE SAW SERGIO, AND I BELIEVE MY SISTER ASKED HIM IF HE HAD A MATCH TO LIGHT HER CIGARETTE AND WE STARTED TALKING.
Q. AND YOU BECAME FRIENDS?

A. YES. WE SPENT THE REST OF THE DAY TALKING IN THAT AREA.
Q. THAT WAS IN 1984?
A. RIGHT.
Q. DID YOU AND SERGIO BEGIN SEEING EACH OTHER OR DATING AFTER THAT?
A. NOT IMMEDIATELY AFTER THAT, BUT EVENTUALLY WE DID.
Q. HOW LONG AFTER YOU FIRST MET DID YOU BEGIN DATING?
A. WITHIN THE SAME MONTH I WOULD SAY.
Q. LISA, YOU SAID YOU WERE RAISED IN LOS ANGELES?
A. YES.
Q. AND DO YOU STILL LIVE IN LOS ANGELES?
A. I DO. IN THE SAME HOUSE.
Q. SAME HOUSE YOU WERE RAISED IN?
A. UH-HUH.
Q. YOU LIVE WITH YOUR PARENTS?
A. YES.
Q. ANYONE ELSE LIVE WITH YOU?
A. NOW JUST MY DAD AND MY DAUGHTER.
Q. AND WHAT'S YOUR DAUGHTER'S NAME?
A. CLAUDIA.
Q. WHO IS THE FATHER OF THAT DAUGHTER?
A. SERGIO.
Q. WHERE DID YOU ATTEND ELEMENTARY SCHOOL?
A. I STARTED IN SOUTH CENTRAL, UP UNTIL THE

NOTICES WERE IN ENGLISH AND SPANISH?

A. I DON'T REMEMBER, BUT I WOULD THINK THEY WOULD BE.

Q. YOUR PARENTS SPEAK ENGLISH?

A. MY PARENTS SPEAK BOTH ENGLISH AND SPANISH.

Q. YOU SAID YOU WERE 17 WHEN YOU MET SERGIO?

A. RIGHT.

Q. AND AFTER YOU MET HIM, YOU SAID WITHIN A MONTH YOU STARTED DATING?

A. YES.

Q. WHAT WAS THE LENGTH OF YOUR TOTAL RELATIONSHIP WITH SERGIO FROM THE TIME THAT YOU MET HIM -- ARE YOU AND SERGIO STILL INVOLVED WITH EACH OTHER?

A. WE STILL SPEAK TO EACH OTHER VERY OFTEN.

Q. BUT YOU ARE NO LONGER CONSIDER YOURSELVES --

A. BOYFRIEND AND GIRLFRIEND, NO.

Q. WHEN DID THAT RELATIONSHIP, BOYFRIEND-GIRLFRIEND RELATIONSHIP, CEASE?

A. 1987.

Q. BUT YOU CONTINUED TO BE FRIENDS WITH SERGIO?

A. YES.

Q. DOES HE CALL YOU?

A. YES, OFTEN.

Q. HOW OFTEN?

A. TWO TO THREE TIMES A WEEK.

Q. DO YOU RECALL A TIME WHEN YOU WENT TO MEXICO WITH SERGIO AND OTHER MEMBERS OF HIS FAMILY?

A. YES.

Q. WHEN DID THAT OCCUR?
A. I BELIEVE IT WAS IN 1985.
Q. DO YOU KNOW WHAT SERGIO HAD BEEN DOING OR WHERE HE HAD BEEN PRIOR TO THAT TIME?
A. HE WAS STILL LIVING AT HOME.
Q. AND IN 1985, WHO WAS IT THAT WENT TO MEXICO.
A. HIS FAMILY AND MYSELF, HIS MOM AND DAD AND HIS SISTERS.
Q. WHERE DID YOU GO IN MEXICO?
A. WE WENT TO HIS MOTHER'S SISTER'S HOUSE.
Q. WHERE WAS THAT?
A. MEXICO CITY.
Q. HOW LONG DID YOU STAY THERE?
A. OH, GOSH, WE STAYED THERE CLOSE TO A YEAR. MAYBE ABOUT SIX, SEVEN MONTHS.
Q. AND WHAT WERE YOU DOING WHILE YOU WERE STAYING IN MEXICO?
A. WE WERE JUST THERE VISITING. WE TRIED TO LOOK FOR JOBS. THINGS LIKE THAT.
Q. WAS SERGIO ABLE TO FIND WORK WHILE YOU WERE THERE?
A. NO, HE DIDN'T. HE TRIED.
Q. WHO AMONG YOU WAS ABLE TO FIND WORK?
A. I DID.
Q. YOU WERE THE ONLY ONE?
A. YES.
Q. AND HOW LONG DID YOU SAY YOU STAYED THERE?
A. PROBABLY ABOUT SIX OR SEVEN MONTHS.

Q. AND THEN WHAT DID YOU DO?
A. FROM THERE, FROM MEXICO?
Q. YES.
A. WE CAME BACK HOME.
Q. DID YOU CONTINUE YOUR RELATIONSHIP WITH SERGIO AFTER YOU RETURNED TO LOS ANGELES?
A. YES.
Q. AND WHEN WAS CLAUDIA BORN -- WHAT IS YOUR DAUGHTER'S NAME?
A. CLAUDIA.
Q. WHEN WAS SHE BORN?
A. IN '86.
Q. HOW OLD IS SHE NOW?
A. SHE'S SIX NOW.
Q. WAS THERE ANY PERIOD OF TIME WHEN YOU AND SERGIO LIVED TOGETHER?
A. YES.
Q. HOW LONG DID YOU LIVE TOGETHER?
A. PROBABLY ABOUT TWO YEARS, I THINK.
Q. AND WHERE DID YOU LIVE?
A. WITH HIS PARENTS.
Q. IS THAT THE HOUSE ON 27TH NEAR ARLINGTON?
A. YES.
Q. INCIDENTALLY, YOU LIVED IN THAT HOUSE FOR APPROXIMATELY TWO YEARS?
A. YES.
Q. AND AT THAT TIME THAT YOU WERE LIVING IN THAT HOUSE, WHO ELSE WAS LIVING THERE?

A. I WAS NEVER INITIATED, BUT I KNEW A LOT OF THE MEMBERS.

Q. WAS THAT FROM DOWNTOWN?

A. RIGHT.

Q. NEAR 7TH AND BROADWAY?

A. YES.

Q. WAS THAT AN AREA WHERE THERE WERE A LOT OF 18TH STREET GANG MEMBERS?

A. YES, IT WAS A MAJOR HANG OUT.

Q. YOU AND YOUR SISTER I ASSUME CAME IN CONTACT WITH THEM WHEN YOU WOULD GO ON SHOPPING TRIPS DOWN THERE ON THE WEEKENDS?

A. YES.

Q. THAT'S, IN FACT IT WAS ON ONE OF THOSE OCCASIONS YOU MET SERGIO?

A. RIGHT.

Q. WHEN YOU RETURNED FROM MEXICO DID SERGIO EVER TRY TO GET A JOB?

A. OFTEN.

Q. WHAT TYPE OF JOBS DID HE TRY TO GET?

MS. SCHWARTZ: OBJECTION, NO FOUNDATION, CALLS FOR HEARSAY.

THE COURT: LAY A FOUNDATION.

Q. BY MR. ROSS: DID YOU AT SOME POINT ATTEND A DENTAL SCHOOL?

A. YES.

Q. WHAT WAS THE NAME OF THAT?

A. PACIFIC COAST COLLEGE.

Q. DO YOU KNOW IF THAT SCHOOL IS STILL IN OPERATION?

A. IT'S NOT, IT'S CLOSED.

Q. AND IS THAT THE SCHOOL THAT WAS CLOSED BY THE ATTORNEY GENERAL'S OFFICE A COUPLE YEARS AGO?

A. I NEVER ACTUALLY KNEW HOW IT GOT CLOSED.

Q. WHEN YOU APPLIED THERE, WHAT WAS THEIR PROGRAM?

A. DENTAL TECHNOLOGY AND COMPUTER TRAINING.

Q. HOW OLD WERE YOU WHEN YOU WENT TO SCHOOL THERE?

A. PROBABLY 18.

Q. WHAT TYPE OF TRAINING COURSE DID YOU GET IN AT THAT SCHOOL?

A. I STARTED WORD PROCESSING AND THEN I SWITCHED OVER TO DENTAL TECH.

Q. AND DID ANYBODY ELSE GO TO THAT SCHOOL WITH YOU?

A. YES.

Q. WHO WAS THAT?

A. SERGIO.

Q. WAS CLAUDIA BORN AT THAT TIME?

A. NO. TOWARDS THE END I WAS PREGNANT WITH CLAUDIA.

Q. HOW LONG DID YOUR COURSE LAST AT THAT SCHOOL?

A. IT WAS ABOUT EIGHT TO NINE MONTHS.

Q. I THINK YOU SAID YOU WERE 18?

A. RIGHT.
Q. SO SERGIO WOULD HAVE BEEN APPROXIMATELY 17?
A. 17. HE'S TWO YEARS YOUNGER THAN I AM, I THINK.
Q. YOU SAID IT WAS A EIGHT MONTH PROGRAM?
A. YES. I BELIEVE SO.
Q. INCIDENTALLY, YOU SEEM TO BE HAVING A LITTLE TROUBLE SPEAKING. IS THERE A REASON FOR THAT?
A. YES, I HAVE HAD TONSILLITIS FOR THE PAST FIVE DAYS.
Q. AND YOU IN FACT WENT TO THE DOCTOR YESTERDAY?
A. YES.
Q. DID SERGIO ATTEND HIS CLASSES AT PACIFIC DENTAL SCHOOL?
A. YES, HE DID.
Q. FOR HOW LONG?
A. HE GRADUATED FROM IT.
Q. AND IT WAS AN EIGHT MONTH COURSE?
A. ROUGHLY. I DON'T REMEMBER EXACTLY.
Q. AND WHAT TYPE OF, WHAT DID THE TRAINING THERE CONSIST OF?
A. THEY TAUGHT YOU THE WHOLE ROUTINE ON HOW TO MAKE DENTURES.
Q. THAT WAS IT?
A. YES.
Q. AND WAS SCHOOL EVERY DAY?
A. YES.

Q. HOW MANY HOURS A DAY?
A. I BELIEVE IT WAS FROM NINE TO THREE.
Q. AND DID SERGIO ATTEND SCHOOL?
A. UH-HUH.
Q. DID HE -- AND YOU ATTENDED WITH HIM?
A. YES.
Q. DID HE APPEAR AT THAT TIME TO BE COMMITTED TO PURSUING --
A. HE WAS.
Q. -- SOME TYPE OF CAREER AS A, IN DENTAL AS A DENTAL TECHNICIAN?
A. YES.
Q. DID HE GO TO SCHOOL REGULARLY?
A. HE DID.
Q. WAS HE EXCITED ABOUT IT?
A. AT THE BEGINNING HE WAS.
Q. HE WAS HAPPY ABOUT THE PROSPECT OF BEING ABLE TO GET A JOB?
A. UH-HUH.
Q. AND YOU SAID THAT YOU BECAME PREGNANT TOWARD THE END OF THAT COURSE?
A. TOWARDS THE END I WAS PREGNANT, YES.
Q. WERE YOU LIVING WITH SERGIO AT THE OCHOA RESIDENCE AT THAT TIME?
A. NO, I WAS STILL AT HOME.
Q. HOW DID SERGIO DO IN SCHOOL? WERE YOU IN CLASSES WITH SERGIO?
A. YES.

Q. WERE THERE DIFFERENT CLASSES IN THE SCHOOL OR WAS THERE ONE BASIC --

A. THERE WAS ONE CLASS, BUT YOU ROTATE FROM CLASS TO CLASS AS THE CLASS DEVELOPED.

Q. WERE YOU AND SERGIO IN THOSE CLASSES TOGETHER?

A. YES.

Q. WHAT DID THE CORRESPONDENCE CONSIST OF IN TERMS OF BOOKS AND READING MATERIAL, AS OPPOSED TO DOING MANUAL DEXTERITY TYPE THINGS WITH -- HOWEVER DENTURES ARE MADE?

A. THEY GAVE YOU A BOOK, BUT MOST OF THE CLASS WAS FOLLOWING THE TEACHER'S INSTRUCTIONS AND THE WAY SHE WAS SHOWING YOU.

Q. IN MAKING MOLDS?

A. RIGHT.

Q. WHAT WERE THE MOLDS MADE OF?

A. PLASTER.

Q. AND THAT WAS PREDOMINANTLY WHAT THIS COURSE WAS, WAS WORKING WITH PLASTER AND MAKING THE MOLDS?

A. RIGHT, AND WAX.

Q. HOW WAS SERGIO IN SCHOOL?

A. HOW?

Q. HOW DID HE DO IN SCHOOL?

A. HE DIDN'T DO TOO GOOD.

Q. WHAT WAS HIS PROBLEM?

A. HE COULDN'T HANDLE THE TOOLS VERY WELL TO SHAPE A TOOTH.

Q. DID HE TRY?
A. YES.
Q. DURING THAT EIGHT MONTH PERIOD, DID HE MISS MANY DAYS OF SCHOOL?
A. I BELIEVE HE MISSED A FEW DAYS.
Q. BUT NOT MORE THAN A FEW?
A. I DON'T BELIEVE SO. AFTER YOU MISS TOO MANY DAYS, I BELIEVE THEY CUT YOU OUT.
Q. SERGIO TO YOUR KNOWLEDGE DID GRADUATE FROM THAT SCHOOL?
A. YES. HE HAS A DIPLOMA.
Q. WAS PART OF THE TRAINING PROGRAM AT THIS SCHOOL, WHERE AFTER YOU COMPLETED THE PROGRAM, THE SCHOOL WOULD ARRANGE FOR JOB INTERVIEWS FOR THE STUDENTS?
A. THEY DID.
Q. DID THEY EVER ARRANGE ANY JOB INTERVIEWS FOR YOU?
A. I BELIEVE THEY DID ONCE.
Q. DO YOU KNOW IF THEY EVER ARRANGED ANY JOB INTERVIEWS FOR SERGIO?
A. I DON'T REMEMBER.
Q. WOULD IT BE FAIR TO SAY THE SCHOOL WAS KIND OF A SCAM?
MS. SCHWARTZ: I OBJECT AS LEADING, CALLING FOR SPECULATION.
THE COURT: SUSTAINED.
Q. BY MR. ROSS: WERE YOU TOLD, WERE ANY REPRESENTATIONS MADE TO YOU WHEN YOU ENTERED THAT SCHOOL,

REGARDING THE SCHOOL PROVIDING FUNDS FOR FOR PART OF YOUR TUITION COSTS?

A. YES, I BELIEVE -- WHEN WE WENT TO SCHOOL, KNOWING THAT THEY WOULD PAY YOU WHILE YOU LEARN.

Q. THAT'S WHAT THEY SAID?

A. YEAH.

Q. AND WERE YOU PAID WHILE YOU LEARNED?

A. WELL, WE GOT THE MONEY, BUT I DON'T THINK THEY FULLY EXPLAINED THAT THE MONEY WE WERE GETTING WAS PART OF OUR LOAN, WHICH EVENTUALLY YOU HAD TO PAY BACK.

Q. THE MONEY YOU WERE GETTING PAID WHILE YOU LEARNED WAS A LOAN YOU HAD TO PAY BACK?

A. RIGHT.

Q. AFTER CLAUDIA WAS BORN, HOW LONG DID YOU CONTINUE TO LIVE -- OR, EXCUSE ME. DID YOU LIVE WITH THE OCHOAS PRIOR TO THE TIME CLAUDIA WAS BORN?

A. YES.

Q. HOW LONG WAS IT PRIOR TO CLAUDIA'S BIRTH YOU MOVED IN WITH THE OCHOA FAMILY?

A. PRIOR TO CLAUDIA'S BIRTH?

Q. YES.

A. ABOUT FIVE TO SIX MONTHS.

Q. YOU SAID YOU LIVED THERE A TOTAL OF APPROXIMATELY A YEAR AND A HALF TO TWO YEARS?

A. YES, PROBABLY TWO YEARS.

Q. HOW OLD WAS CLAUDIA WHEN YOU MOVED FROM THE OCHOA HOME?

A. WHEN I MOVED FROM -- CLOSE TO A YEAR AND A

HALF.

Q. SO FOR A YEAR AND A HALF AFTER CLAUDIA WAS BORN YOU WERE LIVING WITH SERGIO AT THEIR HOME?

A. YES.

Q. DID SERGIO RUN AROUND DURING THAT TIME?

A. NO.

Q. DID HE GO OUT A LOT DURING THAT TIME?

A. HE WENT OUT TO HIS FRIEND'S HOUSE WHICH WAS AROUND THE CORNER.

HE WENT OUT TO RUN ERRANDS, GO TO THE STORE AND THINGS OF THAT NATURE.

Q. HOW WAS SERGIO WITH CLAUDIA?

A. HE LOVED HER A GREAT DEAL.

Q. WHAT TYPES OF THINGS DID SERGIO DO WITH CLAUDIA THAT LEAD YOU TO SAY THAT SERGIO LOVED HER A GREAT DEAL?

A. HE PLAYED WITH HER A LOT, AND HE LIKED TAKING HER WITH HIM, AND HE USED TO TRY TO FOCUS CLAUDIA ON HIMSELF SO THAT SHE WOULD LOVE HIM MORE THAN ME.

Q. HE LOVED HER TO THE POINT ALMOST OF TRYING TO MAKE HER JEALOUS?

A. YEAH.

Q. WHAT OTHER TYPES OF THINGS DID HE DO WITH CLAUDIA?

A. HE LIKED TO TAKE HER SHOPPING. HE USED TO TAKE HER WHEN HE USED TO GO TO HIS FRIEND'S HOUSE. HE USED TO TAKE HER SOMETIMES.

Q. THE EVENINGS WHEN YOU WERE LIVING THERE,

Q. VERY OFTEN?
A. YES.
Q. FOR HOW LONG A PERIOD OF TIME WAS THAT APPROXIMATELY?
A. IT WAS A FEW MONTHS. I USED TO GO OVER THERE. SHE USED TO GO OVER THERE ALL THE TIME.
Q. CLAUDIA USED TO GO OVER THERE ALL THE TIME?
A. YES.
Q. WHEN SHE WAS, WHEN SHE WOULD RETURN HOME FROM THOSE VISITS, DID SHE HAVE THINGS WITH HER THAT HAD BEEN PURCHASED FOR HER WHILE SHE WAS AT THE OCHOA'S?
A. YES, SHE DID.
Q. WHAT DID, DID CLAUDIA ENJOY VISITING WITH HER DAD?
A. YES, SHE LOVED TO GO OVER THERE ALL THE TIME. SHE STILL DOES.
Q. AND SINCE SERGIO HAS BEEN IN JAIL, HAS CLAUDIA SEEN HIM?
A. UH-HUH, SHE HAS.
Q. HOW OFTEN DOES CLAUDIA SEE SERGIO?
A. OFTEN. SHE WOULD GO ABOUT TWICE A MONTH, I WOULD THINK.
Q. DO YOU TAKE HER THERE?
A. I WOULD TAKE HER TO HER GRANDMOTHER AND HER GRANDMOTHER WOULD TAKE HER.
Q. IN OTHER WORDS, YOU WOULD TAKE CLAUDIA TO MRS. OCHOA'S HOUSE AND MRS. OCHOA TAKES CLAUDIA TO THE JAIL TO SEE SERGIO?

BROKE UP?

A. AFTER WE BROKE UP. WHEN EXACTLY DO YOU MEAN?

Q. YOU SAID YOU BROKE UP IN 1987?

A. RIGHT.

Q. WAS HE STILL IN CUSTODY FOR THAT ROBBERY OR HAD HE GOTTEN OUT OF JAIL?

A. WHEN WE BROKE UP, HE WAS IN JAIL.

Q. HE WAS STILL IN JAIL?

A. RIGHT.

Q. YOU SAID YOU BROKE UP BECAUSE YOU BOTH WENT SEPARATE WAYS, AND WHAT I'M WONDERING, WHICH WAY DID YOU GO?

A. HE STILL LOVED ME, BUT I WANTED TO GO BACK HOME BECAUSE HE WAS GOING TO JAIL.

Q. IN FACT, HE WAS IN JAIL FOR A SUBSTANTIAL PERIOD OF TIME?

A. YES.

Q. ON THAT ROBBERY CASE?

A. RIGHT.

Q. AS FAR AS YOU KNEW, MR. AND MRS. OCHOA REALLY TRIED VERY HARD DURING THE TIME YOU WERE WITH THE DEFENDANT TO TAKE CARE OF HIM; ISN'T THAT RIGHT?

A. THEY LIVED IN THE HOUSE. WHAT DO YOU MEAN TAKE CARE OF HIM?

Q. YOU SAID EARLIER THAT THEY WERE LOVING PEOPLE?

A. RIGHT.

Q. I TAKE IT THEY WERE LOVING TO ALL THEIR CHILDREN?

A. RIGHT.

Q. AS WELL AS THEIR GRANDCHILDREN?

A. RIGHT.

Q. AND THEY WERE GIVING PEOPLE, IS WHAT YOU SAID EARLIER?

A. RIGHT.

Q. MEANING THAT THEY WERE GIVING OF THEMSELVES, BOTH EMOTIONALLY AND FINANCIALLY, TO THEIR CHILDREN; ISN'T THAT RIGHT?

A. FINANCIALLY, I WOULD SAY SO.

Q. WELL, THEY LOVED THEIR CHILDREN. WOULDN'T YOU SAY THEY WERE EMOTIONALLY GIVING?

A. YES.

Q. AND THEY WERE GOOD TO YOU AND YOUR DAUGHTER AND STILL ARE; ISN'T THAT TRUE?

A. RIGHT.

Q. AND I TAKE IT THAT WHEN YOU AND THE FAMILY MOVED TO MEXICO AND YOU CAME BACK, THE DEFENDANT, AFTER YOU BROKE UP COULD HAVE GONE BACK TO MEXICO IF HE CHOSE; ISN'T THAT TRUE?

A. IF WE CHOSE TO IN --?

Q. IF HE CHOSE TO, AFTER YOU AND HE BROKE UP HE COULD HAVE DONE THAT?

A. AFTER WE BROKE UP, IF HE WANTED, I BELIEVE SO.

Q. IF HE WANTED TO?

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NW M HON. SANDY KRIEGLER, JUDGE

PEOPLE OF THE STATE OF CALIFORNIA,

PLAINTIFF,

VS

SERGIO OCHOA,

DEFENDANT.

BA 020813
REPORTER'S
CERTIFICATE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)SS

I, APRIL ADAMS, CSR 2824, OFFICIAL REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING COMPRISES A TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS IN THE ABOVE MATTER TAKEN BY ME ON AUGUST 3, 4, 5, 6, 10, 11, 12, 13, 24, 25, 26, 27; SEPTEMBER 2, 3, 8, 9, 10, 11, 14, 1992

DATED THIS 2ND DAY OF MARCH, 1993.

CSR 2824
OFFICIAL REPORTER

APPENDIX P

A 5

CV 02-07774 RSWL

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SUPREME COURT OF THE STATE OF CALIFORNIA

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LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF-RESPONDENT, VS. SERGIO OCHOA, DEFENDANT-APPELLANT.	SUPERIOR COURT NO. BA 020873

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE SANDY KRIEGLER, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

APPEARANCES:

FOR PLAINTIFF-RESPONDENT: DANIEL E. LUNGREN,
ATTORNEY GENERAL
3580 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA

FOR DEFENDANT-APPELLANT: IN PROPRIA PERSONA

COPY

ALEXANDRIA FENNER, CSR #4418,
APRIL SUNDERLAND, CSR #2824,
JOAN KOTELES, CSR #1911,
ANGELA DEVER, CSR #2919
OFFICIAL REPORTERS

VOLUME 23 OF 26 VOLUMES

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PLAINTIFF,

VS BA 020873

SERGIO OCHOA,
DEFENDANT.

REPORTER'S DAILY TRANSCRIPT

VOLUME 23

THRUSDAY, SEPTEMBER 10, 1992

PAGES 2544 THROUGH 2734

APPEARANCES:

FOR THE PEOPLE: IRA REINER, DISTRICT ATTORNEY
BY: TERI SCHWARTZ, DEPUTY

FOR THE DEFENDANT OCHOA: RICHARD ROSS
ATTORNEY AT LAW
AND
JOHN HUD,
ATTORNEY AT LAW

COPY

APRIL ADAMS, CSR 2824
JOAN RUBEY KOTELES, CSR 1911
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BUT IT'S PROBABLY THE MODEL OF AN INTELLIGENCE TEST.

I GAVE MR. OCHOA THE, ALL OF THE VERBAL SUBTESTS AND ONLY SOME OF THE NONVERBAL TESTS.

WHEN I SAW HIM I BELIEVE HE WAS IN MODULE 1750 WITH ONE HAND CUFFED, AND I DIDN'T HAVE THE FREEDOM TO GIVE HIM SOME OTHER TESTS WHERE HE WOULD MANIPULATE OBJECTS.

HIS PERFORMANCE ON THE VERBAL TEST FELL IN, WHAT'S IN THE BORDER LINE RANGE. IF YOU TALKED ABOUT IQ SCORES, HE WOULD BE IN THE SEVENTIES.

THAT'S ABOVE THE CUT OFF FOR MENTAL RETARDATION. NORMAL WOULD BE 100. 50 PERCENT OF THE POPULATION IS ABOVE A HUNDRED, 50 PERCENT IS BELOW.

THE TESTS ARE JUST MADE THAT WAY. HE IS FUNCTIONING LIKE IN THE FIFTH PERCENTILE. IF YOU TOOK A HUNDRED PEOPLE AT HIS AGE, HE WOULD DO MORE POORLY THAN 95 OUT OF A HUNDRED.

THAT'S PROBABLY A LOW ESTIMATE OF HIS ABILITY. IN SOME AREAS, NONVERBAL AREAS, HE PERFORMS VERY MUCH BETTER THAN THAT.

SO WITH MR. OCHOA, HE COMES FROM A BILINGUAL BACKGROUND. HIS FIRST LANGUAGE WAS SPANISH.

THERE IS SOME BIAS WITH THESE TESTS. BUT THE BOTTOM LINE IS HE IS NOT MENTALLY RETARDED. HE IS FUNCTIONING BELOW AVERAGE. EXACTLY WHERE HE WOULD BE, IT'S HARD TO SAY BECAUSE OF EXPERIENCE VARIABLES AND SO FORTH.

I GAVE ANOTHER TEST AMMENS PICTURE

SO IN TERMS OF ABILITY AND INTELLIGENCE, HE IS BELOW AVERAGE. I CAN'T SAY EXACTLY HOW FAR. I WENT BACK AND READ HIS SCHOOL RECORDS TO THE FOURTH GRADE, AND IN THE FOURTH GRADE THEY SAID THAT HE WAS SOMEWHAT CARELESS BUT SEEMED CAPABLE. THEY MIGHT HAVE EVEN SAID HE SEEMED BRIGHT. SIXTH GRADE, WORKING HARD, DID ADEQUATELY.

EIGHTH GRADE, THEY GAVE SOME TESTS CALLED THE CALIFORNIA TEST OF BASIC SKILLS, CTBS TEST, WHICH KIDS GET EVERY YEAR OR TWO.

HE SCORED AT THE 26TH PERCENTILE IN READING AND THE 27TH PERCENTILE IN MATH. THAT'S IN THE BALL PARK OF WHAT I WOULD THINK. HE WAS BELOW AVERAGE, BUT GIVEN HIS BACKGROUND IT'S NOT REMARKABLE.

AFTER THE SIXTH GRADE HIS GRADES TAKE A REAL PLUMMET. THEY DROP VERY SIGNIFICANTLY. SO SEVENTH, EIGHTH AND NINTH HE IS GETTING D'S AND F'S.

BUT THAT'S THE TIME WHEN HE GOT GANG INVOLVED, AND I'M SURE WASN'T DOING MUCH IN SCHOOL. IT'S REFLECTED IN THAT.

I WILL COME BACK TO THAT IN A MINUTE.

I READ TO HIM THE MINNESOTA MULTI-PHASIC PERSONALITY INVENTORY, SIMPLY BECAUSE IT WAS FASTER. SOME OF THE IDEAS, THE READING HE MIGHT HAVE HAD DIFFICULTY WITH. I READ IT AND RECORDED THE ANSWERS.

THIS IS THE SO-CALLED PERSONALITY TEST. IT HAS VALIDITY SCALES, WHICH GIVE SOME IDEA OF HOW A PERSON IS ACTUALLY TAKING THE TEST. SOME PEOPLE TRY TO LOOK

LIKE THEY ARE VERY DISTURBED, AND THESE TESTS PICK THAT UP.

HE WASN'T MAKING THAT KIND OF ATTEMPT, AT LEAST FROM THE DATA FROM THIS TEST.

HE DID HAVE ELEVATIONS ON THREE SCALES MAINLY, AND I'LL GIVE YOU THE NAMES, BUT THEY ARE NOT REALLY MEANINGFUL.

ONE IS CALLED PSYCHASTHENIA, ONE IS SCHIZOPHRENIA, AND ONE IS HYPOMANIA.

FIRST, I WOULD SAY THESE ELEVATIONS DON'T MEAN HE IS SCHIZOPHRENIC OR PSYCHOTIC. HE IS NOT ANY OF THAT. THE DATA DO SUGGEST SOME VULNERABILITY TO ANXIETY. SOME FEELING OF ALIENATION. SOME FEELING OF INSECURITY.

TO SOME EXTENT, THAT'S A RESULT OF HIS BEING IN JAIL AND WAITING A TRIAL SUCH AS THIS. THERE IS SOME SUGGESTION HE HAS ALWAYS BEEN SOMEWHAT INSECURE, BUT NOT GROSSLY DISTURBED.

I'M NOT HERE TO TELL YOU THAT THIS GUY IS PSYCHOTIC OR CRAZY OR ANYTHING LIKE THAT, BECAUSE HE'S NOT.

ON OTHER TESTS, SUCH AS THE RORSCHACH INK BLOT TECHNIQUE, HE WAS PRETTY NONRESPONSIVE.

THIS IS THE ONE YOU MAY HAVE SEEN ON TV, THE INK BLOT TEST. HE BASICALLY SAID THEY LOOK LIKE NOTHING. EVEN LITTLE CHILDREN CAN RESPOND TO THAT, SO HE ESSENTIALLY WASN'T MOTIVATED TO BE INVOLVED IN THAT.

ON THE TIMES I SAW HIM, HE ALWAYS APPEARED DEPRESSED. HIS AFFECT OR EMOTIONALITY WAS FLAT. SPEAKS

IN A SOFT MONOTONIC VOICE.

I BELIEVE HIS RESPONSE ON THE RORSCHACH WAS JUST A RESULT OF DEPRESSION, NOT WANTING TO GEAR UP AND GET INVOLVED TO THAT EXTENTS.

SO THAT'S KIND OF A RUNDOWN OF THE TESTS I GAVE HIM AND WHAT THE RESULTS WERE.

Q. DR. MALONEY, IF I UNDERSTAND YOU CORRECTLY, YOUR OPINION IS THAT HE IS SLIGHTLY, AT LEAST ACCORDING TO THE TESTS YOU GAVE HIM, BORDERLINE MENTALLY RETARDED, OR ABOVE THE CUT-OFF POINT THAT WE NORMALLY CONSIDER FOR MENTAL RETARDATION.

MS. SCHWARTZ: I OBJECT, LEADING. AND ALSO MISSTATING THE EVIDENCE.

THE COURT: IT WAS LEADING, AND ALSO COMPOUND.

MR. HUD: YOUR HONOR, COULD WE APPROACH FOR A MINUTE?

THE COURT: NOT ON THAT ONE, NO. JUST REPHRASE THE QUESTION.

Q. BY MR. ROSS: DR. MALONEY, ON THE WEXLER SCALE, WHAT DID YOU INDICATE WAS HIS IQ?

A. IF YOU TOOK IT AT FACE VALUE, 74, WHICH WOULD FALL IN THE BORDERLINE RANGE, BORDERLINE INTELLIGENCE.

Q. NORMAL IS 100?

A. CORRECT.

Q. YOU SAID THAT YOU FOUND SOME SIGNIFICANCE IN HIS GRADES FALLING IN THE SIXTH GRADE, AND HIS GANG INVOLVEMENT AT THAT TIME.

LANGUAGE SCHOOLS, TEND NOT TO DO REAL WELL IN SCHOOL. ALTHOUGH HE DID IN THE EARLIER GRADES.

FREQUENTLY THAT WHOLE AVENUE OF LIFE TENDS TO BE FRUSTRATING. BEING CHALLENGED WITH ACADEMIC TASKS, OCCUPATIONAL TASKS, AND SO FORTH.

HIS FAMILY BACKGROUND IS HARD TO ASSESS. HE COMES FROM A SUPPORTIVE FAMILY, A CONCERNED FAMILY. HIS PARENTS CAME FROM MEXICO, AND I DON'T BELIEVE THEY EVER DEVELOPED FLUENT ENGLISH.

SO HE BEGAN SPEAKING MORE ENGLISH AND LESS SPANISH AS HE WENT ALONG AND BEGAN COMMUNICATING WITH THEM LESS. BUT THEY WERE SUPPORTIVE. I'M NOT SURE THEY WERE LIMIT SETTING TO THE DEGREE WE MAY WANT, BUT TO SOME EXTENT THEY DIDN'T KNOW WHAT HE WAS GETTING INTO IN TERMS OF JUST THE PROBLEM WITH LANGUAGE.

THEY CERTAINLY KNEW HE WAS HAVING TROUBLE.

I DON'T SEE A NEGATIVE FAMILY BACKGROUND, BUT PERHAPS NOT ENOUGH VIGILANCE AND CONTROL DURING A CRITICAL PERIOD OF TIME. ACTUALLY BEFORE ADOLESCENCE.

Q. IN EXAMINING, EVALUATING MR. OCHOA, DID YOU FIND ANY EVIDENCE OF ALCOHOL OR DRUG ABUSE PROBLEMS IN HIS BACKGROUND?

A. NEITHER WITH HIM NOR HIS FAMILY.

Q. DID YOU FIND ANY EVIDENCE OF WHAT WE WOULD TERM SIGNIFICANT EMOTIONAL DISTURBANCES?

A. NONE THAT I COULD FIND.

Q. WOULD IT BE FAIR TO SAY IN LAYMAN'S TERMS HE'S NOT CRAZY?

A. YES, IT WOULD.

Q. HE'S NOT, HE KNOWS RIGHT FROM WRONG?

A. YES.

Q. DR. MALONEY, IN REVIEWING HIS SCHOOL REPORTS, DID YOU NOTICE ANYTHING OF SIGNIFICANCE REGARDING HIS SCHOOL RECORDS FROM A PERIOD OF TIME WHEN HE WAS IN A JUVENILE CAMP?

A. YES.

Q. WHAT WAS THAT THAT YOU NOTED?

A. WELL, I BELIEVE THEY ARE DATED, OR REFER TO GRADES EIGHT AND NINE PRIMARILY, MAYBE INTO THE 10TH, BUT HIS ACADEMIC PERFORMANCE INCREASED SIGNIFICANTLY ONCE HE WAS IN CAMP.

Q. DO YOU RECALL WHAT HIS GRADES WERE WHEN HE WAS IN CAMP?

A. THEY WERE IN THE B RANGE, SOMETIMES BETTER. THEY CERTAINLY WEREN'T C, D AND F AS BEFORE.

Q. IS THERE SOME EXPLANATION FOR THAT?

A. THERE IS A LOT OF POSSIBLE EXPLANATIONS FOR IT. IT ACTUALLY SURPRISED ME SOME TO SEE HIM DOING THAT WELL, BECAUSE IN TERMS OF ACADEMICS, SUCH AS ARITHMETIC, HE SIMPLY DOESN'T KNOW A LOT OF THE FUNCTIONS. HE CAN ADD, DIVIDE AND SO FORTH, BUT HE DIDN'T LEARN BEYOND THAT.

I THINK IN THE CAMPS THEY HAVE KIDS IN GRADATED CLASSES, LOWER FUNCTION KIDS IN A LOWER CLASS. SO IT MAY NOT REFLECT HIS ACTUAL ACHIEVEMENT, BUT REFLECTS HIS ATTEMPT TO DO IT AT THAT TIME.

Q. SO IN OTHER WORDS, THE FACT THAT WHEN HE WAS IN JUVENILE CAMP THAT HE RECEIVED B'S OR HIGHER GRADES THAN HE HAD BEEN RECEIVING, IF I UNDERSTAND YOU CORRECTLY, DOES NOT NECESSARILY MEAN THAT THAT WAS AN ACCURATE REFLECTION OF HIS REAL ABILITIES?

A. WELL, IT'S AN ACCURATE REFLECTION OF HOW HE WAS DOING IN THAT GROUP OF PEOPLE.

WE WOULD HAVE TO GET MORE INFORMATION AS TO WHO THAT GROUP OF PEOPLE WERE AND WHAT THE GRADE DISTRIBUTION WAS.

BUT IN TERMS OF BOTTOM LINE ABILITY, READING IS NOT BAD. AS I SAID EIGHTH GRADE. FIFTH GRADE LEVEL READING IS UP TO THE POINT WHERE THEY HAVE NOT LEARNED FRACTIONS, PERCENTAGES AND THAT TYPE OF THING. THEY LEARN THE BASIC ARITHMETIC SKILLS.

Q. HAVE YOU PARTICIPATED IN ANY STUDIES OF INDIVIDUALS THAT ARE IN THE BORDERLINE CATEGORY OF INTELLIGENCE WHERE MR. OCHOA IS CLASSIFIED?

A. I HAVE CONDUCTED CERTAIN STUDIES AND RESEARCH MYSELF.

Q. AND DO YOU HAVE ANY OPINION BASED UPON THOSE STUDIES REGARDING THE EFFECTS THAT THOSE TYPES OF INDIVIDUALS, THE KIND OF PROBLEMS THEY FACE IN A COMPLEX URBAN ENVIRONMENT LIKE LOS ANGELES?

A. WELL, THE COMPLEXITY OF THE SOCIETY IS A CHALLENGE FOR EVERYBODY, ALL OF US HERE INCLUDED.

WHEN YOU HAVE SOMEONE WITH MARGINAL ACADEMIC SKILLS, MARGINAL COPING SKILLS, IT'S JUST THAT MUCH MORE

THESE DAYS GET INVOLVED WITH THE GANGS BUT ALSO HAVE THE STRENGTH AND THE ABILITY TO GET OUT OF A GANG?

A. WHEN YOU SAY A LOT, SOME KIDS DO.

I SEE A LOT OF KIDS THAT DON'T.

IN FACT, THERE HAS BEEN ONE LONG TERM STUDY IN A BOOK CALLED THE INVULNERABLES, AND WHAT THAT STUDY REALLY LOOKED AT WAS PEOPLE GROWING UP IN A CERTAIN ENVIRONMENT WITH A LOT OF NEGATIVE THINGS OCCURRING IN THEIR DAILY LIFE AND WHAT HAPPENS TO THEM.

THE KIDS THAT ACTUALLY FLOURISHED, THAT DID WELL, WERE SUCH A MINORITY THAT THEY ARE ENTITLED THE INVULNERABLES.

SERGIO'S BACKGROUND WASN'T HORRIBLE BUT CERTAINLY HE GREW UP IN A HIGH DELINQUENCY AREA AND BY LATE CHILDHOOD HIS ROLE MODEL WAS OLDER GANG MEMBERS.

HE SIMPLY DID NOT HAVE THE EGO STRENGTH TO GO TO CAMP, COME BACK AND RESIST THAT.

Q. BUT ALSO HE GREW UP IN A HOME ENVIRONMENT THAT WAS REALLY UNUSUAL; ISN'T THAT TRUE?

A. FROM HIS REPORT TO ME, FROM EVERYTHING I READ, HE HAD LOVING, CARING PARENTS.

Q. HE HAD TWO PARENTS AND HE HAD AN OLDER SISTER THAT WAS ABOUT TEN OR ELEVEN YEARS OLDER THAN HIM THAT WAS ALSO LIKE A SURROGATE MOTHER TO HIM; ISN'T THAT TRUE?

A. YES.

Q. AND IN THIS DAY AND AGE GROWING UP IN A FAMILY SITUATION WITH TWO PARENTS, LET ALONE THREE, THAT'S A PRETTY GOOD BACKGROUND, ISN'T IT?

A. I HAVE HEARD THAT, YES.

Q. WERE YOU AWARE OF THE FACT THAT THE SECOND MURDER IN THIS CASE INVOLVING A JOE CASTRO WAS A ROBBERY ATTEMPT GONE BAD?

A. YES.

Q. WERE YOU AWARE OF THE FACT THAT IT WAS THE DEFENDANT AFTER THE VICTIM REFUSED TO GIVE UP HIS CAR SIMPLY SHOT AND KILLED HIM?

A. I AM AWARE OF THAT.

Q. AND ARE YOU AWARE OF THE FACT THAT SUBSEQUENT TO BEING INCARCERATED ON TWO COUNTS OF MURDER, THE DEFENDANT TATOOED HIS FOREHEAD WITH THE PENAL CODE SECTION FOR MURDER?

A. I SAW THAT.

Q. WOULD THAT INDICATE TO YOU A LACK OF REMORSE?

A. IT COULD.

I DON'T THINK YOU COULD SAY ONE WAY OR THE OTHER.

THERE IS ANOTHER WHOLE SET OF VARIABLES.

THIS IS A GUY AGAIN WHO IS GANG INVOLVED IN THE JAIL.

IN THE JAIL THERE IS A GREAT DEAL OF PURE INVOLVEMENT. THERE IS PECKING ORDERS.

UNSOPHISTICATED GUYS TATTOO TEARDROPS ON THE CORNER OF THEIR EYE AND DO OTHER THINGS TO INDICATE HOW TOUGH THEY ARE.

SERGIO IS CERTAINLY A CASE OF THAT.

Q. IN FACT, HE HAS A TEARDROP WITH THE NUMBER TWO TATOOED ON HIS FACE; IS THAT RIGHT?

I BELIEVE I SAID ON DIRECT, THERE IS A CHRONIC COMPONENT TO THAT, AND IT IS CERTAINLY AGGRAVATED BY THE FACT THAT HE WAS IN A HIGH POWERED MODULE FACING TRIAL, FACING A DEATH PENALTY.

Q. ARE YOU AWARE OF THE FACT THAT HE WAS IN A HIGH POWERED MODULE FOR CERTAIN REASONS, AREN'T YOU?

A. YES.

I AM NOT -- I AM TRYING TO RECALL A YEAR AGO WHEN I SAW HIM WHAT THE SPECIFIC REASONS WERE, BUT I KNOW HE HAD TROUBLE IN JAIL.

Q. BASICALLY, DOCTOR, I TAKE IT THAT THE THRUST OF YOUR TESTIMONY IS THAT THE DEFENDANT IS REALLY NO DIFFERENT FROM A LARGE MAJORITY OF THE POPULATION IN TERMS OF HIS MENTAL HEALTH?

A. WELL, I WOULDN'T SAY A LARGE MAJORITY.

BUT I DID SAY THAT HE IS NOT MENTALLY RETARDED. HE IS NOT PSYCHOTIC.

HE DOES UNDERSTAND WHAT HE IS DOING.

I WOULDN'T -- I WOULD HOPE THAT A LARGE MAJORITY OF THE POPULATION DON'T HAVE HIS MENTAL MAKEUP AND ACADEMIC MAKEUP.

Q. WHAT I AM TALKING ABOUT IS THERE IS NOTHING TO INDICATE THAT THERE IS A CAUSE FOR THE BEHAVIOR THAT HE HAS EXHIBITED?

A. NOT A MENTAL HEALTH CAUSE.

I THINK WE HAVE GOT TO LOOK BEYOND THAT.

MS. SCHWARTZ: OKAY. THANK YOU. I HAVE NOTHING FURTHER.

MR. OCHOA?

A. NO.

Q. YOU ALSO INDICATED AT ONE POINT THAT I THINK YOU INDICATED YOU FELT THAT THERE MIGHT HAVE BEEN A PROBLEM WITH THE PARENTING THAT MR. OCHOA RECEIVED, AND I BELIEVE YOUR STATEMENT WAS THAT HE DID -- HE HAD A KIND AND CARING AND CONCERNED FAMILY THAT MAY NOT HAVE IMPOSED THE LIMITS THAT WE WOULD WANT TO IMPOSE ON OUR OWN CHILDREN.

DO YOU RECALL STATING THAT?

A. YES.

Q. DO YOU RECALL WHAT DID YOU BASE THAT OPINION ON?

A. LARGELY ON THE DEFENDANT'S OWN REPORT. AGAIN HE IS GANG INVOLVED AT A YOUNG AGE.

HE STARTED DRESSING GANGLIKE AT A YOUNG AGE. HE STARTED HANGING OUT WITH THEM AT A YOUNG AGE.

WE ARE TALKING ABOUT ELEVEN OR TWELVE YEARS OLD, AND I HAVE A TWELVE YEAR OLD, AND, YOU KNOW, I CAN'T USE MYSELF AS A MODEL, BUT CERTAINLY IF I WAS SEEING THOSE BEHAVIORS, I WOULD HAVE TO DO SOMETHING ABOUT IT.

I BELIEVE FROM WHAT HE SAID HIS DAD WAS CONCERNED.

HIS MOM WAS CONCERNED, BUT THEY ALSO SPENT A LOT OF TIME WORKING.

IT JUST DOESN'T APPEAR THAT AN INTERVENTION WAS MADE UNTIL THE JUVENILE AUTHORITIES GOT INVOLVED.

Q. AND YOU CONFIRMED FOR THE PROSECUTOR THAT THE OBJECT OR THE CHIEF OBJECTIVE PERHAPS OF THE JUVENILE COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NW M HON. SANDY KRIEGLER, JUDGE

PEOPLE OF THE STATE OF CALIFORNIA,

PLAINTIFF,

VS

SERGIO OCHOA,

DEFENDANT.

BA 020813
REPORTER'S
CERTIFICATE

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COUNTY OF LOS ANGELES)SS

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DATED THIS 2ND DAY OF MARCH, 1993.

CSR 2824
OFFICIAL REPORTER

APPENDIX Q

A 5

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SUPREME COURT OF THE STATE OF CALIFORNIA

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CENTRAL DIST. OF CALIF.
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THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF-RESPONDENT, VS. SERGIO OCHOA, DEFENDANT-APPELLANT.	SUPERIOR COURT NO. BA 020873

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE SANDY KRIEGLER, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

APPEARANCES:

FOR PLAINTIFF-RESPONDENT: DANIEL E. LUNGREN,
ATTORNEY GENERAL
3580 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA

FOR DEFENDANT-APPELLANT: IN PROPRIA PERSONA

COPY

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VOLUME 23 OF 26 VOLUMES

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REPORTER'S DAILY TRANSCRIPT

VOLUME 23

THRUSDAY, SEPTEMBER 10, 1992

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FOR THE PEOPLE: IRA REINER, DISTRICT ATTORNEY
BY: TERI SCHWARTZ, DEPUTY

FOR THE DEFENDANT OCHOA: RICHARD ROSS
ATTORNEY AT LAW
AND
JOHN HUD,
ATTORNEY AT LAW

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APRIL ADAMS, CSR 2824
JOAN RUBEY KOTELES, CSR 1911
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FOR MANY YEARS?

A. WELL, ABOUT A YEAR AND A HALF LATER IN DOWNTOWN LOS ANGELES I FOUND A JOB AS A SHOEMAKER.

Q. WHERE WERE YOU WORKING, MR. OCHOA?

A. ON SPRING AND 7TH.

Q. IS THAT SPRING STREET NEAR BROADWAY?

A. YES. BROADWAY. YES. THERE.

Q. AND HOW LONG DID YOU WORK AT THAT SHOE STORE?

A. 14 YEARS.

Q. AND THAT WAS ON 7TH STREET BETWEEN SPRING AND BROADWAY?

A. YES.

Q. WHEN YOU FIRST ARRIVED IN LOS ANGELES AND WERE LIVING ON FIGUEROA STREET, HOW OLD WAS SERGIO AT THAT TIME?

A. HE WAS ONLY THREE YEARS WHEN WE HAD JUST ARRIVED.

THAT'S ALL.

Q. AND YOU SAID WHEN YOU FIRST ARRIVED YOUR WIFE HAD A JOB; IS THAT RIGHT?

A. YES.

Q. WHAT WERE HER WORKING HOURS?

A. FROM 7:00 IN THE MORNING TO 6:00.

Q. AND IT WAS DURING THAT PERIOD OF TIME THAT YOU WERE AS YOU SAID I THINK WALKING AROUND THE STREETS DOWNTOWN LOOKING FOR WORK?

A. YES. I ALWAYS ARRIVED ABOUT 6:00 IN THE EVENING.

Q. AND AT SOME POINT DURING THE PERIOD THAT YOU FIRST MOVED HERE AND WERE LIVING ON FIGUEROA, DID YOU BECOME AWARE OF SOME PROBLEMS YOUR CHILDREN WERE HAVING WITH SOME OLDER NEIGHBORHOOD CHILDREN?

A. YES, THEY DIDN'T LET THEM GO OUTSIDE. THEY TRIED TO FRIGHTEN THEN.

MS. SCHWARTZ: OBJECT AND MOVE TO STRIKE.

IT IS NOT RESPONSIVE AND THERE IS ALSO NO FOUNDATION FOR THAT ANSWER.

THE COURT: WELL, EVERYTHING AFTER YES IS STRICKEN.

HE WAS AWARE OF SOME PROBLEMS WITH THE THE NEIGHBORHOOD CHILDREN.

Q. BY MR. ROSS: AND THOSE PROBLEMS THAT YOU WERE AWARE OF REGARDING YOUR CHILDREN DID THOSE INVOLVE NEIGHBORS OF YOURS?

MS. SCHWARTZ: SAME OBJECTION.

THERE IS NO FOUNDATION FOR THAT IF HE WAS OUT OF THE HOME.

THE COURT: OVERRULED.

THE WITNESS: YES. THEY WERE THE CHILDREN OF THOSE WHO LIVED TO THE RIGHT, ACROSS THE STREET FROM US TO THE RIGHT.

Q. BY MR. ROSS: AND WHAT DID YOU DO ABOUT THOSE PROBLEMS?

A. WELL, AS SOON AS I FOUND A JOB, MY WIFE STAYED AT HOME TO TAKE CARE OF THEM.

Q. AT SOME POINT --

INCIDENTALLY, MR. OCHOA, YOU HAVE BEEN IN THE

UNITED STATES NOW APPROXIMATELY 23 YEARS, 22, 23 YEARS?

A. YES.

Q. AND HAVE YOU DURING THAT TIME LEARNED TO SPEAK ENGLISH?

A. ONLY FOR MY WORK, FOR MY JOB.

Q. WHEN YOU SAY ONLY FOR YOUR JOB, DO YOU MEAN JUST THE WORDS THAT ARE NECESSARY TO WORK, THE ENGLISH WORDS THAT ARE NECESSARY IN YOUR OCCUPATION AS A SHOEMAKER?

A. WHATEVER MY EMPLOYER SAYS TO ME LIKE FOOTSOLE, RUBBER HEEL.

Q. OKAY. HOW LONG DID YOU LIVE ON FIGUEROA STREET?

A. ABOUT THREE YEARS.

Q. AND WHERE DID YOU MOVE WHEN YOU LEFT FIGUEROA STREET?

A. TO WELCOME, LIKE WELCOME IN SPANISH. LIKE BIENVENIDO IS THE WORD IN SPANISH.

Q. AND HOW OLD WAS SERGIO WHEN YOU MOVED TO WELCOME AVENUE?

A. ABOUT FOUR YEARS, SIX YEARS, FIVE YEARS OLD. I DON'T REMEMBER.

Q. DO YOU REMEMBER IF SERGIO WAS GOING TO SCHOOL OR STARTED SCHOOL WHEN YOU WERE LIVING ON WELCOME AVENUE?

A. YES.

YES, MY WIFE PUT HIM IN SCHOOL IN KINDERGARTEN.

Q. AND WAS IT ABOUT THAT TIME THAT YOU RENTED AND TRIED TO OR RENTED A RESTAURANT IN SAN PEDRO?

A. YES.

Q. AND WHO WORKED AT THE RESTAURANT?
A. MY WIFE.
Q. AND YOU WERE WORKING AT THE SHOE REPAIR STORE DOWNTOWN AT THE SAME TIME?
A. YES.
I TOOK HER OVER THERE EARLY AT 5:00 IN THE MORNING AND THEN I WENT TO MY JOB.
Q. AT WHAT TIME DID YOU ARRIVE AT YOUR JOB?
A. I CAME AT 7:00. I HAD THE KEYS TO ENTER.
Q. AND HOW LONG WOULD YOU STAY AT YOUR JOB DURING THE DAY?
A. THEY ARRIVED AT 9:00 AND I LEFT AT 4:00.
Q. AND WHERE WOULD YOU GO WHEN YOU LEFT THE SHOE REPAIR STORE AT 4:00?
A. I WENT TO SAN PEDRO.
Q. WHERE TO IN SAN PEDRO?
A. TO THE RESTAURANT BECAUSE I NEEDED MY WIFE.
Q. AND WHEN YOU GOT TO THE RESTAURANT, HOW LONG WOULD YOU STAY THERE?
A. UNTIL 11:00 AT NIGHT.
Q. AND WOULD OPHELIA STAY THERE WITH YOU UNTIL 11:00 AT NIGHT?
A. YES.
Q. SO DURING THE PERIOD OF TIME THAT YOU HAD THE RESTAURANT OPHELIA WAS THERE FROM 6:00 IN THE MORNING UNTIL 11:00 AT NIGHT?
A. YES.
Q. AND YOU WERE ALSO EITHER AT THE RESTAURANT OR

AT YOUR JOB AS A SHOEMAKER FROM EARLY IN THE MORNING UNTIL 11:00 AT NIGHT; IS THAT RIGHT?

A. YES.

I OPENED UP WITH THE KEY, AND THEN AT 9:00 I LET THE OTHER ATTENDANTS IN AND THEN MY BOSS ARRIVED AT 10:00.

Q. MR. OCHOA, HOW LONG DID YOU LIVE ON WELCOME AVENUE?

A. ABOUT FIVE YEARS.

Q. AND WHERE DID YOU MOVE TO AFTER YOU LEFT WELCOME AVENUE?

A. HERE OVER ON 27TH.

Q. IS THAT THE HOUSE YOU STILL RESIDE IN?

A. WE STILL LIVE THERE.

Q. SHORTLY AFTER YOU MOVED TO WEST 27TH STREET, WERE THERE ANY INCIDENTS INVOLVING YOUR NEIGHBORS OR CHILDREN IN THE NEIGHBORHOOD THAT YOU RECALL?

A. YES.

A SHORT TIME AFTER WE ARRIVED THEY STOLED EVERYTHING FROM US.

Q. WHAT WERE YOU ABLE -- WERE YOU ABLE TO DO ANYTHING ABOUT THAT?

A. NO. WE CALLED THE POLICE. THEY DIDN'T DO ANYTHING.

Q. WAS SERGIO IN SCHOOL AT THAT TIME WHEN YOU MOVED TO WEST 27TH?

A. YES.

Q. DO YOU REMEMBER WHAT GRADE HE WAS IN?

BECAUSE SHE NEEDED TO BE HOME WITH THE CHILDREN?

A. YES, SHE STAYED HOME. WE HAD PROBLEMS, WE WERE BEGINNING TO HAVE PROBLEMS WITH THE SCHOOL AND SHE HAD TO LEAVE THE RESTAURANT.

Q. SHE HAD TO LEAVE THE RESTAURANT SO SHE COULD ATTEND TO RAISING YOUR FAMILY; ISN'T THAT RIGHT?

A. YES.

Q. ISN'T IT TRUE, MR. OCHOA, THAT YOU TRIED TO TEACH YOUR CHILDREN THE DIFFERENCE BETWEEN RIGHT AND WRONG?

A. YES, ALWAYS.

Q. ISN'T IT TRUE, MR. OCHOA, THAT WHENEVER ANY OF YOUR CHILDREN HAD A PROBLEM WITH THEIR BEHAVIOR IN SCHOOL, THAT YOU TOOK AN INTEREST IN TRYING TO FIND OUT WHAT YOU COULD DO TO RESOLVE THAT PROBLEM?

A. YES.

Q. ISN'T IT TRUE, MR. OCHOA, THAT FROM THE AGE OF 13 YOU WERE AWARE OF PROBLEMS THAT THE DEFENDANT HAD EXPERIENCED WITH THE LAW?

A. WELL, ONLY THAT HE DIDN'T GO TO SCHOOL. HE DIDN'T DO ANYTHING.

Q. DO YOU REMEMBER, MR. OCHOA, THAT WHEN YOUR SON WAS 13 YEARS OLD HE WAS ARRESTED FOR BREAKING INTO A SCHOOL?

A. YES.

Q. DO YOU REMEMBER GOING TO COURT WITH HIM IN 1981 ON THAT CASE?

A. YES, I WENT TO ALL THE COURTS.

Q. AFTER YOU WENT TO COURT ON THIS SECOND CASE INVOLVING A CHARGE OR A CRIME THAT YOUR SON COMMITTED LATER THAT YEAR, DID YOUR SON ALSO GET TO RETURN TO YOUR HOME ON PROBATION?

A. YES.

Q. DID YOU ALSO TALK WITH YOUR SON AGAIN ABOUT HOW IMPORTANT IT WAS FOR HIM TO OBEY THE LAW?

A. YES.

Q. DID YOU EVER DISCIPLINE YOUR SON, PUNISH HIM FOR EVER DOING ANYTHING WRONG?

A. I GAVE HIM ADVICE AND SOMETIMES I DIDN'T LET HIM GO TO A PARTY.

Q. ISN'T IT TRUE SOMETIMES YOU MADE HIM STAY IN THE HOUSE?

A. YES, I TOLD HIM THAT HE COULDN'T GO OUT AS A PUNISHMENT.

6

Q. ISN'T IT TRUE YOU ALSO TOLD HIM HE COULDN'T SPEAK WITH SOME OF HIS FRIENDS AS A PUNISHMENT?

A. YES.

Q. I UNDERSTAND FROM THE TESTIMONY WE HAVE HAD FROM YOUR DAUGHTER, THAT YOU NEVER PHYSICALLY HIT YOUR SON; IS THAT CORRECT?

A. NO, NO I NEVER HIT HIM.

Q. BUT YOU ATTEMPTED TO PUNISH HIM AND CONTROL HIS BEHAVIOR IN OTHER WAYS; IS THAT RIGHT?

A. YES, I GAVE HIM ADVICE AND I TOLD HIM IT WAS BAD, IT WAS BAD TO GO WITH BAD FRIENDS.

Q. MY QUESTION IS, INSTEAD OF HITTING HIM, YOU

REALIZE HE WAS CONTINUING TO HANG AROUND WITH GANG MEMBERS?

A. NO, HE BEHAVED WELL FOR A LONG TIME.

Q. BUT AT SOME POINT IN TIME HE STARTED GETTING IN TROUBLE AGAIN; ISN'T THAT RIGHT?

A. I DIDN'T NOTICE IT RIGHT AWAY. IT WAS MUCH LATER.

Q. ISN'T IT TRUE THAT HE STARTED GETTING ARRESTED AGAIN IN 1986?

A. NO, I DO NOT REMEMBER.

Q. THE INCIDENT THAT WE REFER TO EARLIER WHERE THE SHOTGUN, OR SHOTGUN WAS TAKEN OUT OF YOUR HOME, DO YOU REMEMBER YOUR SON BEING IN JAIL AROUND THAT TIME?

A. YES.

Q. DO YOU REMEMBER THE DEFENDANT BEING IN JAIL FOR ABOUT A YEAR AFTER THAT INCIDENT?

A. YES.

Q. DO YOU REMEMBER GOING TO COURT WITH HIM EACH TIME HE WENT TO COURT IN 1986?

A. YES.

Q. NOW, ALSO MR. OCHOA, WOULD IT BE FAIR TO SAY THAT YOUR DAUGHTER ROSA WAS LIKE, ALSO LIKE A MOTHER TO YOUR SON?

A. YES.

Q. SHE LOOKED AFTER YOUR CHILDREN WHILE YOU WERE AT WORK SOMETIMES; IS THAT RIGHT?

A. YES.

Q. OF ALL YOUR FIVE CHILDREN, ISN'T IT TRUE

THAT IT'S THE DEFENDANT SERGIO THAT IS THE ONLY ONE THAT'S GOTTEN INTO TROUBLE WITH THE LAW?

A. YES.

MS. SCHWARTZ: THANK YOU, I HAVE NOTHING FURTHER.

THE COURT: ANY REDIRECT?

REDIRECT EXAMINATION

BY MR. ROSS:

Q. MR. OCHOA, WHAT IS SERGIO'S DATE OF BIRTH?

A. I DO NOT REMEMBER IN WHAT YEAR, BUT IT IS THE 9TH APRIL. BUT I DON'T KNOW WHAT YEAR.

Q. HOW DO YOU RECALL IT'S THE 9TH APRIL?

A. BECAUSE IT'S MY DATE.

Q. THE SAME BIRTH DATE, YOU AND SERGIO HAVE THE SAME BIRTH DATE?

A. YES.

MR. ROSS: NO FURTHER QUESTIONS, YOUR HONOR.

THE COURT: ANY RECROSS?

MS. SCHWARTZ: NO.

THE COURT: THANK YOU, MR. OCHOA, YOU MAY STEP DOWN.

LET'S TAKE TEN MINUTES, LADIES AND GENTLEMEN. PICK IT UP AGAIN AT A QUARTER TO THREE. PLEASE REMEMBER THE USUAL ADMONITIONS DURING THE BREAK.

///

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

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CSR 2824

OFFICIAL REPORTER

APPENDIX R

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FOR DEFENDANT-APPELLANT: IN PROPRIA PERSONA

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BY: TERI SCHWARTZ, DEPUTY

FOR THE DEFENDANT OCHOA: RICHARD ROSS
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JOHN HUD,
ATTORNEY AT LAW

APRIL ADAMS, CSR 2824
JOAN RUBEY KOTELES, CSR 1911
OFFICIAL REPORTERS

THE REASON YOU HAVE EVIDENCE OF FACTOR B EVIDENCE, OTHER CRIMINAL ACTIVITY COMMITTED BY THE DEFENDANT, IS BECAUSE IT REALLY SHOWS HIS CHARACTER. IT SHOWS THE TYPE OF PERSON HE IS, SHOWS HIS PROPENSITY TO COMMIT VIOLENT ACTS, AND IT SHOWS THAT BASICALLY HE IS A VIOLENT PERSON.

YOU HAVE ALSO EVIDENCE OF FACTOR C, PRIOR CONVICTIONS, AND THE PURPOSE REALLY FOR THIS TYPE OF EVIDENCE COMING IN IS TO SHOW THAT EACH TIME THE DEFENDANT CAME IN CONTACT WITH THE CRIMINAL JUSTICE SYSTEM, EACH TIME SANCTIONS WERE IMPOSED AND HE WAS PUT IN CUSTODY AND PUNISHED, IT HAD NO AFFECT AT ALL ON HIS CRIMINAL BEHAVIOR.

HE WAS CONVICTED IN 1987 OF THE ROBBERY OF LIONEL FRICKS. IN 1989 HE WAS CONVICTED OF TAKING A CAR AND DRIVING IT WITHOUT THE OWNER'S PERMISSION. ANOTHER FELONY.

EACH TIME HE WAS ARRESTED AND PUNISHED IT DIDN'T WORK, BECAUSE WE HAVE THE CRIMES WE HAVE PROVEN TO YOU BEYOND A REASONABLE DOUBT THAT HE HAS COMMITTED SUBSEQUENT, OR AFTER THESE OTHER CONTACTS WITH THE CRIMINAL JUSTICE SYSTEM.

THOSE ARE ESSENTIALLY THE FACTORS IN AGGRAVATION THAT THE LAW PERMITS ME TO PRESENT TO YOU.

THOSE FACTORS A, B AND C, IN THE FIRST STEP OF YOUR ANALYSIS WHAT YOU HAVE TO DO AFTER ISOLATING THOSE FACTORS, YOU THEN HAVE TO WEIGH THEM AND BALANCE THEM. YOU HAVE TO WEIGH THEM IN THE SENSE THAT YOU HAVE

TO LOOK AT EACH ONE OF THEM AND DETERMINE HOW
EACH ONE OF THEM IS WORTHY OF. HOW MUCH MORAL VALUE.
EACH ONE OF YOU HAS TO DO THAT FOR
YOURSELVES. YOU COULD DIFFER ON WHICH FACTOR YOU FEEL
DESERVES MORE WEIGHT. BUT THE QUESTION REALLY HAS TO
BECOME HOW MUCH WEIGHT DO YOU GIVE ALL OF THESE FACTORS
IN AGGRAVATION.

WHEN YOU GET TO STEP TWO, YOU DO THE SAME
THINGS. YOU LOOK AT THE FACTORS IN MITIGATION PROVIDED
BY THE DEFENSE, AND THOSE ARE THE FACTORS MENTIONED
BEFORE. D THROUGH K.

AND WE REALLY HAVE NO EVIDENCE THAT WAS
PRESENTED BY THE DEFENSE ON MOST OF THESE FACTORS.
HOWEVER, WE HAVE EVIDENCE OF THE DEFENDANT'S AGE, W
SUBMIT TO YOU IS REALLY MEANINGLESS BECAUSE IT'S NO
HE WAS AN 18 YEAR OLD KID. HE WAS OLD ENOUGH TO K
BETTER.

YOU HAVE EVIDENCE UNDER FACTOR K.
FAMILY OF THIS DEFENDANT TESTIFIED IN THIS CASE
DEFENSE ATTEMPTED TO SHOW YOU SOME THINGS ABOU
DEFENDANT'S BACKGROUND, I THINK MR. ROSS SAID
OPENING STATEMENT THAT WOULD EXPLAIN TO YOU
HERE. THAT WOULD EXPLAIN WHY HE COMMITTED

I SUBMIT TO YOU THERE REALLY
THAT THESE FAMILY MEMBERS COULD TELL YOU
EXPLAIN WHY THE DEFENDANT TURNED OUT THI
YOU DIDN'T HEAR EVIDENCE A
CHILDHOOD THIS DEFENDANT HAD. YOU DID

TO LOOK AT EACH ONE OF THEM AND DETERMINE HOW MUCH VALUE EACH ONE OF THEM IS WORTHY OF. HOW MUCH MORAL VALUE.

EACH ONE OF YOU HAS TO DO THAT FOR YOURSELVES. YOU COULD DIFFER ON WHICH FACTOR YOU FEEL DESERVES MORE WEIGHT. BUT THE QUESTION REALLY HAS TO BECOME HOW MUCH WEIGHT DO YOU GIVE ALL OF THESE FACTORS IN AGGRAVATION.

WHEN YOU GET TO STEP TWO, YOU DO THE SAME THINGS. YOU LOOK AT THE FACTORS IN MITIGATION PROVIDED BY THE DEFENSE, AND THOSE ARE THE FACTORS MENTIONED BEFORE. D THROUGH K.

AND WE REALLY HAVE NO EVIDENCE THAT WAS PRESENTED BY THE DEFENSE ON MOST OF THESE FACTORS. HOWEVER, WE HAVE EVIDENCE OF THE DEFENDANT'S AGE, WHICH I SUBMIT TO YOU IS REALLY MEANINGLESS BECAUSE IT'S NOT LIKE HE WAS AN 18 YEAR OLD KID. HE WAS OLD ENOUGH TO KNOW BETTER.

YOU HAVE EVIDENCE UNDER FACTOR K. THAT THE FAMILY OF THIS DEFENDANT TESTIFIED IN THIS CASE, AND THE DEFENSE ATTEMPTED TO SHOW YOU SOME THINGS ABOUT THE DEFENDANT'S BACKGROUND, I THINK MR. ROSS SAID IN HIS OPENING STATEMENT THAT WOULD EXPLAIN TO YOU WHY HE'S HERE. THAT WOULD EXPLAIN WHY HE COMMITTED THESE CRIMES.

I SUBMIT TO YOU THERE REALLY WAS NO EVIDENCE THAT THESE FAMILY MEMBERS COULD TELL YOU ABOUT THAT WOULD EXPLAIN WHY THE DEFENDANT TURNED OUT THE WAY HE DID.

YOU DIDN'T HEAR EVIDENCE ABOUT A HORRIBLE CHILDHOOD THIS DEFENDANT HAD. YOU DIDN'T HEAR EVIDENCE

THAT AS A KID HE WAS BEATEN AND ABUSED BY HIS PARENTS. YOU DIDN'T HEAR EVIDENCE ABOUT THE HOME HE CAME FROM BEING AN UNSTABLE ENVIRONMENT AND THAT THE FAMILY WAS NOT A FAMILY UNIT, AN INTACT FAMILY UNIT. YOU DIDN'T HEAR ANY EVIDENCE OF THAT.

WHAT EVIDENCE DID YOU HEAR? YOU HEARD EVIDENCE THAT THIS DEFENDANT HAD A LIFE THAT WAS BETTER AND IS BETTER THAN MOST PEOPLE TODAY. HE HAD A LOVING FAMILY AND STILL HAS A LOVING FAMILY. FOUR OTHER SIBLINGS. FIVE ALL TOGETHER.

HE HAD NOT ONLY A MOTHER AND A FATHER LIVING IN THE HOME, BUT HE HAD AN OLDER SISTER TEN YEARS OLDER THAT WAS LIKE A MOTHER TO HIM.

AND THESE PEOPLE, I'M TELLING YOU THESE PEOPLE DID EVERYTHING THEY COULD TO MAKE SURE THAT THIS DEFENDANT TURNED OUT ALL RIGHT.

WHAT MORE CAN WE ASK OF PARENTS IN RAISING THEIR KIDS?

MR. OCHOA, YOU HEARD EVIDENCE, WORKED TWO JOBS. WAS GONE FROM EARLY IN THE MORNING TO LATE AT NIGHT TO SUPPORT THIS FAMILY. THIS FAMILY NEVER HAD TO BE WITHOUT THE FOOD AND THE CLOTHING AND THE SHELTER. HE WORKED HARD AT SUPPORTING AND SUPPLYING HIS CHILDREN WITH EVERYTHING THEY NEEDED, EVERYTHING THEY WANTED. EVERYTHING THEY NEEDED TO GET THROUGH LIFE.

HIS MOTHER WORKED FOR A PERIOD OF TIME AND WHEN THINGS WERE GETTING A LITTLE CRAZY AT HOME WITH KIDS NOT GOING TO SCHOOL, SHE LEFT THE JOB TO ATTEND TO THE

FAMILY, TO ATTEND TO THE HOME WHILE MR. OCHOA WORKED TWO JOBS.

THIS IS A FAMILY THAT HAS GIVEN THIS DEFENDANT EVERYTHING ANYONE COULD EVER ASK FOR. THIS IS A FAMILY THAT BENT OVER BACKWARDS TO SEE TO IT THAT HE HAD ALL THE LOVE AND ALL THE SUPPORT, FINANCIAL AND EMOTIONAL, TO HAVE HIM GET THROUGH LIFE AS EASILY AS CNE COULD.

EVERY TIME THIS DEFENDANT GOT INTO TROUBLE HIS FAMILY WAS INVOLVED.

HIS FATHER EVERY TIME WENT TO COURT WITH HIM. EVERY TIME PROBLEMS WERE BROUGHT UP, MR. OCHOA WOULD TALK TO HIS SON TO TRY TO TEACH HIM THAT THERE ARE CERTAIN THINGS YOU DO IN LIFE AND CERTAIN THINGS YOU DON'T, AND YOU DON'T STEAL AND YOU DON'T LIE AND YOU DON'T KILL.

HE TRIED TO INSTILL IN HIS SON A SENSE OF RIGHT AND WRONG.

HE DID EVERYTHING ANY PARENT COULD EVER POSSIBLY DO FOR HIS SON.

OF ALL -- WE KNOW, WE KNOW THAT THESE PARENTS ARE GOOD LOVING PARENTS THAT GAVE THIS DEFENDANT EVERYTHING HE NEEDED IN LIFE, BECAUSE OF THE CHILDREN, THE FIVE OCHOA CHILDREN, EVERYONE ELSE TURNED OUT OKAY EXCEPT FOR THIS DEFENDANT.

I HAVE BEEN LOOKING AND THINKING, WHAT IS IT ABOUT HIS BACKGROUND THAT THE DEFENSE HAS PRESENTED THAT WOULD LEAD US TO BELIEVE THAT THERE IS AN EXCUSE OR A

REASON FOR HIM TO BE HERE, AND THAT'S WHY WE HAVE FACTOR K.

BECAUSE IN A LOT OF THESE CASES YOU HAVE PEOPLE THAT WERE BEATEN AND ABUSED, ABANDONED, AND KICKED OUT OF THE HOME. KIDS THAT HAVE TO FEND FOR THEMSELVES AT A VERY EARLY AGE, THAT AREN'T TAKEN CARE OF, AREN'T LOVED, HAVE DRUG ADDICTS AS PARENTS AND CRIMINALS AS PARENTS.

WHAT IS IT ABOUT THIS DEFENDANT'S BACKGROUND THAT CAUSED HIM TO BE HERE? AND MR. ROSS TOLD YOU HE WAS GOING TO SHOW YOU EVIDENCE. THEY WERE GOING TO FOCUS ON THE EVIDENCE TO TRY TO CONVINCE YOU THAT THERE WAS A REASON FOR HIM TO BE HERE.

THERE IS NO REASON EXCEPT FOR THE FACT THAT THIS MAN IS AN EVIL PERSON.

THEY PRESENTED TESTIMONY OF A DOCTOR, A PSYCHOLOGIST WHO EXAMINED THIS DEFENDANT AT LENGTH, WHO REVIEWED ALL THE MATERIALS IN THE DEFENDANT'S HISTORY, HIS SCHOOL RECORDS, HIS JUVENILE PROBATION RECORDS, HAD INTERVIEWS OR REPORTS OF FAMILY MEMBERS. MEDICAL RECORDS. EVERYTHING WAS REVIEWED BY DR. MALONEY. AND WHAT WAS DR. MALONEY'S TESTIMONY? WHAT IS THE REASON, DR. MALONEY, THAT SERGIO OCHOA TURNED OUT TO BE A COLD VICIOUS MURDERER.

THERE IS NO REASON THAT HE CAN TELL. NO REASON AT ALL.

THE ONLY THING DR. MALONEY COULD SAY IS THAT THE DEFENDANT HAD BELOW AVERAGE INTELLIGENCE. THAT'S IT.

THAT THE PROSECUTOR KNOWS EVERY POTENTIAL FACT IN THIS CASE.

THAT THE DEFENSE ATTORNEYS KNOW EVERY SINGLE FACT OF THIS CASE AND THAT WHAT YOU ARE SEEING HERE IS KIND OF A COURTROOM GAME OF HIDE AND SEEK WHERE WE ALL KNOW THE FACTS AND WE ARE JUST TRYING TO MANIPULATE THEM.

THAT IS PROBABLY TRUE TO A CERTAIN EXTENT WITHIN THE RULES OF LAW.

HOWEVER, WE ALWAYS LEARN SOMETHING. WE ALWAYS LEARN THINGS AT A TRIAL.

AND YESTERDAY ONE OF THE MOST SIGNIFICANT THINGS THAT I LEARNED AND THAT MR. HUD LEARNED DURING THE COURSE OF THIS TRIAL WAS JUST HOW OUT OF TOUCH WITH REALITY SERGIO'S FAMILY WAS REGARDING HIS ACTIVITIES.

IF YOU WILL RECALL ROSIE TESTIFIED AND MR. OCHOA BOTH TESTIFIED THAT SERGIO DID PRETTY GOOD.

HE GOT ALONG OKAY IN ELEMENTARY SCHOOL. THAT THE FIRST TIME IN HIS LIFE THERE WERE PROBLEMS WAS WHEN HE WAS APPROXIMATELY 13 YEARS OLD AND HE ENTERED, HE CHANGED FROM AN ELEMENTARY SCHOOL AND ENTERED MOUNT VERNON JR. HIGH SCHOOL.

THAT WAS THE EXACT DEMARCATION POINT AT WHICH ALL THE FAMILY MEMBERS WERE CERTAIN THAT THEY HAD SEEN THAT CHANGE IN SERGIO WHERE SOMEHOW THE GANG HAD BECOME AN ATTRACTION FOR HIM, WHERE HE STARTED ENGAGING IN THIS CONDUCT OF DRESSING STRAIGHT OR THE WAY HIS PARENTS WANTED HIM TO AT HOME AND THEN STOPPING AT SOMEBODY'S HOUSE AND CHANGING INTO OTHER CLOTHES ON HIS WAY TO SCHOOL AND APPARENTLY DOING THE SAME THING.

EVERYBODY WAS CERTAIN IT WAS 13 SERGIO AND THAT MADE SENSE. HE SWITCHED SCHOOLS. HE HAD GONE TO ANOTHER SCHOOL.

YOU FIGURE, WELL, THAT'S WHERE 18TH STREET IS. SO HE FELL INTO THAT INFLUENCE.

YET YESTERDAY THERE WAS TESTIMONY FROM DR. MALONEY WHICH NOT ONLY SURPRISED ME BUT I FELT HAD INHERENT CREDIBILITY TO IT, AND CLEARLY DEMONSTRATED THE PROBLEMS PERCEIVING SERGIO THAT UNFORTUNATELY HIS PARENTS HAD, THEIR LACK OF TOUCH WITH REALITY AS TO WHAT WAS GOING ON IN HIS LIFE.

AS YOU RECALL, DR. MALONEY TESTIFIED THAT ONE OF THE TESTS HE ADMINISTERED TO SERGIO WAS THE STANDARD MMPI.

I AM CERTAIN MOST OF YOU DIDN'T NEED DR. MALONEY TO EXPLAIN THAT TO YOU.

IT IS PROBABLY THE MOST COMMON PSYCHOLOGICAL ANALYTICAL TOOL THAT IS USED BY PSYCHOLOGISTS.

IT IS USUALLY THE FIRST THING THEY GIVE A PATIENT IS THE MMPI AND THE REASON FOR THAT IS THE MMPI AS DR. MALONEY TESTIFIED HAS EXTREMELY COMPLEX CROSS REFERENCED VALIDITY SCALES, AND WHAT THOSE VALIDITY SCALES DO IS EVENTUALLY ALLOW THE PSYCHOLOGIST TO MAKE AN ASSESSMENT OF WHETHER THE PERSON IS BEING HONEST WITH HIM OR NOT.

AND DR. MALONEY TESTIFIED YESTERDAY THAT ON THE VALIDITY SCALES WITH THE MMPI THAT HE GAVE SERGIO THAT THERE WAS ABSOLUTELY NO INDICATION WHATSOEVER THAT SERGIO WAS BEING ANYTHING LESS THAN FORTHRIGHT AND HONEST WITH HIM

DURING THE COURSE OF THE TESTING PROCEDURE AND THEIR INTERVIEWS.

HE DID SAY THAT SERGIO HAD A PROBLEM WITH THE RORSCHACH INKBLOT TEST, THAT HIS AFFECT WAS FLAT ON THAT TEST, BUT HE DIDN'T CONSIDER THAT AT ALL UNUSUAL GIVEN THE CIRCUMSTANCES AND THE ENVIRONMENT OF THE INTERVIEW.

HOWEVER, YESTERDAY FOR THE FIRST TIME IN WHEN WE WERE QUESTIONING DR. MALONEY REGARDING WHAT INFORMATION HE RELIED ON AND HE TESTIFIED THAT HE WAS RELYING ON SERGIO'S STATEMENTS TOO AND THAT ONE OF THOSE STATEMENTS WAS SERGIO'S DIRECT AND CLEAR STATEMENTS TO HIM THAT HE FIRST BECAME INVOLVED IN GANG ACTIVITY WHEN HE WAS ABOUT ELEVEN AND THE GANG WAS THE PEE WEE WINOS.

I MEAN THIS WAS TWO YEARS, TWO YEARS, WHEN SERGIO WAS IN THE SEVENTH GRADE.

NOT JUNIOR HIGH. TWO YEARS BEFORE ANYONE EVEN AS THE PROSECUTOR KEEPS REFERRING TO ROSIE, EVEN BEFORE HIS SURROGATE MOTHER ROSIE HAD ANY NOTION, ANY HINT OF WHAT WAS GOING ON.

THAT DOES NOT PROVIDE EVIDENCE OF THE TYPES OF PARENTING SKILLS THAT ARE NECESSARY.

ALL YOU HAVE TO DO IS COMPARE WHAT OCCURRED WITH SERGIO IN THAT SITUATION WITH WHAT HAPPENED TO LISA MARTINEZ, HIS GIRL FRIEND.

LISA TOLD YOU THAT WHEN SHE WAS IN THE SAME SITUATION IN SOUTH CENTRAL LOS ANGELES, HER PARENTS DID SOMETHING ABOUT IT.

THEY HAD THE RESOURCES TO DO SOMETHING ABOUT

IT.

THEY COULD READ AND SPEAK ENGLISH AND THEY DID SOMETHING ABOUT IT AND THEY GOT HER OUT OF THAT ENVIRONMENT AND GOT HER TO A SCHOOL AND SHE WENT TO A SCHOOL OUT HERE IN ENCINO AND NOW SHE IS A LEGAL SECRETARY.

SO THERE REALLY IS, THERE REALLY IS A PATTERN WITH SERGIO UNFORTUNATELY.

AND IT IS REALLY TOUGH. I MEAN IT IS REALLY TOUGH.

YESTERDAY WHEN YOU HAVE A NICE MAN LIKE EDUARDO OCHOA UP THERE TESTIFYING ON THE WITNESS STAND AND HAVING TO ASK HIM THINGS ABOUT HIS KNOWLEDGE OF HIS SON'S TEACHERS, WHAT SCHOOLS HE WENT TO, HIS KNOWLEDGE OF HIS OTHER ACTIVITIES, AND SEE HIM RESPOND IN A MANNER THAT INDICATES THAT HE HAD VERY LITTLE REAL KNOWLEDGE OF WHAT WAS GOING ON IN SERGIO'S LIFE.

AND THAT GIVEN HIS BACKGROUND FROM A VERY SIMPLE FAMILY IN A VERY RURAL AREA OF MEXICO, SIMPLY DID NOT HAVE THE SKILLS NECESSARY TO RAISE AND GUIDE AND DIRECT.

THAT'S ALL WE WERE TRYING TO SHOW YOU YESTERDAY WITH DR. MALONEY.

I THOUGHT HIS TESTIMONY WAS VERY FORTHRIGHT. WE WERE NOT TRYING, THERE WAS NO GAMES.

WE DID NOT PUT ON SOME SHRINK TO SIT UP HERE AND TRY TO TELL YOU THAT HE HAD A GROSS MENTAL DEFECT OR ANYTHING ELSE THAT IMPAIRED HIS ABILITY.

SERGIO KNOWS THE DIFFERENCE FROM RIGHT AND WRONG.

HE KNEW THE DIFFERENCE FROM RIGHT AND WRONG.

HE IS NOT THAT MENTALLY IMPAIRED. WE WERE STRAIGHTFORWARD WITH YOU ON THAT.

NONETHELESS THERE CERTAINLY IS EVIDENCE IN SERGIO'S BACKGROUND OF A LACK OF SUPERVISION AND CONTROL.

THE INCIDENTS THAT OCCURRED WHEN HE WAS THREE YEARS OLD AND FIRST CAME HERE THAT WERE NEVER RESOLVED BY HIS FAMILY.

HIS FATHER AS FAR AS HIS DISCIPLINE, I MEAN HE IS A SWEET GUY, YOU KNOW.

BUT WHAT DID HE DO WHEN SERGIO STARTED MESSING AROUND AND GETTING IN TROUBLE.

HE WOULD TALK TO SERGIO. HE WOULD TELL HIM NOT TO DO THOSE THINGS AND OF COURSE THAT WASN'T EFFECTIVE.

THAT MIGHT BE EFFECTIVE IN ITSLAN, MEXICO, A VILLAGE OF 50 OR 75 OR EVEN A HUNDRED PEOPLE, BUT IT IS CERTAINLY THAT TYPE OF PARENTAL CONTROL AND SUPERVISION IS NOT EFFECTIVE IN A COMPLEX URBAN ENVIRONMENT LIKE LOS ANGELES.

AT AN AGE WHEN MOST OF US HOPE OUR CHILDREN ARE BECOMING INVOLVED IN THE CUB SCOUTS OR LITTLE LEAGUE, UNFORTUNATELY SERGIO, THE ONLY CHANNELING OF ACTIVITY LEFT FOR HIM AND THE ONLY ACTIVITY IN WHICH HE WAS -- THERE WAS NO INVOLVEMENT.

SO HE JUST FOUND HIS OWN ACTIVITY AND UNFORTUNATELY THAT ACTIVITY WAS THE PEE WEE WINOS AT AGE ELEVEN IN THE SEVENTH GRADE.

AND THEN, OF COURSE, WHEN HE TRANSFERRED TO

MOUNT VERNON IT APPEARS THAT HE GRADUATED TO 18TH STREET.

I THINK THERE WAS PROBABLY ONE OTHER EVENT THAT HAD A SIGNIFICANT IMPACT UPON SERGIO'S LIFE AND HIS DEVELOPMENT.

IF YOU WILL RECALL ROSIE TESTIFIED THAT SERGIO AND GLORIA OF THE CHILDREN WERE PARTICULARLY CLOSE.

THE YOUNGER CHILDREN WERE SERGIO, GLORIA AND LISA.

AND I THINK YOU PROBABLY SAW THE DEMEANOR AND WHAT OCCURRED WHEN I ASKED ROSIE ON THE WITNESS STAND ABOUT THE INCIDENT INVOLVING GLORIA WHEN SHE WAS 19 YEARS OLD AND SHE TESTIFIED THAT SHE WENT TO THE HOSPITAL, SHE COULD BARELY RECOGNIZE HER SISTER.

THAT HER LEFT EYE WAS OUT OF HER HEAD AND SHE WAS HOLDING IT IN A NAPKIN OR SOME KIND OF BAND-AID.

THAT HER HEAD HAD BEEN BASHED OPEN, AND THAT SHE HAD FINGERPRINT MARKS ALL OVER HER NECK.

AND THAT SHE WAS IN THE HOSPITAL FOR A LENGTHY PERIOD OF TIME.

AND THAT THERE WAS NO RESOLUTION OF THAT EVER.

SERGIO WHO WAS CLOSE TO HER AND VISITED HER IN THE HOSPITAL, IT APPEARS FROM THE TIMING THAT SERGIO HAD JUST GOTTEN OUT OF CAMP WHEN THAT OCCURRED OR WITHIN A FEW DAYS ONE WAY OR THE OTHER.

YOU CAN'T HELP BUT THINK THAT AFTER THE OTHER INCIDENTS THAT OCCURRED IN SERGIO'S EARLY CHILDHOOD, PARTICULARLY THE INCIDENTS AT AGE THREE AND AGE SEVEN THAT THAT EXTREMELY SAVAGE BEATING OF HIS SISTER FOR SERGIO WAS

JUST ANOTHER INSTANCE OF THE POWERLESSNESS OF HIS FAMILY, OF THE FAMILY'S VULNERABILITY AND HOW DO YOU COMPENSATE FOR SOMETHING LIKE THAT IF YOU DON'T, IF YOU CAN'T EVEN SPEAK ENGLISH.

YOU CAN'T EVEN GO TO THE POLICE TO COMPLAIN. YOU CAN'T COMMUNICATE WITH THE JUVENILE PROBATION OFFICERS.

YOU CAN'T COMMUNICATE WITH YOUR SON'S ATTORNEYS.

ANOTHER PIECE OF EVIDENCE WE LEARNED FOR THE FIRST TIME YESTERDAY IRONICALLY WAS THAT ALTHOUGH MR. OCHOA WAS EXTREMELY INVOLVED ACCORDING TO THE PROSECUTION AND KNEW EVERYTHING SERGIO WAS DOING, HE TESTIFIED HE WORKED UP UNTIL JUST A FEW YEARS AGO ON SEVENTH STREET BETWEEN BROADWAY AND SPRING.

LISA MARTINEZ TESTIFIED HERE THAT IT WAS ON SEVENTH AND BROADWAY AT A TIME WHEN SHE WAS ASSOCIATED WITH OR AT LEAST ATTRACTED TO GANG MEMBERS FROM THE 18TH STREET GANG THAT THEY MET.

YOU KNOW, PUTTING TWO AND TWO TOGETHER YOU SUDDENLY REALIZE HERE IS A PARENT WHO SAYS HE IS CONCERNED ABOUT HIS SON.

HERE IS A PROSECUTOR WHO IS TELLING YOU HERE IS A PARENT THAT DID EVERYTHING IN THE WORLD THEY COULD TO GET THEIR SON OUT OF GANG INVOLVEMENT.

YET HERE IS A PARENT WHO IS WORKING HALF A BLOCK AWAY FROM WHERE HIS SON IS HANGING AROUND WITH THE 18TH STREET GANG WHILE HE IS AT WORK.

WHEN THE DEATH PENALTY WAS REINSTATED IN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NW M HON. SANDY KRIEGLER, JUDGE

PEOPLE OF THE STATE OF CALIFORNIA,

PLAINTIFF,

VS

SERGIO OCHOA,

DEFENDANT.

BA 020813
REPORTER'S
CERTIFICATE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)SS

I, APRIL ADAMS, CSR 2824, OFFICIAL REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING COMPRISES A TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS IN THE ABOVE MATTER TAKEN BY ME ON AUGUST 3, 4, 5, 6, 10, 11, 12, 13, 24, 25, 26, 27; SEPTEMBER 2, 3, 8, 9, 10, 11, 14, 1992

DATED THIS 2ND DAY OF MARCH, 1993.

CSR 2824

OFFICIAL REPORTER

APPENDIX S

DECLARATION OF FRANCISCO GOMEZ, PH.D.

I, Francisco Gomez, declare:

1. I am licensed to practice psychology in the State of California. I received a Bachelor of Arts degree in Psychology and Economics from the University of California at Irvine and a doctoral degree in Psychology from Boston University. At Boston University, I was a National Institute of Health as well as a Massachusetts Commonwealth scholar. My area of expertise was psychological testing with Spanish-speaking populations. I completed a one year internship at the University of Southern California's Department of Psychiatry. I worked mainly with Latino populations, including gang members. I was a post-doctoral research fellow in the Department of Medicine at the University of California, San Diego. I studied the effects of different types of violence exposure on children and their parents.

2. I worked as Clinical Director at Head Start in San Diego for five years, where I helped develop clinical services for over 8,000 families and supervised 25 master level and B.A. level providers. I currently serve as Director of Clinical services for a mental health program serving East African refugees.

3. I maintain a practice in forensic psychology and am on the court referral list for juvenile and adult forensics. I have conducted over five hundred evaluations where I have provided a diagnosis. Approximately fifty percent of the population I have evaluated is gang-involved. I have served as a consultant to many gang diversion programs in San Diego.

4. I am a research psychologist in the Department of Psychology at San Diego State University, where I taught courses for three years in abnormal psychology. I have been a research associate of the National Latino Research Center at California State University at San Marcos. My area of research is protective and risk factors for problem behaviors and mental health problems in Latino populations. I have published several scholarly articles and book

chapters in peer reviewed journal in the psychological assessment of Latino populations and developmental risk factors for low income children. I have been invited to present lectures based on my research at universities across the country.

5. I have been asked by counsel for Sergio Ochoa (hereinafter "Sergio" or "Mr. Ochoa") to evaluate his social history and background. In this declaration, I address the overwhelming number of risk factors and absence of protective factors that placed Sergio Ochoa at severe risk for involvement with gangs and violence.

6. I have reviewed: (1) transcripts of Mr. Ochoa's trials, as well as declarations and reports of interviews with individuals who have known or who are related to Sergio Ochoa; (2) school, court, employment and medical records for Mr. Ochoa and various members of his family; and (3) the declarations of various experts who have examined Mr. Ochoa and his background. In addition, I interviewed Sergio Ochoa over the course of three days (August 18, 19 and 20, 2003) for approximately nine hours.

7. Based on my review of his case records, declarations of family members, and my interviews, Mr. Ochoa has a large number of risk factors for problem behaviors that significantly outweigh any protective factors. Extant research has established a constellation of risk and protective factors for "Problem Behaviors." Problem behaviors are identified as drug use, behavior problems, school failure, mental health disorders, teen pregnancy, gang involvement, and violence. Reviewing school, family, individual, community, and societal risk and protective factors in Mr. Ochoa's life indicate that he encountered a significant number of risk factors and almost no protective factors for problem behaviors.

8. A decade of research has helped scientists develop risk and protective factors associated with children and young adults becoming involved in substance abuse, violence, and other serious problem behaviors. The risk and protective factors model suggests that certain risk and protective factors exist in six life domains. These important domains involve school, family, individual, community, peers and society, which have been characterized as a "Web of Influence" in individual's lives. J. David Hawkins, Richard Catalano and Richard Miller, *Risk and Protective Factors for Alcohol and other Drug Problems in Adolescence and Early Adulthood: Implications for Substance Abuse Prevention*, 112 PSYCHOLOGICAL BULLETIN 64 (1992) (hereinafter "Hawkins, *et al.*, 1992"). This "Web of Influence" model has become the:

> dominant approach to thinking about how to prevent substance abuse and associated problems in youth. It proposes that substance abuse and other problems are part of a consistent pattern of circumstances that tend to occur together. Community and neighborhood environment, school conditions and performance, family environment, and particularly, peer attitudes and behaviors all contribute to substance abuse [and involvement in other dangerous behaviors].

THE NATIONAL CROSS-SITE EVALUATION OF HIGH-RISK YOUTH PROGRAMS, CENTER FOR SUBSTANCE ABUSE PREVENTION, UNDERSTANDING RISK, PROTECTION AND SUBSTANCE USE AMONG HIGH RISK YOUTH, Monograph Series No. 2 (2002), DHHS Publication No. SMA-003375 *available at* http://www.healthorg/govpubs/FO36/monograph2.aspx (hereinafter "CSAP, 2002") at 7. Although many of the studies quoted in this declaration were published in the last few years, none of their findings are new. They all rely on research that was well known in the scientific community at the time of Mr. Ochoa's trial. Hawkins, *et al.,* 1992, at 65-97.

9. The web of influence model is the result of more than thirty years of scientific study. CSAP, 2000, at 3. This research has shown that "when risks in a child's life are reduced,

the child is less vulnerable to substance abuse and related social and health problems as she matures." CSAP, 2002, at 7. In contrast, "protective factors . . . . represent the influences, orientations, and behaviors in youth's lives that contribute to positive development and help prevent negative behaviors and outcomes." CSAP, 2002, at 8. Risk and protective factors research indicates that the risk for dangerous behaviors during adolescence is "strongly related to identifiable characteristics of the environments in which adolescents live. The family management practices of parents and family care-givers, the opportunities and policies of the school environment, and the quality of life and opportunities for participation that characterize the community all influence the development of positive and problem behaviors in youth." CSAP, 2002, at 9-10.

10. The Web of Influence model extends beyond substance abuse, and is the dominant approach to the analysis of gang membership, violence, juvenile delinquency, and other dangerous behaviors engaged in by children and young adults. J. David Hawkins, Todd I. Herrenkohl, David P. Farrington, Devon Brewer, Richard F. Catalano, Tracy W. Harachi & Lynn Cothern, *Predictors of Youth Violence*, JUVENILE JUSTICE BULLETIN, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEPARTMENT OF JUSTICE, April 2000 (hereinafter "Hawkins, *et al.*, 2000"); Gail Wasserman, Kate Keenan, Richard E. Tremblay, John D. Coie, Todd I. Herrenkohl, Rolf Loeber, and David Petechuk, *Risk and Protective Factors of Child Delinquency*, CHILD DELINQUENCY BULLETIN, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, UNITED STATES DEPARTMENT OF JUSTICE, April 2003 available at http://www.ncjrs.org/html/ojjdp/193409/contents.html (hereinafter "Wasserman, *et al.*, 2003").

11. The Web of Influence model identifies five external factors that influence the individual risk and protective factors for the development of problem behaviors in young adults: society related risk and protective factors, family environment risk and protective factors,

community environment risk and protective factors, school related risk and protective factors, and peer association risk and protective factors. CENTER FOR SUBSTANCE ABUSE PREVENTION, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, SCIENCE BASED SUBSTANCE ABUSE PREVENTION: A GUIDE, DHHS Publication No. SMA01-3505 (2001) (hereinafter "CSAP, 2001") at 3. These factors in turn influence individual risk and protective factors, which inform the likelihood that teens and young adults will become involved in teen pregnancy, suicide, substance abuse, violent crime, or school drop out. *Id.*

12. Society related risk factors include poor national and state economic conditions, racial prejudice and national media trends that support dangerous behavior. Society related protective factors include good national and state economic conditions, lack of racial prejudice, and national media trends that discourage dangerous behavior.

13. Family environment risk factors include abuse and intra-family conflict, neglect of basic needs, high crime rates and alienation, poor family parenting and parental substance abuse. Family environment protective factors include positive bonding between family members, high levels of warmth within the family, a sense of basic trust and clear rules and parental expectations.

14. Community environment risk factors include community norms that tolerate violence, poverty, community disorganization and cultural isolation. Community environment protective factors include social networks that promote a connection to the community, high expectations in the community that violence won't be tolerated, and opportunities for children and families to participate in the community.

15. School related risk factors include low educational achievement, low interest in education, poor quality schools, high truancy rates and frequent school transitions. School related protective factors include participation in school activities and after school programs,

academic achievement, good school attendance, good quality schools and parental participation in schools.

16. Peer association risk factors include negative peer group role models. Peer association protective factors include positive peer activities and norms, and factors that lead to social competence, such as assertiveness and strong interpersonal communication skills.

17. The combination of these risk and protective factors contribute greatly to individual risk and protective factors. Individual risk factors include lack of perception of individual risk, increased levels of impulsiveness and hostility, and alienation from dominant social values. Individual protective factors include good social skills and emotional resources, supportive family environments, and involvement with supportive social institutions.

DISCUSSION

A. Sergio Ochoa Faced Overwhelming Risk Factors For and Lacked Protective Factors Against Involvement in Gangs and Violence

18. Sergio Ochoa was raised in a family setting where he experienced and witnessed significant poverty, parental substance abuse and inter-family conflict, profound physical and emotional neglect, and probable sexual abuse. There was little or no communication or trust between his family members, no effective parental supervision, and few if any clear rules or parental expectations for Sergio to meet. Sergio was raised in an extremely violent and dangerous neighborhood, as a child in one of the few Latino families in a black neighborhood, where he and his siblings and parents were repeatedly victimized by violent crime, and discrimination because of their race. Sergio attended schools where violence was endemic, and where his needs for basic help, including glasses for his poor vision and assistance to help him overcome the effects of his learning disabilities, were never recognized. His peer role models were overwhelmingly negative; Sergio's three older siblings, and his younger sister were all

involved in the 18th Street gang, and he was recruited by an older gang member to join the gang when he was just 11 years old. Finally, Sergio had few individual resources that would have helped him in resisting gang involvement. Sergio was a passive, learning disabled, traumatized child, who lacked appropriate social skills or emotional resources, a supportive family environment or supportive social institutions. Sergio's involvement in the gang further traumatized him; he suffered multiple life threatening assaults and injuries and experienced the death and injury of many friends and family members. Sergio suffered from brain impairments, symptoms consistent with Post Traumatic Stress Disorder, and symptoms of depressive illness that further compromised his ability to cope with the extraordinary number of stressors in his background. Given the presence of so many overwhelming risk factors and the stark absence of protective factors, Sergio was at extremely high risk for the gang involvement and violence that led to his conviction and death sentence.

B. Sergio Faced Society Related Risk Factors Including Exposure to Negative Economic Conditions, Media Influences and Prejudice.

19. As described in Paragraphs 26-31 and 88-115 below, Sergio Ochoa was raised in poverty stricken, crime-filled neighborhoods, where he and his family members were subjected to intense discrimination and violence on account of their ethnic status. These risk factors placed Sergio at increased risk of involvement with gangs and violence.

C. Sergio Had Extensive Family Environment Risk Factors and Lacked Family Environment Protective Factors.

20. "Inadequate parenting practices are among the most powerful predictors of early anti-social behavior . . . Abused or neglected children . . . offend more frequently and begin doing so at earlier ages." Wasserman, *et al.*, 2003, Family Risk Factors, at 1-2. *See also* Hawkins, *et al.*, 2000 at 4 (noting that children who have been neglected are more likely than others to

commit crimes later in life). In contrast, "[c]onnectedness to family and school forms the core of . . . protection" against dangerous behavior. CSAP, 2002, at 4. Recent studies have emphasized

> the importance of the family as a forum for safe and supportive communication during the developmental years . . . . Family connectedness and family supervision create an environment in which parents' messages carry weight. Family connectedness is a key to the substantial path of family influence [on potentially dangerous behavior.] When family bonding is high, family supervision and parental attitudes exert strong influences on peer associations . . . . When family bonding and family supervision is high, parental attitudes carry particular weight.

Id. at 20.

21. Sergio Ochoa was raised in a family plagued by lack of education and poverty, substance abuse, gross physical and emotional neglect, and probable sexual abuse, where communication between family members and ordinary parental supervision was virtually non-existent. While Sergio's sister Rosie and Sergio's father testified to the contrary, the Ochoa family had essentially broken down, and provided no emotional support for Sergio. The squalid conditions in his home drove Sergio away from his family and into the company of gang members, the only individuals who provided Sergio with any sense of emotional connectedness.

1. Sergio's Family Has a Long History of Poverty and Lack of Education

22. Sergio was the fifth of six children born to Ofelia and Eduardo Ochoa, Sr. His oldest sibling, Enrique Ochoa, died at age two weeks. Sergio's sister, Rosalba Gallegos, known as Rosie, was born in July 1957. His brother, Eduardo Ochoa Sr., was born in April 1962. His sister, Gloria Ochoa, was born in January 1965. Sergio Ochoa was born in April 1968 and his youngest sister, Elizabeth Ochoa, known as Lisa, was born in January 1970.

23. Ofelia and Eduardo, Sr. met in Michoacan, Mexico. Eduardo, Sr. was a shoemaker, who lived in Ixtlan. Ofelia lived with her family on a small ranch nearby. The last year of schooling for both Eduardo, Sr. and Ofelia was the third grade. Ofelia Ochoa recalls, "I only went to school until the third grade because I had to help in the house and with the crops." Declaration of Ofelia Ochoa, ¶ 5.

24. Although they have lived in the United States for more than three decades, neither Ofelia nor Eduardo Ochoa, Sr. can read or speak English. Their lack of cultural sophistication and education are underscored by their continued belief in witchcraft. Ofelia Ochoa has stated

> My mother died many years ago because of witchcraft. She had a sister-in-law who was jealous. She wanted my mother's house and put a witchcraft spell on her. My mother was only 40 years old when she died.

Declaration of Ofelia Ochoa, ¶ 2. Ofelia and Eduardo Ochoa both believe that their first son died as a result of a curse placed on him by the wife of one of her husband's uncles, who wanted to sleep with Eduardo, Sr. Declaration of Ofelia Ochoa, ¶¶ 7-8. Eduardo's belief in witchcraft continues to be very strong:

> our first son Enrique was . . . born cursed and died shortly after his birth. When my wife was pregnant, the wife of one of my uncles was very angry and slapped her. Because of that, the baby was born bad - very skinny and yellow - and died. My father also died from witchcraft. A neighbor was angry because my father wouldn't allow my brother Antonio to go out with the daughter of the neighbor. The girl was crazy. After talking with the neighbor, my father returned to the house vomiting, and with his face twisted. He couldn't open his mouth and his feet swelled up. The doctor couldn't cure him and he suddenly died. Also, my sister

> Berta died of witchcraft when she was only 30 years old. A woman got mad at her because she didn't want to give her an address that she had asked for.

Declaration of Eduardo Ochoa, Sr., ¶¶ 3-5.

25. Since the time of their marriage in 1954, Ofelia and Eduardo Ochoa have suffered from extreme poverty. After their first year of marriage, Ofelia and Eduardo left La Barca, Jalisco for Mexico City. Ofelia's sister, Hermila, moved with them:

> When we moved to Mexico City, we first lived in a Tacuba "vecindad", which was a tenement house made out of metal sheeting. There was one bathroom for around ten families. We lived there around five months. My sister Berta and I slept on a makeshift bed fashioned out of chairs that we put together. Ofelia cooked on a little petroleum stove on the floor. On Sundays, all of us helped to build a house on a little plot of land on Ferrocarriles Street, which Eduardo`s brother-in-law had obtained. The house on Ferrocarriles had one fairly large room, a tiny kitchen and a bathroom that was just a hole. We would collect water by crossing the railroad tracks, at a faucet located around twenty meters away. During that time my mother, Consuelo, my other sister, Maria, my brother Miguel, and an older cousin joined me, my sister Berta, and Eduardo and Ofelia Ochoa at the house on Ferrocarriles. Rosalba was born in 1957, the year of the big earthquake, while they were still living at the house they had built.

Declaration of Hermila Tamayo Suarez, ¶¶ 8-9.

26. A few years later, the Ochoa family moved to Tijuana, where Ofelia and Eduardo moved before coming to the United States. Sergio Ochoa was born while the family was living in Tijuana. Living conditions in Tijuana, especially for poor families who have newly moved

there, were execrable. Father Salvador Diaz Mercado, who has lived and worked in Tijuana for decades, has noted:

> The economy in Tijuana was very poor and the unemployment rates were very high in Tijuana in the late 1960s and early 1970s. It always has been financially difficult for a couple to raise a family in Tijuana. I do not know the Ochoa family personally. However, raising a family in Tijuana would have been especially difficult for a couple with five children, like the Ochoa Family. The poverty and extreme hardships facing such families made it hard to properly educate and support a large family. Life in Tijuana would have been especially difficult for a family like the Ochoas, because they came from another part Mexico. The Ochoas probably did not have any friends or other family to offer support. A large family requires a great deal of material, moral, and spiritual support. Individuals and families who arrive to Tijuana from different parts of the country to begin new lives have to start from the bottom . . . . Children raised in poverty in Tijuana frequently are forced to leave school around eight years of age. These children sell newspapers, gum, or any other goods in order to contribute to the household. Often these children don't get an education. They have to stay home to take care of their younger siblings while their parents are at work. As a result, children grow up here without a complete education. The lack of education exacerbates the generations of poverty and diminishes the overall quality of life. For those without Social Security, which provides medical treatment, there are a handful of hospitals and medical clinics in Tijuana. These provide medical services to the poor . . . . The quality of the medical services provided by these institutions is extremely limited. It always has been difficult for the poor to get medical

> attention in Tijuana. The demand for services far exceeds the resources available. The Ochoa family would have been dependent on these grossly inadequate services as their only means of accessing medical care. In 1988, the late Mother Teresa visited Tijuana. She said that she had seen enormous poverty in her lifetime and yet she believed there was more poverty in Tijuana than in anywhere else in the world. The poverty in Tijuana always has existed. It increases as the population increases. There is no economic or political stability in Tijuana. This is true in part because so many people migrate to Tijuana temporarily, waiting for an opportunity to cross to the United States. Tijuana always has been known for having a highly fluid population. Mexicans and other Latin Americans endure the hardships of migration only in the hopes of a better life.

Declaration of Father Salvador Diaz Mercado, ¶¶ 2, 9-11.

27. Upon arriving in Tijuana, the Ochoas settled first in a house in the Quintana Roo section of Tijuana:

> We lived in a rented house in Tijuana because we didn't have much money. First, we lived in the center of town, on the avenue Quintana Roo, close to the government hospital. The little house had two bedrooms, with the kitchen outside. We didn't have indoor plumbing and the toilet was a hole in the dirt outside of the house. Although we had small children, I had to work outside of the house. Eduardo worked in the house, making shoes, while he took care of the children. I worked as a cook in a restaurant, earning $2.50 a day. I took home all of the leftover food so that the children could eat . . . . When I was pregnant with Sergio,

I never went to a doctor for an exam because we didn't have enough money. I didn't have vitamins either.

Declaration of Ofelia Ochoa, ¶¶ 10-11.

28. Conditions in Quintana Roo were particularly appalling. Father Mercado recalls that in the late 1960s and early 1970s, when the Ochoas lived there:

Quintana Roo was a new "colonia" or neighborhood, just starting to emerge. The roads were all dirt and the houses where people lived were just dilapidated shacks made of cardboard and wood. The poverty in this neighborhood was serious and miserable. This neighborhood was located right next to an old dry and filthy river bed. The river bed was a dump yard, filled with garbage and old cars. The stench in the river bed and the streets in the neighborhood was horrible. When it rained, the awful conditions of the river bed and Quintana Roo became worse, because the rain brought even more garbage and filth from other parts of Tijuana, especially the hilly areas. The rain often destroyed the shacks as it washed through the neighborhood. The rain also flooded the neighborhood, which created even more garbage and caused human waste from the out houses to be spread all about the neighborhood. The drinking water in Quintana Roo was deplorable, just as in most parts of Tijuana at that time. It was not purified in the 1960's and 1970's, and is not purified today. Poor people cannot afford bottled water. Drinking tap water causes many illnesses through parasitic infection. These infections are very common among local poor people.

Declaration of Father Salvador Diaz Mercado, ¶¶ 3-4.

29. Ofelia's sister Hermila visited the Ochoas in Tijuana and was struck by their poverty:

> I visited the Ochoa family after they moved to Tijuana. I was around twenty-four years old then. Sergio had not been born yet. The Ochoas were living between 6th and 7th Streets in a little wooden house in a very poor neighborhood. The house was small and you had to go outside for water.

Declaration of Hermila Tamayo Suarez, ¶ 13

30. Upon arriving in Los Angeles, Ofelia and Eduardo continued to struggle economically:

> We suffered a lot. We left everything in Tijuana and arrived here with nothing - no money, no food, nothing. The same coyote rented us an apartment on Figueroa Street and 43d in Los Angeles. The apartment had two bedrooms. The boys slept in one and the girls in the other. Eduardo and I slept in the living room. I went to the church to ask for food and they also helped us to pay the rent. A store gave us credit because we didn't have money for food. Many times Eduardo and I didn't eat in order to give food to the children. We didn't have money for the bus and so we walked downtown to look for work. I found work in a house, cleaning, and Eduardo looked for leather scraps to make sandals.

Declaration of Ofelia Ochoa, ¶ 23. Eduardo Ochoa recalls that:

> In 1969, we went to the United States. We arrived with nothing. We found a small house on 43rd and Figueroa and we slept on the floor because we didn't have anything. The neighbors didn't like us because we were so poor. They

wrote, "Newly Arrived" and "Poor People" on our house. My wife and I had to walk all the way downtown to look for work.

Declaration of Eduardo Ochoa, Sr., ¶ 9

31. Ofelia Ochoa worked tirelessly at low wage jobs from the time of her arrival in Los Angeles:

I worked in different clothing factories, ironing. For many years I worked for the Jaycee Fashions factory. The owners were Korean and took advantage of all of the workers. They didn't pay us overtime and paid us very low wages, by the piece. The conditions were very difficult. We worked in a very hot room, full of steam from so many irons. We sweated and sweated and afterwards went out to the street totally wet. Also, there was a lot of dust. Now, I can't work because I have chronic bronchitis caused by this job. And my ears are permanently damaged by the machine noise.

Declaration of Ofelia Ochoa, ¶ 29

2. The Alcoholism of Sergio's Father Had Profoundly Negative Consequences for His Family and Produced Significant Inter-Family Conflict

32. During Sergio's youth, the family's financial situation was made much harder by the alcoholism of Sergio's father, Eduardo Ochoa, Sr. Eduardo, Sr. drank excessively for many years. Eduardo Sr, has himself admitted

Now I don't drink alcohol, but when Sergio was a boy I drank a lot. I lost a lot of money. They gave me tickets for DUIs about four or five times and they took away my drivers license.

Declaration of Eduardo Ochoa, Sr., ¶ 14.

33. Sergio's maternal aunt, Berta Tamayo de Godinez, recalled that even when the Ochoa family was living in Mexico City, long before Sergio's birth, "Eduardo was a hard worker but also a hard drinker during the weekends." Declaration of Berta Tamayo de Godinez, ¶ 11.

34. Another aunt, Graciela Tamayo De Robles, who lived with the Ochoas in Mexico, similarly recalled that "When I lived with them, Eduardo drank very heavily on the weekends. Ofelia was very upset with this, but didn't know how to stop it, and it set a bad example for their children." Declaration of Graciela Tamayo De Robles, ¶ 2. Sergio's aunt Hermila Tamayo Suarez, who also lived with the couple in Mexico City, similarly recalled that

> Eduardo Ochoa always drank on weekends. Ofelia would go to his workplace on Fridays to pick him up. Otherwise, the family would be left without a dime. Ofelia did this because when she didn't, Eduardo would start drinking on Friday and not come home until Sunday night. Eduardo's drinking definitely affected the family finances. He was good about going to work but he couldn`t be trusted to come with his wages. Eduardo's tendency to drink up his pay only added to Ofelia`s already hard struggle to meet their basic needs.

Declaration of Hermila Tamayo Suarez, ¶¶ 11-12.

35. The situation did not improve after the family moved from Mexico to the United States. Ofelia Ochoa recalls that

> My husband Eduardo drank a lot. He would leave his job and go to the bars. Many time he wouldn't come home and I had to go look for him and bring him home. At home he always wanted to play the music very loud. Once, Eduardo spent eight days in jail when they caught him for a DUI. He went to Alcoholics Anonymous but continued drinking. Eduardo threw away so much money drinking that I had

> to work Saturdays to have enough money to support us. I also brought work home and my children helped me do it.

Declaration of Ofelia Ochoa, ¶ 30-31.

36. Eduardo Sr's drinking was obvious to the Ochoa's neighbor, Bonzie Williams. Ms. Williams recalls that "Sergio's father had a drinking problem. I used to see him coming home drunk, staggering up to the front door. Also, he used to shoot his gun out the back door sometimes. I never knew why." Declaration of Bonzie Williams, ¶ 7.

37. Sergio's girlfriend, Lisa Martinez, lived with the Ochoas and witnessed Eduardo Sr's drinking first hand:

> Sergio's father offered no guidance in Sergio's life at all. He drank a lot and would come home late, drunk. Sometimes he didn't come home and everyone would be worried. The later it got, the more Sergio's mom would worry and we'd have to go look for him. He'd usually be in one of the bars downtown. Sergio's father would waste what little money the family had on drinking.

Declaration of Lisa Martinez, dated February 3, 2001, ¶ 8.

38. Eduardo, Sr's drinking is a sad and prevalent memory for each of his children. Sergio's oldest sister Rosie recalls that her father "would drink for three, four, or five days at a time." Declaration of Rosalba Gallegos, dated September 11, 2003, ¶ 3. Eduardo's drinking was a source of significant inter-family conflict, and alienated each of his children:

> My father was drinking a lot when we lived on Welcome Street, though it got a lot worse when we moved to 27th Street. . . . My father's drinking was really bad when we lived on 27th Street. He started drinking and couldn't stop. He spent all of the family's money on drinking. My father would disappear for days at a time and nobody knew where he was. My mother would go everywhere trying to find

him. When he got home he'd say a lot of bad words and put the music on really loud. We'd tell him the neighbors would call the police but he didn't care.

Declaration of Rosalba Gallegos, dated February 5, 2001, ¶¶ 13, 17-18. Eduardo Ochoa, Jr. remembers that

> when I was about 10 years old my father started drinking a lot. He'd go to the bars after work and come back drunk, which would cause a lot of arguments between him and my mother. He'd want to turn on the music really loud and I remember a lot of yelling.

Declaration of Eduardo Ochoa, Jr., ¶ 6.

39. Sergio's sister Lisa, who was a year and a half younger than Sergio, had particularly vivid memories of her father's drunkenness:

> My father . . . . had a bad drinking problem when we were growing up and it affected us a lot. I felt like we didn't even really have a father because he wasn't there when he needed him. Sometimes he'd get drunk every day. He'd drink after work and on weekends he'd start drinking in the middle of the day. I preferred to see my father asleep than awake because when he was awake he was often drunk. When my father was drunk he screamed too much. Everything would bother him. He'd want to hear his music loud and would get mad if we said anything. Then he'd just take off and we never knew when he'd be back. My mother cried a lot. I was really afraid of my father when he drank. He'd always scream and throw things around. You just wanted to stay out of his way. My mother would scream at him. We didn't want to be in the house. That's why we ended up spending our time in the street with our friends. I remember Sergio begging my father to stop drinking. Besides my father's drunken behavior, it really hurt Sergio to see my

> mom crying and suffering because of my father's drinking. My father would sometimes say he'd try to stop drinking but it never lasted for long. My father did stop drinking a few years ago, but all through our childhood he was drunk. He wasn't there for us as a father, but just as a problem. My mother was always so worried about his drinking, and the problems it would cause, that what little energy she had went to him rather than to the kids.

Declaration of Elizabeth Ochoa, dated February 5, 2001, ¶¶ 7-11. Lisa recalls that her father's drinking wasn't restricted to the weekends

> he also drank during the week, and sometimes wouldn't go to work. My father would spend his wages on his liquor, which made it much harder for our family to make ends meet.

Declaration of Elizabeth Ochoa, dated September 10, 2003, ¶ 3.

40. Sergio had a particularly difficult time with his father's alcoholism. Sergio's sister Gloria recalls that:

> My father was drunk a lot when we were growing up. He would drive drunk to the liquor store and went to jail. Sergio got him out of jail at least once. Sergio hated my father's drinking and was always trying to get him to stop.

Declaration of Gloria Ochoa, ¶ 14. From a young age, Sergio often responding to his father's drinking by withdrawing from the family altogether:

> Sergio disliked our father's drinking very much. When Sergio came home and found our father drunk, he would leave the home and go out into the streets. Sergio may have been as young as ten years old when he started taking off this way.

Declaration of Elizabeth Ochoa, dated September 10, 2003, ¶ 4.

41. The link between parental substance abuse and subsequent delinquency is well established. High rates of parental substance abuse and depression are found in boys referred for conduct problems. Wasserman, *et al.*, 2003, Family Risk Factors, at 2. "Depressed parents show many parenting deficiencies associated with antisocial behaviors in children, such as inconsistency, irritability, and lack of supervision." *Id.* The discord Eduardo's alcoholism caused also put Sergio at increased risk: "Exposure to high levels of marital and family conflict appears to increases the risk of later violence." Hawkins, *et al.*, 2000 at 4.

3. Sergio and His Siblings Suffered Extreme Neglect

42. In part as a consequence of Eduardo Sr's alcoholism, Sergio and his brothers and sisters suffered extreme physical and emotional neglect. The neglect was evident from the time of Sergio's birth, when the family lived in Tijuana.

a. Physical Neglect in Tijuana

43. Following his birth, Sergio had little if any attention from his mother, and was left instead with his father, who had a serious drinking problem. Ofelia Ochoa recalls:

> Sergio was the first child that I wasn't able to breastfeed because I had to work. I could only leave my job for less than a month when Sergio was born. I had to return so that I wouldn't lose the job. I left Sergio with my husband. I worked seven days a week. I left the house at six in the morning and didn't return until ten at night. My husband took care of Sergio, Eduardo and Gloria while he was making shoes at home. My other daughter, Rosie, was with my family in Mexico City. We had a difficult life. We were very much alone in Tijuana. We didn't have any family there.

Declaration of Ofelia Ochoa, ¶ 14.

44. Sergio's maternal aunt, Hermila Tamayo Suarez, recalls that at that time, the children were badly neglected:

> Eduardo worked nearby in a shoe repair place. Ofelia also worked but I don't know where. The children stayed home alone. I found a job right away and stayed in Tijuana for four months. When Rosalba was around nine or ten years old, my mother Consuelo brought her back to Mexico City after visiting Tijuana. Rosalba was full of lice and unkempt. She looked like she had been neglected. Rosalba stayed with my family for two years.

Declaration of Hermila Tamayo Suarez, ¶ 14.

45. Later on, when Sergio was just a baby, Ofelia and Eduardo left him and his siblings in the care of a total stranger who neglected the children severely:

> When Sergio was a baby, Eduardo and I left the children with a babysitter and went to work in the United States. My husband worked as a gardener in Encinitas and I found work in the home of a doctor in Rancho Santa Fe, close to San Diego. The doctor's name was Dr. Amino and he had three children and no wife. I lived in their house for about a year and Eduardo slept at his boss's house. We returned to Mexico on the weekends to see the children. The women who took care of the children was very bad. I would leave food and money, but the neighbors told me that she robbed everything and gave my children only tortillas and black coffee. When we would come back to the house all of the children would be vomiting and had spots on their faces from drinking so much coffee. Also, the babysitter would go dancing at night and leave the children with my daughter Rosalba who was only about 11 years old.

Declaration of Ofelia Ochoa, ¶¶ 16-17. Rosie recalls this episode as well:

> In Tijuana, after Sergio was born, my parents left us with a babysitter while they worked and lived in the United States. . . . They'd come back once a week to see us. The babysitter kept all of the money my parents gave her for food and just fed us coffee.

Declaration of Rosalba Gallegos dated February 5, 2001, ¶ 4.

46. Ofelia and Eduardo's abandonment of their children scandalized Ofelia's relatives in Mexico City:

> The Ochoa kids were very young when Ofelia and Eduardo Sr. crossed the border without them. I and the rest of my family couldn't understand how the Ochoas could leave the children practically by themselves in Tijuana while they went off to work in the United States, especially since everyone knew that Tijuana is a city where the worst of the worst can be found. I wondered who was taking care of the children, who fed them, cared for them, and took them to school. Ofelia and Eduardo only returned to Tijuana once a week.

Declaration of Graciela Tamayo De Robles, ¶ 3.

b. Physical Neglect in Los Angeles

47. Sergio and his siblings continued to suffer significant physical neglect after the family moved to Los Angeles. The physical condition of the Ochoa house appalled neighbors and relatives alike. Sergio's aunt Hermila Tamayo Suarez recalled that on her last visit to Los Angeles:

> the Ochoas were living on 27th Street. The home was very small and in disrepair. There were some holes in the wall. Because it was so small, and because so many people lived there, it was difficult to keep neat. In addition, Ofelia and Eduardo had not taught their children to do their share. The girls did not even take responsibility for their own soiled

clothes, which they would leave laying around. The parents worked all the time and the house was very dirty, with messes everywhere. Ofelia would do what she could when she got home from work. I remarked that being poor was no excuse for being slovenly.

Declaration of Hermila Tamayo Suarez, ¶ 17.

48. Maria Madrigal, who befriended Rosie Ochoa, recalled the filthy conditions at the Ochoa house:

> The [Ochoa] house was always extremely dirty - like a pigsty. There were dirty dishes, towels and dog hair everywhere. Lots of times there would be dog poo or pee on the couch or the carpet and nobody would even bother to clean it up. I remember covering my nose when I went into the house because it smelled so bad. The house was always dark and depressing. Nobody ever bothered to open the curtains . . . . The house where the Ochoas lived was very small. It was a duplex, with a one-bedroom apartment in front and a one-bedroom apartment in back. Eduardo and Rosie lived in back and everyone else lived in front. I don't know where everyone slept because I only remember one bed in the bedroom. There could have been more though; it was hard to see because there were piles of clothes everywhere - clean and dirty all mixed up.

Declaration of Maria Teresa Madrigal dated January 3, 2001, ¶ 6, 24. Maria Silva Flores, who befriended Lisa Ochoa, similarly recalls that "The inside of the Ochoa house was very dirty. The Ochoa family had a lot of dogs and the house smelled like the dogs." Declaration of Maria Silva Flores, ¶ 4. Carmen Silva's recollection is similar:

> The house was always very messy and dirty because of the dogs. They had pit bull-type dogs that would poo everywhere and nobody ever cleaned it up. Nobody ever cleaned the house except for the mother and she didn't do much because she

was always working. It was always dark inside the house; the curtains were always shut.

Declaration of Carmen Silva, ¶ 2.

49. Sergio and Gloria Ochoa also had trouble with basic hygiene, a problem that apparently wasn't addressed by their parents. Maria Madrigal, who was a friend of Rosie's recalls that:

> There was a big problem with Sergio and Gloria's personal hygiene. It seemed like they never bathed or brushed their teeth. The kids at school made fun of them because of their dirty teeth and the way they smelled. They'd call them "Green Teeth." Sergio also got called, "Bony," because he was so skinny. Once, as a joke, the other kids gave Gloria a present of deodorant, soap and a toothbrush. Sergio and Gloria both got teased a lot at school because of how dirty they were and also because they were mentally slow.

Declaration of Maria Teresa Madrigal dated January 3, 2001, ¶¶ 14-15. Lisa Ochoa's friend, Maria Silva Flores recalls that:

> Gloria did not take very good care of herself. Her teeth were green, brown and yellow in color. Gloria's gums also were inflamed. Sergio also did not take very good care of himself. Like Gloria, Sergio's teeth also were green, brown and yellow in color.

Declaration of Maria Silva Flores, ¶ 8. Carmen Silva recalls:

> Both Sergio and Gloria were teased a lot for not brushing their teeth. "Your rotten breath," the kids would say, or "Your breath smells like shit." I'd walk ahead because I didn't want to be picked on along with Sergio and Gloria. The kids would push Sergio but he'd never fight back. He was picked on a lot.

Declaration of Carmen Silva, ¶ 10. Jose Silva recalls:

> Sergio and Gloria also had problems in keeping themselves clean. They didn't brush their teeth and looked like they never showered. Other kids would tease them, telling them to take a shower or brush their teeth. The other kids teased them a lot both for being slow and for their bad grooming . . . . {Sergio's] clothes never looked quite right. He looked messy, like nobody took care of him. His parents were already gone for work when he was getting ready for school so nobody ever bothered to make sure he looked all right.

Declaration of Jose Silva, dated February 4, 2001, ¶ 24, 25.

50. Worse still, Sergio and Gloria had bed wetting problems and sometimes reeked of urine:

> Except for my godmother, Rosie, everyone seemed depressed in that family - especially Sergio, Gloria and the mother. They always walked with their heads down and seemed to have very low self-esteem. Sergio was always just by himself. I never saw him play with any other kids; never saw any friends come by. Gloria was always lying around in her bathrobe or sleeping. Neither she nor Sergio ever had anything interesting to say. They were just kind of there. Both Sergio and Gloria were bed wetters. They also peed on themselves and their clothes would sometimes smell like urine.

Declaration of Maria Teresa Madrigal dated January 3, 2001, ¶¶ 19-20

51. The Ochoas also failed to respond to their children's basic health problems. In October 1976, when she was 11 years old, Gloria's teachers noted that she was developmentally delayed and referred her for assessment, but her parents took no steps to obtain special education services for her. In January 1980, when she was 9 years old, Sergio's sister Lisa Ochoa was

knocked down in the school yard and broke a tooth. Although school officials made a dental appointment for her that same month, more than a year later, in May 1981, the school nurse noted that Lisa's tooth had still not been fixed. In October 1981, the nurse noted that Lisa was suffering from tooth decay and sent a notice to the Ochoas advising them to take Lisa for dental care.

52. Sergio Ochoa suffered problems seeing at a distance from childhood, but neither his parents nor his school saw to it that he was properly tested. In school, Sergio requested that his teachers put him close to the chalkboard, because he had difficulty seeing what was written on it. In February 1993, shortly after his admission to San Quentin, Sergio complained that he was having difficulty seeing clearly, that he had headaches associated with his vision, and that his eyes were sensitive to light and that they hurt frequently. In a questionnaire that he filled out at that time, Sergio noted that he did not wear contacts or glasses. On February 19, 1993, Sergio was prescribed glasses for the first time. His prescription was -2.5 in the right eye and -3.25 in the left eye; more than 20/200 in both eyes on the Snellen scale. Sergio was legally blind in both eyes.

c. Emotional Neglect

53. The emotional neglect that Sergio Ochoa and his siblings suffered was devastating. Apart from those times when his father's alcoholism intruded on the peace and quiet of the Ochoa home, the Ochoa parents weren't a significant factor in their children's emotional lives. Moreover, rather than coming together in the face of this adversity, the siblings went their own separate ways, leaving everyone to cope as best they could, without any emotional support from within the family. Sergio's older sister Rosie recalls that:

> Sergio was about three or four years old when we moved to 43rd and Figueroa. It was a small house. I think it had two bedrooms. All of us children were left alone

> all day while my parents looked for work. We had to hide in the house all day because one of the neighbors told my parents that the INS would send us back to Mexico if anyone saw us. They didn't even put us in school. We felt like prisoners locked up in that house all day with no TV, no radio, no toys. My parents were gone the entire day – walking everywhere looking for jobs . . . . I was about 13 at that time and in charge of watching all of my brothers and sisters. We were all very scared that the police would take us.

Declaration of Rosalba Gallegos dated February 5, 2001, ¶ ¶ 8-10.

54. Ofelia Ochoa admits that during much of Sergio's youth, she simply wasn't there for her children:

> Eventually, Eduardo found work picking up used things for the Salvation Army, and I worked cleaning houses. We were away from the house all day . . . . When Sergio was about six or seven years old, we rented a Mexican restaurant in San Pedro. I did everything; we didn't have any employees. I got up every morning at five and would go to buy the vegetables for the restaurant. I would return home in the middle of the night, many times at one in the morning, and still had to wash clothes. Many times I'd get to the house so late because I had to wait for my husband to pick me up . . . . And when he was drinking he'd arrive very late. Sometimes Eduardo drank so much that he didn't pick me up and I'd have to spend the night at the restaurant. I worked seven days a week in the restaurant. When I'd arrive home I was so tired that I almost couldn't raise my arms to take off my clothes.

Declaration of Ofelia Ochoa, ¶¶ 27-28.

55. With their mother and father both out of the house, and Eduardo Sr. often drunk, the Ochoa children were left to their own devices:

> With my father's drinking problem we felt like we didn't really even have a father. He didn't give us the attention he needed because he was drunk. We were pretty much on our own . . . . We didn't get much attention from my mother either. She'd work all day, pressing clothes at a garment factory, and come home tired. Sometimes she even had to work at home and all of the kids would help her cut the threads off of the garments. She worked six days a week and on Sundays would do all of the housework. My mother worked very hard and was always exhausted. Meanwhile, my father would be out drinking, spending the money.

Declaration of Rosalba Gallegos dated February 5, 2001, ¶ ¶ 19-20.

56. In addition, contrary to her testimony at trial, Rosie did not act as a "second mother" to her siblings. Rosie very much wanted to distance herself from the Ochoa family, and did so as soon as she was able to:

> When I was 15 or 16, I had a job at Celaya Bakery in Lincoln Heights. I also worked at a photo shop by the time our family moved to 27th and Arlington. I worked hard at these jobs. I generally started at around 3 p.m. and did not reach home until 10 or 11 p.m. I was usually working, and between school and work, I was rarely home. This was true from the time I was 15 or 16 years old.

Declaration of Rosalba Gallegos, dated September 11, 2003, ¶ 4.

57. Given the squalor of the Ochoa household, it is understandable that Rosie wanted emotional space between herself and the rest of her family. Rosie's childhood friend, Maria Madrigal, recalled that:

> Rosie almost seemed like she wasn't part of the same family. While the younger kids didn't even keep themselves clean, Rosie had her shoes matching her socks and her earrings. She was more outgoing and had a job so was away from the family a lot. She didn't help her family with the money she made, though, which was unusual. Sergio's older brother, Eduardo, was totally into the gangs and ran around all the time with the other gang members. He kept himself clean too, compared to Gloria and Sergio. Eduardo and Rosie lived in the back apartment and didn't interact with Sergio or the rest of the family at all. He didn't play with Sergio like most older brothers do. He seemed like he didn't want anything to do with him.

Declaration of Maria Teresa Madrigal, dated January 3, 2001, at ¶¶ 21-22.

> Rosie and her sister Gloria Ochoa did not get along. Rosie used to call me often to go shopping. Gloria never accompanied Rosie and me when we went shopping. It appeared to me that Rosie and Gloria never did much of anything together. One time, I asked Rosie why she never invited Gloria to go shopping. Rosie told me that she did not invite Gloria shopping because Gloria was always dirty. I saw Rosie and Gloria argue very often. One day, Rosie told Gloria to be quiet and go brush her teeth. At times, Rosie would yell at Gloria, "why didn't you clean the house." I got the feeling that Rosie was ashamed of Gloria and the rest of the Ochoas. By living away from the rest of the family (but technically still

> on the property), Rosie was able to keep her distance from Gloria and the rest of the Ochoa family.

Declaration of Maria Silva Madrigal, dated July 23, 2003, ¶¶ 3-4.

58. Lisa Ochoa's childhood friend, Maria Silva Flores, similarly recalls that "Rosie was very nice, but she was not very close to her own family." Declaration of Maria Silva Flores, ¶ 6. The distance between Rosie and the rest of the family also was notable to her maternal Aunt Hermila, "Rosalba worked, but did not share with her siblings or her mother. This is different from my family in Mexico - where we all help each other out so that we can all progress and have better lives." Declaration of Hermila Tamayo Suarez, ¶ 23.

59. Eduardo, Jr. also distanced himself from his siblings. Sergio's aunt Hermila recalled that when she visited the Ochoas in Los Angeles:

> Eduardo, Jr. was already married and lived in a place in the back with his wife. He never talked much, just hello. From the time Eduardo, Jr. was a child he was very quiet and timid and somewhat slow. As an adult, he was not too responsible.

Declaration of Hermila Tamayo, ¶ 18. Lisa Martinez, who lived with the Ochoas, similarly recalled that "Sergio's older brother, Eduardo, lived in the back house. He didn't have much interaction with Sergio or the rest of the family. He'd never just sit down and talk." Declaration of Lisa Martinez, dated February 13, 2001, ¶ 13.

60. The emotional distance between Eduardo and Sergio seemed particularly large. A neighbor of the Ochoas' recalled that:

> Sergio had an older brother, Eduardo, but Eduardo pretty much ignored him. He didn't play with him or interact like most brothers do. Eduardo would sometimes play with the other kids - the girls - but never with Sergio.

Declaration of Carmen Silva, ¶ 6. Eduardo, Jr. has admitted that he and Sergio were not close:

> Since there was such a big age difference between Sergio and I, we never really talked about problems or how he was doing. I used to hit him on the back of the head for hanging out with the gang.

Declaration of Eduardo Ochoa, Jr., ¶ 14.

61. Sergio's first and second grade teacher, Helene Rufran recalled the lack of warmth in the relationship between Sergio and his older brother Eduardo, Jr., who picked Sergio up after school:

> My children did not leave the classroom until all their work was done. The parents stood outside the gate of the school, waiting for their kids to be let out of the classroom. Children often stayed with me until around five in the afternoon - almost nighttime during the winter months. All too often, the parents punished their children for having to stay after class, although I often attempted to persuade them not to. Sergio was one of the children who had to stay in the afternoons. I don't ever recall Sergio's parents picking him after school, but I do remember that his older brother, who was around twelve or [thirteen] years old, would yell at Sergio when he picked him up. Sergio would cower in response to his brother's shouts. Sergio was clearly miserable when his brother shouted, but he showed no signs of resistance.

Declaration of Helene Rufran, ¶¶ 11-12.

62. Because of their learning disabilities and hygiene problems, Sergio and his sister Gloria were particularly isolated from their siblings:

> Eduardo, Rosie and Lisa - called Sergio and Gloria retarded and treated them like they were. "You're so dumb," "You're retarded," "Get a brain," they'd say.

> Those two were always referred to as "slow," or "retarded." In the Ochoa family everybody was mean to each other.

Declaration of Jose Silva, dated February 4, 2001, ¶ 22.

63. Sergio's maternal aunt Berta commented that "There was no communication in the Ochoa household. The parents didn't talk with the children. They didn't discuss their lives. They lived together live a group of strangers and they weren't connected at all." Declaration of Berta Tamayo de Godinez, ¶ 16. The recollections of the Ochoa children confirm this point of view. Rosie recalls that

> At night, we didn't have dinner together as a family. We didn't have any family meals together. Everyone was on their own to get something to eat. The only time we sat down together for a family meal was at Thanksgiving and Christmas. We never had any birthday parties or went on family outings. Everyone was on their own and just did their own thing.

Declaration of Rosalba Gallegos, dated February 5, 2001, ¶ ¶ 21-22. Eduardo Ochoa, Jr. similarly recalls that "Our family wasn't close . . . . [M]y parents never talked to us about anything. Maybe it was because they were shy, or too busy. Both of my parents were sort of distant from us."

Declaration of Eduardo Ochoa, Jr., ¶ 13.

64. Sergio's girlfriend, Lisa Martinez, saw first hand how the Ochoa's behaved towards each other:

> When Sergio and I were together, I lived with him and his family for about two years. I could see that there was no real parent-child communication. The TV was on all the time and nobody talked . . . . It was like Sergio had no family. Neither his mother nor his father were involved with him. They never had any idea what

> he was doing and Sergio would come and go as he pleased. They never sat down and talked to him or tried to guide him . . . . There were never any family dinners at Sergio's house; no family meals at all. Sergio's sister, Gloria, would cook, and she was a very poor cook. She'd just leave the pot on the stove and everyone would serve themselves - if the person before you didn't take it all.

Declaration of Lisa Martinez, dated February 3, 2001, ¶¶ 6, 9-10. Sergio's girlfriend Yvette Ancira, similarly recalled that Sergio's parents:

> were not very affectionate people. Sergio's father never showed any emotion at all; he was always just sitting there watching TV. He didn't have any interaction with anybody. Sergio's mother didn't show much emotion either.

Declaration of Yvette Ancira, ¶ 2.

65. The younger Ochoa children suffered strongly from the misery of their emotional disconnection with each other. Lisa Ochoa recalls:

> I felt very sad and lonely as a child because I needed some attention from my parents and couldn't get it. All three of the younger kids - Gloria, Sergio and myself - were in the same position. We were starved for our parent's attention. My mother worked long hours in a factory and when she came home she didn't have any energy left for her kids. She would just come home, cook some food, eat, watch TV, shower and go to bed. We wanted just a little bit of time from them - just to sit down and talk for a minute, to pay attention to us. We wanted them to hug us or kiss us, which they rarely would do. I remember Sergio going up to my mother and giving her a hug, trying to get her attention, but she'd just say, "I'm tired." I don't remember my mother ever tucking us in at night or giving us baths. We were all pretty much on our own . . . . Because I could never get my

> parent's attention it made me feel unwanted, like my parents didn't even care about me. There was nobody to turn to. My older brother, Eduardo, and my older sister, Rosie, were already doing their own thing and didn't really pay attention to the younger kids. Sergio, Gloria and I each lived in our own little worlds and didn't even communicate about our feelings of rejection by our parents with each other. We kept all of our feelings inside. To this day, none of us in my family talk to each other about our feelings. We just have never had that kind of communication. Sometimes I would leave home and stay away for three or four days at a time. I just felt unwanted in the house because nobody paid attention to me.

Declaration of Elizabeth Ochoa, dated February 5, 2001, ¶¶ 5-6, 12-13

66. Individuals outside the Ochoa family perceived the extreme isolation suffered by the Ochoa children:

> All of the kids in that family were sort of loners. There wasn't any interaction between any of them. Each child was in their own little world - in a room watching TV, or playing by themselves. The only interaction I saw between them was arguing over little things, like who was at the stove first to get some food. Nobody ever said hello or goodbye to each other. They'd just come and go like the others didn't exist. Sergio was the most withdrawn in that family. It was like he was there physically but not mentally. Nobody even noticed he was there. His family didn't pay any attention to him at all. In that family, there was no interaction with the parents either. They were illiterate and were never home - they worked even on weekends - so the kids were left alone in the house all the time. They never played outside. Sergio's family didn't have meals together.

> Sometimes there would be some food left on the stove and each one would just go eat it whenever they were hungry. The mother would come home at 6:30 or 7 at night and fix dinner sometimes but nobody would eat. Both parents would come home from work exhausted and didn't interact with Sergio at all. The mother would go into the kitchen to cook and the father would sit on the couch, get fed and watch TV. Sometime he would play with the girls, especially the youngest, Lisa, but he never gave any attention to Sergio. Neither parent ever asked Sergio how his day was or anything like that. It seemed like they showed more love to the dogs than to Sergio. Sergio's mother always looked like she was depressed, like she felt bad about herself. She looked withdrawn and unhappy. I compared her to my mother, who even though she was a single mother with nine kids, always kept her head held high and put on make-up every day. She bathed us and made sure we were clean for school. Sergio's mother didn't do any of that. My mother was also fun to be around. Sergio's mother wasn't.

Declaration of Maria Teresa Madrigal dated January 3, 2001, ¶¶ 8-13. Jose Silva recalls:

> The Ochoas were a strange family. They were not close at all; in fact there was no communication. Everyone lived in their own little world. They wouldn't even say "Hi" to each other when they came in the house. I thought it was very strange. It seemed like the parents didn't want to be bothered at all with the kids. The parents didn't take any interest in school or participate in any of the activities, from what I saw.

Declaration of Jose Silva dated February 4, 2003, ¶ 5.

67. While neighbors often attributed the emotional distance between the Ochoa parents and children to the Ochoa's work schedules, they were nevertheless struck by it:

> The children in the Ochoa family stayed alone in the house because the parents were always working. There wasn't time for love. The mother was always tired and depressed. Their house was always very dirty. They slept with dogs. Also nobody brushed the children's teeth. Sergio and Gloria had teeth the color of butter.

Declaration of Maria Silva, ¶¶ 5-6. Carmen Silva recalls:

> I would see Sergio and Gloria's parents come home from work and they would be so tired that they didn't even talk to their kids. The mother would go into the kitchen to cook and the father would just sit down and watch TV. They had no interaction at all with their children. When I went over to their house Sergio was always really quiet. He'd just be by himself - eating or watching TV. Nobody really communicated with him. He was just left on his own. I never saw anyone help Sergio with his homework . . . .Sergio's mother was tired all the time. I remember her as being sick a lot - with anemia or something wrong with her blood sugar. She never had any energy to take care of her children. The kids were left on their own. Sergio's parents never came to school for Sergio, that I know of. They didn't participate in school events.

Declaration of Carmen Silva, ¶¶ 3-4, 8-9.

68. The lack of emotional connection between Sergio and his family and the fact that his parents were largely absent from the home put him at increased risk for involvement in gangs and violence:

> Strong parental involvement can function as a positive factor against violence. Conversely, a lack of parental interaction and involvement with children may increase children's future risk of violence . . . . disruptions of parent-child relationships predict later violent behavior in children. Parent child separation before age 10 has been found to predict violence.

Hawkins, *et al.*, 2000 at 4.

4. There is a Strong Likelihood That Sergio's Father Was Involved in an Incestuous Relationship With Sergio's Sister Gloria

69. Among his siblings, Sergio Ochoa was closest to his sister Gloria. As discussed in Paragraphs 123-24 and 146-52 below, Gloria is developmentally disabled and her five children suffer serious mental, emotional and cognitive problems. As discussed in Paragraph 99 below, Gloria was brutally raped when she was 18 years old and Sergio was 15 years old. Gloria recalls that:

> Sergio and I were close growing up. He didn't really have other friends; he just hung out with me. Sergio was also very protective of me. He'd say, "Don't talk to my sister like that," if someone was bothering me.

Declaration of Gloria Ochoa, ¶ 3.

70. Despite his protective feelings towards Gloria, there was little Sergio could do to protect her from abuse within the Ochoa home. From the reports of neighbors and others who

knew the Ochoas, it appears very likely that Sergio's father, Eduardo Ochoa, Sr., had an incestuous relationship with Gloria. Jose Silva

> heard strong rumors in the neighborhood for years that Gloria Ochoa's father, Eduardo Ochoa, Sr., was having sex with Gloria. One afternoon, I visited the Ochoa home. Gloria, her mother and father were home. Gloria was about 20 years old at the time and she had two or three kids of her own. I asked Gloria's mother, Ofelia Ochoa, where Gloria was. Mrs. Ochoa told me that Gloria was in the bathroom helping her father bathe. It did not seem right to me that Gloria, a grown woman, was helping bathe her father. Mr. Ochoa was able-bodied and I saw no reason why he needed help with bathing. I always wondered if the rumors about Gloria and her father were really true. Gloria kept on having baby after baby and I never heard about or saw any of the fathers. Sergio and the other Ochoa kids had boyfriends and girlfriends. However, Gloria never talked about her boyfriends or had them come over to her house. I overheard some of Sergio's friends from the neighborhood saying that the Eduardo Ochoa, Sr. was the father of Gloria's kids.

Declaration of Jose Silva dated July 22, 2003, ¶¶ 3-4.

71. Maria Silva Madrigal, who was a friend of Sergio's sister Rosie, also heard and saw things that raised her suspicions about this relationship:

> One morning. I went to pick up Gloria for school. We were both in junior high at the time. Gloria was late as usual. I went inside the house to check on Gloria, and saw Gloria coming out of her father's bedroom dressed only in a thin nightie. As Gloria was leaving the bedroom, her father yelled to her to get dressed. I'm not sure what was happening between Gloria and her dad and she never told me,

> but it left me with an uncomfortable feeling, as if I had seen something that I wasn't supposed to.

Declaration of Maria Silva Madrigal dated July 23, 2003, ¶ 7.

72. The relationship between Gloria and her father was sufficiently extraordinary that it caused concern among those who knew her. The ex-wife of Eduardo Ochoa, Jr., Maria Guadalupe Vargas, commented that

> The relationship between Gloria and her father, Eduardo Ochoa Sr., was strange. Eduardo Sr. was jealously watchful of Gloria, not even allowing her to go to the store by herself. He would accompany her wherever she went. Because Gloria didn't go out and was always under her father's control, but still kept having children whose fathers no one ever named, I wondered if Eduardo Sr. was the father of Gloria's children.

Declaration of Maria Guadalupe Vargas, ¶ 4.

73. Sergio Ochoa's childhood friend, Leland Bradford, recalled that "If Gloria didn't get home on time, their father beat her with a garden hose." Declaration of Leland Bradford, ¶ 5. Sergio's sister Rosie similarly recalled that "I never saw any of Gloria's friends while she was growing up. My parents didn't allow Gloria to bring friends over to the house. I don't know who the father of any of Gloria's five children is." Declaration of Rosalba Gallegos, dated September 11, 2003, ¶ 8.

74. Gloria was extremely evasive about the identity of the father of her five children. In birth records for her five children, she steadfastly refused to reveal the identity of the father in each, listing her father's first name and her mother's last name as the father of her second child Jessica, but refusing to specify any father for each of the rest. The school records for Gloria's children comment on her refusal to discuss the identity of her children's fathers. In her daughter

Jessica's records, the psychologist noted that Gloria spoke to him in a very guarded manner, and refused to volunteer any information about Jessica's father. On another occasion, Gloria claimed that the father of her son Jonathan was named David, but claimed that she did not recall his last name. Family friends as well as her own siblings have professed complete ignorance of the identity of the father of all of Gloria's children. In addition, Lisa Ochoa's friend, Maria Silva Flores, has admitted that she "heard from a member of the Ochoa family that Eduardo Ochoa, Sr. was the father of his daughter Gloria's five children." Declaration of Maria Silva Flores, ¶ 7. All of Gloria's five children have suffered significant cognitive and emotional problems, including mental retardation and selective mutism. These circumstances suggest the possibility that some or all of Gloria's children may well have been fathered by Eduardo, Sr.

75. Finally, Sergio Ochoa's girlfriend, Lisa Martinez, lived with the Ochoas for almost two years and saw grossly inappropriate behavior between Eduardo, Sr. and Gloria while she was there:

> Sergio's sister Gloria was nice, but mentally not all there. She struck me as either mentally retarded or nearly so. During the time I spent at the Ochoa house, it became obvious to me that Sergio's father, Eduardo Ochoa, Sr., was having an incestuous relationship with Sergio's sister, Gloria. I also suspected that Eduardo Sr. had fathered Gloria's son Joey. The relationship between Eduardo, Sr. and Gloria was unnatural and unnerving. Two examples of this come to mind. One day, when I was living at the Ochoa house with my daughter, Claudia, I was in the living room with Gloria and Eduardo, Sr. No one else was at the house at that time. Gloria, who was in her early 20s, was either pregnant with, or had just given birth to, her son Joey. Gloria was wearing a low-cut tank top that day. I saw Eduardo Sr. pinch one of Gloria's breasts. Gloria had no reaction to this.

> Gloria did not appear to be upset or exhibit any other emotion. I was appalled by what Eduardo, Sr. had just done, but I did not think it was my place to say anything, so I kept quiet. On another occasion, when my daughter Claudia was about nine months old, I was in the single bedroom of the Ochoa house. Eduardo, Sr. was in the living room with Gloria and my daughter Claudia. No one else was at home at that time. I heard Gloria from the other room, talking to Eduardo, Sr., who speaks only Spanish. In Spanish, Gloria told her father to get away from her. The tone of her statement was striking; it sounded like a wife telling her husband that she was not in the mood for sex. After I heard this comment, I became concerned about Claudia, who was in the living room with Gloria and Eduardo, Sr. I did not want my daughter to see anything inappropriate that might be going on, so I immediately called for Claudia to come to the bedroom. I heard Eduardo, Sr. tell my daughter, in Spanish, that I was calling for her.

Declaration of Lisa Martinez, dated August 1, 2003, ¶¶ 5-9.

76. Gloria's total failure to respond to her father's grossly inappropriate conduct in front of Lisa Martinez suggests that Gloria was thoroughly inured to it. Under these circumstances, it is likely that Eduardo, Sr. had an incestuous relationship with Sergio's sister Gloria. Given Sergio's protective feelings toward Gloria, Eduardo Sr's actions would have had a profoundly alienating effect on him, driving him even further away from his family and further undermining any sense of moral authority that his parents might have exercised upon the Ochoa children.

5. There Was a Stark Absence of Parental Supervision and Other Family Environment Protective Factors That Could Have Influenced Sergio Away From Dangerous Behavior

77. As described above, Sergio Ochoa had a host of family environment risk factors that placed him at increased risk for involvement in dangerous behavior. In addition, his family lacked the family environment protective factors that could have helped to steer him away from gang involvement and criminality. As a result of his father's alcoholism and the resulting intra-family conflict, the physical and emotional neglect Sergio and his siblings suffered and the probable incest between Gloria and Eduardo Sr., there was no positive bonding between family members, little or no warmth within the family, and no sense of basic trust between Sergio and his siblings and parents.

78. In addition, his parents provided little or no supervision to Sergio and his siblings. Lack of appropriate parental supervision is a particularly serious risk factor for later delinquency. "Three parental practices are particularly associated with early conduct problems: (1) a high level of parent-child conflict, (2) poor monitoring, and (3) a low level of positive involvement." Wasserman, *et al.*, 2003, Family Risk Factors, at 1:

> Family management practices such as failure to set clear expectations for children's behavior, poor monitoring and supervision and severe and inconsistent discipline consistently predict later delinquency and substance abuse . . . . parents' poor supervision and aggressive discipline predicted their children's convictions for prison crimes for persons well into their forties.

Hawkins, *et al.*, 2000 at 3-4.

79. Contrary to the impression left with the jurors at trial, Sergio was not the only gang-involved child in the Ochoa family. Each member of the family, in turn, became involved in gangs. Sergio's oldest sister, Rosie Ochoa, recalled that:

> My first contact with gangs was at Belmont High School. I was not in a gang but I hung out with them. When I was 16 or 17, I got tattoos. My boyfriend then, Richard, was in the 18th Street gang, and went by the name "Chino." Richard was Filipino, and was my boyfriend for three or four years, starting in the 9th grade. My parents knew Chino but didn't have any opinion about him, and they didn't comment on my tattoos.

Declaration of Rosalba Gallegos, dated September 11, 2003, ¶ 5.

80. Eduardo Ochoa was the next to join the 18th Street gang:

> I was in the 8th grade - 13 years old - when I joined the 18th Street Gang . . . . I dropped out of the gang when I was 18 and got married. This was right around the same time that Sergio started hanging out with the gang . . . . I first noticed that Sergio was hanging around with the gangs because I'd find some of my gang-style clothes missing. He didn't want anyone in the family to know so he'd change after he left the house . . . . My sisters Rosie and Gloria were also in the gang, so I guess it was natural for Sergio to join too.

Declaration of Eduardo Ochoa, Jr., ¶¶ 7, 9, 12, 15 .

81. Gloria Ochoa also became an 18th Street gang member:

> Sergio and I were in the same gang together - the 18th Street gang. It was sort of like follow the leader - first my sister Rosie joined the gang, then my brother Eduardo, then Sergio and me. I was 16 when I joined. In our

> neighborhood it was normal to join the gangs. About half of the kids in our school were in gangs.

Declaration of Gloria Ochoa, ¶ 4. Lisa Ochoa similarly admits. "I hung out with the gang, too. At one time, my boyfriend was Bandit, the guy who got shot by the Crazy Riders before Sergio's arrest . . . " Declaration of Elizabeth Ochoa, dated February 5, 2001, ¶ 16.

82. The Ochoa children developed a notorious reputation for gang membership in their neighborhood. Maria Madrigal knew that "Sergio's older brother, Eduardo, was totally into the gangs and ran around all the time with the other gang members." Declaration of Maria Teresa Madrigal dated January 3, 2001, ¶ 22. Jose Silva recalls that

> All of Sergio's role models were bad rather than good, starting with his older brother and sisters who were all in the gang. His brother and sisters would have huge gang parties at the house while the parents were at work. There would be 50 to 100 gang members there in the middle of the day partying. They would be drinking, smoking marijuana, smoking PCP. Sergio would be right there, seeing everything. It wasn't a good environment for him when he was a little kid. I would see Sergio high sometimes, passed out on a couch or in the car, or he'd be staggering around. He was only 13 or 14 years old. When the parents came home from work and found a party at home they wouldn't even do anything about it. The kids would tell the parents to leave. The father would never take a stand. He'd just turn around and leave the house. With his brother and sisters, and their parties, Sergio was surrounded by gangs.

Declaration of Jose Silva, dated February 4, 2001, ¶¶ 17-19. Maria Silva Flores recalls:

> The Ochoa kids organized gangster parties in the Ochoa home where most of the people who attended the parties were members of the 18th Street gang. The parties were known for being rowdy and for having loud music . . . .

Declaration of Maria Silva Flores, ¶ 5. The Ochoa's neighbor, Bonzie Williams, similarly remembers that

> Sergio and his brother and sisters were on their own a lot because the parents worked long hours. The kids pretty much raised themselves. They would have parties during the day and play loud music, sexy songs that I didn't want my kids to hear. I'd have to tell them to turn it down.

Declaration of Bonzie Williams, ¶ 9.

83. According to Leland Bradford, an 18th Street gang member, Sergio's "older brother or sisters . . . .were all in the gang . . . . Gloria was also a gang member. She dressed like a gangster, with khaki pants and a lot of eye make-up, and had the reputation of being with a lot of guys. She got beat up once and stabbed in the eye. That attack was gang related." Declaration of Leland Bradford, ¶ 6. Another gang member, Juan Lombero recalls:

> Sergio's parents were always working and weren't able to pay much attention to Sergio. Sergio's older bother Eduardo, Jr. also had been an 18th Street gang member. For that reasons, its not surprising to me that Sergio joined the 18th Street gang. He was following in his brother's foot steps.

Declaration of Juan Lombero, ¶ 4

84. The Ochoas relatives were scandalized by the Ochoa children. Arturo Arias, who stayed with the Ochoa's at the 27th Street house, recalled that

> The Ochoa children all dressed like gang members. Eduardo, Jr. had tattoos all over, including tattoos of tears by his eyes. Sergio seemed like a normal kid to

> me. Gloria dressed like a female gang member, and she seemed very slow. I didn't promote a friendship between my kids and the Ochoa kids, because of their apparent connection to gangs.

Declaration of Arturo Arias, ¶ 3. Sergio's maternal cousin, Jaime Tamayo, recalls:

> Sergio, Sergio's friends, Sergio's sisters Elizabeth, Gloria and Rosalba, and Sergio's brother Eduardo, Jr., all had tattoos. They never told me that they belonged to a gang, but I realized that they were all gang members later, as I got older.

Declaration of Jaime Tamayo, ¶ 2.

85. Not surprisingly, given their lack of connection with their children, Ofelia and Eduardo Ochoa parents took no effective steps to prevent their children from becoming involved with gangs or to otherwise discipline them. Sergio's friend and fellow gang member, Leland Bradford, recalls that "[e]ven when Sergio was young – 14 or 15 years old – his parents would let him come and go as he pleased . . . . they let Sergio do whatever he wanted. He could sleep with his girlfriend right in their house." Declaration of Leland Bradford, ¶ 5. Jose Silva recalls that:

> [t]he Ochoa family was totally dysfunctional. The parents didn't offer any guidance or discipline to the kids at all. The father was not around most of the time but even when he was home he was like butter - you could run right over him. He'd tell Eduardo to take the trash out and Eduardo would answer him back, "You take it out." The mother was the same way. You could put both the father and the mother together and you still would come up with less than a full person, in as far as guidance and discipline. I was just a kid but I could see it was wrong. There was a lot more guidance in my house even without a father.

Declaration of Jose Silva dated February 4, 2001, ¶ 4.

86. The Ochoa's relatives also commented on the lack of connection between the parents and children, and how differently Sergio's family behaved from themselves:

> They gave the kids material things, such as cars for Sergio and Eduardo. Jr., but they lacked a family life. Ofelia told me that she and Eduardo, Sr. were always at work, and I wondered what were the kids doing when they were alone - and whether anyone made sure they went to school and were not running around in the streets getting into trouble. When I did go to visit the Ochoas in L.A. and when they came to visit us, it was obvious that Ofelia and Eduardo had lost control of their kids. The kids talked back, argued and paid no attention to Ofelia and Eduardo, Sr. whenever I visited them. I and the rest of my family told Ofelia many times that they should come back and live in Mexico with the rest of our family. We help each other out in difficult times and our children have done much better than hers. The children here, most of whom are now adults, have better educations, and those that did not continue on to university have stable jobs and families.

Declaration of Graciela Tamayo De Robles, ¶ 4. Sergio's aunt Hermila recalls:

> Ofelia often tried to convince me to stay in Los Angeles. It would have been easy for me to find a job there as a hairdresser, which is what I do for a living, but after my visits, I concluded that I was better off in Mexico. Ofelia and Eduardo said that they had cars, which were important to them, and eventually they bought a house, but when I visited them, what struck me most was the neglect and poverty in their house . . . . The Ochoas did not appear to be a united family. There was little communication between them, they all did their own thing and rarely talked to each other. The parents would leave very early in the morning and come back

> very late in the evening. The family members treated each other aggressively and spoke very harshly to each other. The girls were especially disrespectful. Lisa would swear at her mother, and I was very shocked by this. The parents gave the children material things, but these things only provided them with momentary pleasure. Rosalba worked, but did not share with her siblings or her mother. This is different from my family in Mexico - where we all help each other out so that we can all progress and have better lives. Ofelia didn't educate her children - they raised themselves . . . . Ofelia and Eduardo are both hardworking people, but they were ineffective as parents, and its clear to me that this has contributed to many of the difficulties their children have had.

Declaration of Hermila Tamayo Suarez, ¶¶ 20-24, 28.

87. As a child growing up, Sergio lacked the parental guidance that might have shielded him from involvement in gangs and violence. Sergio's disconnection from his family placed him at heightened risk for the actions that resulted in his conviction and death sentence.

D. Sergio Had Extensive Community Environment Risk Factors and Lacked Community Environment Protective Factors

1. Sergio's Family Lived in Exceedingly Poor and Violent Communities

88. Sergio Ochoa lived in communities where poverty and violence was the norm. Community disorganization is a predictor of later violence in youth. Hawkins, 2000 *et al.*, at 5. The "prevalence of drugs and firearms in the community predict[s] greater variety of violent behavior at age 18." *Id.*

> Children raised in poor disadvantaged families are at greater risk of offending than children raised in relatively affluent families. Disadvantages at the neighborhood level are also of primary importance in the development of

> antisocial behaviors. Disorganized neighborhoods with few controls may have weak social networks that allow criminal activity to go unmonitored and even unnoticed . . . . [S]ocial disorganization and concentrated poverty within the community lead to residents' decreased willingness to intervene when children are engaged in antisocial/unlawful acts, further contributing to a greater likelihood of violence within neighborhoods . . . . [D]isadvantaged inner-city neighborhoods are often characterized by a predominance of delinquent peer groups and gangs that draw young people into crime. Juveniles living within high-crime neighborhoods are often exposed to norms favorable to crime and are at a high risk for offending.

Wasserman, *et al.*, 2003, School and Community Risk Factors, at 2.

89. Sergio was born in Tijuana. In 1971, when Sergio was three years old, his family moved to Figueroa Street. Three years later, when Sergio was six years old, his family moved to Welcome Street. In the late 1970s, when Sergio was about ten years old, his family moved again, to 27th Street near Arlington, where his family continued to live until his arrest in 1990.

90. As discussed in Paragraphs 26-29 above, the neighborhood in Tijuana where Sergio was born was extremely impoverished and disorganized, and the residents had little in the way of medical care or educational resources. Unemployment rates were high and the sanitary conditions were deplorable, with little or no access to potable drinking water.

91. As discussed in Paragraph 53 above, upon their arrival in Los Angeles, Sergio and his siblings found themselves totally isolated from the community in which they lived. While their parents looked for work, the children were locked up all day and never left the house. Their mother didn't put any of them in school, for fear that they all would be deported.

92. Sergio and his brothers and sisters were taunted by neighboring children, who threw hot water on their backs and called them wetbacks. Reporter's Transcripts of Proceedings

in *People v. Ochoa*, Los Angeles Superior Court Case No. BA 020873 (hereinafter "R.T.") at 2450-51. The neighborhood children took the Ochoa children's food away from them and threw it in the trash and took their laundry and cut it into pieces. R.T. 2452. The family was desperately poor at the time; Sergio and his siblings only had two sets of clothing apiece and the family had no money to replace the destroyed clothing. *Id.* The Ochoa family remained impoverished throughout their time in the Figueroa Street house. When Ofelia finally put Sergio in kindergarten, his teacher took pity on the family and gave them clothes. Declaration of Ofelia Ochoa, ¶ 25. The school also gave the family food for Christmas. *Id.*

93. The 27th Street residence, where the Ochoas moved when Sergio was 10 years old, was in an exceptionally violent neighborhood. Bonzie Williams, a neighbor of the Ochoas' there, recalled that:

> Our neighborhood had its share of crime and violence. We'd hear gunshots regularly and the police came quite a bit to the apartments on the corner where they were selling drugs. When my son-in-law was shot he came to my front porch, bleeding, before he died.

Declaration of Bonzie Williams, ¶ 3.

94. The 27th Street neighborhood was almost entirely black, and the Ochoa's were one of the few Latino families who lived there. Members of the Silva family, who also lived in the neighborhood then, recall that:

> All of us were picked on because we were about the only Latinos in a black neighborhood. The black people hated the Mexicans. They'd call us "Mexican Beaners," and "Wetbacks." They'd tell us, "You Mexicans should go back to Mexico." I remember two black girls that used to pick on my sister, Maria Elena, and I all the time. We'd try to hide but they'd find us and hit us all over. "Hey

> bitch, I'm talking to you," they'd say, and if we didn't answer they'd beat us up . . . . We were afraid of the blacks all of the time. We'd go around the block to avoid them. I still remember all of that. It was very traumatic to live in fear all of the time . . . . The black kids also made fun of us for not being able to read. At 6th Avenue Elementary, Sergio, Gloria and I were in some kind of classes for slow learners. It was called ESL or Special Ed. The black kids made fun of us for being in those classes and called us retarded . . . . The high school we went to, Dorsey High, was famous for all of the violence. A lot of parents were afraid to send their children there because of the shootings. Once they found a girl in the trash who'd been killed. I'd come out of school and see drive-by shooting right in front of the school. That happened all the time. In our neighborhood there were also a lot of shootings. We always heard gunfire, police sirens, and helicopters.

Declaration of Carmen Silva, ¶ 11, 13-16. Maria Madrigal recalls:

> The neighborhood at that time was almost entirely black and there was a lot of racism towards the Ochoas and us. The blacks would throw rocks at us and yell things at us like, "Your people had my family as slaves." One time a boy at school started beating me with a belt. We were all afraid of the Blacks . . . .

Declaration of Maria Teresa Madrigal, dated January 3, 2001, ¶ 3. Jose Silva recalls:

> A lot of Latino kids joined the gangs because of the racism against us by the blacks. In the gang you felt like you had some protection. I used to get beat up almost every day by the blacks to the point that I was scared to go to school. I remember telling my mother that I wanted to go back to live in Mexico, where I wouldn't get beaten up. Here, the blacks would walk by and sock you or push you down for no reason. One would come up behind you and hold you while another

> hit you in front. Or they'd throw rocks at us. This would happen all the time - on lunch breaks, after school and on the way home . . . . All of the Latinos got beaten up regularly. It was a fight for your life. I remember seeing Sergio with bruises on him after being beaten up by the blacks. The blacks were angry that Latinos had moved into their neighborhood.

Declaration of Jose Silva, dated February 4, 2001, ¶¶ 19-20.

2. Sergio's Family Was Subjected to Extensive Violence

95. The Ochoa family suffered greatly as a result of the chaos and disorganization in their new neighborhood, and on account of their race. Ofelia Ochoa recalled that:

> [w]hen Sergio was about 10 years old, we went to live on 27th Street, near Arlington Street. We had to leave Welcome Street because the owner sold the house. This owner sent us to 27th Street because he had another house there. We were in a hurry to leave and didn't know that we were entering the mouth of the wolf on 27th Street. It was a neighborhood of Blacks and we were almost the only Latinos. In this neighborhood there was a lot of violence. Every day we heard shootings, ambulances, police helicopters. The children couldn't play outside of the house. We were robbed two times just as we arrived in the neighborhood. They left us with nothing. Afterwards, I saw other children wearing my children's clothes. Once, when I was getting off the bus, they took my purse and robbed me of $70 and all of my identification. Another time, my daughter and I were leaving the bank and they stole our purses. They shot at my son, Eduardo, so they could steal his car. He still has the bullets inside his leg. Another time, they shot at him to steal his wallet. There were always assaults on the busses. Usually two men entered and robbed all of the passengers. They

> robbed my husband right after he cashed his tax check and was waiting for the bus. They put a chain around his neck and robbed him of $600. The bus driver saw everything but told my husband, "Let them go because they could kill you." A friend of my husband's told him, 'Get out of that area because it's very violent and it's bad for your children." But we didn't have money to move to another place. One time, my daughter Gloria was downtown, waiting for a bus when she was beaten up. They pulled her by the hair and they raped her. She fainted and was lying in the street for six hours until a drunk man, from the bar where my husband drinks, saw her. Gloria was unconscious for two days. She had one eye out of its socket and all of her throat was bruised. It's a miracle that they didn't kill her.

Declaration of Ofelia Ochoa, ¶¶ 33-39. Eduardo Ochoa, Sr. similarly recalled that:

> After two years, we went to live on 27th Street, near Arlington Street. There, there was a lot of violence. Many times, cars went down the street with the people yelling at the neighbors, "I'll kill you!" The children had to stay in the yard so that they wouldn't get hit by a bullet. We could never walk at night. As soon as we arrived in that neighborhood they robbed everything from the house. One time I was waiting for the bus and they beat me up. They robbed the purses of my wife and daughter and also my daughter's necklaces. They robbed my son's tape recorder when he was walking in the street.

Declaration of Eduardo Ochoa, Sr., ¶ 12

96. For Sergio and his siblings, the experience of living on 27th Street was terrifying. They never knew when the next act of random violence would come. Eduardo, Jr, recalled:

> On 27th Street we were in the middle of a neighborhood with constant violence. Every night we heard gunshots, sirens and police helicopters flying overhead. Within two weeks of the time we moved in, we were robbed. They stole everything we had, including our clothes. My mother saw another kid wearing one of my jackets. It was dangerous to take the bus in our neighborhood. I would never take the bus alone; I'd try to have about ten people with me. Somebody would get mugged right in front of everyone and nobody would do anything. The police never did anything either. Once I was just walking down the street with my radio and two guys with a pipe grabbed it from me.

Declaration of Eduardo Ochoa, Jr., ¶¶ 5-6.

97. Rosie recalled that the Ochoas were robbed and assaulted over and over again:

> We moved to 27th Street, near Arlington when Sergio was about ten, it was an all black neighborhood and we were about the only Latinos. The blacks made it clear that they did not want us in their neighborhood. They called us names and told us to move out, that they did not want us there. My parents didn't know how dangerous the neighborhood was until after we'd already moved there. Right away, we were robbed. They took everything we had . . . . The neighborhood was very violent. It was dangerous even to walk around. Twice, my mother and I had our purses snatched away from us–once when I was coming out of a bank. I lost everything.

Declaration of Rosalba Gallegos, dated February 5, 2001, ¶¶ 14-16.

98. Elizabeth Ochoa also was assaulted by other children in school on account of her race:

> During most of my childhood and teenage years, our family lived in a house on 27th Street in Los Angeles. It was a black neighborhood and we were practically the only Latinos. We felt out of place and unwelcome there. The blacks didn't like the Latinos at all and they'd hurt us for no reason. I remember one time, when I was in about the fourth grade, some black kids knocked me down during the lunch break at school and broke off my front tooth. I had to get a bridge because the tooth was so damaged. The black kids that pushed me down didn't even get punished. It was an everyday thing that they'd hurt the Latinos and call us names, like "Mexican jelly beans" . . . . Walking around in our neighborhood was dangerous. One time, my mother and I were walking home from the bus stop after we had cashed our paychecks from working in the garment factory. I was about 16 at the time and went to work with my mother while I was off school for the summer. As we walked down the hill towards our house some black guys snatched our purses right out of our hands. My mom cried about it but she was scared to go to the police because she thought the blacks might retaliate. My parents wanted to move out of that neighborhood but couldn't because that was all we could afford.

Declaration of Elizabeth Ochoa, dated February 5, 2001, ¶¶ 3-4. Sergio's sister Gloria had similar experiences:

> The neighborhood we lived in - 27th Street and Arlington - was also very violent. It was normal to hear gunshots and sirens every day. As kids, we couldn't even play outside of our yard because it was too dangerous. My brother Eduardo had a

> tape recorder stolen right out of his hands when he was walking down the street. One time, a man got shot and they chased him to our next door neighbor's house. He collapsed dead on the front porch. Right after we moved into the neighborhood, somebody broke into our house and stole everything we had - which wasn't much. We saw other kids wearing our clothes and our bikes in other kid's yards. But my parents were afraid to say anything to them; they didn't want more trouble. They were afraid of retaliation; they thought that maybe one of the neighbors would send somebody over to hurt us . . . . The neighborhood was mostly black and they didn't like the Latinos at all. They picked on us a lot and would call us Mexican chili beans and wetbacks. They used to bother me in school a lot - putting their hands in my hair and messing it up.

Declaration of Gloria Ochoa, ¶¶ 11-13.

99. When Gloria was 18 years old and Sergio was 15 years old, Gloria suffered a particularly brutal assault:

> When I was 18 years old, I was attacked and raped while I was waiting for a bus downtown after coming out of a party. I didn't even see who it was because they hit me in the back of the head. The last thing I remember is somebody grabbing my hair. My eye was knocked out of its socket and I had to have about 30 stitches in the back of my head. There were finger marks around my neck where somebody had tried to strangle me . . . . My family didn't even know where I was, or what happened, because for three days I was in such bad shape that I couldn't talk.

Declaration of Gloria Ochoa, ¶¶ 6-7. Hospital records from March 24, 1984 document Gloria's rape. Her upper right eyelid was lacerated in two places and needed to be repaired. She suffered

a corneal abrasion. She was sexually assaulted, had facial and neck trauma, and a scalp laceration. She was strangled and there were thumb prints on the front of her neck. There were abrasions and bruises on the left side of her face, and she suffered a possible hyoid bone fracture.

100. Sergio, who was close in age to Gloria and very protective of her, was emotionally affected by her assault. Lisa Ochoa recalls that "Sergio was really affected when our sister Gloria was attacked and raped. They left Gloria with her head split open and one eye hanging out. Sergio got really quiet and wouldn't talk to anyone." Declaration of Elizabeth Ochoa, dated February 5, 2001, ¶ 19.

3. Sergio Experienced Repeated Serious Assaults

101. Sergio was subjected to considerable violence himself:

> Sergio got beaten up by the black kids too. I remember once, when he was about 12, he had both eyes bruised and swollen and his legs had marks all over them from being kicked.

Declaration of Carmen Silva, ¶ 12.

102. From the time he joined the Pee Wee Wino's clique at the age of 11, Sergio suffered repeated, violent, often life-threatening assaults. Francisco Lupercio was a neighbor of and classmate of Sergio's who befriended him when the two of them were 11 years old. Francisco recalls:

> our neighborhood was dominated by the Harpies gang. Because Sergio and I were members of the 18th Street gang, we were both targeted . . . . I . . . recall visiting Sergio at County USC General Hospital after he was attacked by members of the Harpies gang. The Harpies didn't like Sergio or me and they were always around. Both Sergio and I attended Mt. Vernon Junior High School. The Harpies dominated Mt. Vernon, and they were very hostile to 18th Street gang members.

> Sergio and I were their main targets. They often stopped the two of us from even entering our school. Rivals would even go to our classrooms to look for Sergio and me. It was so bad that security guards sometimes walked Sergio and me to class or told us to go home. On one occasion, when Sergio and I were 14 years old, we were beaten by about ten Harpies gang members, two blocks away from Mt. Vernon Junior High, as we were walking to school. Three of the Harpies attacked me and the rest attacked Sergio. Two of the Harpies had baseball bats. The Harpies hit me in the ribs with the bat, and hit Sergio in the back a few times. The beating lasted about two or three minutes. I recognized three of the Harpies who beat us: Mousie, Primo and Little Man. I saw Mousie a few years ago in the county jail. After the beating, Sergio and I still went to school, even though we were all bloody. A security guard saw us, and told us that we couldn't go to school like that. The school called my parents to pick the two of us up.

Declaration of Francisco Lupercio, ¶¶ 12, 14-17.

103. Another friend and fellow gang member, Juan Lombero, remembered other assaults:

> Whenever Sergio and his friends were chased by rival gang members, everybody, including Sergio, would run. Sergio would get tired right away though, so he would get caught and get beat up. Sergio got beat up all the time. I was with Sergio twice when he was beaten. On one occasion, in the late 1980s, Sergio and I were walking with our friend and fellow gang member, Luis Magallanes-Martinez, by 7th and Adams, close by one of our houses. Some Harpies gang members went by. I made some 18th Street gang signs. Luis, Sergio

and I then ran. The Harpies caught Sergio while he was trying to jump a fence and pulled him down. They then hit him in the head with a bat. Luis and I got away, but Luis called the paramedics. I saw Sergio at the hospital about three hours later. Sergio's head was bandaged up and he was dizzy from the injury. He was treated at a hospital between Washington and Adams. When the bandage needed to come off, Sergio went to County USC for further medical attention, because he didn't have insurance. Even before this incident, Sergio often complained of headaches. A few time when I went to Sergio's house to pick him up, Sergio told me he wanted to stay home because of the headaches he was suffering from. On another occasion, I went with Sergio, Leland Bradford and another 18th Street gang member called Quincy to a park by Hoover and Washington. When we arrived, members of the Harpies gang were already at the park. Some Harpies jumped out of a car, and began chasing and cursing at us. Sergio and the rest of us all ran, but the Harpies caught Sergio. They beat Sergio and hit him in the back of the neck. We went back to look for Sergio and found him, waiting for us by his father's car. We took Sergio back to the same hospital, between Adams and Washington. The doctors there fitted Sergio for a neck brace, which he wore for about a month. When Sergio needed to have the neck brace removed, he again went to County USC hospital for assistance. Even for a gang member, Sergio was assaulted a lot. Sergio was stabbed in the back. Sergio told me about a beating he suffered at L.A. County jail from members of the Avenues 43rd gang. Sergio also told me about beatings he received when he was attending Mt. Vernon Junior High School, which I also attended. Sergio walked to Mount Vernon Junior High School from his home on 27th Street, which was about two

miles away. He had to walk through Harpies territory. According to Sergio, Harpies often caught Sergio on the way home and beat him up. On another occasion, Sergio was riding in a car with Leland Bradford when shots were fired into it.

Declaration of Juan Lombero, ¶ 7-12

Sergio and I saw a lot of violence in the gangs. At least a couple of times a month, Sergio and I were shot at. Our cars were covered with bullet holes. On New Years Eve in 1988, Sergio and I were sitting in my car in front of my girlfriend's house and five guys walked by and started shooting at us. We were in the 90 Crips neighborhood and they could probably tell we were outsiders. When they finished, there were 40 bullet holes in the car. I got hit in the shoulder. When Sergio was about 17, he and Saggy [Juan Lombero] got beaten up really badly with baseball bats by the Harpies gang, on 7th at Adams. About two months later, 20 or 30 guys from the Harpies were chasing Sergio, Saggy and me around Washington at Hoover. Sergio tripped on something and they caught him. They tried stabbing him with a fingernail file, but he had a heavy jacket. They ended up cracking his neck. We had to take Sergio to the hospital by Adams and Western because he had blood coming out of his mouth. We got attacked just because we were in the wrong area of town, in another gang's turf . . . . When Sergio was about 19, he and I got shot at in Compton when we were visiting some girls. Another time, when he was about 19, we got shot at on Halloween when we were cruising in Hollywood. Once, in front of the Shrine Auditorium, where they had a play about gangs called Duke of Earls, some Harpie guys started shooting at us.

> Sergio jumped in a station wagon and I jumped onto a bus to escape. Sergio was about 17.

Declaration of Leland Bradford, ¶¶ 7-8, 11. Medical records from County USC Hospital document that on February 1, 1987, Sergio was assaulted with a baseball bat in the head, face, chest and neck and suffered a fractured spine.

104. Sergio's family recognized that he was the victim of many assaults. Gloria Ochoa recalls that Sergio:

> was the victim of a lot of violence. He would get beat up by other gangs and hit on the head with bats. One time, when he was about 18, he was just walking down the street and a car passed by. The car stopped and a bunch of guys got out with bats and started hitting him on the head. Sergio had to go to the hospital. Another time, about two months later, Sergio ducked when they tried to hit him with a bat and he got hit on the neck instead. He had to wear a neck brace for a while . . . . One time Sergio was sitting in his car waiting to pick up his daughter. Another gang did a drive-by and shot up his car. Getting shot at was a normal part of gang life.

Declaration of Gloria Ochoa, ¶ 8, 10. Ofelia Ochoa also became aware of the violence Sergio faced:

> We didn't know much about the gang but I think there was a lot of violence because Sergio had his car full of bullet holes. Also, I remember twice when they hurt him. One time they attacked him with a bat and another time they hurt his neck.

Declaration of Ofelia Ochoa, ¶ 41.

105. Lisa Ochoa was present during one of these assaults herself:

> I was with Sergio one time when he got shot at. Sergio was in the driver's seat and I was in back. We were parked, waiting for his daughter to come out. All of a sudden, Sergio yelled, "Get down!" I ducked and the car was sprayed with bullets. Afterwards, Sergio acted like it was no big deal, like it happened all the time. Another time, I remember Sergio getting beat up by somebody with a baseball bat.

Declaration of Elizabeth Ochoa, dated February 5, 2001, ¶¶ 17-18.

106. Sergio's girlfriend, Lisa Martinez, met Sergio when he was 16. She also became aware of the constant assaults that he suffered:

> When I met Sergio in 1984 he was already a member of the 18th Street gang. As a gang member, Sergio was always getting chased, shot at and jumped by other gangs. There didn't have to be a reason except that he was from a different gang. I remember one time when Sergio was at Hoover Park with some of his friends. Some people from another gang spotted him and beat him up pretty bad with a baseball bat. Sergio ended up in the hospital with a broken collarbone. Another time, in 1986, Sergio was parked in front of my mom's house with one of his friends, waiting for me. Some people from another gang drove by and shot at them. I heard the shots and then saw Sergio and his friend run into the house because his friend had been hit. We called the paramedics for him. A lot of people that we knew died from the gang violence. It was always a shock to both Sergio and I. It was hard to believe that another person we knew was dead.

Declaration of Lisa Martinez, dated February 3, 2001, ¶¶ 2-5.

4. Sergio's Friends Were Often Assaulted and Frequently Killed

107. Once Sergio joined a gang, his closest friends were subjected to constant violence and many of them died. Francisco Lupercio, a neighbor and childhood friend of Sergio's recalls that:

> The neighborhood where Sergio and I lived was very dangerous and violent. Most of the people I grew up with are either dead or in prison . . . . I was beaten by rival gang members as well as cops. As a kid, I was beaten with bats, crow bars, and billy clubs. On one occasion, when I was 18 years old, police officers from the Southwest station hit me in the head with a billy club and split my head open.

Declaration of Francisco Lupercio, ¶¶ 12-13. Juan Lombero, who was a fellow member of the 18th Street gang, recalled that "Of the people that I knew, half have been killed and the other half are in prison. Very few of us made it out and are doing okay." Declaration of Juan Lombero, ¶ 6. Another member of the 18th Street gang, Oscar Montes-Hernandez, recalled:

> There were also enemies who lived close to my home. You had to constantly watch your back since you could easily run into someone. I lived between a probation and parole office which increased the chances of running into an adversary. Sergio lived in that area as well. It was important to watch what you wore. You kept walking whenever a car drove by. That was all part of "gang banging." If you were confronted by someone, you just dealt with it. I would feel safer if I was carrying a knife or gun for self-defense. I of course preferred to have a few of my homies with me. That made me feel safer too. I recall getting jumped three different times. The first time I was crossing the street from my house to a gas station. Three members from a rival street gang, Easy Riders drove by. They jumped me at the gas station. I was saved by the gas station attendant

> who broke up the fight. The second time was when my car broke down, and I had to walk through Crazy Riders territory. Two guys from Crazy Riders jumped me and hit me with a bat. They aimed at my head but I was able to block the bat with my hand. I did, however, get bruised up. The third time was in a park when I got jumped by some guys.

Declaration of Oscar Montes-Hernandez, ¶¶ 13-16.

108. The degree of violence Sergio and his friends experienced is similar to that experienced in war. Leland Bradford recalls:

> At the disco we went to, Don Quijotes, on 3rd and Spring, there were always fights and shootings. Sometimes there would be fights with two or there hundred people in the middle of the street. Or people would throw [Molotov] cocktail bombs at us. It was basically an 18th Street hangout, so if people from other gangs came there would be fights, sometimes every week . . . . A lot of our friends were killed by gangs. I can think of eight or nine friends without even trying."

Declaration of Leland Bradford, ¶¶ 9, 13. Fellow 18th Street gang member Walter Aguilar recalls:

> The gang life was like being in a constant war. Our life was drive-bys and killing each other. Every two days somebody would get shot or stabbed. I've had at least three or four friends killed and have been shot at many times. I saw a friend of mine get shot in the belly and had to bring him to life by slapping him in the face. I tried to flag down an ambulance and the guy pointed to a sign in his window that said Not in Service. I waited fifteen minutes more and took him to the ambulance myself.

Declaration of Walter Aguilar, ¶ 13.

109. Violence was part of the initiation into gang life itself. Sergio's friend, Francisco Lupercio, recalls that:

> Sergio and I both were jumped into the 18th Street gang itself when we were 13 years old. Sergio joined first. I was "jumped into" the gang by three members of 18th Street. To initiate me in as a new gang member, they beat and kicked me as hard as they could. I was supposed to just stand there and take it, and I did, although I was bloody and bruised for weeks afterwards. While other gangs would beat you for 13 seconds, 18th Street would beat you for 18 seconds. If the person getting jumped in fought back, then four guys would beat you. Sometimes the person counting would count real slow or would purposefully lose track of counting and start counting over again. This was the norm for getting jumped in.

Declaration of Francisco Lupercio, ¶ 10.

110. As members of the 18th Street gang, Sergio's siblings were also subjected to the daily violence of gang life:

> Being in the gang exposed us to a lot of violence. There was always a lot of tension between the different gangs and people would get attacked just for being in another gang's territory . . . . The other gangs would attack each other for no reason - just because someone was from a different gang.

Declaration of Gloria Ochoa, ¶ 5, 9. Eduardo, Jr. recalls:

> I got shot by a Jamaican gang for no reason. I wasn't even hanging around the gangs then but was with my friend who was in one of the Mexican gangs. We were standing on the corner near the high school and about 30 guys from a Jamaican gang came up. One guy pulled a gun and started shooting. I got hit in the

knee. Another time I got shot in the leg by someone trying to take my car. I feel lucky that I never got killed. Most of my friends who stayed in the gang are dead.

Declaration of Eduardo Ochoa, Jr., ¶¶ 10-11.

5. Sergio's Family Perceived That the Police Were Unwilling or Unable to Protect Them From This Violence

111. In the face of this extraordinary violence, the Latino community often felt that they couldn't turn to the police. "We never felt like we could turn to the police when there were problems. Most of the Latinos, including us, didn't have papers to be in this country legally, so we just tried to stay hidden." Declaration of Maria Teresa Madrigal dated January 3, 2001, ¶ 5.

112. On those few occasions when the Ochoa family did turn to the police, they found them unresponsive to their plight. During the three or four months after the Ochoas first moved into the 27th Street house, neighborhood youths threw rocks and bottles at their house every night, and on four or five occasions these rocks and bottles entered their house. R.T. 2456. The Ochoas called the police on four or five separate occasions about these incidents, but the police never came to the Ochoas home in response. *Id.*

113. Rosalba Ochoa recalls that shortly after moving to 27th Street and Arlington, the family was robbed: "They took everything we had. The police were very mean to us, asking, 'Well how could they have taken much if you didn't have anything?'" Declaration of Rosalba Ochoa, dated February 5, 2001, ¶ 15. Gloria Ochoa has a similar recollection of this event:

> Right after we moved into the neighborhood, somebody broke into our house and stole everything we had - which wasn't much. We saw other kids wearing our clothes and our bikes in other kid's yards . . . . When we reported it to the police

they didn't do anything. After that, we felt that we couldn't turn to the police for help because they'd just ignore us again.

Declaration of Gloria Ochoa, ¶ 12.

114. The aftermath of Gloria Ochoa's brutal rape solidified the Ochoa family's feeling of alienation from the police. Gloria Ochoa recalled that:

The attack happened about 7pm and it wasn't until 2am that somebody finally saw me and called an ambulance. I had been unconscious and couldn't walk so they put on the record that I was drunk. My family didn't even know where I was, or what happened, because for three days I was in such bad shape that I couldn't talk. When Sergio found out he came right to the hospital. He was really upset that it had happened so close to the police station.

Declaration of Gloria Ochoa, ¶¶ 6-7. Rosie Ochoa recalls:

I was at home and receiving a phone call from the hospital when Gloria was assaulted and raped. I recall Gloria telling us that when the ambulance arrived, they thought that Gloria was drunk and therefore didn't treat the event as a criminal incident. Gloria had lost a lot of blood.

Declaration of Rosalba Gallegos, dated September 11, 2003, ¶ 10.

115. Not surprisingly, after Sergio Ochoa joined a gang, his alienation from the police only deepened. Sergio's maternal cousin, Jaime Tamayo, visited the family and saw Sergio's relationship with the police firsthand:

The police stopped Sergio at least three times while I was driving in the car with him. The police would stop Sergio, have him get out of the car, search him and then let him go. At first I was very scared during these stops, but Sergio told me not to worry. After awhile, these stops seemed routine. In hindsight, I found it

very disturbing that this was a routine event for Sergio, as if it were actually normal. I wondered at the fact that these abnormal events had become normal for Sergio, because he was so used to seeing them.

Declaration of Jaime Tamayo, ¶ 3.

116. Sergio Ochoa lived in communities plagued by poverty, violence, and discrimination, where he, his family, his neighbors and friends were consistently victimized and seemingly powerless to protect themselves. The police seemed at best indifferent and at worst hostile to their predicament. Under these circumstances, the chaos and disorganization of the communities in which Sergio lived placed him at heightened risk for involvement with gangs and violence.

117. The degree to which Sergio's family and community environments placed him at risk for involvement with gangs and violence is underscored by the nine months that Sergio spent at Camp Kilpatrick when he was 15 years old. When Sergio was removed from the chaotic community and family he lived in to Camp Kilpatrick, where he was supervised by individuals who demanded good behavior from him, Sergio thrived. His grades improved markedly and he stayed out of trouble. Sergio's return to his chaotic family and neighborhood marked his return to the gangs and violence from which he briefly escaped.

E. Sergio Had Extensive School Related Risk Factors and Lacked School Related Protective Factors

118. Apart from connection to family, connection to school is one of the most important factors influencing youth involvement in dangerous behavior. CSAP, 2002, at 27 ("Connectedness to school and family are the most robust and important protective factors"). *See also* Hawkins, *et al.*, 2000, at 4 ("bonding to school is a protective factor against crime.") Recent

studies have emphasized "the importance of the school as a forum in which youth can realize self-efficacy." CSAP, 2002, at 20.

119. By the same token, the lack of connection to school is an important risk factor. "Poor academic performance has consistently predicted later delinquency. Academic failures in the elementary grades also increases risks for later violent behavior . . . . [Y]outh with high delinquency rates at age 12-14 [a]re more likely to engage in violence as adolescents." Hawkins, *et al.*, 2000, at 4. *See also* Wasserman, *et al.*, 2003, School and Community Risk Factors, at 1 ("A specific school risk factor for delinquency is poor school performance.")

> Children with weak bonds (low commitment) to school, low educational aspirations, and poor motivation are also at risk for general offending and child delinquency. It is likely that children who perform poorly on academic tests will fail to develop strong bonds to school and will have lower expectations of success. As a result, academic achievement and school bonding are, in many ways, interdependent.

Id.

120. As a result of his learning and vision disabilities, and the overwhelmingly chaotic conditions in which he was raised, Sergio Ochoa had great difficulty achieving any measure of academic success. Helene Rufran, Sergio's first and second grade teacher, recalls Sergio as a withdrawn and well-mannered child, whose essential sadness and emotional neediness was apparent to her:

> Sergio was a well-mannered child who was prone to daydreaming; a follower, not a leader. As my comments on his school records indicate, Sergio had difficulty using his time well unless he was directed. Sergio needed to belong. He wanted people to like him. He was mischievous but not naughty. He didn't started fights

> or say mean things to others. Sergio would sometimes come up next to me in the schoolyard and take my hand. I would ask him if he was lonely and he would say "Yes." I would swing his hand for a little bit and then tell him to go play. I often held back in giving all the attention that I thought Sergio and many of the children needed, because their needs were so much greater than what I could provide. Sergio did not have a mean bone in his body. I have had a great deal of experience with children who are sly and sneaky, and children who put on an innocent look after having caused some harm. There are some children who don't seem to care when they have hurt others. Sergio was not like that.

Declaration of Helene Rufran, ¶¶ 8-10.

121. In later years, Sergio continued to be well-mannered, but very withdrawn. Sheila LaCour, Sergio's Sixth Grade teacher at Sixth Street school, recalls that Sergio craved invisibility:

> Sergio was a very quiet and shy child who did little to draw attention to himself. It seemed to me as if he wanted to just disappear . . . . There were dominant personalities in the class, but Sergio wasn't one of them. My general impression of Sergio is that he was shy and introverted, and struggling in reading. He was reading at a very low level. I am very surprised to learn that Sergio became an active gang member. He hardly spoke at all and was not a behavior problem . . . . I am saddened by what happened with Sergio. Over the years I have learned that a child in need of help will often not ask for help. In retrospect, I realize that Sergio's actions in making himself virtually invisible was a red flag. He needed

> attention, and not because of his poor communication skills or lack of competence in English.

Declaration of Sheila LaCour, ¶ 3-4, 10. Gwen Fowler, who was an aide to Sheila LaCour at that time, recalled that Sergio "was the tallest member of his class and he always was quiet." Declaration of Gwen Fowler, ¶ 2.

122. Sergio's desire to go unnoticed is not surprising, given the difficulties he faced there. Because of his brain impairments, described in Paragraphs 171-72 below, and his unrecognized vision problems, described in Paragraph 52 above, Sergio had consistent difficulty performing at grade level. Sergio Ochoa's school records document that he was below grade level in most academic subjects in the fourth and sixth grades. In 1975, at age 8, Sergio needed improvement in listening and following directions. His cumulative record card for elementary school documented his need to develop math and language skills, and the fact that he was working below grade level but trying hard. Sergio had difficulty using time well unless directed and had very poor personal hygiene. Sergio had consistently failing grades from age 12 to age 14. In 1983, at age 15, Sergio had a Wide Range Achievement Test score of 78, within the lowest ten percent of the population. At age 24, Sergio Ochoa had a verbal I.Q. of 74, within the mentally retarded range.

123. Sergio's mental slowness was apparent to those who knew him well. Maria Silva, whose children were contemporaries of the Ochoa children, recalled:

> I met Sergio when he was about eight years old. I noticed quickly that he was a child that was very slow. He wasn't very smart in comparison to other kids his age. Even the way he walked was slow. His sister, Gloria, was the same way. You could see that they were different from the other kids in the family. Sergio was always very quiet, more than normal. He wasn't very alert. You could see that he

> didn't understand a lot of things . . . . Since Sergio was so slow, he was a boy that was easy to fool. He was a boy that followed others. He was nothing of a leader.

Declaration of Maria Silva, ¶¶ 2-3, 8. Maria's Silva's daughter, Maria Madrigal, noted that this mental slowness affected both Sergio and Gloria:

> Sergio and Gloria both got teased a lot at school because of how dirty they were and also because they were mentally slow. I don't think they had Special Ed back in those days but both Sergio and Gloria should have been in it. They were slow in everything; they even walked slow. Neither Sergio nor Gloria could read. I had one class with Gloria and she would always sit way in the back to avoid reading. If she were asked to read, she'd say her stomach hurt. Sergio couldn't read either. Sometimes Gloria and I would be looking at fashion magazines at their house. When I asked Sergio to read something he got really nervous and tried to change the subject. Finally, he pretended he was reading but just made up things that weren't on the page. He would always avoid anything that involved reading. This was at an age that he should have known how to read and write. I could see that Sergio couldn't spell either. Sometimes things that he had written were left lying around the house and you could tell he couldn't write correctly. I'd also see his homework lying around the house that he'd never done. It was rare to see either Sergio or Gloria doing their homework.

Declaration of Maria Teresa Madrigal, dated January 3, 2001, ¶¶ 15-18. Jose Silva's recollection is similar:

> Sergio and Gloria just were not very sharp. Sergio was slow in everything. He didn't do well in school because he didn't understand what was going on. Even playing basketball, he was slow. He was slow to react to everything. If I tried to

> talk to Sergio about something - like a math problem - he looked at me like I was speaking Chinese. He couldn't follow what I was talking about; he couldn't even do basic math, like adding. You could see it if we were talking about money. He might be able to add two plus two but if you asked him to add 13 and 17 he couldn't do it. This was when he was already a teenager. He was way behind the other kids his age. Sergio also couldn't read. He'd ask me what something said in a magazine because he couldn't read it. He was like that the whole time I knew him - up to the age of about 16. Sergio's brother and sisters, except Gloria, could handle a conversation. They'd have an answer, or at least a thought. Sergio was lost. He had a hard time even keeping up the conversation. When Sergio didn't know something he'd ignore your question or try to evade it. Or he'd get mad. I would try to talk to him about pure common sense things, like history or stuff you learn in school. Sergio hardly ever even went to school - maybe two or three times a week . . . . You could tell just by looking at Sergio that he was slow or there was something wrong with him . . . . you could see something was wrong with him by the way that he walked - very slowly. And when it came to playing sports, he had no coordination.

Declaration of Jose Silva dated February 4, 2001, ¶¶ 9-13, 25.

124. Gloria and Sergio both needed assistance at school, which they simply never received. In elementary school, teachers noted that Gloria was at times painfully shy, and if at all threatened would retreat. Her grades were very low in all classes. She had great difficulty in mastering any academic skills. In October 1976, at age 11, Gloria was identified as having a learning problem and referred for assessment, but it appears that she never got any special assistance, notwithstanding this referral. A school district medical evaluation in Grade 10 notes

that Gloria had frequent absences, always had slow academic progress and was below grade level. Gloria had periodontal and dental problems. School officials noted that she had a learning disability, borderline intelligence and a mild speech disorder. They recommended special education and a speech evaluation, which she never received. Gloria's school records also demonstrated consistently failing grades in junior high school and high school. Gloria recalls

> I had bad grades in school but was never tested for Special Ed. I don't think there were any programs like that at that time. The work was very difficult for me - especially reading and math. I couldn't keep up. The teachers would call my mom and tell her I needed help in reading but she couldn't help me because she only went to school through the third grade herself and can't read very well - especially in English.

Declaration of Gloria Ochoa, ¶ 17.

125. As noted in Paragraph 52 above, Sergio Ochoa suffered from vision problems that should have been, but never were, identified and corrected by the school system. Moreover, despite his apparent learning disabilities, Sergio Ochoa was never even identified as a child in need of assistance. The reason for this is simple. The quality of the schools Sergio attended was abysmal. According to Sergio's first and second grade teacher, Helene Rufran:

> Union Avenue School was in a very poor neighborhood, with students who faced considerable cultural and financial barriers to learning. Many of the teachers there had given up hope on these kids and were uninterested in really teaching them . . . . The parents of our students often didn't have an education that allowed them to help their kids, and the parents often were overwhelmed by the task of surviving . . . . I don't recall that Sergio had learning difficulties that indicated a need for special education, although he was quite young, and he may have had needs that

> manifested after I taught him. However, if I had believed that Sergio had special needs and requested additional services, it is doubtful that any would have been provided. The administration's standard answer at this time whenever teachers did request special services was that the student had a language problem. They blamed everything on language. The school did not take responsibility for teaching. They blamed the kids . . . . The children I taught at Union Avenue School desperately needed guidance and mentors, and they weren't getting them.

Declaration of Helene Rufran, ¶ 7, 12-13.

126. Scott Schmerelson, the Principal of Mt. Vernon Middle School, was a counselor at Virgil Junior High School in the mid 1980s, when Sergio Ochoa was a student there. Mr. Schmerelson recalls that:

> Union Avenue Elementary School, which Sergio Ochoa also attended, was Virgil's poorest perfoming feeder school. The kids who had graduated from Union Avenue generally were the lowest performing students we got. Typically, their parents had little or no education. We often had a very difficult time placing children who had attended Union Avenue School. Upon entering Virgil Junior High School after seven years of instruction at Union, many of them still did not know how to read or write. They often didn't fit in to English as a Second Language ("ESL") slots because they did speak English, but they couldn't be mainstreamed because they were illiterate.

Declaration of Scott Schmerelson, ¶ 4.

127. The schools Sergio attended were violent, chaotic places where far too much violence and far too little learning took place. Union Avenue School, which Sergio attended

from Kindergarten through Third Grade, was in a dangerous neighborhood. Helene Rufran, Sergio's first and second grade teacher, recalls that

> [t]he area around Union Avenue school was very dangerous. Parents usually walked me to my car after I finished working with kids after school. Three teachers were raped while I taught at Union Avenue School.

Declaration of Helene Rufran, ¶ 6.

128. Sixth Street School, which Sergio attended from age 10-12, also was a violent, dangerous place. Sheila LaCour, Sergio's sixth grade teacher, recalled:

> The Sixth Avenue School had a reputation for being a tough school, as does Hillcrest School, where I currently teach. I left there in 1983. The playground reflected the territorial separation of the area. The school yard at Sixth Avenue School was volatile; there was a lot of fighting. My experience with the kids that I taught at Sixth Avenue School was that school provided some peace for them and represented a safe haven . . . . We had a security guard named Charles who provided security for Sixth Avenue School. It was not at all unusual for a room to be vandalized, broken into or even torched at night and on weekends. The teachers were encouraged to leave the campus as soon as their contracted hours were over. There was resentment towards whites at the Sixth Avenue School. One girl called me a "white bitch." Another student then wondered aloud about what I was going to do in response to the fact that I'd been called "white," without even focusing on the fact that I had been called a bitch. I was one of the only white teachers in the three upper grades–4th, 5th and 6th grade. On another occasion, someone off the streets, who was not a parent, came into the school asking for the "white teacher" and behaving as if he wanted to harm me. Security

had to be called. Working at the Sixth Avenue School helped me realize that I had been living in a "bubble" - I had not been aware, up until that point, that children in Los Angeles were living in such violent conditions. Much of what I taught in class was not academics, but self-control.

Declaration of Sheila LaCour, ¶¶ 5-8.

129. Gwen Fowler, who was an aide in Sergio's Sixth grade class, recalls that when Sergio was a student there:

The gangs very much dominated Sixth Avenue School . . . . The kids either did what they were told by the gang members or their families would be attacked. Gang violence in our neighborhood seemed worse in the summers. There were many fights and a lot of kids were killed. Our kindergarten faced an alley where there was a lot of criminal activity, as well as fights. I recall that one gang member, known as "Cheetah", was found shot and hung on a telephone or light post. Youth Services workers, who wore red shirts, complained of being attacked by gang members. The color red was an identifier for Blood gang members.

Declaration of Gwen Fowler, ¶¶ 4-5.

130. Marion Sims, the Assistant Vice Principal at Sixth Avenue School, taught at the school in the 1970s. Sims recalls that

In 1974, a teacher was raped in her classroom by a junior high kid. By the late 70s, the Sixth Avenue School had plain clothes security guards walking the premises. Gangs dominated the neighborhood where the Sixth Avenue School was. After the kids left the school premises each day, the gangs would come in and take over. The 18th Street gang gained so much control that Queen Anne Place Park was effectively off-limits to non-gang members. The city just recently

> recovered control of the park. The late 1970s was a time of transition for 6th Avenue school. There was forced bussing and a lot of resentment towards newcomers.

Declaration of Marion Sims, ¶¶ 3-4.

131. The next school Sergio attended, Mt. Vernon Middle School, also was wracked by near-constant violence. Phyllis Siegel, a former counselor at Mt. Vernon, recalls that when she started working at Mt. Vernon in 1979:

> the racial composition was 98 percent black. Two percent of the population consisted of Hispanic, Asian and other students. There was only one white family living in the neighborhood. The gang presence at Mt. Vernon was very visible, especially in the lunch area, where gang members staked their turf, bench by bench. The school was very overcrowded; we had more than 2000 students, with a capacity for just 1200. For this reason, we had two lunch periods, back to back. Many kids would ditch one class and take two lunch periods, increasing the number of kids milling about. The lunchtime entertainment was the numerous fights that broke out between boys, girls and boys, and girls. There was always fighting, and we often had as many as ten fights breaking out during a single lunch period. The kids would run from fight to fight. Mt. Vernon was a wild place; overcrowded and very dangerous. Eventually, Mt. Vernon adopted year-round school and school uniforms, and got rid of its 9th grade class. These measures did much to reduce the chaos at Mt. Vernon. However, in the early 1980s, when Sergio Ochoa attended Mt. Vernon, conditions there were particularly bad.

Declaration of Phyllis Siegel at ¶¶ 3-6.

132. Virgil Junior High School, which Sergio also attended, was little different. Scott Schmerelson, who was a counselor there, recalls that

> The community where Virgil Junior High School is located was a very poor and a very sad place. At the time Sergio Ochoa was a student there, Virgil Junior High School has a huge gang presence, which included a very large contingent of 18th Street Gang members, as well as gang members from the Rockwood gang, the Satanas (a Filipino gang), the KKs (Korean Killers), and the Mara Salvatrucha & White Fence gangs.

Declaration of Scott Schmerelson, ¶ 3.

133. Sergio attended Sixth Avenue School from age 10 to 12, when he first joined the Pee Wee Winos clique of the Eighteenth Street gang. At Sixth Avenue School, Sergio Ochoa and his fellow Latino students felt particularly isolated and marginalized on account of their race. Carmen Silva recalls, "We used to get beaten up really bad but were afraid to tell my mother because then she'd go to the school and make it worse. Most of the teachers were black too, so nobody was on our side." Declaration of Carmen Silva, ¶ 11. Elizabeth Ochoa also felt that "[t]he teachers didn't seem to like the Latinos either. They favored the blacks any chance they got." Declaration of Elizabeth Ochoa, dated February 5, 2001, ¶ 2. Jose Silva remembers that when he and his fellow Latinos were assaulted by black students:

> The white teachers wouldn't want to get involved because they were afraid of the blacks too. And the black teachers had no sympathy for the Latinos. They'd just laugh at us. Or they'd treat us like we didn't even exist - making jokes about us while we were standing right there.

Declaration of Jose Silva, dated February 4, 2001, ¶ 19. Maria Madrigal bitterly recalls the favoritism showed towards black students at her school:

> Almost all of the teachers at school were black and they didn't like the Latinos. If we had a problem because of the language they'd call us stupid and tell us we weren't trying. Even in the cafeteria the blacks were favored. If there was some kind of good food they'd make the Latinos wait and give it to the blacks first.

Declaration of Maria Teresa Madrigal, dated January 3, 2001, ¶ 4.

134. Given the chaos, disorganization and violence that pervaded the schools Sergio attended and the school's complete failure to meet his needs for special assistance, it is not surprising that Sergio essentially dropped out of school in his first few years of junior high school. Sergio's failure to achieve even minimal academic success was another significant risk factor contributing to his involvement in gangs and violence.

F. Sergio Had Extensive Peer Association Risk Factors and Lacked Peer Association Protective Factors

135. Sergio Ochoa had extremely poor peer role models. All of his older brothers and sisters were in the 18th Street gang, and they had significant problems themselves. Sergio was a passive, withdrawn, low functioning child who had poor interpersonal communication skills and could easily be led by others. When Sergio joined the Pee Wee Winos clique of the 18th Street gang at the young age of 11, he was a ripe target for the influence of older peers who had already joined the gang, and he remained easily influenced by others through the time of his arrest and current incarceration.

136. The presence of poor peer role models is a significant risk factor for involvement in delinquency and crime:

> Association with deviant peers is related to increased co-offending and . . . the joining of gangs . . . . a number of publications have underscored the role played by siblings in influencing delinquent behavior in both the domains of family and

> peer influence. For example, compared with teens with lower rates of offending, teens with high rates of offending were more likely to have siblings who also committed delinquent acts at a high rate. Some studies speculate that older siblings who are prone to delinquent behavior may reinforce antisocial behavior in a younger sibling.

Wasserman, *et al.*, 2003, Peer Risk Factors, at 1. *See also* Hawkins, *et al.*, 2000, at 5 ("having delinquent siblings by age 10 predicted later convictions for violence").

1. Sergio's Siblings Were Negative Peer Role Models

137. Contrary to the evidence presented at trial, Sergio's siblings provided terrible role models for him. As noted in Paragraphs 79-84 above, all of his siblings were members of, or associated with, the 18th Street gang, and in their parents' absence they held huge gang parties in the middle of the day with up to 100 gang members present; drinking, smoking, and taking PCP. At 13 or 14 year old, Sergio would often be high as well, staggering around the Ochoa house or passed out there.

138. Each of Sergio's siblings had significant problems of their own. Sergio's sister Rosie Ochoa's cumulative junior high school and high school records reflect that she suffered from decayed teeth and had mostly failing grades. In 1990, Rosie pled guilty to embezzlement after she took $5,000 from her employer, a check cashing business. Three of Rosie's children have had difficulty at school. Rosie herself noted that "One of my daughters, Tatyana, is in Special Ed classes at school. We were told that her disability would qualify her to receive SSI except that our family income is too high." Declaration of Rosalba Gallegos, dated February 5, 2001, ¶ 27. Tatyana's school records reflect that her reading and writing skills are far below grade level and that she has global cognitive delays. School records for her son, Ignacio Gallegos, reflect that he has extreme difficulty attending and remaining focused. School Records

for Rosie's daughter, Kristal Gallegos, also reflect that she has been working below grade level and in danger of being retained.

139. Eduardo Ochoa, Jr. also had failing grades in high school. As noted in Paragraphs 59-60, Eduardo, Jr. was withdrawn and emotionally distant from his siblings. Eduardo, Jr's contemporary, Jose Silva recalls that "Eduardo was a very quiet guy. It was hard to get anything out of him." Declaration of Jose Silva, dated February 4, 2001, ¶ 2. In addition, Eduardo, Jr's former wife, Maria Guadalupe Vargas, discussed some of the emotional problems he suffered:

> Although he never beat me, Eduardo Jr. was psychologically and emotionally abusive. Eduardo was jealous to the point of obsession, threatening to kill me and my family. I felt secure enough to leave Eduardo only when my younger brothers became old enough to defend me.

Declaration of Maria Guadalupe Vargas, ¶ 2.

140. Sergio's younger sister, Lisa Ochoa, has suffered from serious emotional problems. Her maternal Aunt Hermila recalls that Lisa, like Sergio and Gloria, had a bed wetting problem, "[A]t age fifteen, [she] was still wetting the bed. Lisa slept with me, and I would wake up all wet. At that time, I thought that Lisa was just careless and dirty but now I know that she had a psychological problem." Declaration of Hermila Tamayo Suarez, ¶ 25. Lisa herself has stated that

> When I was 23 years old I tried to commit suicide by taking a bunch of pills. I was in the hospital for a week or two. I was depressed because I still felt unloved and unwanted by my family and I also felt bad about their situation. My parents

have been victims all of their lives. They still lived in that bad neighborhood and I wanted to help them but I couldn't.

Declaration of Elizabeth Ochoa, dated February 5, 2001, ¶ 14. Lisa's medical records reflect that in 1993, she was admitted to County USC Medical Center after taking an overdose of 40 tabs of aspirin and other cold medications. Lisa admitted to four previous suicide attempts, including one the month before. Her mother and sister noted that Lisa had been disappearing for three or four days at a time, without telling anyone where she is going.

141. As a child growing up, Lisa had serious academic difficulties. In second grade, she was below grade level in almost all academic subjects. In high school and junior high school, Lisa received Ds and Fs in virtually all subjects. Lisa dropped out of school entirely in the 11th grade.

142. During her teenage years, Lisa began running away from home for days at a time. "Lisa was the youngest child in the family . . . . The last time I asked about her, they said she had run away and nobody seemed to know where she was." Declaration of Maria Teresa Madrigal, dated January 3, 2001, ¶ 23. Lisa recalls, "Sometimes I would leave home and stay away for three or four days at a time. I just felt unwanted in the house because nobody paid attention to me." Declaration of Elizabeth Ochoa, dated February 5, 2001, ¶ 13.

143. After dating an 18th Street gang member, Lisa became involved with her current husband, Alejandro Duran. Their marriage is very troubled. Sergio's sister Rosie has stated

My sister Lisa's husband, Alejandro Duran, is abusive and insanely jealous. Recently, Alejandro kept their son up all night talking to him - the child was so tired that he couldn't go to school the following day. I wanted to report Alejandro

to the authorities, but my mother advised me not to because she feared the authorities might take the children away from Lisa.

Declaration of Rosalba Gallegos, dated September 11, 2003, ¶ 12.

144. Sergio's sister Gloria has functioned very poorly from childhood. As noted in Paragraphs 49-52, and 122-24, Sergio and Gloria both had significant learning disabilities and hygiene problems. Maria Madrigal described Gloria in pathetic terms:

I used to go by in the mornings to pick up Gloria for school. She was always running late and I'd have to make her hurry so we wouldn't be late for school. I didn't like to see her getting teased so much so I'd ask her if she brushed her teeth. She'd get defensive, saying, "Are you going to start bugging me?" Gloria would dress in really skimpy and tight clothes. She tried to get attention from the boys by dressing like that but she didn't look good because she had a big belly. I tried to tell her she was attracting the wrong kind of attention but she ignored me.

Declaration of Maria Teresa Madrigal dated January 3, 2001, ¶¶ 25-26

I felt sorry for Gloria. It seemed obvious to me that Gloria had low self-esteem and could easily be influenced by anyone who paid attention to her. During high school, Gloria used to hang out and talk with male gang members, known as "Cholos." Gloria enjoyed ditching school and going off with the Cholos. I don't know who fathered Gloria's five children. I met Gloria and one of her sons seven or eight years ago, when I was visiting the old neighborhood. Gloria's son was about 1 or 2 months old. I asked Rosie who the father was, and Rosie replied, "you don't know him." I felt sorry for Gloria's son because he was stuck living with the Ochoas and it appeared that he did not have a father in his life.

Declaration of Maria Silva Madrigal, dated July 23, 2003, at ¶¶ 5-7.

145. Eduardo, Jr's ex-wife, Maria Guadalupe Vargas, recalls that "Eduardo, Jr.'s sister, Gloria Ochoa, was a person who was childlike, much younger than her years. Gloria never went out of the house." Declaration of Maria Guadalupe Vargas, ¶ 3. Lisa Ochoa recalls that "My older sister, Gloria, would also get teased at school because she was slow. I remember her being really sad, crying, saying that the other kids called her 'retarded.'" Declaration of Elizabeth Ochoa, dated February 5, 2001, ¶ 4.

146. Gloria began having children at a very young age, but has proved incapable of caring for them. Sergio's maternal Aunt Hermila recalls that

> Gloria started having kids, and it was obvious to me that she was not trained or capable of taking care of them. Ofelia and Eduardo ended up taking care of them. I told Ofelia and Eduardo to do something to prevent Gloria from getting pregnant but they didn't, and she ended up with five abnormal children. Rosalba reproached Gloria for bringing so many children she couldn't take care of into the world, and Ofelia for allowing her to do it. On one of my visits to L.A., I walked in to the Ochoa home and found Gloria sitting on the couch, engrossed in a television show and mindlessly rocking her infant daughter in her arms. Gloria was trying to keep the baby from crying. It was a warm day and Gloria had her daughter completely covered with a blanket, head and all. I asked her repeatedly about the baby and Gloria, with her eyes glued to the T.V., answered that the baby was going to sleep. Finally, because I was concerned for the child, I uncovered her head. The baby was running such a high fever that I thought that she was going to go into convulsions. I wanted to take the baby to the hospital, but Gloria responded that she didn't know what to do and they should wait for her father to come home. They took the baby to the hospital when Eduardo came home. Gloria

was not able to fulfill her responsibilities as a mother. Ofelia would yell at her for not feeding the children or doing any chores around the house, and Eduardo would call his daughter a dunce and tell her that she didn't know how to do anything.

Declaration of Hermila Tamayo Suarez, ¶¶ 26-27. The perceptions of Gloria's paternal cousin Guadalupe are similar:

Gloria is not a responsible mother. She does not take good care of her children. She is not a person who knows how to think and reflect on her actions. No one in the family knows why Gloria's parents, who can see that she can't take care of the children, never put any limits on her. Gloria's children are not well. They don't speak well and seemed delayed in their development, compared to the many children that I have been around. My Chicago cousins lacked fluency in Spanish but they could reason. Gloria's kids and Gloria couldn't.

Declaration of Guadalupe Tamayo Ochoa, ¶¶ 6-7. Rosie Ochoa has commented that:

My parents take care of Gloria and her kids. My mother wonders what's going to happen to Gloria and her kids when she and my father die. She worries that Gloria will lose everything because she is so gullible. I have talked to Gloria about getting a tubal ligation, but Gloria has to give consent and she somehow has never gotten around to getting one.

Declaration of Rosalba Gallegos, dated September 11, 2003, ¶ 9.

147. Each of Gloria's children, in turn have had serious cognitive and emotional problems of their own. Gloria has commented:

I have five children, ranging in age from 8 to 14. All of my children are in Special Ed. Classes. My son, Jonathan, who is 11, doesn't look like other handicapped kids. I didn't even know anything was wrong until one of his teachers said, "I

> can't teach kids like that." He was then tested and put in special classes for kids with low IQ. He'll be 12 in July and he still can't hold a pencil correctly or color inside of the lines. He can't read at all. My daughter Jessica, who is 13, didn't talk at all in school until she was in the fifth grade. I don't know why; I guess she just didn't feel comfortable. My son Enrique, who is 8, spent three years in kindergarten. They told me that he's mentally retarded but I don't like to say that around him. They say his mind is like that of a 3 or 4-year-old's. He still can't tie his shoes. I have to do everything for him - dress him, brush his hair. Also, the doctor says that Enrique's only half of the weight that he's supposed to be at his age.

Declaration of Gloria Ochoa, ¶¶ 15-16.

148. School records for Gloria's son Enrique Ochoa, reflect that at age 6, his speech production was muffled and unintelligible and that he had considerable difficulty in accomplishing even the most rudimentary tasks, including writing his name and basic letters and numbers. At age 7, his fluid scale IQ was at 58, his brief IQ was at 68 and his full I.Q. was at 75, all within the mentally retarded range. He defecated in his pants in class 2 to 3 times a week and did not respond to the fact that he had done so, and was still unable to write his name.

149. School records for Gloria's daughter, Jessica Ochoa, reflected that upon entering kindergarten, she was unable to say her first and last name, her address or age, and couldn't follow simple oral directions, read her own name or identify letters or colors. She gave no responses on any of the tests administered and didn't not speak a single word the entire year and did not interact with other students. Jessica did not speak a word to staff in first grade, second or third grade and only began to talk in the fourth grade. She was diagnosed as suffering from

selective mutism. In various tests administered to her over the years, Jessica fell within the lowest 3% of the population.

150. School records for Gloria's son Joey Ochoa reflected that in 3rd grade, he was having a difficult time learning to read and seldom spoke in the classroom. At nine years old, he did not know his alphabet, left right or certain body parts, identified the day as Friday when it is Monday and his speech was very difficult to understand. His vocabulary tested in the lowest 1%. of the population. Although Gloria and Joey had been counseled numerous times, Joey's gums were very poor, red, puffy and lined with debris. At age 12, Joey again tested in the lowest one percent for vocabulary. He didn't like to speak and when he did, it was in two to three word sentences and he seemed almost fearful to speak. His communication was very selective and limited. He scored in the low 60s on the Wechsler Individualized Assessment Test, and in the high 50s on a test of non-verbal intelligence, placing him in the mildly mentally retarded range. At age 12, his auditory processing was below the level expected of a four year old. He could not spell his name correctly when writing it.

151. School records for Gloria's son Jonathan Ochoa reflect that at age six, he was delayed in all areas and only spoke in short words. His speech was unintelligible and too inarticulate to allow scores for testing. On a Vineland Adaptive Behavior Scale, he tested at, or below, 2 years, 6 months in all domains, and at 1 year 8 months overall, in the lowest one percent of the population. Jonathan did not recognize his first name, or know basic shapes and colors and he had mild to moderate developmental delays in all areas. He had never had a dental check-up and Gloria was counseled to take Jonathan to a dentist.

152. School records for Gloria's son Louie Ochoa reflect that although Gloria felt that he was bright and ready for kindergarten at age 4, a transdisciplinary team concluded that issues of environment were affecting Louie's development. In fact, Louie's auditory comprehension

and expressive communication were in the lowest 1% of the population and he showed significant weaknesses in social and emotional functioning. At age 6, Louie still had difficulty labeling items and did not express himself in full sentences, but just yes or no, or short phrases. At that time, his overall developmental levels was in the range of 2 years, 2 months to 6 years with significant weaknesses in social and emotional functioning, and he was significantly withdrawn.

153. None of Sergio's siblings functioned as appropriate or helpful role models. Apart from their own gang membership, they had significant emotional and cognitive problems of their own, which allowed them to provide little useful guidance or support to Sergio.

2. Sergio Had Other Negative Peer Role Models

154. Sergio's neighbor and childhood friend, Francisco Lupercio, has described the circumstances that brought the two of them to both join gangs at the age of 11. Francisco recalls:

> When we were both 11 years old, Sergio and I joined gangs. Sergio's brother, Eduardo, Jr., was a member of the 18th Street gang. Eduardo, Jr. was friends with another neighbor, Angel Silva, who also was an 18th Street gang member. One of Angel's brothers and one of his sisters also joined the 18th Street gang. Angel was at least six years older than Sergio and me. He had a good job and plenty of money. He drove around in a 1963 Chevrolet Impala convertible. He worked at a restaurant in Beverly Hills. Sergio and I both looked up to Angel, and the fact that Eduardo, Jr. also was in the gang made joining a gang seem like a very natural thing to do. Angel introduced both Sergio and me to gang life when we were just 11 years old. The 18th Street gang, which Angel and Eduardo, Jr. were both a part of, didn't dominate our neighborhood. We lived in the Harpies' territory. So Angel drove us to Rancho Park, which was far away from our neighborhood, to

hang out with his fellow 18th Street gang members. Angel bought us clothes from his own money at a surplus store on King and Vermont in the neighborhood where lots of gang members shopped. Sergio went on these trips about three or four times. Angel bought me Converse All Stars and big baggy pants, like the other 18th Street gang members wore. My mom once found a pair of the oversized khaki pants Angel bought me and she tore them up. Angel bought less clothing for Sergio, because Sergio could wear the gang clothes Eduardo Jr. had. I do recall though, that Angel did buy Sergio at least two pairs of baggy khaki pants and a jersey. Angel taught Sergio and me how to spray paint gang graffiti. He had us practice in front of him on sheets of paper. Angel would write on the walls and he showed us his work. Sergio and I were both impressed by how big his graffiti was; in big block letters one to two stories high. We asked Angel how he was able to write so high. Angel told us he used a ladder. Angel's graffiti was very straight and neat. When Sergio and I tried to copy Angel's spray painting, Sergio's efforts were terrible. His graffiti was totally illegible. I used to laugh at Sergio and take his spray cans away. He was so bad, I told him to quit tagging. When I was 11, I joined the Tony Locos clique, which was affiliated with the 18th Street gang. The Tiny Locos hung out at King Boulevard and Menlo, by the Colosseum. After I joined I told Sergio, who had just joined the Pee Wee Winos clique, which was also affiliated with the 18th Street gang. The Pee Wee Winos hung out at Seventh and Broadway, in downtown Los Angeles. Sergio didn't try to influence me to join a gang. We both looked up to older gang members, like Eduardo Jr., and Angel, and I think that is why we did it. Eduardo had been a member of the

> Pee Wee Winos himself when he was Sergio's age, so I guess it's not surprising that Sergio also became one of them.

Declaration of Francisco Lupercio, ¶¶ 3-9.

155. In addition, Sergio's friends and fellow gang members, Juan Lombero and Leland Bradford, sensed that his siblings involvement in the gang played a large part in Sergio's own gang membership. Leland Bradford recalled:

> I joined the [18th Street] gang when I was 13, almost 14 years old. I'm not sure how old Sergio was when he joined. He probably joined because of his older brother or sisters. They were all in the gang. At the time Sergio and I were in the gang most of the kids were older than us.

Declaration of Leland Bradford, ¶ 4. Juan Lombero recalled:

> Sergio lived around 18th Street gang members. All his friends were from the 18th Street gang. His brother was an 18th Street gang member. Everybody knew Sergio was part of the gang, and he had been a member since he was 13. I don't think Sergio had any way out of the gang life.

Declaration of Juan Lombero, ¶ 5.

156. Once he joined the gang, Francisco Lupercio found it difficult to leave:

> It was difficult to escape the gang life because gangs were all we saw. Gang members from 18th Street would hang out in the alley behind my house. The Hispanics as well as a lot of Blacks were in gangs, and a lot of the gang members were selling drugs. As a kid, it seemed that that is all that there was in our neighborhood: drugs and gangs, and a lot of other crazy stuff. Once, when Sergio and I were standing by a restaurant near Exposition and Arlington, we saw a lady who was high on PCP. She was wearing a coat, but was nude underneath.

> She took off her coat and ran from Western to Adams, until the police caught her. Our neighborhood was really out of control, and the only people who seemed to have any control over their lives were gang members.

Declaration of Francisco Lupercio, ¶ 11.

3. Sergio Lacked the Social Competence That Might Have Assisted Him in Resisting Gang Involvement

157. The Web of Influence Model identifies social competence, including assertiveness and strong interpersonal communication skills, as a protective factor against potential involvement with gangs, violence and other dangerous behavior. Sergio lacked the assertiveness and interpersonal communication skills that might have provided some assistance to him in resisting gang involvement. In addition, as noted above in Paragraphs 49-50, 62 and 122-23 above, Sergio suffered rejection by his siblings and peers based upon his very poor hygiene and learning disabilities. This too, placed him at increased risk:

> [R]ejection causes children to have fewer positive social options and, consequently, to become part of lower status and deviant peer groups. Rejected, aggressive children are more likely than others to be members of deviant peer groups and be peripheral members of these groups. Their tenuous sense of belonging may dispose them to engage in more anti-social activity in order to gain standing in these groups.

Wasserman, *et al.*, 2003, Peer Risk Factors, at 2.

158. Sergio Ochoa was a passive, withdrawn, and depressed child, raised in a family in which his basic physical and emotional needs were woefully neglected. As Sergio's sixth grade teacher Sheila LaCour commented, both in his family and at school, Sergio was "virtually invisible." Declaration of Sheila LaCour, ¶ 10. Sergio's very poor hygiene and learning

disabilities made him a target for abuse. In the face of this abuse and neglect, Sergio was sweet natured, but socially withdrawn.

159. Sergio's sister Rosie recalls that Sergio was very easy going and unassertive. "As a child, Sergio was a good little boy. He was not selfish and always wanted to share his toys. He was never mean to anyone." Declaration of Rosalba Gallegos dated February 5, 2001, ¶ 23. Sergio's Aunt Hermila also recalled Sergio as a sweet natured, affectionate youngster:

> I visited the United States around four or five times. The first time was in 1976, when the Ochoas were living on Welcome Street. I stayed for about a month. They were living in two rooms then. Sergio was a normal eight year old boy, playful and very affectionate with me. Of the five Ochoa kids, Sergio and Rosalba were the most affectionate ones.

Declaration of Hermila Tamayo Suarez, ¶ 16.

160. Even in later years, Sergio's temperament was often mild-mannered. His girlfriend, Yvette Ancira, recalls that Sergio:

> was always very kind and respectful towards me. He never raised his voice to me and was never violent at all. I was younger than him and he always pushed me to do my homework and continue in school. He guided me and always wanted the best for the baby and me. He insisted that the baby was not going to grow up on welfare.

Declaration of Yvette Ancira, ¶ 3.

161. Sergio's neighbors and fellow gang members are consistent in describing Sergio as a follower rather than a leader. Maria Silva recalled that Sergio was "a boy that was easy to

fool. He was a boy that followed others. He was nothing of a leader." Declaration of Maria Silva, ¶ 8. Jose Silva recalls that:

> Sergio was . . . . easily influenced by others. He was not smart enough to know what was going on so he'd allow himself to be lead by others. Somebody would come by and say, "let's go," or "come on, we gotta take care of this," and Sergio would be off without hesitation. Their order was his command. You've heard the expression that you can lead a horse to water but can't make him drink. Well, with Sergio you could make him drink until he drowned and he still wouldn't stop unless you told him to. Sergio was influenced by people who took advantage of him. He was the type who could be guided to do a robbery. They could make him the one who would get caught. It was easy to do that with Sergio because he didn't have control of himself. Eduardo [Ochoa, Jr.] was more sharp. If somebody came by for him he'd ask questions, like where are we going, what are we doing. He could say, I'm not going, I don't want to be part of that. Sergio couldn't do that. If somebody asked him to go, he'd go.

Declaration of Jose Silva, dated February 4, 2001 , ¶¶ 14-15 . Fellow gang member Leland Bradford agreed that, "Sergio was a follower, not a leader . . . In a group, Sergio was always a follower. He was never anyone that would come up with an idea. He'd just go along with whatever anyone else wanted to do." Declaration of Leland Bradford, ¶ 12. Gang member Juan Lombero also described Sergio as "more of a follower than a leader. In larger groups he tended not to be the one making decisions, he just went along." Declaration of Juan Lombero, ¶ 3.

162. Growing up in his family, Sergio was surrounded by negative peer role models, and he was not a particularly assertive, or socially competent youth. Under these circumstances,

peer association risk factors placed Sergio at increased risk for involvement with gangs and violence.

G. Sergio Had Extensive Individual Risk Factors and Lacked Individual Protective Factors that Might Have Protected Him From Involvement in Gangs and Violence

163. As noted above, Sergio lacked the supportive social institutions or family involvement that might have protected him from involvement in the gangs that dominated his neighborhood. Research has shown that:

> exposure to even a substantial number of risks factors in a child's life does not necessarily mean that substance abuse of other problem behaviors will inevitably follow . . . . The reasons for this . . . is the presence of protective factors that reduce the likelihood that [problems behaviors] will develop.

CSAP, 2001, at 2. Unfortunately, Sergio lacked protective factors that might have protected him from the impact of the overwhelmingly negative influences in his life.

164. Scientists working in the field of risk and prevention have described as "resilient" those children "whose internal protective characteristics overcome the influence of internal risk." CSAP, 2002, at 11. Typically, these resilient youth feel a bond with their family, their school or some person or institution who shares a stake in their future:

> Bonded youth have a stake in the external environment. They believe that interacting and accomplishing in that environment are worthwhile and contribute to a positive future. Thus developing a sense of connectedness to meaningful segments of the environment that provide and support positive opportunities is an important aspect of the internal protective orientation of young people in high risk environments . . . . Positive behavioral outcomes among youth reflect a tight

> interweaving of external and internal protective factors. Connectedness to family and to school forms the core of this protection. Meaningful involvement is key to connectedness. When the external environments of family and school offer youth involvement that is challenging, provides recognition, and is rewarding, these environments serve as powerful protective factors against substance abuse [and other dangerous behaviors.]

CSAP, 2002, at 11, 21.

165. Prior to his involvement in gangs, Sergio Ochoa was not an aggressive or hostile child, nor was he prone to misbehavior. As noted in Paragraphs 159-60 above, his relatives and friends described him as shy, sweet-natured and affectionate with them, even in later years. His sixth grade teacher, Sheila LaCour, was surprised to hear that he became an active gang member: "He hardly spoke and was not a behavior problem." Declaration of Sheila LaCour, ¶ 4. Sergio's first and second grade teacher, Helene Rufran, recalled that Sergio:

> wanted people to like him. He was mischievous but not naughty. He didn't start fights or say mean things to others . . . . Sergio did not have a mean bone in his body. I have had a great deal of experience with children who are sly and sneaky, and children who put on an innocent look after having caused some harm. There are some children who don't seem to care when they have hurt others. Sergio was not like that.

Declaration of Helene Rufran, ¶¶ 8, 10.

166. Sadly, however, Sergio Ochoa's life circumstances left him unconnected to any person or institution that might have helped him resist the violence that pervaded his community, and without the capacity to imagine a positive outcome for his own life. His family provided him with no protection from gang involvement. Sergio's parents were largely absent from the

home, and when they were present, his alcoholic father was an extremely disruptive influence, draining the family finances, promoting intra-family conflict and engaging in probable incest with Sergio's sister Gloria. Sergio was virtually invisible to his parents and his teachers, who never addressed his needs for special assistance in school, for basic hygiene, or even for assistance with his failing vision. He grew up in a dark, filthy, conflict-filled house, where his parents and siblings didn't communicate or care for each other. Sergio's siblings were openly affiliated with the 18th Street gang; they tattooed themselves and threw huge raucous gang parties and his parents took no effective steps to intervene to protect them from gang involvement.

167. The community where Sergio lived was extremely violent. As one of the few Latino families in an almost entirely black neighborhood, Sergio and his siblings were targets for particular abuse. Members of Sergio's family were raped and repeatedly assaulted and robbed and the police did little or nothing to protect the Ochoas or apprehend the people who had victimized them.

168. The schools that Sergio and his siblings attended were extremely violent places. They were overcrowded, dominated by gangs, and incapable of providing Sergio with the assistance that he needed in order to achieve any measure of academic success.

169. Sergio's siblings and peers provided terrible role models for him. His siblings were all gang-involved and suffered serious emotional and academic difficulties themselves, and Sergio was befriended by older gang members, who offered him the only emotional support he had ever known.

170. This multiplicity of external risk factors placed Sergio at very high risk for involvement with gangs and violence. "The risk of violence is . . . compounded by the number of risk factors involved . . . . The larger the number of risk factors to which an individual is

exposed, the greater the probability that the individual will engage in violent behavior." Hawkins, *et al.*, 2000, at 7.

171. In addition, Sergio lacked the emotional resources that might have protected him from gang involvement. Neuropsychological tests administered to Sergio Ochoa have revealed "consistent evidence of impairment in the right hemisphere of his brain, particularly in an area of the brain known as the somatosensory strip." Declaration of Patricia Perez-Arce, Ph.D., dated September 15, 2003, ¶ 26. According to Dr. Patricia Perez-Arce, Mr. Ochoa:

> has significantly impaired abilities in auditory and tactile perception with the left side of his body, in visual-spatial memory functions, in non-verbal reasoning, and in verbally mediated conceptual thinking and problem solving. Using the terminology employed by the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, TEXT REVISION (DSM-IV-TR), Mr. Ochoa suffers from Cognitive Disorder Not Otherwise Specified (294.9). In essence, Mr. Ochoa has difficulty perceiving, understanding, and recalling information received by the right hemisphere of his brain (from the left side of his body) through physical touch and auditory stimulation, in integrating visuospatial information, in understanding the meaning of abstract concepts, and in spontaneously analyzing and solving problems through reasoning.

Id. at ¶ 25.

172. As Dr. Perez-Arce noted, Sergio Ochoa's neurological deficits greatly compounded his other problems:

> During his childhood, Sergio Ochoa's neuropsychological deficits and his undetected poor vision left him at severe risk for academic failure. Sergio Ochoa began failing in school during the transition from elementary school to junior high

school, at a time when academic demands typically become more rigorous. By this point, Sergio Ochoa was multiply impaired. He suffered deficits in his ability to problem solve and grasp abstract concepts, to retain visual-spatial information of a social nature, and in his sensory perception . . . . Mr. Ochoa's neurological disorders limited his ability to recognize opportunities to escape his grim life circumstances. As a result of his impairments, Mr. Ochoa has difficulty generating imaginative and functional solutions to his own problems. Moreover, he was not only physically and emotionally neglected by his primary caretakers but also was surrounded by negative, rather than positive role models. Sergio's daily life, in a relentlessly hostile environment where he, his family and his friends were never far away from danger, reinforced his natural difficulty in imagining positive outcomes that differed from his present reality . . . . Under these circumstances, it was predictable that Mr. Ochoa would fail to escape the gang violence that consumed his neighborhood. Finally, Sergio Ochoa's brain impairments compromised his ability to make good decisions and think independently in highly stressful, emotional situations. Under the least stressful circumstances and without opportunity for rehearsing, Mr. Ochoa lacks the ability to analyze and recall complex unfamiliar situations accurately, to generate effective solutions to common problems, and to understand how present actions may affect future behavior or outcomes. Under more stressful circumstances, Mr. Ochoa is significantly more likely than most people to follow the directions of others, to react simplistically and emotionally to the circumstances that confront him, and to fail to perceive opportunities to escape peril to himself and others.

Id. at ¶¶ 36, 38-39.

173. Sergio's neurologic impairments also placed him at increased risk for involvement in gangs and violence. "[E]arly neurological deficiencies, when combined with the failure of family, school and community to provide adequate socialization, lead to early onset offending that persists through life." Wasserman, *et al.*, 2003, School and Community Risk Factors, at 1.

174. In addition, Sergio Ochoa suffered symptoms of mental illness that further limited his capacity to escape involvement in gangs and violence. Based upon my interviews with Sergio Ochoa and my review of extensive documentation regarding his medical history, past psychological examinations, and background, I have concluded that he suffers from symptoms consistent with Post Traumatic Stress Disorder ("PTSD") and symptoms of depressive illness. PTSD is characterized by: (1) exposure to traumatic events in which a person experiences, witnesses, or is confronted with an event or events that involve actual or threatened death or serious injury or threat to the person's physical integrity, and experiences intense fear, helplessness or terror; (2) the re-experiencing of the traumatic event through recurrent intrusive recollections, distressing dreams, flashbacks, or intense psychological reactions; (3) avoidance of the trauma and numbing of general responsiveness; (4) symptoms of increased arousal; and (5) significant distress or impairments in functioning.

175. From early childhood, Sergio experienced and witnessed a significant number of traumas, which included exposure to violence, savage beatings by peers, constant threats to his well-being from rival gang members, and the rape and assault of his sister. Sergio also witnessed and was exposed to his father's alcohol abuse and conflict between his mother and father, and probable incest between his sister Gloria and his father.

176. He suffered early symptoms that may have been a reaction to this, including bed wetting, emotional withdrawal and neediness from early childhood. He suffered additional impairments in functioning that appear to be attributable, in part, to the traumatic life experiences

that he suffered growing up. From a young age, Sergio had significant difficulties in school and in maintaining his own basic hygiene. In addition, Sergio's constant exposure to traumatic and violent events caused him to developed a foreshortened sense of his own survival; in my interview with Mr. Ochoa, he repeatedly stated that he never expected to live past the age of twenty-five.

177. During my interviews with him, my overall impression of Mr. Ochoa was that he was emotionally numbed by his life experiences. He had a poor recollection of his own life history and denied traumatic events in his life in a way that suggested emotional numbing and dissociation. For example, he denied his father's alcohol abuse and the extent of his family disorganization, although numerous family members and friends have corroborated his father's alcohol abuse and described his family's extreme disorganization.

178. The trauma and symptoms of PTSD that Sergio Ochoa suffered often lead to increased arousal and irritability. Stress reactions to extreme violence often produces hyper-vigilance and a "hair trigger" response to perceived dangers and provocations. In individuals suffering from PTSD, the hyper-arousal resulting from past traumatic events can lead to unpredictable, angry behavior. Individuals who suffer from PTSD are at greatest risk when they are overstimulated, including when they are subject to external stressors. The events that led to the crimes in question, particularly the attempts on the lives of Mr. Ochoa and the near fatal shooting of his two friends, Luis Magallanes-Martinez and Oscar Quijada, were extremely stressful events, that were likely to produce such a hair trigger response.

179. In addition, Mr. Ochoa has long suffered consistent symptoms of depressive illness, which include his chronic, severe hygiene problems and emotional withdrawal in early childhood. In his youth, Sergio had very low self-esteem and difficulties with concentration. In 1991, when Mr. Ochoa was given the Minnesota Multiphasic Personality Inventory Scale, he had

elevated levels on the psychasthenia, schizophrenia and hypomania scales. (RT 3576). These results suggest that Sergio Ochoa continued to suffer from depression and anxiety.

180. Sergio Ochoa's ability to cope with traumatic events was compromised by his life circumstances. His main coping method was denial; during my interviews with him he seemed unable to connect to his past traumatic experiences, to accurately describe events that happened to him in childhood, or relate how he felt about any of the profoundly difficult circumstances that he encountered growing up. Instead, his response to traumatic events appears to have been to help others who experience trauma. For example, Mr. Ochoa reported, "I will always help someone even if it is negative for me, I can't stand to see other people suffer." He reported that his mother would tell him, "Every one takes advantage of you because you never can say no when they need something even if you need it more."

181. Research has revealed that children exposed to chronic and severe violence develop cognitive structures associated with poor impulse control, forethought, and problem-solving and coping skills. In addition, Mr. Ochoa encountered significant acculturation stress that further eroded his coping skills. Factors associated with acculturation stress include poor language development, cultural isolation, poor interaction with the social system around them, discrimination, and family instability.

182. Because of the extent of the extreme neglect and trauma that he suffered, Mr. Ochoa was at high risk for developing serious mental health disorders. He evidences symptoms consistent with PTSD and symptoms of depressive illness that are a result of his severe, traumatic, childhood experiences. Sergio's ability to cope with the trauma he suffered was further compromised by his cognitive deficits, family disruption, and poor community and societal support. His risk for involvement with gangs and violence could have been decreased if

he had been referred for appropriate mental health treatment, followed-up in school for his learning disability, and enrolled in a mentoring program, but unfortunately, none of this occurred.

183. Mr. Ochoa was at significantly high risk for problem behaviors. He had a myriad of significant risk factors and lacked meaningful protective factors. As a result, he was at extreme risk for gang involvement, violence, drug use, school drop out, and delinquency. The circumstances of the crimes that led to Sergio's conviction and death sentence are, at least in part, the unfortunate but predictable product of the traumatic circumstances of Sergio's youth and early adulthood, and the lack of positive intervention that could have buffered him from the effects of the profound neglect and violence that he suffered.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

Dated: September 18, 2003

Francisco Gomez, Ph.D.

APPENDIX T

DECLARATION OF FATHER GREGORY BOYLE, S.J.

I, Father Gregory Boyle, S. J., declare:

INTRODUCTION

1. I am a Catholic Priest and a member of the Society of Jesus religious order, commonly known as the Jesuits. I became a Jesuit in 1972. Shortly thereafter, I began working in Bolivia as a missionary. In 1984, I was ordained as a priest. From 1986 to 1992, I was pastor at Dolores Mission Church in Boyle Heights. Subsequently, I have dedicated my career and energies to working with "at risk" youth. The children who I work with suffer from poverty, homelessness, violence, crime, physical and mental illness, disorganized family structures, child abuse, illiteracy, alcoholism, drug dependence and drug addiction, malnutrition, and lack of educational, medical and financial assistance.

2. The Dolores Mission Church is the poorest Catholic parish in the archdiocese of Los Angeles. It is located in the Boyle Heights area, between Pico Gardens and Aliso Village housing projects, which had been the largest group of public housing west of the Mississippi, before remodeling and demolition that began in the late 1990s. When I was pastor at Dolores Mission Church, this area had the highest concentration of gang activity in the entire city of Los Angeles.

3. Since 1992, I have been the director of Jobs for the Future, a non-profit agency that includes a gang rehabilitation program, employment referral center, and economic development program. I also direct Homeboy Industries, a program that offers employment to gang members who forswear gang involvement, which is comprised of four businesses. In addition, we offer free tattoo removal, counseling, case management, and a variety of other

services for young men and women who come from different neighborhood gangs in Los Angeles, to help them re-direct their lives. My work with gang members has been the subject of a book entitled FATHER GREG & THE HOMEBOYS: THE EXTRAORDINARY JOURNEY OF FATHER GREG BOYLE AND HIS WORK WITH THE LATINO GANGS OF EAST L.A. (Hyperion Books 1995) by Celeste Fremon, a reporter for the Los Angeles Times. In 2000, the California Wellness Foundation awarded me their California Peace Prize, a $25,000 grant awarded to "honor[] individuals whose outstanding efforts have helped prevent violent deaths and injuries in communities across California." California Wellness Foundation Announcement at http://www.tcwf.org/press_room/2000/english/index.htm.

4. Dolores Mission Church is located in the Hollenbeck police precinct, which has 60 gangs and 10,000 gang members. In conjunction with my work at the Dolores Mission, I regularly visit 25 different detention facilities, including probation camps, juvenile halls, prisons, and youth authority facilities, where I celebrate Mass and have Catholic services.

5. Over the course of nearly two decades, I have worked with thousands of gang members and their families. I have taught them, counseled them, assisted them in obtaining a wide range of social services, and have organized and supervised community social functions. My work has required me to develop the trust of gang members in order to help them to break free of their relationships with gangs. In order to participate in our programs, gang members must follow three basic rules: they can't associate with other gang members (no hanging), they can't sell drugs (no slanging), and they can't participate in other gang related crimes (no banging).

6. I have helped youth from many disenfranchised neighborhoods within the Los Angeles area. As a result, gang members have viewed me as both neutral and benign, and have largely been willing to cooperate with my efforts. Consequently, I have been able to interact with gang members and travel freely in extraordinarily dangerous situations with children and adolescents whose lives would otherwise be at risk by rival gang members. Over the course of my work with gang members, I have acquired substantial familiarity with gang culture and gang life among street gangs in Los Angeles.

7. Since 1988, I have had to bury 118 people who have been killed in gang warfare. I knew each of these men and women personally, because my work as a pastor has enabled me to develop individual relationships with gang members.

8. I have been asked by counsel for Sergio Ochoa (hereinafter "Sergio" or "Mr. Ochoa") to discuss with them the factors in Mr. Ochoa's life that may have drawn him to join a gang, and the accuracy of the testimony of the prosecution's purported gang expert, Detective Michael Berchem.

9. I have reviewed: (1) excerpts from the transcripts of Mr. Ochoa's trials; (2) declarations by, and reports of, interviews with various persons who have known or who are related to Sergio Ochoa; (3) school, court, employment and medical records for Mr. Ochoa and various members of his family; and (4) the declarations of various experts who have examined Mr. Ochoa and his background. In addition, on August 25, 2003, I interviewed Sergio Ochoa over the course of three hours.

10. From my review of this information and my interview with Mr. Ochoa, I have concluded that Mr. Ochoa faced life circumstances that made it extremely likely that he would

join a gang, and that the testimony of the prosecution's purported gang expert, Detective Michael Berchem, was inaccurate.

DISCUSSION

A. Mr. Ochoa Faced Life Experiences That Made It Extremely Likely That He Would Join a Gang

11. In his comprehensive declaration concerning the circumstances of Sergio Ochoa's life, Dr. Francisco Gomez has observed that:

> Sergio Ochoa was raised in a family setting where he experienced and witnessed poverty, parental substance abuse and inter-family conflict, profound physical and emotional neglect, and probable sexual abuse. There was little or no communication or trust between his family members, no effective parental supervision, and few if any clear rules or parental expectations for Sergio to meet. Sergio was raised in an extremely violent and dangerous neighborhood, as a child in one of the few Latino families in a black neighborhood, where he and his siblings and parents were repeatedly victimized by violent crime, and discriminated against on account of their race. Sergio attended schools where violence was endemic, and where his needs for basic help, including glasses for his poor vision and assistance to help him overcome the effects of his learning disabilities, were never recognized. His peer role models were overwhelmingly negative; Sergio's three older siblings, and his younger sister were all involved in the 18th Street gang, and he was recruited by an older gang member to join the gang when he was just 11 years old. Finally, Sergio had few individual resources

> that would have helped him in resisting gang involvement. Sergio was a passive, learning disabled, traumatized child, who lacked effective significant social skills or emotional resources, a supportive family environment or supportive social institutions. Sergio's involvement in the gang further traumatized him; he suffered multiple life threatening assaults and injuries and experienced the death and injury of many friends and family members. Sergio suffered from brain impairments, symptoms consistent with Post Traumatic Stress Disorder, and symptoms of depressive illness that further compromised his ability to cope with the extraordinary number of stressors in his background. Given the presence of so many overwhelming risk factors and the stark absence of protective factors, Sergio was at extremely high risk for the gang involvement and violence that led to his conviction and death sentence.

Declaration of Francisco Gomez, Ph.D., ¶ 18.

12. Based upon my conversations with Sergio Ochoa, my review of voluminous records regarding his life, and my extensive experience with gang members during the course of the last two decades, I fully agree with Dr. Gomez's conclusions. Most people join gangs in childhood, under the age of 18, and sometimes, as in the case of Sergio Ochoa, as young as 11 years old. Gang experts sometimes talk about the glamour of gang life as a reason why youth join gangs. Gang members themselves sometimes talk about the sense of belonging they experience in a gang as the reason they were attracted to gang membership in the first place. In my experience, however, the forces that impel youth to join gangs are overwhelmingly negative experiences that push them away from their homes, their school and their communities, rather

than glamour or any sense of belonging that gangs allegedly offer youth in low income neighborhoods that might pull them into a gang.

13. The perilous and unhappy circumstances of gang life are well-known throughout the community in which I work; if you join a gang, you put your life and the lives of your family members at risk and effectively confine yourself to a postage-stamped size geographical area where you can safely travel. As Dr. Gomez has discussed in his declaration, gang members face circumstances that approximate those faced by participants in war. Declaration of Francisco Gomez, Ph.D., ¶ 104. Juan Lombero, who was a member of the 18th Street gang, has recalled that, "Of the people that I knew, half have been killed and the other half are in prison. Very few of us made it out and are doing okay." Declaration of Juan Lombero, ¶ 6. This statement is echoed again and again in the witness statements I have reviewed on behalf of Sergio Ochoa, and in my experience, this is an extremely common observation among gang members generally.

14. As Dr. Gomez has extensively documented, gang members face the prospect of constant unexpected beatings and the strong possibility of early, violent deaths. Declaration of Francisco Gomez, Ph.D. ¶¶ 101-10. Once a child joins a gang, his life is circumscribed and in constant danger, and he can travel through very few neighborhoods safely. The witness statements I reviewed on behalf of Sergio Ochoa repeatedly echoed this theme as well. For example, Oscar Montes-Hernandez, who was a member of the 18th Street gang along with Sergio, recalled that during his years as an active gang member:

> There were . . . enemies who lived close to my home. You had to constantly watch your back since you could easily run into someone. I lived between a probation and parole office which increased the chances of running into an

adversary. Sergio lived in that area as well. It was important to watch what you wore. You kept walking whenever a car drove by. That was all part of "gang banging." If you were confronted by someone, you just dealt with it. I would feel safer if I was carrying a knife or gun for self-defense. I of course preferred to have a few of my homies with me. That made me feel safer too. I recall getting jumped three different times. The first time I was crossing the street from my house to a gas station. Three members from a rival street gang, Easy Riders, drove by. They jumped me at the gas station. I was saved by the gas station attendant who broke up the fight. The second time was when my car broke down, and I had to walk through Crazy Riders territory. Two guys from Crazy Riders jumped me and hit me with a bat. They aimed at my head but I was able to block the bat with my hand. I did, however, get bruised up. The third time was in a park when I got jumped by some guys.

Declaration of Oscar Montes-Hernandez, ¶¶ 13-16.

15. Under these circumstances, gangs offer little in the way of glamour to the youth who join them. In addition, any sense of belonging that they offer is generally unappealing to children who have meaningful emotional support outside the gang. Gangs are bastions of highly conditional love; one false move, one mistake, and you can face the wrath, rather than the support, of your fellow gang members.

16. In order to join a gang, youth have to ask to join. With very few exceptions, they are then jumped in, and suffer a beating at the hands of their fellow gang members as part of their initiation. Sergio Ochoa's friend, Francisco Lupercio, recalled that:

> Sergio and I both were jumped into the 18th Street gang itself when we were 13 years old. Sergio joined first. I was "jumped into" the gang by three members of 18th Street. To initiate me in as a new gang member, they beat and kicked me as hard as they could. I was supposed to just stand there and take it, and I did, although I was bloody and bruised for weeks afterwards. While other gangs would beat you for 13 seconds, 18th Street would beat you for 18 seconds. If the person getting jumped in fought back, then four guys would beat you. Sometimes the person counting would count real slow or would purposefully lose track of counting and start counting over again. This was the norm for getting jumped in.

Declaration of Francisco Lupercio, ¶ 10.

17. In my experience, gangs are not attractive to even minimally adjusted children; they are filled with despairing and despondent youth, who have internalized the adage that misery loves company. In the two decades I have worked with gangs, I have never yet met a hopeful child who joined a gang. In my experience, gang members are people for whom the present isn't compelling, and for that reason, they don't care if they put themselves in harms way.

18. Typically, youth who join gangs are asked whether they want to be jumped in and decline repeatedly, as many as four or five times, before they finally join. Under ordinary circumstances, young people, even in early adolescence, have a strong instinct that guides them to refuse gang membership; they sense the constant emotional terror that awaits them in the gang.

The moment of joining a gang tends to be one of hopelessness and utter despondency, when a child's experiences are so bleak that he no longer cares about his life and when it will end.

19. As detailed in Dr. Gomez's declaration, at the time Sergio joined a gang, when he was just 11 years old, he lived in an out-of-control family, and attended an out-of-control school, in an out-of-control community. In the face of such a disordered life, it may well have appeared to Sergio that the only people who had any sense of control around him were the gang members who his siblings brought into his house when his parents were away. As Sergio's childhood friend, Francisco Lupercio, commented:

> It was difficult to escape the gang life because gangs were all we saw. Gang members from 18th Street would hang out in the alley behind my house. The Hispanics as well as a lot of Blacks were in gangs, and a lot of the gang members were selling drugs. As a kid, it seemed that that is all that there was in our neighborhood: drugs and gangs, and a lot of other crazy stuff. Once, when Sergio and I were standing by a restaurant near Exposition and Arlington, we saw a lady who was high on PCP. She was wearing a coat, but was nude underneath. She took off her coat and ran from Western to Adams, until the police caught her. Our neighborhood was really out of control, and the only people who seemed to have any control over their lives were gang members.

Declaration of Francisco Lupercio, ¶ 11.

20. When Sergio joined the 18th Street gang, the conditions of his life were appalling. The Ochoa house was filthy, dark and overcrowded. Declaration of Francisco Gomez, Ph.D. at ¶¶ 47-48. There was little or no communication between the Ochoa parents and children, or

among the siblings themselves. *Id.* at ¶¶ 57-60, 63-67. Sergio's father Eduardo, Sr. was often drunk and when he was at home, he was loud, argumentative, and disruptive. *Id.* at ¶¶ 36, 38-39. In addition, as Dr. Gomez has noted, there is a substantial likelihood that Eduardo, Sr. had an incestuous relationship with Sergio's older sister, Gloria. *Id.* at ¶¶ 69-76. Sergio literally fled from his home to the streets to avoid the chaos in his house. His sister, Lisa Ochoa recalled:

> Sergio disliked our father's drinking very much. When Sergio came home and found our father drunk, he would leave the home and go out into the streets. Sergio may have been as young as ten years old when he started taking off this way.

Declaration of Elizabeth Ochoa dated September 10, 2003, ¶ 4.

21. Sergio Ochoa suffered the sort of desperate life circumstances that are common among the people I know who have joined gangs as pre-adolescents. The four walls of Sergio's home, which should have held him in, pushed him out onto the street and into a gang.

22. In the chaotic and violent neighborhoods in which I work, children who don't get attention are much more prone to join gangs. Sergio Ochoa had virtually no attention. As his sixth grade teacher, Sheila LaCour commented, Sergio was invisible in school (Declaration of Sheila LaCour, ¶ 10) and, as Dr. Gomez's declaration makes clear, the Ochoa parents were profoundly inattentive. Declaration of Francisco Gomez, ¶¶ 42-67. One neighbor, Maria Madrigal, recalled:

> All of the kids in that family were sort of loners. There wasn't any interaction between any of them. Each child was in their own little world - in a room watching TV, or playing by themselves. The only interaction I saw between them

> was arguing over little things, like who was at the stove first to get some food. Nobody ever said hello or goodbye to each other. They'd just come and go like the others didn't exist. Sergio was the most withdrawn in that family. It was like he was there physically but not mentally. Nobody even noticed he was there. His family didn't pay any attention to him at all. In that family, there was no interaction with the parents either. They were illiterate and were never home - they worked even on weekends - so the kids were left alone in the house all the time. They never played outside. Sergio's family didn't have meals together. Sometimes there would be some food left on the stove and each one would just go eat it whenever they were hungry. The mother would come home at 6:30 or 7 at night and fix dinner sometimes but nobody would eat. Both parents would come home from work exhausted and didn't interact with Sergio at all. The mother would go into the kitchen to cook and the father would sit on the couch, get fed and watch TV. Sometime he would play with the girls, especially the youngest, Lisa, but he never gave any attention to Sergio. Neither parent ever asked Sergio how his day was or anything like that. It seemed like they showed more love to the dogs than to Sergio.

Declaration of Maria Teresa Madrigal, dated January 3, 2001, ¶¶ 8-12.

23. By the same token, the antidote to gang involvement is attention. When I ask young people who I work with why they don't join gangs, I hear a single, common theme: their mothers or fathers simply wouldn't stand for it. To prevent their children from drifting away, vigilant parents pursue them, and as children gravitate towards gangs, they look back to see if

they are being pursued. Sergio and his siblings weren't pursued by their parents. Each of the Ochoa joined the 18th Street gang, and became tattooed, one after another, and their parents took no effective actions to stop them. As Dr. Gomez has detailed at length, there was little or no parental supervision in the Ochoa house. Declaration of Francisco Gomez, Ph.D., ¶¶ 78-87.

24. Typically, gang members know which mothers and fathers are likely to tolerate them congregating, and where they can go. The fact that the Ochoa house became a place where huge numbers of gang members congregated and partied gives a sense of how completely inattentive his parents were. As one neighbor of Sergio's, Jose Silva, recalls:

> [t]he Ochoa family was totally dysfunctional. The parents didn't offer any guidance or discipline to the kids at all. The father was not around most of the time but even when he was home he was like butter - you could run right over him. He'd tell Eduardo [Ochoa, Jr.] to take the trash out and Eduardo would answer him back, "You take it out." The mother was the same way. You could put both the father and the mother together and you still would come up with less than a full person, in as far as guidance and discipline. I was just a kid but I could see it was wrong. There was a lot more guidance in my house even without a father . . . . All of Sergio's role models were bad rather than good, starting with his older brother and sisters who were all in the gang. His brother and sisters would have huge gang parties at the house while the parents were at work. There would be 50 to 100 gang members there in the middle of the day partying. They would be drinking, smoking marijuana, smoking PCP. Sergio would be right there, seeing everything. It wasn't a good environment for him when he was a little kid.

> I would see Sergio high sometimes, passed out on a couch or in the car, or he'd be staggering around. He was only 13 or 14 years old. When the parents came home from work and found a party at home they wouldn't even do anything about it. The kids would tell the parents to leave. The father would never take a stand. He'd just turn around and leave the house. With his brother and sisters, and their parties, Sergio was surrounded by gangs.

Declaration of Jose Silva, dated February 4, 2001, ¶¶ 4, 17-19.

25. Typically, if gang members survive long enough outside prison, they mature out of gang involvement sometime in their 20s. The same misery and hopelessness that leads youth into gang involvement can keep them there for many years however, and it can be particularly hard for youth to find the strength to break away from the gang while they remain in the community where their fellow gang members reside. Very few gang members ever formally leave the gang. In the two decades I have worked with gang members, I know of only five gang members who have been "jumped out," which is a requirement in order to formally leave the gang. The process of being jumped out requires a particularly savage beating in which large numbers of gang members participate, and can result in very serious injuries or even hospitalization to the person leaving the gang. More commonly, as gang members mature and feel less peer pressure to participate, they simply stop involving themselves in gang activities.

26. It is impossible to know what life event or circumstance will cause an individual to be ready to leave a gang. Some life event generally gives them enough hope or strength to leave. My organization is designed to assist gang members in imagining a positive future they can't see, in order to assist them in making this transition. In Sergio's case, he made tentative

and unsuccessful steps to leave gang activity behind, which I would have viewed as hopeful if he were to come to my organization for assistance. Sergio completed a course of study in dental technology, and he left the State of California to go to Mexico and later to Oregon in apparent attempts to have a real life apart from the gang. In addition, when Sergio was at Camp Kirkpatrick, receiving three meals a day and being supervised by adults who provided some structure and actually paid attention to him, Sergio thrived. At Camp Kilpatrick, Sergio was housed with gang enemies, in a place with ample opportunities to become provocative with them, but he did not do so. While Sergio's efforts to break free from gang life were ultimately unsuccessful, they showed some desire on his part to have a better life, which is the necessary first step towards ending involvement with gangs and violence.

B. The Testimony of the Prosecution's Purported Gang Expert Was Inaccurate

27. At Sergio's trial, the prosecution called an alleged gang expert, Detective Michael Berchem. He testified that gangs have: (1) associates, who are not heavily involved in criminal activities; (2) ordinary gang members, who are involved in some criminal activities "but not the real hard core stuff;" and (3) hard core gang members, who will retaliate for shootings "as soon as somebody from his gang gets shot." Reporter's Transcripts of Proceedings in *People v. Ochoa*, Los Angeles Superior Court Case No. BA 020873 (hereinafter "R.T.") at 1238. Detective Berchem testified that the hard core gang members are tattooed from head to foot (R.T. 1239) and that based upon his tattoos, Sergio Ochoa was a hard core gang member (RT 1245).

28. Over the course of the last decade, I have often heard similar testimony from policemen who have qualified as gang experts, and have watched police training videotapes that made similar generalizations. In my experience, while these generalizations are commonly

made, they are inaccurate. There are no hard and fast rules, or gang bylaws, that allow for the kinds of generalizations made by Detective Berchem. Contrary to his testimony, I have known many very involved and dangerous gang members who have no tattoos. The mere presence or absence of tattoos will not necessarily tell you how involved a person is in gang violence.

29. In gangs, tattoos are identification. They are a way of stating your involvement in the gang, but they can be posturing and posing. By stating that he is involved in the gang through tattoos, a gang member can sometimes avoid having to participate in gang violence to prove his loyalty. The most violent gang members are often not tattooed at all, because they don't have to show that they are committed to the gang with tattoos; everyone knows their involvement as a result of their actions.

30. The fact that Detective Berchem provided these inaccurate generalizations does not surprise me. The difficulty with police officers who testify as so called-gang experts is that they have extensive contact with gang members, but limited knowledge of the actual lives of the gang members they arrest and interrogate. Gang members are unlikely to confide in police officers or give them accurate information about how gangs work, and their contacts with gang members often occur during interrogations and arrests, under circumstances in which it is highly unlikely that gang members will be candid about their lives.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

September 16, 2003

Father Gregory Boyle, S.J.

APPENDIX U

DECLARATION OF PATRICIA PÉREZ-ARCE, Ph.D.

I, Patricia Pérez-Arce, declare as follows:

1. I am a clinical and forensic psychologist, based in Oakland, California. I am licensed to practice in the State of California. I received my doctorate in clinical psychology at Catholic University in Washington, D.C. and completed a post-doctoral fellowship in neuropsychology at the San Francisco V.A. Medical Center in 1985. The training I received in clinical neuropsychology is in accordance with the standards of the American Psychological Association's (APA), Division 40 (Neuropsychology), of which I am a member. I also am a member in good standing of the APA, the National Academy of Neuropsychology (NAN), the International Neuropsychology Society (INS), and I am a co-founder of the Hispanic Neuropsychological Society (HNS).

2. I am an assistant clinical professor at the University of California, San Francisco (UCSF) and a member of the UCSF Latino Mental Health Research Program at San Francisco General Hospital.

3. I speak, read, and write fluently in Spanish, and most of the research articles and a book chapter that I have published concern issues related to the neuropsychological assessment of Latino populations, and the cultural factors that affect testing performance.

INTRODUCTION

4. At the request of current counsel for Sergio Ochoa (hereinafter "Sergio" or "Mr. Ochoa"), I conducted neuropsychological examinations of Mr. Ochoa on July 9, 2003 and July 16, 2003. On these dates, I saw Mr. Ochoa for a total of approximately 9 hours. I administered a number of standard neuropsychological tests and test batteries, and conducted a mental status examination and clinical interview. These tests were an addition to my initial

neuropsychological evaluation of Mr. Ochoa in October 2000. The purpose of my assessment was to determine if brain impairment existed and, if it did, to determine the severity and effect of brain damage on Mr. Ochoa's cognitive functions.

5. The tests I administered included the seven core tests of the Halstead-Reitan Neuropsychological Battery (HRB) as well as a number of measures that are considered an integral part of the HRB. The HRB tests administered were the Booklet Category Test, Tactual Performance Test, Speech Sounds Perception Test, Seashore Rhythm Test, Finger Oscillation Test, Trail Making Tests "A"and "B," Aphasia Screening Test, Reitan-Kløve Sensory Perceptual Exam, and Hand Dynamometer. Taking into account my initial neuropsychological evaluation, I also administered the following tests, including the Wechsler Adult Intelligence Scale-III (WAIS-III), Wechsler Memory Scale-III (WMS-III), Peabody Picture Vocabulary Test-III (PPVT-III), Wide Range Achievement Test-3 (WRAT 3), Porteus Mazes, Test of Memory Malingering (TOMM), Rey-Osterrieth Complex Figure Test, Wisconsin Card Sorting Test, four sub-tests of the Delis-Kaplan Executive Function System Scale, The MacArthur Competence Assessment Tool-Criminal Adjudication (MacCat-CA), a number of cancellation tests (linguistic and non-linguistic symbols) and the Grooved Pegboard Test.

6. In addition, I have reviewed numerous documents and materials relating to Mr. Ochoa, including previous psychological testing data and results, documentation of his family and social history, substance abuse history, educational records, medical records for Mr. Ochoa and his family, records and documents relating to Mr. Ochoa's capital trial, and declarations from family members, other witnesses familiar with Mr. Ochoa and his family, and other expert witnesses. These are the kinds of materials routinely relied upon by experts in the

field of forensic neuropsychology, psychology and psychiatry to reach a professional opinion about the client's cognitive and emotive functioning.

7. A thorough and comprehensive assessment involves a review of family and patient history, a clinical interview that focuses on obtaining the patient's unique perception of historical antecedents of present functioning, and a valid neuropsychological evaluation. Reliance on any one of these factors alone (the history, testing, patient report) can potentially lead to inaccurate conclusions. In particular, reliance on a patient's report alone is inadequate because such a report may be materially inaccurate as a result of the patient's neurocognitive deficits and lack of knowledge about his developmental markers and the critical events that happened to him in the womb, at birth, or as an infant, toddler or child.

8. Based on my interview and examination of Mr. Ochoa and my review of his history, I have formed opinions regarding his neuropsychological condition related to the status of his brain. If called upon to testify regarding the contents of this declaration, I could and would competently do so. These opinions, and a summary of the evidence upon which they are based, are set forth below.

HISTORY AND BACKGROUND

9. Records and other information provided indicate that Sergio Ochoa was exposed to multiple sources of potential central nervous system (CNS) injury, including lack of pre- and post-natal care, multiple head traumas, and malnutrition. In addition, based on descriptions of Sergio's extreme social withdrawal, unresponsiveness, and psychomotor slowness by his siblings, teachers, peers and neighbors, Sergio probably suffered from childhood depression and life-long Dysthymic Disorder. According to Dr. Francisco Gomez, Mr. Ochoa additionally suffers from symptoms consistent with Post Traumatic Stress Disorder (PTSD), which may have

further affected his emotional and mental development. Declaration of Francisco Gomez, Ph.D., ¶ 174.

10. Sergio Ochoa is the fifth of six children born to Ofelia and Eduardo Ochoa, Sr. Sergio was born while his family was residing in Tijuana, Mexico. Ofelia Ochoa recalls:

> We lived in a rented house in Tijuana because we didn't have much money. First, we lived in the center of town, on the avenue Quintana Roo, close to the government hospital. The little house had two bedrooms, with the kitchen outside. We didn't have indoor plumbing and the toilet was a hole in the dirt outside of the house. Although we had small children, I had to work outside of the house. Eduardo worked in the house, making shoes, while he took care of the children. I worked as a cook in a restaurant, earning $2.50 a day. I took home all of the leftover food so that the children could eat . . . . When I was pregnant with Sergio, I never went to a doctor for an exam because we didn't have enough money. I didn't have vitamins either.

Declaration of Ofelia Ochoa, ¶¶ 10-11.

11. Conditions in Quintana Roo were appalling. In the late 1960s and early 1970s, when the Ochoas lived there:

> Quintana Roo was a new "colonia" or neighborhood, just starting to emerge. The roads were all dirt and the houses where people lived were just dilapidated shacks made of cardboard and wood. The poverty in this neighborhood was serious and miserable. This neighborhood was located right next to an old dry and filthy river bed. The river bed was a dump yard, filled with garbage and old cars. The stench in the river bed and the streets in the neighborhood was horrible. When it rained,

> the awful conditions of the river bed and Quintana Roo became worse, because the rain brought even more garbage and filth from other parts of Tijuana, especially the hilly areas. The rain often destroyed the shacks as it washed through the neighborhood. The rain also flooded the neighborhood, which created even more garbage and caused human waste from the out houses to be spread all about the neighborhood. The drinking water in Quintana Roo was deplorable, just as in most parts of Tijuana at that time. It was not purified in the 1960's and 1970's, and is not purified today. Poor people cannot afford bottled water. Drinking tap water causes many illnesses through parasitic infection. These infections are very common among local poor people.

Declaration of Father Salvador Diaz Mercado, ¶¶ 3-4.

12. Shortly after his birth, Sergio's mother left Sergio in the care of his father, Eduardo, Sr., who had a serious problem with alcoholism. Declaration of Francisco Gomez, ¶¶ 32-41. Ofelia Ochoa recalls:

> Sergio was the first child that I wasn't able to breastfeed because I had to work. I could only leave my job for less than a month when Sergio was born. I had to return so that I wouldn't lose the job. I left Sergio with my husband. I worked seven days a week. I left the house at six in the morning and didn't return until ten at night. My husband took care of Sergio, Eduardo and Gloria while he was making shoes at home. My other daughter, Rosie, was with my family in Mexico City. We had a difficult life. We were very much alone in Tijuana. We didn't have any family there.

Declaration of Ofelia Ochoa, ¶ 14.

13. When Sergio was just a baby, his parents left Sergio and his siblings to move to the United States, where they lived and worked apart from their children for approximately a year. The Ochoas left their children in the care of an abusive caretaker, who failed to provide Sergio and his siblings with proper nourishment and overall care. Ofelia recalls:

> When Sergio was a baby, Eduardo and I left the children with a babysitter and went to work in the United States. My husband worked as a gardener in Encinitas and I found work in the home of a doctor in Rancho Santa Fe, close to San Diego. The doctor's name was Dr. Amino and he had three children and no wife. I lived in their house for about a year and Eduardo slept at his boss's house. We returned to Mexico on the weekends to see the children. The women who took care of the children was very bad. I would leave food and money, but the neighbors told me that she robbed everything and gave my children only tortillas and black coffee. When we would come back to the house all of the children would be vomiting and had spots on their faces from drinking so much coffee. Also, the babysitter would go dancing at night and leave the children with my daughter Rosalba who was only about 11 years old.

Declaration of Ofelia Ochoa, ¶¶ 16-17.

14. A number of studies of infants and toddlers diagnosed as significantly malnourished have shown that such children, when compared to normal controls, suffer from a variety of cognitive deficits. At age 3, malnourished children had a poorer grasp of relative concepts such as big-little and in-out." (Spreen, Tupper, Risser, Tuokko, & Edgell, Human Developmental Neuropsychology, 1984, p. 185). A significant relationship was found between lack of stimulation at home, including stability of adult contact, vocal stimulation, and emotional

climate, and nutritional status. In an article titled, "The influence of early malnutrition on subsequent behavioral development," Galler, Ramsey, Solimano, and Lowell (1983), documented the results of a study of grammar school children who had suffered significant protein-calorie malnutrition at an early age. They found that their teachers rated these children as evincing increased attentional problems, reduced social skills, and poorer physical appearance.

15. Sergio and his family moved to Los Angeles when he was around three. As described at length in the Declaration of Francisco Gomez, Ph.D., Sergio continued to suffer serious physical and emotional neglect throughout his childhood. Declaration of Francisco Gomez, Ph.D., ¶¶ 47-68. Ofelia and Eduardo Ochoa, Sr. were away from home most hours of the day and the children were left to fend for themselves. *Id.* at ¶¶ 47-49, 54-55, 65-68, 86. Eduardo, Sr. was often intoxicated and his alcoholism drained the families meager finances. *Id.* at ¶¶ 32, 34-35, 37, 39. Eduardo, Sr., periodically went on drinking binges and disappeared for days at a time. *Id.* at ¶¶ 34-35, 38. When Eduardo, Sr. was at home, he was loud, argumentative, and disruptive. *Id.* at ¶¶ 36, 38-39. As Dr. Gomez has noted, there is a substantial likelihood that Eduardo, Sr. had an incestuous relationship with Sergio's older sister, Gloria. *Id.* at ¶¶ 69-76.

16. The Ochoa house was filthy, dark and overcrowded. *Id.* at ¶¶ 47-48. There was little or no communication between the parents and children, or among the siblings themselves. *Id.* at ¶¶ 57-60, 63-67. Sergio and his next oldest sister, Gloria, had severe hygiene (oral, body, clothing) problems that were never addressed, and the children were essentially left to raise themselves. *Id.* at ¶¶ 49-50.

17. The neighborhoods where Sergio Ochoa grew up were impoverished, exceptionally violent and dominated by gangs. *Id.* at ¶¶ 88-110. Various members of his family were repeatedly robbed and assaulted, and Sergio's older sister Gloria was brutally raped. *Id.* at ¶¶ 92, 95-100. In addition, every one of his siblings became members of the 18th Street gang, which Sergio also joined when he was just 11 years old. *Id.* at ¶¶ 79-84. Thus, from an early age, young Sergio experienced, witnessed, and was confronted with events that involved actual and threatened death or serious injury to his family members, his home, and himself, and as a child he could only feel intense fear and helplessness. These are conditions that can lead to Post-Traumatic Stress Disorder. As a result of his siblings' actions, Sergio was exposed to alcohol and other illegal substances at a very young age. Sergio's neighbor, Jose Silva, recalls:

> All of Sergio's role models were bad rather than good, starting with his older brother and sisters who were all in the gang. His brother and sisters would have huge gang parties at the house while the parents were at work. There would be 50 to 100 gang members there in the middle of the day partying. They would be drinking, smoking marijuana, smoking PCP. Sergio would be right there, seeing everything. It wasn't a good environment for him when he was a little kid. I would see Sergio high sometimes, passed out on a couch or in the car, or he'd be staggering around. He was only 13 or 14 years old.

Declaration of Jose Silva, dated February 4, 2001, ¶¶ 17-18.

18. Individuals who knew Sergio during his childhood and adolescence viewed him as intellectually impaired, abnormally socially withdrawn, and apathetic or non-reactive, with significant psychomotor retardation or slowness. Besides reflecting the presence of learning problems, these symptoms are associated with depression and the effects of malnutrition at an

early age (Spreen et al., 1984). Maria Silva, whose children were contemporaries of the Ochoa children, recalled:

> I met Sergio when he was about eight years old. I noticed quickly that he was a child that was very slow. He wasn't very smart in comparison to other kids his age. Even the way he walked was slow. His sister, Gloria, was the same way. You could see that they were different from the other kids in the family. Sergio was always very quiet, more than normal. He wasn't very alert. You could see that he didn't understand a lot of things . . . . Since Sergio was so slow, he was a boy that was easy to fool.

Declaration of Maria Silva, ¶¶ 2-3, 8. Maria Silva's daughter, Maria Madrigal, similarly recalled:

> Sergio and Gloria both got teased a lot at school because of how dirty they were and also because they were mentally slow. I don't think they had Special Ed back in those days but both Sergio and Gloria should have been in it. They were slow in everything; they even walked slow. Neither Sergio nor Gloria could read . . . . Sometimes Gloria and I would be looking at fashion magazines at their house. When I asked Sergio to read something he got really nervous and tried to change the subject. Finally, he pretended he was reading but just made up things that weren't on the page. He would always avoid anything that involved reading. This was at an age that he should have known how to read and write. I could see that Sergio couldn't spell either. Sometimes things that he had written were left lying around the house and you could tell he couldn't write correctly. I'd also see his homework lying around the house that he'd never done. It was rare to see either

Sergio or Gloria doing their homework.

Declaration of Maria Teresa Madrigal dated January 3, 2001, ¶¶ 15-18. Jose Silva also recalls:

> Sergio and Gloria just were not very sharp. Sergio was slow in everything. He didn't do well in school because he didn't understand what was going on. Even playing basketball, he was slow. He was slow to react to everything. If I tried to talk to Sergio about something - like a math problem - he looked at me like I was speaking Chinese. He couldn't follow what I was talking about; he couldn't even do basic math, like adding. You could see it if we were talking about money. He might be able to add two plus two but if you asked him to add 13 and 17 he couldn't do it. This was when he was already a teenager. He was way behind the other kids his age. Sergio also couldn't read. He'd ask me what something said in a magazine because he couldn't read it. He was like that the whole time I knew him - up to the age of about 16. Sergio's brother and sisters, except Gloria, could handle a conversation. They'd have an answer, or at least a thought. Sergio was lost. He had a hard time even keeping up the conversation. When Sergio didn't know something he'd ignore your question or try to evade it. Or he'd get mad. I would try to talk to him about pure common sense things, like history or stuff you learn in school. Sergio hardly ever even went to school - maybe two or three times a week . . . . [Their siblings] called Sergio and Gloria retarded and treated them like they were. "You're so dumb, "You're retarded," "Get a brain," they'd say. Those two were always referred to as "slow," or "retarded" . . . . You could tell just by looking at Sergio that he was slow or there was something wrong with him . . . . you could see something was wrong with him by the way that he walked

- very slowly. And when it came to playing sports, he had no coordination.

Declaration of Jose Silva dated February 4, 2001, ¶¶ 9-13, 22, 25.

19. Sergio had great difficulty in school. Sergio Ochoa's school records document that he was below grade level in most academic subjects in the fourth and sixth grades. In 1975, at age 8, Sergio needed improvement in listening and following directions. His cumulative record card for elementary school documented his need to develop math and language skills, and the fact that he was working below grade level but trying hard. Sergio had difficulty using time well unless directed and had very poor personal hygiene. Sergio had consistently failing grades from age 12 to age 14. In 1983, at age 15, Sergio had a Wide Range Achievement Test score of 78, within the lowest 7 percent of the population. At age 24, Sergio Ochoa had a verbal I.Q. of 74, in the low Borderline to Mildly Mentally Retarded/Extremely Low range.

20. Sergio Ochoa suffered problems seeing at a distance from childhood, but neither his parents nor his school saw to it that he was properly tested. In school, Sergio requested that his teachers put him close to the chalkboard, because he had difficulty seeing what was written on it. In February 1993, shortly after his admission to San Quentin, Sergio complained that he was having difficulty seeing clearly, that he had headaches associated with his vision, and that his eyes were sensitive to light and that they hurt frequently. In a questionnaire that he filled out at that time, Sergio noted that he did not wear contacts or glasses. On February 19, 1993, at age 24, Sergio was prescribed glasses for the first time in his life. His prescription was -2.5 in the right eye and -3.25 in the left eye; more than 20/200 in both eyes on the Snellen scale. Sergio was legally blind in both eyes. When he had a follow-up vision test eight years later, his prescription was -4.75 in the right eye and -5.50, 20/400, indicating moderate to high myopia. Interference with the accurate perception of visual stimuli has a direct impact on how

information is processed. Diminished vision due to primary visual system damage may result from a variety of disorders, whether in utero or post-natally. However, primary visual system damage in children is particularly associated with prenatal infections and nutritional deficiencies at an early age (Chan, G.H., in R.D. Harley (ed.), Pediatric Ophtalmology). Unfortunately Sergio's mother, Ofelia, received no medical care during her pregnancy and no hospital records are available for her. For the first two years of his life, Sergio was first under the primary care of his father, who had a severe alcohol addiction, and in his second year of life, Sergio was under the 24-hour care of a babysitter who mostly fed coffee to the Ochoa children.

21. Sergio Ochoa has also suffered repeated assaults and head traumas. He has been shot at, stabbed and repeatedly beaten by rival gang members. Declaration of Francisco Gomez, Ph.D., ¶¶ 101-106. He recalls losing consciousness at least twice after he was brutally beaten by bat-wielding rival gang members. Medical records from County USC Hospital document that on February 1, 1987, Sergio Ochoa was assaulted with a baseball bat in the head, face, chest and neck and suffered a fractured spine. Medical records from Harbor UCLA Medical Center document that on October 7, 1989, Sergio was struck by a car and thrown 15 feet. He struck his head and lost consciousness.

22. As Dr. Gomez has recognized, the trauma and neglect that Mr. Ochoa has suffered has had an adverse effect on his mental and emotional functioning. In addition, Mr. Ochoa's lack of prenatal care, early malnutrition and his history of head trauma are all significant sources of potential injuries to the central nervous system.

NEUROSPYCHOLOGICAL ASSESSMENT

23. In analyzing neuropsychological test results using a comprehensive battery of tests it is necessary to take into account, at minimum, four variables: 1) the individual's general

level of performance on each test when compared to individuals of similar educational level and age, 2) the patterns of results across all tests, 3) comparisons between the right and left or dominant and non-dominant sides of the body, and 4) the presence of pathognomonic signs, which, by their very presence, indicate brain damage. My analysis uses this framework.

24. On the Test of Memory Malingering, Mr. Ochoa obtained a perfect score, demonstrating no evidence of malingering. Mr. Ochoa appeared motivated to perform to his best of his ability in all tests. The consistency of the pattern of test results further suggests that they are a valid measure of Mr. Ochoa's cognitive functioning. The neuropsychological test results showed a significant pattern of brain dysfunction laterized to the right hemisphere of Mr. Ovchoa's brain in which he scored within or above the normal range in a number of tests and in the borderline to moderate range of impairment in others. In interpreting these test results, mild levels of impairment denote significant impairments. For example, the great majority of mentally retarded individuals test in the mild range of mental retardation, yet mildly mentally retarded individuals fall within the lowest 2% of the population in terms of intelligence testing and suffer significant adaptive deficits that interfere with their normal functioning.

25. The results of the neuropsychological measures administered to Mr. Ochoa revealed that he has significantly impaired abilities in auditory and tactile perception with the left side of his body, in visual-spatial memory functions, in non-verbal reasoning, and in verbally mediated conceptual thinking and problem solving. Using the terminology employed by the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, TEXT REVISION (DSM-IV-TR), Mr. Ochoa suffers from Cognitive Disorder Not Otherwise Specified (294.9). In essence, Mr. Ochoa has difficulty perceiving, understanding, and recalling information received by the right hemisphere of his brain (from the left side of his body) through

physical touch and auditory stimulation, in integrating visuospatial information, in understanding the meaning of abstract concepts, and in spontaneously analyzing and solving problems through reasoning. Mr. Ochoa's mathematical abilities are at the 5th grade level. He can divide up to 2-digit numbers in the numerator and 1-digit in the denominator. He cannot multiply by 2-digit numbers, nor he can perform computations involving decimals or fractions.

26. Discrepancies in performance on the two sides of the body are the most powerful signs of lesions that are lateralized to a single side of the brain. On the tests I administered, Mr. Ochoa showed consistent evidence of impairment in the right hemisphere of his brain, particularly in an area of the brain known as the somatosensory strip. The right hemisphere subserves the left side of the body, and the left side of Mr. Ochoa's body showed sensory impairment, as measured by both the Sensory-Perceptual Exam and the Tactual Performance Test (TPT) of the Halstead-Reitan Neuropsychological Battery. For example, in the Sensory Perceptual Exam, Mr. Ochoa demonstrated significant errors of tactile perception on his left side. When his left cheek and right hand were touched at the same time, he was unaware that he had been touched on the face. He also failed to perceive input on his left ear when both ears were simultaneously stimulated. This type of auditory suppression is associated with the opposite temporal lobe of the brain from the ear that fails to perceive the stimulation. Mr. Ochoa's inability to perceive sensations on the left side of his body is evidence of dysfunction of the right hemisphere of his brain.

27. Mr. Ochoa was mildly impaired in the Tactual Performance Test. The Total Time and Localization scores for Mr. Ochoa on the TPT were in the brain-damaged range. The TPT localization score is one of the most sensitive tests of central nervous system impairment. Another strong indicator of brain impairment on this test is reflected in the difference in

performance between Mr. Ochoa's right (dominant) and left (non-dominant) hands. When compared to that of his right, Mr. Ochoa's left hand's performance was significantly deficient. On the TPT, a timed test, the patient is blindfolded and faces a wooden board with geometric shaped spaces. On the table are nine wooden blocks. Each block can only fit into its own space. Individuals are expected to place each block in its space, using only the dominant or preferred hand in the first trial, the non-dominant hand in the second trial, and both hands in the third trial. Ordinarily, patients perform the second trial faster than the time required for the first trial; the expectation is that there will be a transfer of learning from the preferred hand's experience, assuming that both hemispheres of the brain are intact and in communication with each other. Traditionally, the non-dominant hand is expected to perform 20% faster than the preferred hand. Mr. Ochoa took longer to complete the test with his left, non-dominant hand, and was mildly impaired on this measure. In the third trial, which Mr. Ochoa performed with both hands, his left hand struggled and interfered in the efficient performance of his right hand, slowing it down. Mr. Ochoa was mildly impaired on this measure. Mr. Ochoa's impaired Localization score on this test supports other findings that indicate visual-spatial memory impairment. These results are powerful indicators that Mr. Ochoa suffers from brain damage to the posterior right side of his brain.

28. As a consequence of his sensory-perceptual deficits, Mr. Ochoa would have difficulty relying upon touch to give him accurate perceptions of what was going on in the world around him. Without corrective glasses, Mr. Ochoa's ability to function would have been much more impaired, and would have created insecurities about whether his perceptions of the world around him were accurate. The adaptive problems of children with brain damage resulting in sensory and cognitive deficiencies exist from early development on. They do not suffer a "loss"

of function, but a chronic state of lack of function. Children who suffer from a perceptual deficit have never had the benefit of accurate information processing capabilities. Mr. Ochoa lacked visual and sensory (tactile and auditory) feedback and, consequently, was not as aware of the world around him as the average person. Failure to gain appropriate experiences during the developmental years permanently distorts the way the brain processes information and how it benefits from experience. Consequently, as an adult, Mr. Ochoa has been impaired in coping effectively with the demands of his environment. Dykman and Ackerman (In Spreen et al., 1984, p. 248) found that children with sensory processing deficits in visual, auditory, or other senses were unable to discriminate between different types of stimuli; the impact of this is that the input they receive is, "constantly overloaded and confused." Mr. Ochoa's deficits in sensory perception and vision also may have affected his awareness of his own hygiene, contributing to the hygiene problems described by Dr. Gomez, as well as relatives, teachers, and friends.

29. On the Wechsler Adult Intelligence Scale III, Mr. Ochoa's Verbal I.Q. was 79, in the borderline to low average range of intelligence. Mr. Ochoa showed significant deficits in a number of its sub-tests. His ability to problem solve and his general comprehension of social conventions were both in the mildly impaired range; his ability to analyze two or more pieces of information in order to understand their commonalities or similarities was in the borderline to low average range; and his non-verbal reasoning skills were in the mildly impaired to borderline range. Since his incarceration at San Quentin, Mr. Ochoa has shown significant gains in his fund of general knowledge, the breadth of his vocabulary, and spelling skills. This is probably attributable to the fact that Mr. Ochoa's extremely poor vision has been corrected through prescription eyeglasses and that his life in prison is less chaotic than it was during his childhood and young adulthood, allowing Mr. Ochoa to focus his attention on learning in ways that were

difficult for him prior to his incarceration. In contrast to these gains, Mr. Ochoa has not improved his arithmetic skills; he scored at the 5th grade level in arithmetic on the Wide Range Achievement Test III, and had made no gains since his testing at trial. Mr. Ochoa suffers from a persistent, life-long deficit in understanding the more complex and abstract mathematical concepts such as multiplication and division with 3-digit numbers, fractions, and decimals. This impairment would place significant limitations on Mr. Ochoa's capacity to perform a number of jobs.

30. On the Wechsler Memory Scale III (WMS-III), Mr. Ochoa also evidenced significant deficits, performing in the mildly impaired range on a test requiring him to recall visual scenes of family members engaged in various social activities. He had significant difficulty recalling all of the individuals who were in each picture, their location in the visual spatial field, and the activity of each family member. His delayed memory of these same scenes was in the borderline range of impairment. On the Rey-Osterrieth Complex Figure test, which also assesses immediate and delayed visual spatial memory, but of a complex design, Mr. Ochoa scored in the mildly to moderately impaired range. Mr. Ochoa was unable to retain the coherence or gestalt of the picture; he recalled some of the details on the right and left side of the design, albeit inaccurately integrated, and was unable to recall the middle part of the design. Mr. Ochoa's pattern of memory deficits, impairments in visual-spatial location and integration, and losing the gestalt while maintaining some elements of the whole, are strongly associated with damage to the temporal lobe of the right hemisphere, and is consistent with other results of this evaluation. In his seminal book, Thinking & Problem Solving (1994), Robert Sternberg emphasizes the critical role that visual representation plays in developing problem solving skills in children. Mr. Ochoa's visual acuity and visual-spatial memory are both significantly impaired

and, thus, his ability to learn through observation and reasoning would have been significantly limited.

31. Mr. Ochoa performed well under testing conditions when he had concrete visual cues in front him, repeated information over time, multiple trials, and corrective feedback. He was significantly impaired when he had to generate spontaneous responses without external cues. For example, one of the sub-tests of the Delis Kaplan Executive Function System Scale requires individuals to interpret proverbs, a demanding test which required Mr. Ochoa to form a coherent, abstract principle on the basis of the meaning of a sentence that at a surface level refers to other concrete events or ideas. In the initial part of the test, when Mr. Ochoa had to rely on his spontaneous ability to think abstractly, to integrate various levels of meaning, and to generalize to higher-order principles, without verbal prompts, he had significant difficulties in interpreting even the most common and familiar of proverbs, scoring in the mildly impaired range. Without prompts, Mr. Ochoa responded very concretely to the surface level meaning of each proverb and failed to grasp that the proverbs could convey deeper meanings or truths about the human condition. In the multiple choice segment of this test, however, Mr. Ochoa had to select one sentence out of four that best represented the more abstract meaning of a proverb, and scored 100 %.

32. The implication of this significant deficit in spontaneous verbal reasoning and abstract thinking on Mr. Ochoa's behavior is profound: Life and living are not multiple choice tests. In most situations, especially those outside of school, we are not given corrective feedback. In order to plan for the future and learn from experience, we must analyze and accurately interpret current situations and understand how our experiences relate to similar situations from the past in order to avoid making the same mistakes all over again; what we call generalizing from experience. Mr. Ochoa's central nervous system dysfunction prevents him

from doing this. Under protected testing conditions, with corrective feedback and concrete visual cues in front of him, Mr. Ochoa can improve his performance on tasks involving analysis and planning. However, when Mr. Ochoa was out in his world, where self-generated, verbally-mediated thinking and problem solving were the keys to his survival, Mr. Ochoa's significant cognitive deficits precluded him from being able to put together various aspects of social situations in a coherent manner, and understand how they related to each other. Because of his brain damage, Mr. Ochoa was unable to generate solutions on his own or trust that his sensory perceptions were accurate.

33. Mr. Ochoa's conceptual and problem solving deficits limited him to following directions from others, because he could not be relied upon to suggest ideas himself. He had great difficulty reading, due to undetected poor vision that rendered him legally blind, and could not understand many words, particularly abstract words or concepts. The breadth of Mr. Ochoa's deficits naturally inclined him to be a follower and not show a lot of initiative but to rely upon others to problem solve for him.

34. Mr. Ochoa lacks the capacity to engage in the verbally-mediated inner dialogue or private speech that unimpaired people use to guide themselves through complex problems. Given his impairments and the fact that there was no communication in his household from parent-to-child or from sibling-to-sibling, it is not surprising that he lacks spontaneous overt and covert self-directed speech. This type of speech emerges at age 4 or 5 years of age. Older children also use self-directed speech but is it not audible; eventually it becomes covert, internalized speech. Internalized self-directed speech facilitates problem solving, because it slows down actions and prevents careless errors, allows the person to maintain goals in mind, and facilitates maintaining in mind subtle and critical features of a problem. (L.S. Vygotsky, Mind in Society: The development of higher psychological processes, 1978). Mr. Ochoa is

mildly impaired in his ability to generate alternative solutions to problems or to analyze aspects of a problem. He would have considerable difficulty generating a range of options for himself. For example, when I asked Mr. Ochoa what he would do if he were lost in a specific, unfamiliar environment, his response was illogical. He did not analyze the component parts of the situation, and his reasoning processes were deficient.

35. Because of his brain impairments, which appear to be predominantly localized to the right hemisphere of his brain, Mr. Ochoa has limited insight into his own cognitive problems and their effect on his ability to function independently in the world. Patients with right hemisphere injuries are less aware of their mistakes and tend to deny the extent of their disabilities. This diminished self-awareness tends to cause them to set unrealistic goals for themselves, because they fail to take their cognitive impairments into account. Mr. Ochoa has unrealistic goals and limited insight into his cognitive deficits, which is often found in individuals who suffer from right hemisphere injuries.

36. During his childhood, Sergio Ochoa's neuropsychological deficits and his undetected poor vision left him at severe risk for academic failure. Sergio Ochoa began failing in school during the transition from elementary school to junior high school, at a time when academic demands typically become more rigorous. By this point, Sergio Ochoa was multiply impaired. He suffered deficits in his ability to problem solve and grasp abstract concepts, to retain visual-spatial information of a social nature, and in his sensory perception. In addition, Sergio Ochoa had poor vision, which was not corrected. Moreover, as described in Dr. Gomez's declaration, Sergio Ochoa was living in a chaotic, neglectful, conflict-filled household, in a poor and violent neighborhood, and among siblings who were all gang members. School officials and parents failed to recognize Sergio Ochoa's learning deficits or even his need for corrective

glasses. Under these circumstances, it is not surprising that Sergio was unable to achieve any measure of academic success and effectively dropped out of school at a very young age.

37. Mr. Ochoa suffered compromised brain functioning from early childhood, which was further impacted by a number of head traumas that he suffered in early adulthood. As has been mentioned earlier, he sustained two major assaults with bats and kicks, one on January 31, 1987 and another on March 11, 1987, resulting in a spine fracture and pulmonary contusion. On October 7, 1987, he was in an automobile accident in which he was tossed 15 feet and was found unconscious. These were major traumas that would probably have had a deleterious effect on his already-impaired brain functions.

38. Mr Ochoa's neuropsychological deficits limited his ability to recognize opportunities to escape his grim life circumstances. As a result of his impairments, Mr. Ochoa has difficulty generating imaginative and functional solutions to his own problems. Moreover, he was not only physically and emotionally neglected by his primary caretakers but also was surrounded by negative, rather than positive role models. Sergio's daily life, in a relentlessly hostile environment where he, his family and his friends were never far away from danger, reinforced his natural difficulty in imagining positive outcomes that differed from his present reality. Mr. Ochoa's Dysthymic Disorder or chronic depression and symptoms consistent with Post-Traumatic Stress Disorder further diminished Mr. Ochoa's capacity and energy to work through his many problems. Under these circumstances, it was predictable that Mr. Ochoa would fail to escape the gang violence that consumed his neighborhood.

39. Finally, Sergio Ochoa's brain impairments compromised his ability to make good decisions and think independently in highly stressful, emotional situations. Under the least stressful circumstances and without opportunity for rehearsing, Mr. Ochoa lacks the ability to analyze and recall complex unfamiliar situations accurately, to generate effective solutions to

common problems, and to understand how present actions may affect future behavior or outcomes. Under more stressful circumstances, Mr. Ochoa is significantly more likely than most people to follow the directions of others, to react simplistically and emotionally to the circumstances that confront him, and to fail to perceive opportunities to escape peril to himself and others.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

Dated: September 15, 2003

Patricia Pérez-Arce, Ph.D. PSY 10176