

No. _____

IN THE
Supreme Court of the United States

TAUNO WAIDLA, *Petitioner*,

v.

CHRISTOPHER PIERCE, WARDEN, *Respondent*.

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

**APPENDIX IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

CUAUHTEMOC ORTEGA
Federal Public Defender
MARTA VANLANDINGHAM*
KATHERINE FARKAS
Deputy Federal Public Defenders
321 East 2nd Street
Los Angeles, California 90012
Telephone: (213) 894-7565
Facsimile: (213) 894-0081
Marta_VanLandingham@fd.org

Attorneys for Petitioner
**Counsel of Record*

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

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

TAUNO WAIDLA,

Petitioner-Appellee,

v.

RONALD DAVIS, Warden,

Respondent-Appellant.

No. 18-99001

D.C. No. 2:01-cv-00650-AG
Central District of California,
Los Angeles

ORDER

TAUNO WAIDLA,

Petitioner-Appellant,

v.

RONALD DAVIS, Warden,

Respondent-Appellee.

No. 18-99002

D.C. No. 2:01-cv-00650-AG
Central District of California,
Los Angeles

Before: WARDLAW, CHRISTEN, and MILLER, Circuit Judges.

All judges on the panel have voted to deny Tauno Waidla's petition for rehearing en banc. Judge Wardlaw filed a separate concurrence in the denial. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petition for rehearing en banc, (Dkt. 107), is DENIED.

Waidla v. Davis, Nos. 18-99001, 18-99002

WARDLAW, Circuit Judge, reluctantly concurring in the order denying rehearing en banc:

In this capital habeas appeal, a reconstituted panel of our court withdrew and replaced the original opinion—changing the disposition on grounds not requested by the state in its petition for rehearing. The original opinion affirmed the district court’s grant of habeas relief based on Waidla’s claim that his trial counsel was constitutionally defective at the penalty phase. The amended opinion flipped this result, concluding that Waidla did not suffer prejudice as a result of his counsel’s constitutionally deficient assistance. The basis for this change was not a misapprehension of the facts or law, or the existence of intervening authority. Instead, a new panel member was selected to replace a retired panel member and the new panel member disagreed with the original panel majority’s application of the law. In other words, a change in the composition of the panel resulted in a change of disposition, after the original opinion was filed. This reversal resulted in the difference between life and death for Waidla.

General Order 3.2(h)—which provides for the substitution of a panel member when the original panel member becomes unavailable to serve after a matter is under submission to a three-judge panel, and the remaining two judges are not in agreement—and a line of Circuit precedent seemingly allows such reconstituted panels to change the disposition of a previously filed decision. But I

am concerned that this practice undermines the stability and legitimacy of our court's decisions. And this concern is especially acute where, as here, a change in the panel composition directly results in the opposite disposition of an issue of constitutional dimension. Fortunately, by my count, this exact circumstance has occurred only five times.¹ However, each time it occurs, it engenders the view that judicial decisions are solely a matter of panel composition and fortuity. And in a time where the independence and legitimacy of the courts is under assault, we must be especially attuned to how our dispositions (or change in dispositions) affect the public's perception of the courts. As Judge Reinhardt wrote, almost 16 years ago in response to this exact situation:

[I]t is unwise for a court, once it has published an opinion on a constitutional question, to change its mind for so fortuitous and subjective a reason. Rather, I suggested that a procedure [en banc proceedings] exists under which we could reach a different result through a more objective process in which the merits, not the composition of the panel, would provide the basis for our action. Proceeding in the latter manner would help to secure the legitimacy of court decisions and, necessarily, to maintain public confidence in the judicial system.

Carver v. Lehman, 558 F.3d 869, 881 (9th Cir. 2009) (Reinhardt, J., concurring).

¹ See *Carver v. Lehman*, 558 F.3d 869, 878-79 (9th Cir. 2009); *Perez v. City of Roseville*, 926 F.3d 511, 524-28 (9th Cir. 2019); *Smith v. Agdeppa*, 81 F.4th 994 (9th Cir. 2024); *Kelsey v. Garrett*, No. 22-15557, 2023 WL 6160627 (9th Cir. Sept. 21, 2023), *cert. denied*, 145 S. Ct. 235 (2024); *Waidla v. Davis*, 126 F.4th 621 (9th Cir. 2024).

Here, as in Judge Reinhardt's concurrence in *Carver*, I have decided not to make what in my experience would most certainly be a futile en banc call. Rather, I write to ask my colleagues to reconsider or clarify the substitution rule to avoid the situation where a newly drawn panel member alters the outcome of a previously filed opinion.

I.

In this capital habeas case, Waidla sought to overturn a conviction and death sentence imposed by the California courts based on his murder of Viivi Piirisild in 1991. The district court granted Waidla penalty phase relief, holding that his counsel was constitutionally ineffective under 28 U.S.C. § 2254(d)'s deferential standard. The district court found that Waidla's trial counsel's failure to sufficiently investigate potentially mitigating evidence constituted deficient performance, and that this deficient performance prejudiced Waidla, based in part on the jury's nine-day deliberation and submission of two jury notes indicating deadlock. The district court denied Waidla's remaining claims.

Waidla and the state cross-appealed the district court's ruling, and Judges Wardlaw, Watford, and Miller were assigned to hear the case. In a per curiam opinion, published on May 23, 2023, a majority of the panel affirmed the district court's ruling, including the district court's grant of habeas relief on Waidla's claim

of ineffective assistance of counsel (“IAC”) at the penalty phase. *Waidla v. Davis*, 68 F.4th 575 (9th Cir. 2023), *vacated and superseded*, 126 F.4th 621. Judge Miller concurred in most of the decision but dissented with respect to Waidla’s penalty phase IAC claim, asserting that under § 2254(d)’s deferential standard, Waidla’s counsel was neither deficient nor was any deficient performance prejudicial. *See id.* at 600-06 (Miller, J., concurring).

On May 31, 2023, Judge Watford publicly announced that he would retire, leaving only Judges Wardlaw and Miller on the panel. On July 6, 2023, the state filed a petition for panel rehearing (“PFR”), seeking a correction of a single footnote. Specifically, the state contended that the panel incorrectly stated that the state forfeited any objection to the district court granting relief based on exhibits submitted by Waidla.

The next day, on July 7, 2023, an off-panel judge requested 5.4(b) notice. We ordered a response to the state’s PFR, and because Judge Miller and I disagreed on the merits of the case itself, we formally requested that the clerk’s office draw a new judge pursuant to General Order 3.2(h). The clerk’s office drew Judge Christen, and on July 17, 2023, Judge Christen was appointed.²

² In his opposition to the state’s PFR, Waidla argued that the panel should deny the PFR, notably also asserting that a petition for rehearing en banc was the more appropriate procedure for amending or altering the original opinion under these

On November 17, 2023, Judge Christen requested re-argument. On November 21, 2023, the reconstituted panel ordered re-argument, which was held on January 25, 2024.

On December 23, 2024, the reconstituted panel vacated the original opinion and issued a new per curiam opinion, which reversed the district court's grant of habeas relief to Waidla based on his penalty phase ineffective assistance of counsel claim. Judge Christen separately concurred; she agreed that Waidla's trial counsel acted deficiently, but she believed that the deficient performance did not prejudice Waidla. I dissented, adopting the analysis in the original opinion that Waidla had shown both deficient performance and prejudice. The reconstituted panel denied the state's PFR as moot but otherwise did not explicitly address the state's PFR.

On February 19, 2025, Waidla filed a petition for rehearing en banc ("PFREB"), arguing that the reconstituted panel's decision "put Waidla back on death row after nineteen months with a life sentence."

Waidla argues that allowing a reconstituted panel to alter an already published opinion "effectively allow[s] for" panel rehearing without regard for the

circumstances. As Waidla's counsel wrote, "[t]his approach is also consistent with the requirement that '[c]ases and controversies shall be heard and determined by a court or panel of not more than three judges' except where there is a vote for hearing en banc. *See* 28 U.S.C. § 46(c)."

procedures set forth in Federal Rule of Appellate Procedure 40(b)(1)(A), “undermine[s] the principle of finality,” “result[s] in gross judicial inefficiency,” “open[s] the floodgates to judge shopping,” and “diminish[es] the reliability and efficiency of all of the Court’s opinions.” I agree.

II.

Our precedent recognizes:

Until the mandate has issued, opinions can be, and regularly are, amended or withdrawn, by the merits panel [(1)] at the request of the parties pursuant to a petition for panel rehearing, [(2)] in response to an internal memorandum from another member of the court who believes that some part of the published opinion is in error, or [(3)] *sua sponte* by the panel itself.

Carver, 558 F.3d at 878-79; *see also In re Zermeno-Gomez*, 868 F.3d 1048, 1053 (9th Cir. 2017) (“[U]ntil the mandate has issued, a published decision by a panel of this court is subject to modification, withdrawal, or reversal.”). This rule generally applies to a panel that has maintained its composition throughout each step. However, on at least five occasions, we have permitted a change in the panel composition (made after the decision was published but before the mandate issued) to directly alter the disposition of an already decided issue. *See Carver*,³ 558 F.3d

³ It is also worth noting that in none of the cases that *Carver* cited for support for the view that panels regularly amend and withdraw opinions, was there a change in panel composition in the interim. 558 F.3d at 879 nn.17 & 18; *id.* at 881 n.2 (Reinhardt, J., concurring).

at 878-79; *Perez v. City of Roseville*, 926 F.3d 511, 524-28 (9th Cir. 2019); *Smith v. Agdeppa*, 81 F.4th 994 (9th Cir. 2024); *Kelsey v. Garrett*, No. 22-15557, 2023 WL 6160627 (9th Cir. Sept. 21, 2023), *cert. denied*, 145 S. Ct. 235 (2024); *Waidla v. Davis*, 126 F.4th 621 (9th Cir. 2024).

Beginning with *Carver*, a panel consisting of Judges Ferguson, Reinhardt, and M. Smith affirmed a district court's grant of summary judgment against a prisoner who brought a procedural due process claim against the Washington Department of Corrections for denying him a transfer to community custody. 528 F.3d 659, 670 (9th Cir. 2008), *opinion withdrawn on denial of reh'g*, 540 F.3d 1011 (9th Cir. 2008), *opinion amended and superseded*, 550 F.3d 883 (9th Cir. 2008). In a decision authored by Judge Reinhardt and joined by Judge Ferguson, a majority of the original panel concluded that although the prisoner had a protected liberty interest, qualified immunity applied. *Id.* at 663-69. Judge M. Smith concurred in the judgment, disagreeing with the majority that the prisoner had a liberty interest. *Id.* at 670 (M. Smith, J., concurring).

However, while a PFR and PFREB were pending, Judge Ferguson passed away, and Judge Tallman was drawn to replace him. Following this change in the panel composition, the original opinion was withdrawn and replaced with a new opinion. The new opinion still affirmed the district court, but on different grounds; it concluded that the prisoner did not have a protected liberty interest. *Carver*, 558

F.3d at 871. Judge Reinhardt concurred, emphasizing the impropriety of the reconstituted majority's actions:

[I]t is indisputable that the law did not change and the Constitution did not change between the time of the original panel's decision and the time of the new majority's opinion. All that changed is the composition of the three-judge panel. To those who question whether the results in constitutional and other cases depend on the membership of the panel, or whether the replacement of even a single Supreme Court justice can change the fundamental nature of the rights of all Americans with respect to matters as basic as affirmative action, a woman's right of choice, and the nature of religious liberty, the result in the case currently before our panel is merely a minor illustration of how the judicial system currently operates. . . .

In the case before us, it is not necessary for the new majority to undo the original majority's constitutional ruling, even if it disagrees with it. The constitutional question is a close one, and substantial arguments can be made for either position. Under these circumstances, the more important consideration, in my view, is maintaining the stability and legitimacy of the court's decisions. We have a procedure for correcting decisions that a majority of the court believes warrant reconsideration. That process is known as a[n] en banc rehearing. It can be invoked if any single judge on the court, including either member of the majority, elects to make a call. Relying on this process would, in my view, be in the better interests of the court and the judicial system; increasing the extent to which judicial decisions depend on chance and subjectivity is not a wise alternative.

Id. at 880-81 (Reinhardt, J., concurring).

To be sure, Judge Reinhardt conceded that the reconstituted panel had the authority to withdraw and amend the opinion. *See id.* at 881 ("I have not suggested, nor do I believe, that Judge Smith and Judge Tallman do not have the authority to withdraw the opinion filed by the initial panel and published as the

opinion of the court. Of course, they do.”) (Reinhardt, J., concurring). However, in my view, the practice of allowing new panel members to substitute their own judgment for one of their colleagues is in deep tension with the text and spirit of Federal Rule of Appellate Procedure Rule 40. “We have a procedure for correcting decisions that a majority of the court believes warrant reconsideration. That process is known as a[n] en banc rehearing.” *Id.* at 880-81 (Reinhardt, J., concurring).

However, I believe the real culprit here is not the inherent authority to alter, amend, and withdraw an already published opinion by the same panel. The problem is the language of General Order 3.2(h). It provides:

If, after a matter is under submission to a three-judge panel, a judge becomes unavailable by reason of death, disability, recusal, or retirement from the Court, the remaining two judges may – if in agreement – decide the matter as a quorum pursuant to 28 U.S.C. § 46(d), or shall request the Clerk to draw a replacement judge. If the two judges are not in agreement, the Clerk shall draw a replacement judge. If a replacement judge is requested, the Clerk shall draw a replacement judge from among active judges (and senior judges willing to serve), drawn by lot. Once a replacement judge is designated, the Clerk will advise the parties.

Ninth Circuit General Orders 3.2(h) (emphasis added).

Waidla persuasively argues that his case was no longer “under submission,” i.e., being considered, when Judge Christen was drawn to replace Judge Watford—it had already been decided.

Indeed, Judge Molloy dissenting from the newly constituted panel majority's decision in *Perez v. City of Roseville*, explained:

Submission is the process by which the panel has received and reviewed the record, heard argument by the parties, and taken the matter under consideration for decision. *Cf.* 9th Cir. R. 25-4 (distinguishing among cases that have been scheduled for oral argument, argued, submitted, and decided). Deciding the case takes place when a quorum of two on the panel agrees to an appropriate disposition. . . . The majority's emphasis on the absence of a mandate misses the mark. Once the case is decided by a quorum of the panel judges it is no longer under submission. Because this case was not under submission when Judge Reinhardt died, General Order 3.2(h) is not applicable.

926 F.3d at 527 (Molloy, J., dissenting) (citation omitted). Further, the Ninth Circuit Rules and General Orders contemplate “under submission” as being distinct from the filing of a disposition. *See* 9th Cir. R. 25-4 (listing relevant dates for calendared cases as including the “date of argument,” date of “submission,” and date of “decision”); Ninth Circuit General Orders 9.1 (“Each judge shall periodically report to the Chief Judge the number of cases under submission assigned to the reporting judge for the preparation of dispositions, the number of such cases in which dispositions have been written and are in circulation, and the length of time such cases have been under submission and, where applicable, in circulation.”).

As Judge Molloy noted, “[t]here is no need for a substitution when the majority decided and published the opinion questioned here. . . . A published quorum opinion is not under submission; it is final, except if the entire court

corrects it *en banc*.” *Perez*, 926 F.3d at 528 (Molloy, J., dissenting) (citations omitted). And in this case an off-panel judge requested 5.4(b) notice, starting the process of rehearing *en banc* of the original panel decision, before Judge Christen was appointed as the replacement for Judge Watford.

As the Supreme Court has stated “[u]nder [28 U.S.C.] § 46(c), a court of appeals case may be decided by a panel of three judges, and therefore on such a panel two judges constitute a quorum and are able to decide an appeal—provided, of course, that they agree.” *Yovino v. Rizo*, 586 U.S. 181, 185-86 (2019). Here a quorum of the court publicly released its decision in this case. Unlike in *Yovino*, Judge Watford was still an active judge when the decision was released, thus, that decision stood as the opinion of our court. “In *Yovino*, the Supreme Court recognized the appropriate procedure in such a situation by acknowledging the rules in this and other circuits: ‘Like other courts of appeals, the Ninth Circuit takes the position that a panel decision . . . can be overruled only by a decision of the *en banc* court or this Court.’” *Perez*, 926 F.3d at 526 (J. Molloy, dissenting) (quoting *Yovino*, 586 U.S. at 183).

The procedure we followed in this case also ran afoul of the appropriate procedure for rehearing set forth in Federal Rule of Appellate Procedure 40 and is in tension with the requirements of 28 U.S.C. § 46.

a. Federal Rule of Appellate Procedure 40

Federal Rule of Appellate Procedure 40 outlines two types of petitions that a party may file in response to a filed disposition: a PFR and PFREB. Each of these petitions serves a distinct function. *See* Fed. R. App. P. 40 Advisory Committee's Comment to 2024 Amendment ("Panel rehearing and rehearing en banc are designed to deal with different circumstances.").

"A properly drawn petition for rehearing serves a very limited purpose." *United States v. Mageno*, 786 F.3d 768, 774 (9th Cir. 2015) (quoting *Armster v. U.S. Dist. Court for Cent. Dist. of Cal.*, 806 F.2d 1347, 1356 (9th Cir. 1986)). "The purpose of petitions for rehearing, by and large, is to ensure that the panel properly considered all relevant information in rendering its decision." *Armster*, 806 F.2d at 1356. Accordingly, unlike a PFREB, a PFR focuses on "point[s] of law or fact that the petitioner believes the court has overlooked or misapprehended." Fed. R. App. P. 40(b)(1)(A). "Our authority under Rule 40, therefore, extends only to those situations in which we have 'overlooked or misapprehended' a 'point of law or fact.'" *Mageno*, 786 F.3d at 774 (citation omitted). "A party 'abuse[s] ... the privilege of making such a petition' when it seeks review of a scope greater than the limited confines of Fed.R.App.P. 40." *Armster*, 806 F.2d at 1356 (alteration in original) (quoting *Anderson v. Knox*, 300 F.2d 296, 297 (9th Cir. 1962)). And while a panel may consider the effect of subsequently issued controlling legal

opinion, before the mandate issues, *see id.* at 1357, “a petition for rehearing is not a vehicle for a party to ‘study and reargue his case anew.’” *Mageno*, 786 F.3d at 775 (quoting *Anderson*, 300 F.2d at 297).

By contrast, a PFREB is designed to handle more substantive disagreements where “the panel decision conflicts with”: (1) “a decision of the court”; (2) “a decision of the United States Supreme Court”; (3) “an authoritative decision of another United States court of appeals”; or (4) where “the proceeding involves one or more questions of exceptional importance.” Fed. R. App. P. 40(b)(2). In other words, a PFR is designed to address a point of law or fact that the original panel overlooks or misapprehends, while a PFREB is designed to address purported errors in the original panel’s application of law. *See also W. Pac. R. Corp. v. W. Pac. R. Co.*, 345 U.S. 247, 262-63 (1953) (“[I]t is essential to recognize that the question of whether a cause should be heard en banc is an issue which should be considered separate and apart from the question of whether there should be a rehearing by the division.”).

In light of these principles, judges in our sister circuits have recognized that in similar circumstances—where a member of the original panel is no longer able to serve and the remaining members of the panel disagree on resolving a PFR—the appropriate course of action is to seek amendment through the en banc process. *See People of State of N.Y. by Abrams v. 11 Cornwell Co.*, 718 F.2d 22, 24 (2d Cir.

1983) (noting that the court decided to rehear the case en banc because following the death of one of the panel members, the remaining members of the panel were divided on how to resolve a petition for rehearing); *United States v. Safehouse*, 991 F.3d 503, 503 n.1, 505 (3d Cir. 2021) (noting that no judge on the original panel, including a judge who dissented in the original opinion and dissented from the denial of rehearing en banc, voted for panel rehearing); *Martin Cnty. Coal Corp. v. Universal Underwriters Ins. Co.*, Nos. 11-5773/11-5793, 2013 U.S. App. LEXIS 22674 (6th Cir. Oct. 25, 2013) (denial of rehearing by a divided panel of two judges, explaining that “the issues raised in the petition were fully considered upon the original submission and decision of the cases”). Indeed, in dissenting from a denial of rehearing en banc, then-Judge Gorsuch, joined by three other judges, acknowledged that the proper method of addressing a PFR under similar circumstances was through the en banc process:

While voting for rehearing *en banc*, I have not sought panel rehearing. The matter before us is one of “exceptional public importance,” meriting *en banc* review, 10th Cir. R. 35.1(A), and I surely believe the panel got it wrong. But, I cannot say, as I must to request panel rehearing, that my panel colleagues “overlooked or misconstrued” any argument or evidence presented to them. *See* 10th Cir. R. 40.1(A). In addition, because we have, sadly, lost a panel colleague to the academy, a vote among the remaining two panel members would likely result in a tie.

Williams v. Jones, 583 F.3d 1254, 1256 n.1 (10th Cir. 2009) (Gorsuch, J., dissenting).

As Waidla argues, the reconstituted panel’s amendment of the original opinion could not have been pursuant to the limited grounds requested by the state in its PFR, nor in response to en banc proceedings. Instead, it was performed pursuant to the court’s inherent power to alter a disposition before the mandate issues. Although *Carver* justified its amendment on the grounds that the mandate had not been issued, the reconstituted majority (and Judge Reinhardt) misapprehended the issue before them. The issue before them was not simply whether an opinion may be withdrawn or amended prior to the mandate; instead, the precise issue was whether it is consistent with Rule 40 and our en banc procedures to permit a newly drawn panel member to reconsider the published decision of a prior quorum that had already decided the case. In my view, it is not.

b. 28 U.S.C. § 46

Pursuant to 28 U.S.C. § 46(c): “Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing or rehearing before the court in banc is ordered.” Moreover, “[a] majority of the number of judges authorized to constitute a . . . panel thereof . . . shall constitute a quorum.” 28 U.S.C. § 46(d). Thus, even if a judge on the original panel can no longer serve on the panel, the remaining two judges constitute a quorum able to decide any case or controversy so long as they agree on the outcome of that case or controversy.

“Under our ‘law of the circuit doctrine,’ a published decision of this court constitutes binding authority which must be followed unless and until overruled by a body competent to do so.” *In re Zermeno-Gomez*, 868 F.3d 1048, 1052 (9th Cir. 2017) (quotation marks and citations omitted). This is the case even if a mandate has yet to issue. Indeed, “a stay of the mandate does not ‘destroy the finality of an appellate court’s judgment,’ and [] a published decision is ‘final for such purposes as stare decisis, and full faith and credit, unless it is withdrawn.’” *Id.* (quoting *Wedbush, Noble, Cooke, Inc. v. SEC*, 714 F.2d 923, 924 (9th Cir. 1983)).

To be sure, a panel retains the ability to withdraw and amend its own opinions before issuance of the mandate, *see In re Zermeno-Gomez*, 868 F.3d at 1053, but consistent with the principles undergirding Federal Rule of Appellate Procedure 40 and 28 U.S.C. § 46, the exercise of that power should require the consent of a quorum of the original panel. General Order 5.3(c) explains that “[a]fter an en banc call is made, but prior to the completion of a successful vote on whether the case should be reheard en banc . . . a panel may withdraw *its* opinion and issue a new opinion or file a superseding amended opinion.” (emphasis added). The Order speaks in terms of the panel’s *own* decision. And, absent an en banc hearing, a panel cannot consist of any more than three judges.⁴ The exercise

⁴ Indeed, as Waidla persuasively argues, the appeal was “heard in full by four panel judges” of this court. The State contends that “the existence of a panel” is not

of withdrawing or amending an opinion should therefore require the consent of a quorum of the original panel.

While “it is generally understood that a judge may change his or her position up to the very moment when a decision is released,” *Yovino*, 586 U.S. at 184, another judge should not be able to step in and change an original panel member’s mind for them—especially after a decision has been released to the parties and the public. Accordingly, the court should limit a reconstituted panel’s ability to *sua sponte* withdraw and amend a published opinion. The court should require the consent of a quorum of the original panel to make such withdrawals or amendments. Absent a quorum of the original panel, an opinion should only be amended through the en banc process. Such an approach is consistent with 28 U.S.C. § 46(c)’s command that a case or controversy be decided by *either* an en banc court *or* a panel of no more than three judges.

“determined by the identity of the panelists,” and therefore “[t]he replacement of the unavailable judge did not add a fourth judge to the panel; rather, assignment of the replacement judge completed the three-judge panel that was short one panelist.” But this Circuit defines a panel as “a division of more than one judge of this Court to which a case or motion is referred for disposition.” General Order 1.6. If that “division” of judges has changed—because the members on the panel have changed—then the panel itself has changed as well. And in this case, that change resulted in four different judges each hearing, considering, and deciding the merits of the appeal.

Now, I recognize that if a member of the panel is newly drawn pursuant to General Order 3.2(h), that judge, as an Article III judge, will not want to be bound by the absent member's conclusion, and will wish to decide the case in accordance with her view of the law and facts. This is why I conclude that the real culprit is found in General Order 3.2(h). We should consider changing this rule to act like it says it does, and provide for replacement judges only when the case is under submission,⁵ before it is decided.

III.

I recognize that this case presents a close question on the issue of prejudice—a question on which the district court, Judge Watford, and I agree. However, where the difference of disposition is life or death, we should err on the side of life and be wary of changing the result to death. The disposition of this case should only have been changed through a quorum of the original panel or through the en banc process.⁶ Accordingly, I urge my colleagues to reconsider and amend our practice

⁵ The term “submission” is not the only ambiguous term in General Order 3.2(h). The rule twice mentions “agreement” by the two remaining judges, but does not tell us “agreement as to what.” If the rule, for example, specified “in agreement as to the petition for panel rehearing,” the remaining judges, though not in agreement as to the merits, might very well agree that the PFR or PFREB, filed after the panel decision was published, lacked merit. Indeed, here, the new majority decided the case without resolving the point raised in the PFR.

⁶ For those of our colleagues who may be concerned that this process might burden our court with too many additional en banc hearings, that a substitution has

and rules to require a quorum of the original panel to withdraw or amend a panel opinion.

changed the outcome in a case only five times since *Carver* in 2009 should ameliorate this concern.

18-99001, 18-99002

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TAUNO WAIDLA,
v. Petitioner-Appellee,

RON DAVIS, Warden,
Respondent-Appellant.

DEATH PENALTY CASE

No. 18-99001

TAUNO WAIDLA,
v. Petitioner-Appellant,

RON DAVIS, Warden,
Respondent-Appellee.

DEATH PENALTY CASE

No. 18-99002

On Appeal from the United States District Court
for the Central District of California, No. CV 01-00650-AG
The Honorable Andrew J. Guilford, Judge

RESPONSE TO PETITION FOR REHEARING EN BANC

ROB BONTA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
JAMES WILLIAM BILDERBACK II
Senior Assistant Attorney General
DANA MUHAMMAD ALI
Supervising Deputy Attorney General
SHIRA SEIGLE MARKOVICH
Deputy Attorney General
State Bar No. 267722
300 South Spring Street, Suite 1702
Los Angeles, CA 90013-1230
Telephone: (213) 269-6065
Fax: (916) 731-2143
Email: DocketingLAAWT@doj.ca.gov
Shira.Markovich@doj.ca.gov
Attorneys for Respondent

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INTRODUCTION

Unhappy with the result of the State's appeal reversing the district court's grant of penalty phase relief and reinstating his death sentence, Petitioner-Appellee Tauno Waidla seeks rehearing en banc to challenge this Court's faithful adherence to its own internal rules and procedures for assigning a replacement judge when a member of a three-judge panel becomes unavailable before a case is final on appeal. (*See* United States Court of Appeal for the Ninth Circuit General Orders § 3.2(h) (General Orders).) Respondent-Appellant the State urges this Court to deny the petition for rehearing en banc because Waidla's objections to this Court's procedures for replacing an unavailable panelist and general appellate rules that a non-final opinion may be vacated, withdrawn, or amended sua sponte by a panel do not warrant rehearing.

PROCEDURAL HISTORY

In 1991, a California jury convicted and sentenced Waidla to death for murdering Viivi Piirisild with an axe. The California Supreme Court affirmed the judgment on appeal. *People v. Waidla*, 22 Cal. 4th 690 (2000). In state habeas corpus proceedings before the California Supreme Court, Waidla presented ineffective assistance of counsel claims based on the failure to investigate and present at the penalty phase additional mitigating evidence related to his early childhood and character, his experiences in the Soviet Army, and his good

behavior in jail while awaiting trial; the claims were rejected on the merits. (*See* 2-ER-274-76.)

The same claims were presented to the federal district court on habeas corpus review. (*See* 1-ER-14.) The district court held an evidentiary hearing so that Waidla could prove his allegations related to the ineffective assistance of counsel claims (*id.*; 2-SER-97-336; 3-SER-338-479; 4-SER-481-697; 5-SER-699-891), but ultimately purported not to consider any evidence adduced at the evidentiary hearing following the Supreme Court's decision in *Cullen v. Pinholster*, 563 U.S. 170 (2011) (1-ER-28-29; *see also* 1-ER-14-15, 17-18). The district court granted relief on Waidla's penalty phase ineffective assistance of counsel claims, concluding that the California Supreme Court unreasonably rejected them. (1-ER-201-02, 219.)

The State appealed the district court's grant of relief. (1-ER-1.) On federal appeal, the panel, in a two-to-one published opinion issued on May 23, 2023, affirmed the grant of penalty phase relief concluding that the California Supreme Court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984). (Dkt. 85 at 19-37.)¹ On July 6, 2023, the State filed a petition for panel rehearing. (Dkt. 92.) Waidla was ordered to file a response (Dkt. 93), and, four days later, pursuant

¹ The State's citation to "Dkt." refers to the docket in the instant case before this Court.

to General Orders section 3.2(h), Judge Morgan Christen was drawn to replace Judge Paul Watford, who had left the Court (Dkt. 94). On August 3, 2023, Waidla filed his response to the State’s petition for rehearing. (Dkt. 95.) On November 21, 2023, “[i]n light of the fact that Judge Morgan Christen had replaced Judge Paul Watford on the three-judge panel,” the Court “agreed to schedule additional argument[.]” (Dkt. 96.) The case was reargued on January 25, 2024. (Dkt. 100.)

On December 23, 2024, in a two-to-one published opinion, the panel vacated the May 23, 2023, opinion, denied the State’s petition for rehearing as moot, and reversed the district court’s grant of penalty phase relief, concluding the state supreme court’s rejection of Waidla’s ineffective assistance of counsel claims was reasonable under 28 U.S.C. § 2254(d). *Waidla v. Davis*, 126 F.4th 621, 624, 640-44 & n.1 (9th Cir. 2024). Waidla filed the instant petition for rehearing en banc on February 19, 2025. (Dkt. 107.)² Pursuant to this Court’s February 26, 2025, order (Dkt. 108), the State hereby files the instant response.

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² The State will cite to the petition for rehearing en banc as “Dkt. 107” using the ECF-generated page numbers reflected at the top of each page.

ARGUMENT

WAIDLA’S DISPLEASURE WITH THIS COURT’S INTERNAL RULES AND PROCEDURES FOR REPLACING AN UNAVAILABLE JUDGE ON A PANEL AND A PANEL’S GENERAL AUTHORITY TO VACATE A NON-FINAL OPINION DOES NOT WARRANT EN BANC REVIEW

The crux of Waidla’s argument in his petition for rehearing en banc is that he disagrees with this Circuit’s General Orders regarding the replacement of an unavailable judge on a three-judge panel with a new panelist, as well as a panel’s ability to vacate, withdraw, or amend a non-final opinion. But mere displeasure with internal court processes does not meet the criteria for rehearing en banc. Moreover, this Court has already confirmed that replacement of an unavailable panelist and subsequent vacatur, amendment, or withdrawal of a non-final opinion does not run afoul of any binding federal laws or rules. Accordingly, the petition for rehearing en banc should be denied.

A. Waidla’s Petition Fails To Meet The Criteria For Rehearing En Banc As Set Forth In Rule 40(b)(2) of the Federal Rules of Appellate Procedure

Rule 40(b)(2) of the Federal Rules of Appellate Procedure requires a petition for rehearing en banc to begin with a statement that the panel decision warrants en banc review because it conflicts with a decision of this Court, another circuit court, or the Supreme Court, or because “the proceeding involves one or more questions of exceptional importance, each concisely stated.” (Fed. R. App. P. 40(b)(2)(A)-(D).) In this case, Waidla states in conclusory fashion that his challenge to this

Circuit’s internal rules for replacing unavailable judges and vacating non-final opinions falls within Rule 40(b)(2)(C) and (D). (Dkt. 107 at 7 n.2.) However, he fails to identify any “authoritative decision of another United State court of appeals (with citation to the conflicting case or cases)” that conflicts with the panel opinion in this case. (Fed. R. App. P. 40(b)(2)(C).) Indeed, Waidla does not even appear to quarrel with the substance of the panel opinion in his petition for rehearing en banc, just the manner in which it came to be. (*See* Dkt. 107.) And, he does not “concisely state[.]” what question of “exceptional importance” (Fed. R. App. P. 40(b)(2)(D)) is at issue in this proceeding other than an opaque reference to “issues of access to multiple appellate procedures and appellate finality” (Dkt. 107 at 7 n.2). Because his petition fails to meet the criteria for rehearing en banc set forth in Rule 40(b)(2), the petition should be denied.

B. Because An Opinion May Be Vacated, Amended, Or Withdrawn Sua Sponte By The Panel At Any Time Prior To Issuance Of The Mandate, Waidla’s Objections To The Panel’s Vacatur And Issuance Of A New Opinion In This Non-Final Case Do Not Warrant Rehearing En Banc

Waidla’s various challenges to the procedures by which Judge Watford was replaced by Judge Christen, the vacatur of the prior panel opinion, and the issuance of a new panel opinion are foreclosed by this Court’s opinion in *Carver v. Lehman*, 558 F.3d 869 (9th Cir. 2009), which involved a situation almost identical to the one here. In *Carver*, after a two-to-one panel majority opinion issued, but before the

panel could rule on the petitions for rehearing, one of the judges on the panel died. *Carver*, 558 F.3d at 880 (Reinhardt, J., concurring). A replacement judge was assigned to the panel pursuant to General Orders section 3.2(h). *Id.* The original panel opinion was withdrawn and replaced with a substantially amended version that changed the outcome of the case. *Compare Carver*, 558 F.3d 869 with *Carver v. Lehman*, 528 F.3d 659 (9th Cir. 2008).³ The pending petitions for rehearing were subsequently denied as moot, since the new panel had voted to amend the previous opinion. *Carver v. Lehman*, 540 F.3d 1011 (9th Cir. 2008). In the amended opinion, Judge Reinhardt argued it was “unwise” to withdraw and replace the prior opinion simply because the composition of the panel changed, and that only rehearing en banc should be used to correct published decisions. *Carver*, 558 F.3d at 880-81 (Reinhardt, J., concurring). The *Carver* majority unequivocally rejected that argument, explaining that “[u]ntil the mandate has issued, opinions can be, and regularly are, amended or withdrawn, by the merits panel at the request of the parties pursuant to a petition for panel rehearing, in response to an internal memorandum from another member of the court who believes that some part of the

³ The original panel majority opinion held Washington state law created a liberty interest in an inmate’s early release into community custody. *See Carver v. Lehman*, 528 F.3d 659. The substitute opinion filed after replacement of one of the original panelists held no such liberty interest existed. *See Carver v. Lehman*, 550 F.3d 883 (9th Cir. 2008). The substitute opinion was subsequently amended with no change in the result. *See Carver*, 558 F.3d 869.

published opinion is in error, or *sua sponte* by the panel itself.” *Id.* at 878-79. This “collaborative process strengthens, not weakens, the final quality of those opinions, thereby better enabling them to stand the test of time, and engender the respect of thoughtful citizens for both the opinion, and the court that produced it.” *Id.* at 879. And Judge Reinhardt himself conceded that the newly constituted panel had the authority to withdraw and amend the initial panel opinion because it was not final. *Id.* at 881 (Reinhardt, J., concurring).

Carver is controlling here. Despite Waidla’s insinuations otherwise (*see* Dkt. 107 at 13-15), the prior panel opinion was not final because the mandate had not issued, and thus the new panel had the authority to vacate, withdraw, or amend the opinion filed by the prior panel. *Carver*, 558 F.3d at 878-79; *id.* at 881 (Reinhardt, J., concurring). And that is exactly what happened here: a replacement judge was assigned after one of the original panelists became unavailable; instead of ruling on the pending petition for rehearing, the panel elected to request additional argument pursuant to one of the panelist’s requests, and then subsequently vacated the prior panel opinion and issued a new opinion. Having issued a new opinion, the panel denied the petition for rehearing as moot. Nothing in that sequence of events runs afoul of any federal law or internal rule of this Court. *See Carver*, 558 F.3d at 878-79; *see also Perez v. City of Roseville*, 926 F.3d 511, 525-26 (9th Cir. 2019) (applying *Carver* and explaining that, “[b]ecause

‘the opinion issued by the prior majority was only part way through its finalization process,’” a replacement judge was assigned and “the new panel had the authority to reconsider and withdraw the opinion filed by the prior panel and to substitute a different opinion.” (citations omitted)); *Hernandez-Gutierrez v. United States Dist. Court (In re Zermeno-Gomez)*, 868 F.3d 1048, 1053 (9th Cir. 2017) (“until the mandate has issued, a published decision by a panel of this court is subject to modification, withdrawal, or reversal”).

Finally, *Carver* expressly rejects Waidla’s arguments that there was something improper about the panel’s vacatur of the prior panel opinion and issuance of a new opinion without first granting the State’s petition for rehearing. (See Dkt. 107 at 3-9, 11-13.) Indeed, an opinion can be reconsidered, withdrawn, substituted, amended, or vacated up until the time the mandate issues sua sponte by the panel itself. *Carver*, 558 F.3d at 878-79; see also *Perez v. City of Roseville*, 926 F.3d at 525-26; *In re Zermeno-Gomez*, 868 F.3d at 1053. That is exactly what happened here.⁴ There was no error, and there are no bases upon which to grant the petition for rehearing en banc.

⁴ Waidla also asserts that the State’s petition for rehearing “was pretextual,” “serv[ing] solely as the trigger for a do-over.” (Dkt. 107 at 11, 13.) That is false. The State carefully considered the merits of its petition for rehearing and filed it in good faith based on the legal error asserted therein without regard for the identity of the judges on the panel. Further, Waidla’s baseless assertion assumes that the State could preordain which replacement judge would be assigned to the panel, or
(continued...)

C. The Panel’s Compliance With This Circuit’s General Orders For Replacing An Unavailable Panelist Did Not Violate Any Federal Rules Or Procedures

Apparently attempting to avoid the inescapable conclusion that the opinion was not final and thus the prior panel opinion could properly be vacated or amended at any time without rehearing being granted, Waidla argues that the case was “decided” when the prior panel opinion issued, and thus drawing a replacement judge violated General Orders section 3.2(h). (Dkt. 107 at 13-14.) This characterization strains credulity. General Orders section 3.2(h) provides that “[i]f, after a matter is under submission to a three-judge panel, a judge becomes unavailable by reason of death, disability, recusal, or retirement from the Court, the remaining two judges may – if in agreement – decide the matter as a quorum pursuant to 28 U.S.C. § 46(d), or shall request the Clerk to draw a replacement judge.” Here, because “the opinion issued by the prior majority was only part way through its finalization process,” *Carver*, 558 F.3d at 878, the matter was “under submission” within the meaning of General Orders section 3.2(h). Stated another way, until an opinion is final, it remains “under submission” (General Orders § 3.2(h)). *See United States v. Foumai*, 910 F.2d 617, 620 (9th Cir. 1990) (“A court

that one would be assigned at all. (See General Orders § 3.2(h) (matter can be decided by two-judge quorum if there is agreement).)

of appeals may modify or revoke its judgment at any time prior to issuance of the mandate, sua sponte or by motion of the parties.”).

Waidla’s reliance on *In re Zermeno-Gomez*, 868 F.3d 1048, as establishing that the issuance of a non-final panel opinion means a case is “decided,” and thus the case is no longer “under submission” within the meaning of General Orders section 3.2(h) (Dkt. 107 at 13-14), is wrong. In that case, this Court explained that a stay of the mandate does not undo “the finality of an appellate court’s judgment[.]” *In re Zermeno-Gomez*, 868 F.3d at 1052. Waidla appears to misapprehend that if a stay of a mandate was issued, then a decision would be *final* even if the mandate was subsequently stayed. More importantly, he appears to conflate law of the circuit principles allowing for citation and reliance on a non-final published opinion with “the unremarkable proposition that, until the mandate has issued, a published decision by a panel of this court is subject to modification, withdrawal, or reversal.” *Id.* at 1053; *see generally United States v. Ruiz*, 935 F.2d 1033, 1037 (9th Cir. 1991) (clarifying that “no expectation of finality can attach during the period in which either party may petition for rehearing” (quoting *United States v. Foumai*, 910 F.2d at 620)). Simply put, there was no error in drawing a replacement judge consistent with this Circuit’s General Orders as it is clear the case was “under submission” because the original panel opinion was not yet final. *See Perez v. City of Roseville*, 926 F.3d at 525-26 (new panel withdrew the opinion

filed by the prior panel and substituted a different opinion after replacement judge assigned; explaining “[l]ike all three-judge panels, we must resolve the case before us to the best of our abilities, which may include reconsidering and revising an opinion that has not yet mandated.”); *Carver*, 558 F.3d at 878-89 (replacement judge drawn after panel opinion issued; new panel withdrew the original panel opinion and replaced it with a substantially amended opinion); *see also Kelsey v. Garrett*, 81 F.4th 1264 (9th Cir. 2023) (replacing unavailable panelist with new judge after the original panel opinion issued, granting the petition for panel rehearing, withdrawing the previously published opinion, resubmitting the case without rehearing argument, and replacing the prior published panel opinion with an unpublished memorandum disposition with an outcome that was different than the original panel opinion).

Next, Waidla asserts that replacing an unavailable judge in compliance with General Orders section 3.2(h) “violates the Judicial Code.” (Dkt. 107 at 14-15.) According to Waidla, 28 U.S.C. § 46(c) mandates no more than three judges may sit on a panel, and assigning a replacement judge when a panelist is unavailable equates to four judges on a panel. (Dkt. 107 at 15.) Again, Waidla’s argument hinges on two incorrect premises: 1) that because the original panel issued an opinion, the non-final opinion is somehow frozen in time, and 2) that the existence of a panel is determined by the identity of the panelists. As explained above, Judge

Watford became unavailable before the case was final. Accordingly, there were only two judges on the panel at the time the State filed a petition for rehearing. While the remaining two panelists could have decided the matter as a quorum, it appears they either decided not to do so or there was disagreement about doing so, resulting in the assignment of a replacement judge. (*See* General Orders § 3.2(h).) The original panel opinion was subsequently vacated, and a new opinion was issued by the newly constituted three-judge panel. The replacement of the unavailable judge did not add a fourth judge to the panel; rather, assignment of the replacement judge completed the three-judge panel that was short one panelist. *See generally Yovino v. Rizo*, 586 U.S. 181, 186 (2019) (because a deceased judge was no longer a judge at the time when the relevant en banc decision was filed, the federal appellate court erred in counting him as a member of the majority). And, if further clarity is required, the fact that Judge Watford did not weigh in, consider, or opine on the issues set forth in the new panel opinion reveals that this case was “heard and determined by a court or panel of not more than three judges[.]” *See* 28 U.S.C. § 46(c).

Finally, apparently acknowledging that the replacement of retired Judge Watford with Judge Christen on the panel in this case was done in accordance with the rules and internal procedures set forth within the General Orders of this Circuit for assigning a replacement judge (*see* Dkt. 107 at 13-14), Waidla urges this Court

to change its procedures (Dkt. No. 107 at 17-20). There is a designated process for suspending a provision of this Circuit's General Orders, and a petition for rehearing en banc is not the way. (*See* General Orders § 12.11.) In any event, this Court has "readily acknowledge[d] the self-evident truth of [the] observation that in our judicial system the out-come of important appellate cases can vary based on the composition of the judicial body or panel deciding those cases. It has been so ever since the founding of the Republic." *Carver*, 558 F.3d at 878. The process by which non-final opinions are amended or withdrawn is a "collaborative process" that "strengthens, not weakens, the final quality of those opinions, thereby better enabling them to stand the test of time, and engender the respect of thoughtful citizens for both the opinion, and the court that produced it." *Id.* at 879. Simply put, there is no there there. Waidla's petition for rehearing en banc should be denied.

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CONCLUSION

For the foregoing reasons, the State respectfully requests that Waidla's petition for rehearing en banc be denied.

Dated: April 14, 2025

Respectfully submitted,

ROB BONTA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
JAMES WILLIAM BILDERBACK II
Senior Assistant Attorney General
DANA MUHAMMAD ALI
Supervising Deputy Attorney General

s/ Shira Seigle Markovich
SHIRA SEIGLE MARKOVICH
Deputy Attorney General
Attorneys for Respondent

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 11. Certificate of Compliance for Petitions for Rehearing/Responses

Instructions for this form: <https://www.ca9.uscourts.gov/forms/form11instructions.pdf>

9th Cir. Case Number(s)

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- ☒ Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words:** .
(Petitions and responses must not exceed 4,200 words)

OR

- ☐ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature

Date

(use "s/[typed name]" to sign electronically-filed documents)

CERTIFICATE OF SERVICE

Case Name: **Tauno Waidla v. Ron Davis,
Warden**

No. **18-99001, 18-99002**

I hereby certify that on April 14, 2025, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

RESPONSE TO PETITION FOR REHEARING EN BANC

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on April 14, 2025, at Los Angeles, California.

A. D. Kartikarini
Declarant

s/ A. D. Kartikarini
Signature

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Nos. 18-99001, 18-99002
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TAUNO WAIDLA,
Petitioner-Appellee,
v.
RON DAVIS, Warden,
Respondent-Appellant.

No. 18-99001
D.C. No. 2:01-cv-650-AG
Central District of California,
Los Angeles
DEATH PENALTY CASE

TAUNO WAIDLA,
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v.
RON DAVIS, Warden,
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No. 18-99002
D.C. No. 2:01-cv-650-AG
Central District of California,
Los Angeles
DEATH PENALTY CASE

PETITIONER-APPELLEE'S PETITION FOR REHEARING EN BANC

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA
HONORABLE ANDREW J. GUILFORD
United States District Judge

CUAUHTEMOC ORTEGA
Federal Public Defender
MARTA VANLANDINGHAM
Email: Marta_VanLandingham@fd.org
KATHERINE FARKAS
Email: Kathy_Farkas@fd.org
Deputy Federal Public Defenders
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-2854
Facsimile: (213) 894-0081

Attorneys for Petitioner-Appellee
TAUNO WAIDLA

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I. INTRODUCTION

In the State’s appeal of the district court’s grant of penalty-phase relief to Petitioner-Appellee Tauno Waidla, a two-to-one published decision of this Court affirming the grant of relief was relitigated and overturned when a member on the majority retired. Aside from the judicial retirement, the only intervening event was the State’s filing of an unmeritorious petition for rehearing (PFR). The new judge appointed to consider the PFR ordered full reargument and then voted with the former minority on the basis of an issue not raised in the PFR. The result is that, without a PFR being granted, the same appeal was adjudged by two differently-constituted panels with two different outcomes.

The Judicial Code provides that “[c]ases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing or rehearing before the court in banc is ordered [.]” 28 U.S.C. § 46(c). Here, the appeal was heard in full by four panel judges, two of whom decided to affirm the grant of penalty relief, and two of whom voted to deny. Thus, counting the lower court, three federal judges found a basis for penalty relief—but two others determined the outcome, and put Waidla back on death row after nineteen

months with a life sentence. And this reversal was instituted without a finding of a basis for rehearing under the rules of appellate procedure.¹

The Ninth Circuit is in the minority in appointing a new judge to consider rehearing where a member of the original panel departs. In the majority of circuits, if one member of a three-judge panel becomes unavailable after a case has been decided but before a decision is reached on a PFR, the two remaining judges decide whether to rehear the case, and a third judge may be appointed only if necessary after rehearing is granted. This practice places reasonable guardrails on panel rehearing.

The practices in this Circuit, however, as in Waidla's case, effectively allow for a new appeal without a petitioner's showing of an overlooked or misapprehended point of law or fact, as the Rules require for panel rehearing. These procedures undermine the principle of finality. They result in gross judicial inefficiency, open the floodgates to judge-shopping, and diminish the reliability and legitimacy of all the Court's opinions. Waidla thus respectfully petitions for en

¹ The Federal Rules of Appellate Procedure require a party seeking panel rehearing to "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended." Fed. R. App. P. 40(b)(1)(A).

banc review of this Court's procedures for panel rehearing and correction of those procedures' improper effect on the outcome of the State's appeal.²

II. ARGUMENT

A. The reconstituted panel vacated the original published decision on a basis not raised in the PFR.

1. Waidla's appeal was fully adjudged twice.

Waidla was convicted and sentenced to death in 1991 for the killing of Viivi Piirisild. Though neither side presented any evidence at Waidla's penalty trial, the jury deliberated for nine days, twice sending notes expressing difficulty reaching unanimity, before voting for death.

In 2017, the district court granted Waidla penalty relief upon concluding, with the requisite deference due under 28 U.S.C. § 2254(d), that defense counsel's performance was constitutionally ineffective. The district court found that no mitigation investigation, even of a preliminary nature, was ever carried out. In light of the jury's lengthy deliberation, the district court found a reasonable probability that, had counsel conducted an investigation and presented mitigation at penalty, the jury would not have voted for death, and granted relief.

² Waidla seeks en banc review and not panel rehearing, as this Circuit's procedures regarding panel rehearing form the basis for this petition. The Circuit's rules fall within the purview of the full Circuit. The issues of access to multiple appellate procedures and appellate finality are questions of exceptional importance on which circuit courts differ, thus bringing this petition within the scope of en banc review under Rules 40(b)(2)(C) and (D) of the Federal Rules of Appellate Procedure.

In January of 2018, Respondent filed a notice of appeal of the grant of penalty relief, and Waidla cross-appealed the denial of guilt and special circumstance claims. This Court granted Waidla a certificate of appealability in January of 2020. (Case no. 18-99001,³ dkt. 32.) Briefing was completed on April 25, 2022. (Dkt. 73.)

The panel assigned to hear the appeal and cross-appeal consisted of Circuit Judges Kim McLane Wardlaw, Paul J. Watford, and Eric D. Miller. (Dkt. 84.) Oral argument was held on March 1, 2023. (*Id.*)

The panel published its opinion on May 23, 2023 (dkt. 85), with a corrected opinion (correction not relevant here) issued on May 31, 2023 (dkt. 91). In its per curiam opinion, the panel affirmed the district court's grant of habeas relief on Waidla's claim of ineffective assistance of counsel (IAC) at the penalty phase. (*Id.* at 48.) The Court highlighted the fact that "it took the jury nine days of deliberation and two bouts of deadlock to reach a verdict." (*Id.* at 32.) The panel thus held that "the jury's uncertainty, the extremely minimal mitigation evidence originally presented, and the missed opportunity to rebut various aspects of the State's aggravation argument, which was itself modest," required affirmance of the district court's grant of penalty relief. (*Id.* at 37.) With this affirmance the panel did

³ Identical documents can be accessed on the docket for Ninth Circuit case no. 18-99002, though the document numbering differs.

not need to address Waidla's penalty claim that the prosecutor's presentation of false evidence deprived him of due process. (*Id.* at 37.) The panel also denied Waidla's claim of an unconstitutionally-derived confession and claims of IAC in the guilt phase. (*Id.*) Judge Miller concurred in the denial of Waidla's challenges to his conviction. He dissented, however, from the grant of penalty phase relief, largely on the basis of deference to the California Supreme Court. (*Id.* at 61-62.)

Meanwhile, Judge Watford had publicly announced that he would be resigning from the Court on May 31, 2023. Thus, at the time the panel issued its opinion on May 23, 2025, the parties were aware that one of the two judges in the majority would be retiring.

On July 6, 2023, Respondent submitted a PFR.⁴ (Dkt. 92.) The Court then appointed Judge Morgan B. Christen to replace Judge Watford on the panel. (Dkt. 94.) Waidla opposed rehearing and also objected to the Circuit procedures appointing a replacement panelist to review the petition for rehearing. (Dkt. 95 at 11 n.6.)

On November 21, 2023, the panel issued the following order: "In light of the fact that Judge Morgan Christen has replaced Judge Paul Watford on the three-

⁴ As detailed below, the matters discussed in the PFR had no impact on the ultimate outcome of this case.

judge panel, the court has agreed to schedule additional argument” (Dkt. 96.)

The argument was requested by Judge Christen. (*See* dkt. 101 at 1 n.*.)

At the second oral argument in the case, held on January 25, 2024 and lasting over one hour, the claimed error brought to the Court’s attention in the PFR was raised, but the majority of the questions from the panel focused closely on the issue of penalty-phase prejudice. (*See* recording of 2nd oral argument, Jan. 25, 2024, *Waidla v. Davis*, 18-99001, https://www.youtube.com/watch?v=SzKE_D1gx6s.)

On December 23, 2024, eleven months after the second argument was held, the panel issued a new per curiam opinion denying the grant of penalty-phase relief and vacating the prior opinion. (Dkt. 101.) Judge Christen and Judge Miller joined the per curiam opinion in full. (*Id.* at 6 n.2) Without addressing the issue of deficient performance, the panel found that the California Supreme Court could reasonably have rejected the penalty IAC claim on the prejudice prong. (*Id.* at 45.) Now addressing the previously-bypassed claim of violation of Waidla’s due process rights by the prosecution’s presentation of false evidence and inconsistent theories, the panel found there is not clearly established federal law and no prejudice. (*Id.* at 50.) The reconfigured panel agreed with the original panel in denying Waidla’s claims that his confession violated *Miranda* and his claims of IAC in the guilt phase. (*Id.* at 25.)

Judge Christen authored a separate concurrence “to avoid minimizing the requirement that counsel investigate a capital defendant’s available options before deciding not to pursue them.” (*Id.* at 50.) She found that trial counsel’s failures and choices at penalty “fell below an objective standard of reasonableness.” (*Id.* at 55.) Based on the California Supreme Court’s summary denial, however, she concluded that its “prejudice analysis was not unreasonable.” (*Id.* at 50.)

Judge Wardlaw concurred in the portion of the judgment denying the guilt phase claims. (*Id.* at 55.) She dissented, however, from the judgment as to the penalty phase ineffective assistance of counsel claim. The text of her dissent was “drawn largely from the original per curiam opinion.” (*Id.* at 55 n.1.) Thus, the basis for her findings of both deficient performance and prejudice are the same as in the original opinion, and focus, for prejudice, on the long-drawn-out struggle by the jury to reach a penalty verdict even in the absence of any mitigation presentation—a nine-day effort not addressed in the majority portion of the revised opinion.

2. The error raised in the PFR was pretextual, and was dismissed by the Court on reconsideration of the State’s appeal.

Respondent submitted a PFR on July 6, 2023 (dkt. 92), shortly after Judge Watford left the bench. The PFR complained only about a single footnote, finding the State forfeited any objection to the district court granting relief based on the exhibits submitted by Waidla, without relying on an evidentiary hearing at the de

novo review stage of its analysis. (*Id.* at 3 *et seq.*; dkt. 91 at 29 n.1.) The PFR misconstrued the footnote it attacked, and focused on reiterating the State’s argument that some of the evidence of Waidla’s good conduct in jail while awaiting trial should have been found inadmissible. (Dkt. 92.)

The reconstituted panel’s reconsideration of the case was not based on this putative error. Two of three judges in the reconstituted panel found Waidla demonstrated his good behavior in jail, and the new member of the panel expressly found sufficient *admissible* evidence to support this subclaim. (Dkt. 101 at 54 (Christen, J. concurring) (“The record does not suggest a strategic reason for failing to investigate and present this admissible, mitigating evidence of Waidla’s adjustment to incarceration.”); *id.* at 66-67 (Wardlaw, J. dissenting).) Thus, a majority of the reconfigured panel *rejected* the argument that formed the basis of the PFR. In fact, the same footnote on which Respondent based his PFR reappears in the text of Judge Wardlaw’s dissent to the second opinion (*id.* at 67 n.2), with no commentary or objection by the majority.

As discussed above, in the replacement opinion, Judge Christen agreed with the original majority that trial counsel’s *performance* was constitutionally deficient at penalty; but the reversal of the original grant of relief was predicated on her disagreement regarding the *prejudice* prong of IAC. (*See* dkt. 101 at 50.) At the second oral argument, counsel for Respondent asserted that the Court had erred

“by not reviewing de novo after finding 2254(d) satisfied. . . . A de novo review would have seriously undermined petitioner’s claims especially as to the performance prong.” (2nd oral argument at :35, Jan. 25, 2024, *Waidla v. Davis*, 18-99001, https://www.youtube.com/watch?v=SzKE_D1gx6s.) Judge Christen asked, “How would it have changed the prejudice prong?” (*Id.* at :45.) Respondent: “It would not have. The record would have been the same.” (*Id.* at 1:00.)

The petition for review was not granted. The reconstituted court did not find merit in the error raised by Respondent. Rather, in its order vacating the original published decision, the Court denied the PFR as “moot.” (Dkt. 101.) The PFR thus opened the door for a revised set of judges to be impaneled, but did not otherwise affect the scope or focus of the reconfigured panel’s reconsideration of the State’s appeal. The PFR served solely as the trigger for a do-over.

B. The procedures used to decide this case anew do not comport with the Judicial Code, the standard for rehearing, or the procedures of other circuits.

1. This Circuit sometimes appoints a new judge once a PFR is filed.

In appointing a new judge, this Court stated it was acting pursuant to General Order § 3.2.h. (Dkt. 94.) That section allows a new judge to be selected if a member of the panel becomes unavailable “after a matter is under submission to a three-judge panel,” unless the remaining judges are in agreement and elect to “decide the matter as a quorum.” (*See* G.O. § 3.2.h.) However, this case was not

under submission when Judge Watford retired; it was decided. *See In re Zermeno-Gomez*, 868 F.3d 1048, 1052 (9th Cir. 2017) (holding that, despite a stay of mandate, “a published decision of this court constitutes binding authority which must be followed unless and until overruled by a body competent to do so.” (internal quotation marks and citations omitted)). A new judge was not drawn to replace Judge Watford until the State filed its PFR. At that time, the case was still decided—not under submission. *See id.*

Instead of ruling on the PFR, the newly-appointed judge requested reargument, largely on matters unrelated to the PFR, and joined the former dissenter to reverse on an issue not raised by the PFR that had already been fully considered by the original majority.

2. The Ninth Circuit procedure violates the Judicial Code.

The Judicial Code provides that “[c]ases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing or rehearing before the court in banc is ordered [.]” *See* 28 U.S.C. § 46(c). The legislative history explained that this “provision continues the tradition of a three-judge appellate court and makes the decision of a division, the decision of the court, unless rehearing in banc is ordered.” *W. Pac. R. Corp. v. W. Pac. R. Co.*, 345 U.S. 247, 256 n.13 (1953) (quoting Reviser’s Notes, 28 U.S.C., Cong. Serv. 1948, pp. 1707-08). “[T]he Court has to sit either in panels of three judges or all the judges. Any opportunity or possibility of the outcome being affected by a choice of

more than three but less than all, whether fortuitous or purposeful, was thereby avoided.” *Allen v. Johnson*, 391 F.2d 527, 532 (5th Cir. 1968).

Here, the case was “determined” when the Court first issued its published opinion. *See Yovino v. Rizo*, 586 U.S. 181, 185 (2019) (holding that a case “is ‘determined’ when it is decided” (quoting *United States v. American-Foreign S. S. Corp.*, 363 U.S. 685, 688 (1960))). While a *grant* of rehearing might have meant the case was no longer “determined,” the appointment of a fourth judge to consider a case anew without any basis for rehearing cannot be squared with 28 U.S.C. § 46(c).

3. Under Rule 40, there was no ground for rehearing.

The “very limited purpose” of a petition for rehearing is to “direct[] the attention of the court to some controlling matter of law or fact which a party claims was overlooked in deciding a case.” *Anderson v. Knox*, 300 F.2d 296, 297 (9th Cir. 1962). This limitation serves to “protect this court against the commonly attempted effort to argue anew cases which it has once decided.” *Id.* R. 297-98. The purpose of a PFR “is to ensure that the panel properly considered all relevant information in rendering its decision. A party ‘abuse[s] . . . the privilege of making such a petition’ when it seeks review of a scope greater than the limited confines of Fed. R. App. P. 40.” *Armster v. U.S. Dist. Ct.*, 806 F.2d 1347, 1356 (9th Cir. 1986) (citing *Anderson*, 300 F.2d at 297); *Weaver v. Clark*, 540 F. App’x 668, 669 (9th Cir. 2013) (failure to petition for rehearing held not IAC absent any basis to

conclude the court overlooked claims); *accord Missouri v. Jenkins*, 495 U.S. 33, 47 n.14 (1990) (“A petition for rehearing is designed to bring to the panel’s attention points of law or fact that it may have overlooked.”).

Rule 40 refers to matters “overlooked or misapprehended” by the panel. *See* Fed. R. App. P. 40. “Misapprehended,” as used here, means “misunderstood.” *See Easley v. Reuss*, 532 F.3d 592, 593 (7th Cir. 2008) (“As suggested by the rule, petitions for panel rehearing should alert the panel to specific factual or legal matters that the party raised, but that the panel may have failed to address or may have misunderstood.”).

Both the parties and the Court are bound by the limited scope of PFRs. This Court has held: “Our authority under Rule 40 . . . extends only to those situations in which we have ‘overlooked or misapprehended’ a ‘point of law or fact.’” *United States v. Mageno*, 786 F.3d 768, 774 (9th Cir. 2015).

As discussed in Section II.A.2, the reconfigured panel never held the PFR was well-taken, and the basis for reversal was not tied to the issue addressed in the PFR. The reconstituted panel did not find—nor even suggest—that the original panel overlooked or misapprehended the relevant facts and legal standards as to the *Strickland* prejudice prong; instead, the new majority simply looked at the same legal standards and same information, but reached a different conclusion.

In sum, the panel lacked any basis to grant rehearing under Rule 40 and did not do so.

4. The majority of circuits do not appoint a new judge to consider a PFR.

Undersigned counsel have found no cases outside the Ninth Circuit that followed the path here—involving appointment of a new judge to consider a PFR, who then formed a new majority without first granting rehearing. Most circuits do not appoint a new judge to decide a petition for panel rehearing; instead, the two remaining judges address whether they overlooked or misapprehended the facts or law in reaching a decision.

Although one case in the Federal Circuit was recently changed by a reconfigured panel *after it granted rehearing*, *see Novartis Pharms. Corp. v. Accord Healthcare, Inc.*, 38 F.4th 1013, 1018 (Fed. Cir. 2022),⁵ it appears all remaining circuits proceed with two judges until a decision is reached on the PFR. *See, e.g., N.Y. by Abrams v. 11 Cornwell Co.*, 718 F.2d 22, 23-24 (2d Cir. 1983) (granting rehearing en banc due to the significance of the issues after the two “remaining members of the panel were divided”); *United States v. Safehouse*, 991 F.3d 503, 505 (3d Cir. 2021) (declining panel rehearing with “no judge who

⁵ Unlike here, the *Novartis* court found the rehearing petition was meritorious, because it identified a material “misquotation” of the claim specification by a testifying expert. *Novartis*, 38 F.4th at 1018.

concurred in the decision having asked for rehearing”); 5th Cir. R. 40.2 (“Petitions for rehearing of panel decisions are reviewed by panel members only.”); *Martin Cnty. Coal Corp. v. Universal Underwriters Ins. Co.*, No. 11-5773/11-5793, 2013 U.S. App. LEXIS 22674 (6th Cir. Oct. 25, 2013) (denial of rehearing by divided panel of remaining two judges); *Williams v. Jones*, 583 F.3d 1254, 1256 n.1 (10th Cir. 2009) (Gorsuch, J., dissenting) (explaining vote for en banc rehearing but not for panel rehearing, given that “a vote among the remaining two panel members would likely result in a tie”).

The majority approach comports with Section 46(c), Rule 40, and the goals of finality and public confidence in the judiciary. Members of the original panel are in the best position to address whether they overlooked or misunderstood a point of law or fact. And, in the ordinary course, panel rehearing is only available where at least one judge who concurred in the holding votes for rehearing.

The Ninth Circuit’s minority procedure has been criticized from within. In language that foreshadowed the present case, Judge Reinhardt wrote:

In the case before us, it is not necessary for the new majority to undo the original majority’s constitutional ruling, even if it disagrees with it. The constitutional question is a close one, and substantial arguments can be made for either position. Under these circumstances, the more important consideration, in my view, is maintaining the stability and legitimacy of the court’s decisions. . . . [En banc rehearing] can be invoked if any single judge on the court, including either member of the majority, elects to make a call. Relying on this process would, in

my view, be in the better interest of the court and the judicial system; increasing the extent to which judicial decisions depend on chance and subjectivity is not a wise alternative.

Carver v. Lehman, 558 F.3d 869, 880-81 (9th Cir. 2009) (Reinhardt, J., concurring in the judgment); *see also Perez v. City of Roseville*, 926 F.3d 511, 526 (9th Cir. 2019) (Molloy, J., dissenting) (asserting that “the substitution of a judge who legitimately disagrees with the original opinion should not change the outcome except as part of an en banc court decision”).

5. The Court’s procedure here is out of step with its jurisprudence concerning the law-of-the-case and law-of-the-circuit.

This Court has held that a judge replacing another on a case should not generally overrule the former judge’s decision, as “reconsideration of previously litigated issues, absent strong justification, spawns inconsistency and threatens the reputation of the judicial system.” *Zeyen v. Bonneville Joint Dist.*, 114 F.4th 1129, 1137 (9th Cir. 2024) (quoting *Ellis v. United States*, 313 F.3d 636, 647 (1st Cir. 2002)). As this Court explained, “judges who too liberally second-guess their co-equals effectively usurp the appellate function and embolden litigants to engage in judge-shopping and similar forms of arbitrage.” *Id.* (quoting *Ellis*, 313 F.3d 647). While *Zeyen* applied to district courts, this Court applies similar principles to published panel decisions under the law-of-the-circuit doctrine. *See, e.g., Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc) (explaining three-judge panels are

normally bound by the decisions of prior three-judge panels). Even prior to the conclusion of an appeal, “a motions panel’s published opinion binds future panels the same as does a merits panel’s published opinion.” *Lair v. Bullock*, 798 F.3d 736, 747 (9th Cir. 2015).

Here, once the initial panel’s decision was published, it bound other three-judge panels and remained the law of the circuit for the next year and a half. Allowing a replacement judge to fully readjudicate a published decision without finding grounds for rehearing implicates the same concerns underlying *Zeyen* and *Lair*—namely, avoiding inconsistency, protecting the reputation of the judicial system, preventing judge-shopping, and forestalling a system in which individual judges are asked to second-guess their co-equals.

III. CONCLUSION

In this capital case, the Circuit's unique application of the rules of appellate procedure allowed a losing party to reverse the outcome by filing a meritless PFR upon the retirement of a panel judge. Should this Court leave its procedures as they stand, then going forward, the non-prevailing party in any case where a judge becomes unavailable will be motivated to burden the Court with a PFR. Waidla thus respectfully requests that this Court vacate the opinion of the second panel and grant rehearing en banc to bring its rules out of conflict with other Circuits.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender

DATED: February 19, 2025

By /s/ Katherine Farkas
KATHERINE FARKAS
MARTA VANLANDINGHAM
Deputy Federal Public Defenders

Attorneys for Petitioner-Appellee
TAUNO WAIDLA

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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9th Cir. Case Number(s) 18-99001; 18-99002

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Filed	Document Description	Page	Docket Text
12/23/2024	<u>99</u>		FILED PER CURIAM OPINION (KIM MCLANE WARDLAW, MORGAN B. CHRISTEN and ERIC D. MILLER) (Concurrence by Judge Christen; Partial Dissent by Judge Wardlaw) The opinion filed on May 23, 2023, (Dkt. [84]) is hereby ordered VACATED. The Warden's Petition for Panel Rehearing (Dkt. [91]) is DENIED as moot. The parties may seek panel rehearing or rehearing en banc from this opinion. AFFIRMED in part and REVERSED in part. FILED AND ENTERED JUDGMENT. [12917618] [18–99001, 18–99002] (MM)
	<u>99</u> Opinion	2	
	99 Post Judgment Form DOCUMENT COULD NOT BE RETRIEVED!		

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TAUNO WAIDLA,

*Petitioner-Appellee /
Cross-Appellant,*

v.

RONALD DAVIS, Warden,

*Respondent-Appellant /
Cross-Appellee.*

Nos. 18-99001
18-99002

D.C. No. 2:01-cv-
00650-AG

OPINION

Appeals from the United States District Court
for the Central District of California
Andrew J. Guilford, District Judge, Presiding

Argued and Submitted March 1, 2023
Reargued and Submitted January 25, 2024
Pasadena, California

Filed December 23, 2024

Before: Kim McLane Wardlaw, Morgan B. Christen, and
Eric D. Miller, Circuit Judges. *

* The Honorable Paul J. Watford retired from the Ninth Circuit Court of Appeals on May 31, 2023. Judge Morgan B. Christen was drawn to

Per Curiam Opinion;
Concurrence by Judge Christen;
Partial Dissent by Judge Wardlaw

SUMMARY**

Habeas Corpus / Death Penalty

In the State of California’s appeal and Tauno Waidla’s cross-appeal from the district court’s judgment on Waidla’s habeas corpus petition challenging his California conviction and death sentence for a 1988 murder, the panel affirmed the district court’s denial of guilt-phase relief and reversed the district court’s grant of penalty-phase relief.

Waidla cross-appealed the district court denial of relief on his two claims of guilt-phase error. Reviewing under 28 U.S.C. § 2254(d), the panel agreed with the district court’s assessment that Waidla’s claims lack merit.

Waidla contended that his Fifth Amendment rights were violated when the State introduced his confession at trial. The trial court ruled that Waidla’s confession and pre-trial statements to the police were admissible because it found that, although Waidla had invoked his right to counsel, he later initiated dialogue with a detective. The California Supreme Court relied on *Edwards v. Arizona*, 451 U.S. 477

replace him on July 17, 2023 (Dkt. 94) while the Petition for Rehearing was pending. Judge Christen asked for oral argument and this appeal was reargued on January 25, 2024.

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

(1981), to conclude that, as a matter of law, Waidla's question to a detective amounted to initiation of interrogation that constituted waiver of *Miranda*. The panel held that the California Supreme Court did not unreasonably apply *Edwards* and its progeny when it upheld the admission of Waidla's pre-trial statements and confession, as fairminded jurists could conclude that law enforcement did not recommence interrogation in the sense relevant to the *Edwards* analysis.

Waidla contended that counsel rendered ineffective assistance in four areas at the guilt phase: (1) investigating and litigating the motion to suppress Waidla's confession; (2) counseling Waidla to recant his confession and testify to an alibi; (3) failing to investigate alternative defenses; and (4) failing to rebut the State's expert testimony regarding the lifespan of fingerprints. The panel concluded that, as to the first and second alleged deficiencies, the California Supreme Court reasonably could have concluded that counsel met the performance standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); and that the remaining alleged deficiencies did not prejudice Waidla.

The State appealed the district court's order granting penalty-phase relief on Waidla's claim that his counsel rendered ineffective assistance by failing to investigate and present mitigation evidence that competent counsel would have discovered. Not reaching *Strickland*'s performance prong, the panel concluded, under the Antiterrorism and Effective Death Penalty Act, that the California Supreme Court's conclusion that Waidla was not prejudiced by his counsel's alleged errors was not unreasonable.

As alternative grounds for affirming the district court's order granting penalty-phase relief, Waidla argued (1) that

the prosecutor violated his Eighth Amendment right to heightened reliability in capital sentencing by presenting inconsistent factual theories at the seriatim trials of Waidla and his codefendant, and (2) that prosecutorial misconduct denied him his right to due process and a fair trial in violation of the Fourteenth Amendment. The panel concluded (1) the district court correctly observed that there is no clearly established Supreme Court precedent prohibiting a prosecutor from presenting inconsistent theories to convict codefendants in separate trials, and (2) whether the alleged prosecutorial misconduct is considered under the Eighth Amendment or the Fourteenth Amendment, the claim fails because the California Supreme Court's factual findings were not unreasonable.

Judge Christen concurred. She concluded that the California Supreme Court's prejudice analysis was not unreasonable, but also concluded that some aspects of Waidla's counsel's performance fell below an objectively reasonable standard. She wrote separately to avoid minimizing the requirement that counsel investigate a capital defendant's available options before deciding not to pursue them.

Judge Wardlaw dissented in part. She concurred in the portion of the judgment denying habeas relief from Waidla's conviction, but would affirm the district court's grant of habeas relief to Waidla on his penalty phase ineffective assistance of counsel claim because she believes counsel performed deficiently during the penalty phase and that this deficient performance prejudiced Waidla.

COUNSEL

Marta VanLandingham (argued), Tracy Casadio, Craig A. Harbaugh, and Katherine Farkas, Deputy Federal Public Defenders; Cuauhtemoc Ortega, Federal Public Defender; Federal Public Defender's Office, Los Angeles, California; for Petitioner-Appellee.

Seth P. McCutcheon (argued), Scott Hayward, and Michael C. Keller, Deputy Attorneys General; Dana M. Ali, Supervising Deputy Attorney General; James W. Bilderback II, Senior Assistant Attorney General; Lance E. Winters, Chief Assistant Attorney General; Xavier Becerra, Former Attorney General; Rob Bonta, Attorney General; Office of the California Attorney General, Los Angeles, California; for Respondent-Appellant.

OPINION

PER CURIAM:

A California jury sentenced Tauno Waidla to death for the 1988 murder of Viivi Piirisild. Among other findings, the jury convicted Waidla of first-degree murder with two special circumstances: murder during the commission of a robbery and murder during the commission of a burglary. Viivi was murdered in her home, having sustained multiple blows to her head with a hatchet. The blows crushed her skull and fractured her jaw, larynx and hyoid bone. She was also stabbed multiple times. The State argued that Waidla acted with an accomplice, but the two men were tried separately. The jury in Waidla's trial found that he personally used a hatchet.

The California Supreme Court affirmed Waidla's convictions on direct appeal, *People v. Waidla*, 996 P.2d 46 (Cal. 2000), and the United States Supreme Court denied his petition for a writ of certiorari, *Waidla v. California*, 531 U.S. 1018 (2000). This appeal arises from the district court's decision granting penalty-phase relief on Waidla's petition for a writ of habeas corpus. The State has appealed that decision and Waidla cross-appealed the denial of guilt-phase relief.¹ We affirm in part and reverse in part.²

I. Background

A

Tauno Waidla was born and raised in Estonia during its occupation by the Soviet Union. In 1986, when Waidla was 18 years old, he was conscripted into the Soviet Army, an institution known for mistreating Estonian soldiers. *Id.* at 54. While stationed in East Germany, Waidla escaped into West Germany with a fellow Estonian, Peter Sakarias. From there, Waidla and Sakarias sought and received asylum in the United States in 1987. *Id.*

Upon arriving in New York, Waidla and Sakarias were received warmly by the Estonian émigré community. *Id.* In April 1987, Waidla moved to Los Angeles, where he met Avo and Viivi Piirisild. The Piirisilds had relocated to the

¹ The opinion filed on May 23, 2023, (Dkt. 85) is hereby ordered **VACATED**. The Warden's Petition for Panel Rehearing (Dkt. 92) is **DENIED** as moot. The parties may seek panel rehearing or rehearing en banc from this opinion.

² Judge Christen and Judge Miller join the per curiam opinion in full. Judge Wardlaw concurs in the portion of the judgment denying the guilt phase claims and dissents from the judgment as to the penalty phase ineffective assistance of counsel claim.

United States from Estonia decades earlier and were active members of the Baltic American Freedom League, an organization devoted to fighting for the Baltic States' independence from the Soviet Union. *Id.* The Piirisilds invited Waidla to live with them shortly after meeting him. He moved in and lived with the Piirisilds for just over a year, and they paid for his food, cigarettes, clothes, and medical care. *Id.* at 54. They also offered to help him find employment. *Id.* Waidla applied for a radio broadcasting job and accepted occasional short-term jobs, but he was otherwise uninterested in finding work or returning to school. *Id.*

The Piirisilds asked Waidla to help them renovate their home in exchange for his room and board. *Id.* at 54–55. Waidla agreed and completed several significant projects. *Id.* at 55. At some point, Viivi indicated that Waidla could have the Piirisilds' non-functioning car if he started to attend school or obtained a job. *Id.* Later, she promised him the car for finishing certain home improvement projects.

Waidla sought to collect on Viivi's promise in May 1988, claiming that he was owed for the work he had done on the house. *Id.* Viivi refused, in part because Waidla showed little initiative to work or attend school. *Id.* Waidla became angry and threatened to report the Piirisilds for building without a permit. *Id.* He also threatened to kill Avo and to break his arm. *Id.* at 56. Viivi told him to pack and leave. *Id.* Rita Hughes, the Piirisilds' daughter, was able to calm Waidla down and help him pack, after which he left peacefully. *Id.*

Waidla began traveling with Sakarias across the country by car. While in Arizona, they sent Viivi a postcard featuring a recipe for skinning, cutting up, and cooking

rattlesnake, on which they wrote: “You are as wise as the rattlesnake.” Waidla also called the Piirisilds from the road several times to ask for the car or the proceeds from its sale. *Id.* During this period, Viivi expressed fear of Waidla and Sakarias to several people, including her acquaintance George Charon, a Federal Bureau of Investigation agent. *Id.*

Waidla and Sakarias eventually made their way to Boston, where Sakarias accepted a job to deliver a pickup truck to San Francisco. *Id.* The two drove to Los Angeles on their way to San Francisco. *Id.* On July 4, 1988, they went to the Piirisilds’ home to ask again for the car. *Id.* Avo told them that he was unable to get the car’s title from the bank due to the holiday and that he would be leaving town the next day. Avo said that he would be gone for two weeks. Waidla and Sakarias went on their way after Avo bought gas for the pickup. *Id.* At some point, the two drove to the Piirisilds’ cabin in Crestline, California, which Waidla had previously visited as the Piirisilds’ guest. *Id.* at 54, 56. They stayed there without permission for over a week, eating the Piirisilds’ food and making calls. When they left, they took a hatchet and various other possessions. *Id.* at 56.

On July 12, the Piirisilds’ neighbor saw two men that he later identified as Waidla and Sakarias walking toward the Piirisilds’ home wearing jackets and carrying no bags. *Id.* at 56–57. When he saw them leave later, they carried bags and no longer wore jackets. *Id.* at 57. On July 14, a friend checked on the Piirisilds’ house at Avo’s request because Avo had not been able to reach Viivi. The friend found that the kitchen door had been broken to allow entry. Viivi was dead inside a bedroom. *Id.* at 57.

The crime scene showed that Viivi was attacked as she walked through the front door of the house and that her body

was later moved from the entryway to a bedroom, where it was covered with a bedsheet. *Id.* at 57. Viivi sustained multiple wounds to the head consistent with blows from the blunt side of a hatchet. *Id.* As a result, all of the bones on one side of her face were broken. Viivi also had been stabbed four times in the chest and suffered three head wounds caused by the sharp edge of a hatchet. *Id.* One of the sharp-edged hatchet blows, which was inflicted pre-mortem, was so forceful that it cut through the top of her skull and left a flap of bone attached only by scalp tissue. The others, which had been inflicted post-mortem, left incisions on her forehead. *Id.* While she was alive, she also suffered a broken voice box that may have been caused by strangulation. The medical examiner, Dr. James Ribe, also testified that post-mortem abrasions he observed on Viivi's back could have been caused by dragging her body from the entryway to the bedroom. The official cause of death was the combined effect of the bludgeoning, stabbing, chopping wounds and strangulation. *Id.* Dr. Ribe found no evidence of defensive wounds.

Police found only seven fingerprints at the residence. One, on the deadbolt cover of the kitchen door—the door that had been broken to allow entry—was a match for Waidla. *Id.* Police also obtained saliva samples from two cigarette butts found in the trash that matched Waidla's, but not Sakarias's, blood type. *Id.*

On July 12, Waidla and Sakarias pawned two pieces of Viivi's jewelry and purchased two plane tickets to New York using Viivi's credit card. *Id.* While in New York, they stayed with an Estonian acquaintance, Andres Juriado. Juriado raised the news of Viivi's murder, but Waidla and Sakarias changed the subject rather than engage on the topic. *Id.*

On August 28, Waidla was arrested by United States Border Patrol in New York near the United States-Canada border on suspicion of illegal entry. *Id.* He carried a loaded gun in a backpack as well as an unsent letter to Sakarias. The letter suggested that Waidla had considered suicide. He also wrote: “When you hear that I am dead, then you should know that I’ve [croaked] with a weapon in hand. If you hear that I have been taken alive . . . (almost impossible) . . . then you should know that I did my best.” *Id.* at 58.

While in custody in New York, Waidla initially invoked his right to counsel during interrogation by a Border Patrol agent. *Id.* at 69. However, he made incriminating statements to Los Angeles Police Department (“LAPD”) Detective Victor Pietrantonio the next day at a jail facility in Rouses Point, New York. *Id.* at 69–70. When he talked to Detective Pietrantonio, Waidla initially denied any role in Viivi’s murder, telling Pietrantonio that he had parted ways with Sakarias after leaving the Piirisilds’ cabin in Crestline and that he returned to Los Angeles on July 9, and then hitchhiked alone to New York where he met up with Sakarias. Waidla also stated that he last saw Viivi on May 21 and Avo on July 5. After Detective Pietrantonio confronted Waidla with information that an eyewitness identified him and Sakarias leaving the Piirisilds’ house on July 12, Waidla admitted to being in the house that morning. He stated that he and Sakarias had entered through the rear door by breaking the glass and unscrewing the dead bolt. He recounted that he ran outside when he saw Viivi pull up and that he heard a struggle during which Viivi said, “don’t hit.” Waidla said that he saw Sakarias hit Viivi with a hammer that they had taken from the Crestline cabin. He described the hammer as blunt on one end and with a blade on the

other. Waidla stated that when he re-entered the house, he saw blood and left.

Detective Pietrantonio then told Waidla that police had recovered his fingerprints from Viivi's body, and Waidla told a third version of events. This time, he admitted helping Sakarias drag Viivi's body to the bedroom but denied being involved in the attack. He also admitted that Sakarias took Viivi's purse, that they pawned several of her items, and that they used her credit cards to fly to New York on July 12.

On August 30, in a tape-recorded statement made after he waived his *Miranda* rights, Waidla admitted that he had been angry with Viivi because she had "promised [him] everything and was laughing at [him]" and that he and Sakarias had no opportunities because she was telling everybody that they were on drugs. Waidla said that after he saw Avo on July 4, he and Sakarias went to the Crestline cabin and stayed there until July 11. From the cabin, they took a "hammer" and a screwdriver and then broke into the Piirisilds' house to get food. Waidla confessed that he was the first to strike Viivi and said that he struck with the blunt end of the "hammer" as she came through the front door. He also said that the hammer hit her hand and glanced off her head. Sakarias then stabbed Viivi with the knife, they dragged her body into a bedroom, and eventually left.

The police later found the Crestline cabin in a state of disarray. The rear window of the cabin had been broken, and the cabin was strewn with dirty dishes, cigarette butts, tobacco debris, and empty liquor containers. *Id.* Laying out in the open on a table, the police found a receipt for a DMV identification application with Waidla's name on it.

B

Waidla and Sakarias were jointly charged with Viivi's murder, but their cases were severed before trial when Sakarias was found incompetent. At Waidla's trial, his counsel sought to suppress the pre-trial statements Waidla had made to the police because they were obtained after Waidla had invoked his right to counsel. The motion to suppress argued that "[t]he People have not indicated through any information provided during discovery that counsel was made available to the defendant, or that the defendant initiated the conversation with Detectives Crews and Pietrantonio, and defendant does not believe the People will contend at this time that either was the case."

At a pretrial status hearing, counsel reminded the court of the pending motion to suppress. The State remarked that it needed to conduct more research and was not sure whether it would seek to introduce Waidla's pretrial statements, but it agreed to produce live witnesses to litigate the issue if it decided to introduce the statements. The case proceeded to trial. Near the end of the State's case on November 15, 1990, the State indicated that it would seek to introduce Waidla's pretrial statements. In the suppression hearing that followed, Detective Pietrantonio testified that Waidla had initiated the conversation on August 29 in which he gave incriminating statements admitting to being present at the time of the murder. Finding Detective Pietrantonio credible, the trial court held that Waidla's *Miranda* waiver was valid and admitted the August 29 pretrial statements and August 30 confession. *Waidla*, 996 P.2d at 68–70.

Detective Pietrantonio's testimony that Waidla had initiated the conversation with him at Rouses Point was a surprise to the prosecutor and to the defense counsel.

Waidla's counsel sought and obtained a short continuance at the close of the State's case to reformulate his strategy because he had not expected the court to admit Waidla's confession. Defense counsel had access to the prosecutor's file during the pre-trial phase, and he knew the State doubted the confession was admissible. Waidla's counsel had not pursued a mental state defense because two pretrial mental health evaluations had concluded that Waidla had no psychiatric condition that could have prevented him from forming the intent to kill. After the court denied Waidla's motion to suppress, counsel "advised Mr. Waidla that he needed to testify to any bases for repudiating the validity of the confession and any alibi." Waidla confirmed that he could truthfully recant his confession.

When the trial resumed, Waidla testified that he was coerced by LAPD detectives, who he said had threatened to hang him if he did not parrot a confession they "fed" to him. *Id.* at 58. Personally familiar with the violent interrogation style of the KGB, Waidla said that he believed the threat and did not feel free to deny his guilt. *Id.* Before the jury, he testified to the first version of events he had relayed to Detective Pietrantonio: that he was not present when Viivi was killed because he had begun hitchhiking to New York before the murder occurred. *Id.*

During closing argument, the prosecutor argued that the jury should find that Waidla used the hatchet throughout the attack, "choosing . . . the more devastating of the instruments," while Sakarias "accept[ed]" the knife, "the lesser implement." The prosecutor argued that "Waidla first inflicted the blunt force injuries, then, turn[ed] the hatchet blade so it was more effective . . . [and he] was now able to chop through the top of her skull." The prosecutor called Dr. Ribe to testify that the abrasion on Viivi's lower back

occurred post-mortem, suggesting that she was already dead when she was dragged to the bedroom. After four days of deliberation, the jury found Waidla guilty of first-degree murder during the course of a burglary and robbery with personal use of a deadly and dangerous weapon, a capital crime. The jury also found that Waidla used the hatchet.

Sakarias's trial began approximately ten months after Waidla's trial concluded. At that trial, the same prosecutor argued that it was Sakarias who inflicted the fatal blows and that Sakarias struck all three hatchet chopping blows in the bedroom before Viivi died. The prosecutor introduced Sakarias's statements to the police in which he said that during the attack on Viivi in the living room, he used the knife while Waidla used the hatchet, and that Waidla directed him to the bedroom where Sakarias struck Viivi's head with the hatchet two more times. The prosecutor called Dr. Ribe to testify but did not ask him about the abrasion on Viivi's lower back. Accordingly, the jury at Sakarias's trial did not hear testimony opining that Viivi was most likely dead by the time Sakarias went back to the bedroom and struck her with the hatchet.

C

Neither side presented additional evidence at the penalty phase of Waidla's trial. Defense counsel agreed with the trial court's statement that the defense had "sound tactical reasons" for resting on the mitigation evidence it had elicited during the guilt phase. The trial court stated that counsel had put forth "a tremendous amount of evidence about the defendant's background." The court specifically referred to an article that Waidla authored. It was published in a Canadian newspaper, and it gave a first-hand account of his time in the Soviet Army. The article, entitled *Escaping*

Through the Fog, detailed the harsh conditions Waidla experienced during his service in the military. It described that he spent long periods in the bitter cold, was given ill-fitting and dirty clothes, slept in crowded spaces, and received abysmal medical care for a respiratory infection. In the article, Waidla wrote that while in the military hospital, “[a]ll wishes to exist disappear[ed].” The article was introduced as an exhibit at trial.

Waidla’s counsel later acknowledged that he had not investigated any mitigating evidence aside from that presented during the guilt phase. He did not seek out any evidence related to Waidla’s positive adjustment to incarceration, although he was aware that Waidla had not been subject to any disciplinary proceedings while awaiting trial. He also made no attempts to contact Waidla’s family, friends, or acquaintances from Estonia to obtain background or good character mitigation evidence. According to defense counsel, Waidla “expressed considerable reluctance” when it came to a social history investigation because he did not want his family to know about his situation and because he feared that Soviet authorities would retaliate against any Estonian who aided in his defense. When counsel revisited the question, Waidla acknowledged that his loved ones likely knew about his criminal case, but he remained concerned about their safety. Ultimately, counsel “did not definitively resolve the issue” with Waidla.

The defense counsel’s penalty phase argument at Waidla’s trial principally pleaded for the jury’s mercy. Counsel’s explanation of Waidla’s struggles in the Soviet Army was limited to his observation that “after three weeks in a Russian Army hospital Mr. Waidla was so consumed by a desire for freedom . . . that he risked everything to run.” Counsel also referred to the limited information available

about Waidla's background and character. He drew the jury's attention to Waidla's young age and lack of criminal history. He reminded the jury of testimony from Avo and Rita that Waidla had been friendly, nonaggressive, and helpful around the house, and argued that Waidla had been cooperative with law enforcement. Finally, counsel asked the jury to show Waidla mercy because he had no one who could testify to his character, from which the jury could infer that he was "essentially alone in this world."

The State largely argued that the horrific nature of the crime warranted the death penalty. The prosecutor detailed the brutality of the attack on Viivi. He described Viivi's wounds in detail and argued that Waidla had struck the "death blow" to her head with the sharp edge of the hatchet.³

The prosecutor characterized the crime as planned, calculated, and especially callous given the kindness Viivi had shown Waidla, during the year he lived with the Piirisilds. The State also attacked Waidla's character by portraying him as a deserter from the Soviet Army and as a lazy "parasite" who believed that "he deserved to be taken care of," citing his refusal to look for work or attend school. The State suggested that Waidla had a propensity for violence because he had been willing to harm others during his escape from the Soviet Army and because he carried a loaded gun when Border Patrol agents arrested him, which

³ The California Supreme Court found that the "great weight of evidence indicates that Viivi Piirisild was dead or near death when dragged into the bedroom and thus that Waidla, rather than Sakarias, struck the antemortem, hemorrhagic hatch-blade blow." *In re Sakarias*, 106 P.3d 931, 948 (Cal. 2005). The court also found that the impact of the prosecutor's arguments derived from the hemorrhagic chop "through the top of her skull" or "death blow," rather than from the fact that "further blows were struck after she was dead." *Id.* at 950.

his unsent letter to Sakarias suggested he might use to harm any officer who tried to arrest him. According to the State, these incidents “revealed his violent nature” and showed that “killing doesn’t mean anything to Mr. Waidla.”

After hearing no new evidence from either party and less than a day’s worth of argument at the penalty phase, the jury went on to deliberate for just over eight days. On day three, the jury sent a note asking what would happen if it could not reach unanimity. *Waidla*, 996 P.2d at 80. On day five, the jury sent a note stating that it was deadlocked. *Id.* A poll of the jurors revealed that ten of twelve believed they could not come to a unanimous verdict. The court asked the jury to continue deliberating. *Id.* On the morning of day nine, the jury returned a death verdict. *Id.*

D

The California Supreme Court rejected Waidla’s Fifth Amendment claim on direct appeal, *Waidla*, 996 P.2d at 71, and summarily denied his ineffective assistance of counsel claims on the merits. Waidla filed state petitions for postconviction relief. In them, he asserted, among other claims, ineffective assistance of counsel at the guilt and penalty phases, prosecutorial misconduct, and failure to suppress his confession as required by the Fifth Amendment.⁴

⁴ The California Supreme Court denied Waidla’s first habeas petition, which included guilt-phase ineffective assistance of counsel claims for failure to seek an earlier adjudication of Waidla’s motion to suppress his pretrial statements and failure to investigate and rebut the State’s fingerprint evidence. The state court summarily denied these claims on the merits. In his second state petition, Waidla reasserted the same guilt-phase claims and added penalty-phase ineffective assistance of counsel

In support of his claim of ineffective assistance of counsel at the penalty phase, Waidla offered three categories of mitigation evidence that could have been presented had counsel conducted a more complete investigation: (1) evidence of his psychosocial history and character; (2) evidence of the abuse faced by Estonians serving in the Soviet Army; and (3) evidence that he had behaved well in custody before trial.

Mare Pork, a professor of clinical psychology in Estonia, interviewed Waidla's family members, friends, and teachers in support of Waidla's postconviction claim. Dr. Hillevi Ruumet, an Estonian-American clinical psychologist, conducted interviews that corroborated the information gleaned from Pork's interviews. We recount their relevant combined findings.

Waidla's parents asked Waidla's great-uncle Gunnar and Waidla's grandmother Linda to raise him when he was just one month old. Waidla saw his mother only occasionally after that and essentially never saw his father. When Waidla was 11 years old, Linda developed a debilitating brain tumor. From that time until she passed several years later, she became "uncontrollably abusive" to those around her. Waidla became very attached to Gunnar, who "in many ways took the place of both mother and father" for Waidla. As a teen, Waidla's favorite cousin and an aunt who had taken on the role of his primary female caregiver died in a house fire, which devastated him. In all, three maternal figures—his mother, grandmother, and aunt—abandoned him or passed away before Waidla turned 15.

claims. The state supreme court denied these claims as untimely, repetitive, and on the merits.

Waidla displayed “a strong will to succeed” and a “desire for excellence” in his athletic pursuits. He attended a prestigious sports school for marksmanship, where his coach recalled that Waidla “was the best shooter in his [grade] and the only one who spent more hours training than was required by the overall training schedule.” A headmistress from his school recalled that he was a quick learner but did “just enough homework to get by.” In all, Waidla seemed to focus more on sports, but maintained adequate grades. Waidla developed a “reputation among his teachers and coaches [for] having a lot of willpower and a desire to fight for justice.” According to a family friend who was a well-known photographer, Waidla also showed a facility for photography. He published several photographs in magazines and newspapers.

Gunnar recalled that Waidla “never showed a violent or aggressive nature” in social environments and was not one to get into fights with peers. Waidla’s primary marksmanship coach similarly recalled that Waidla “was a consistently peaceable and non-violent youth, who was never aggressive or bullying toward his classmates or other competitors.” Other coaches and students at the school concurred in that assessment.

In support of his efforts to seek post-conviction relief, psychologist Dr. Myla Young evaluated Waidla to determine whether he posed a risk of violence in a carceral setting. Personality testing showed that Waidla had a “pro-social orientation” and was a “fundamentally non-violent, non-confrontational individual.” Dr. Young reported that, over the ten years she had spent evaluating individuals in criminal proceedings, Waidla exhibited “fewer risk factors to violence than any individual [she had] ever examined.”

Dr. Young reviewed information about Waidla's background that supported her clinical findings. She opined that Waidla had "a very difficult and stressful early life." She found it notable that despite the "traumatic separation" from his parents, Waidla "was able to achieve strong psychological and emotional bonding with his Great-Uncle Gunnar and other members of the family." In Dr. Young's opinion, these connections "permitted Mr. Waidla to develop [an] intact personality structure." Waidla's well-formed personality structure was consistent with "the positive efforts he made within the family and in his academic and athletic efforts," as well as his "impeccable record of peaceableness [sic]" outside of Viivi's murder. Dr. Young concluded that Waidla's was "a very unusual case in which an otherwise pro-social, law-abiding, and high-achieving individual lapsed into a momentary assaultive outburst . . . and [that he] has led an entirely non-violent life both before and afterward."

Dr. Ruumet also conducted clinical interviews of Waidla. Based on those interviews and her assessment of Waidla's background, she confirmed the psychological conclusions reached by Dr. Young. Her clinical evaluation showed that Waidla was "passive, intelligent, socially appropriate and invested in giving a good impression, respectful of authority, diffident, and avoidant of any confrontation or physical violence." In fact, she found that Waidla displayed a "characterological aversion to confrontation and violence."

Waidla also offered postconviction evidence of the cruelty endured by Estonian conscripts in the Soviet Army. Dr. Ruumet declared that serving in the Soviet Army in the 1980s as an Estonian was "a guarantee of extended physical beatings and brutality" and carried a serious risk of death.

Hazing was rampant and “any superior could, with total impunity, inflict any kind of physical or mental suffering on any inferior at any time and for any (or no) reason.” Dr. Ruumet conveyed the story of an Estonian soldier who died of kidney failure because he was denied water as a form of punishment. According to Dr. Ruumet, such stories were not “isolated incident[s].” These conditions were the product of Russians’ longstanding prejudice against Estonians, with whom Russians had ethnic and linguistic differences. Waidla sent a letter to family during his service asking for their help. In it, he expressed suicidal thoughts and fear for his life.

Finally, at the post-conviction stage, Waidla provided evidence that he had adjusted to incarceration without disciplinary incident. The State produced an internal memorandum from the District Attorney’s office evaluating whether the death penalty was appropriate for Waidla and Sakarias in January 1989, several months after Waidla’s arrest (the “DA memo”). The DA memo reported that while incarcerated, Sakarias had been found in possession of weapons several times. Whereas Sakarias had been designated an escape risk and the DA memo concluded that he was “a danger to others even while in custody,” the memo was silent as to Waidla’s disciplinary history and observed that Waidla did not “evidence the same degree of danger to society.”

Waidla submitted a declaration detailing his positive experience in Wayside Maximum Security, where he was incarcerated for three months before trial. He applied for and obtained jobs in the kitchen and maintenance units. He received a uniform reserved for inmates with a clean behavioral record as well as a pass that allowed him to work outside of the dormitories. He swept, passed out toilet paper,

and buffed floors. Waidla spent his free time in the library reading the newspaper and improving his English. Unlike most inmates, he was allowed to read in the library rather than taking his reading materials to his cell.

When Waidla was transferred to San Quentin State Prison after trial, California Department of Corrections officials conducted Waidla's orientation review to assign him housing (the "CDC document"). The officials at San Quentin verified Waidla's statement that he had "no problems programming in the county jail" by contacting the jail. An unidentified official at the jail "stated that Waidla was not a disciplinary problem and programmed well with other inmates."

E

Sakarias and Waidla both argued in their petitions for postconviction relief that the prosecutor had presented factually inconsistent theories at their respective trials. For this reason, the California Supreme Court consolidated their petitions for consideration of the prosecutorial misconduct claim. The Court appointed a referee to conduct a hearing on the claim and, in a reasoned opinion, subsequently concluded that the prosecutor had violated Sakarias's due process rights by "intentionally and without good faith justification arguing inconsistent and irreconcilable factual theories in the two trials, attributing to each petitioner in turn culpable acts that could have been committed by only one person." *In re Sakarias*, 106 P.3d at 934. The court could not conclude beyond a reasonable doubt that the prosecutorial argument that Sakarias struck all the hatchet-blade blows played no role in Sakarias's penalty-phase verdict. *Id.* at 949. The court therefore set aside Sakarias's death sentence. *Id.* at 949–50, 952. As to Waidla, the

California Supreme Court did not decide whether the prosecutor's inconsistent theories had constituted a due process violation because it deemed any misattribution harmless. *Id.* at 950–51.

The court explained that the jury in Waidla's case had heard that when Viivi entered through the front door, Waidla hit her in the head with the blunt part of the hatchet with such force that it fractured several bones and knocked out her teeth, and then likely "turned the hatchet around and struck Viivi with the sharp blade with such force as to penetrate her skull and cut a flap of skull and scalp from the top of her head." *Id.* at 950. Although the prosecutor likely misattributed to Waidla two post-mortem hatchet blows, the court concluded that in light of the strong evidence that Waidla struck the initial pre-mortem hatchet blow—and likely delivered the other hatchet blows inflicted in the entryway where Viivi died—the false attribution was harmless.⁵ *Id.* The court denied Waidla's Eighth Amendment claim in a footnote that concluded the "attribution of blows [did not] make Waidla's penalty determination unreliable." *Id.* at 951 n.11.

Waidla filed the operative petition in federal district court for the Central District of California pursuant to 28 U.S.C. § 2254 on March 17, 2006. He asserted eleven claims for relief related to: (1) the trial court's denial of his motion to exclude his confession in violation of the Fifth

⁵ The court noted that the crime scene evidence showed a large pool of blood in the living room, a minimum blood spatter on the bedroom walls and ceiling, and the lack of blood on the bedroom floor and observed that this constituted strong physical evidence that Viivi's hemorrhagic wounds were inflicted during the initial attack on her in the living room, where she died. *See In re Sakarias*, 106 P.3d at 948.

Amendment; (2) law enforcement officers' failure to advise him of his rights under the Vienna Convention on Consular Relations; (3) ineffective assistance of trial counsel at the guilt phase of trial; (4) prosecutorial misconduct; (5) judicial misconduct; (6) the Los Angeles County District Attorney's decision to seek the death penalty; (7) judicial bias in favor of the death penalty; (8) ineffective assistance of trial counsel at the penalty phase; (9) the trial court's refusal to answer the jury's penalty phase questions; (10) the jury's reliance upon his non-testimonial demeanor; and (11) the jury's reliance on "extraneous and inaccurate" information.

The district court held a four-day evidentiary hearing beginning on March 17, 2009. The Supreme Court subsequently issued a decision in *Cullen v Pinholster*, 563 U.S. 170, 181 (2011) holding that the threshold determination in adjudicating a § 2254(d) petition is limited to the state-court record. At that point, the district court recognized that the initial review of Waidla's petition could not include consideration of new evidence offered for the first time in federal court.

Ultimately, the district court granted relief on Waidla's claim of ineffective assistance at the penalty phase and rejected Waidla's remaining claims. The State now appeals the decision granting penalty phase relief and Waidla cross-appeals the denial of relief on his Fifth Amendment and guilt-phase ineffective assistance claims. Waidla also reasserts his prosecutorial misconduct claim as an alternative basis for affirming the district court's grant of penalty-phase relief.

We review de novo the district court's denial of Waidla's habeas petition. See *Gulbrandson v. Ryan*, 738 F.3d 976, 986 (9th Cir. 2013). Under the Antiterrorism and Effective

Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, we review the last reasoned state court opinion. *See Tamplin v. Muniz*, 894 F.3d 1076, 1082 (9th Cir. 2018). Here, because of the unusual consolidation of the postconviction petitions on the prosecutorial misconduct claim, we consider two reasoned state-court decisions: (1) the California Supreme Court’s decision on Waidla’s direct appeal, *People v. Waidla*, 996 P.2d 46 (Cal. 2000); and (2) the California Supreme Court’s decision on Waidla’s second state habeas petition, which was consolidated with Sakarias’s, *In re Sakarias*, 106 P.3d 931 (Cal. 2005).

A court may not grant habeas relief with respect to any claim adjudicated on the merits in state court unless the state court’s decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” 28 U.S.C. § 2254(d)(1), or “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,” *id.* § 2254(d)(2).

II. Waidla’s Cross-Appeal

The district court denied relief on Waidla’s two claims of guilt-phase error, which Waidla raises on cross-appeal. We consider these claims before we turn to the State’s penalty-phase appeal. Waidla first contends that his Fifth Amendment rights were violated when the State introduced his confession at trial. Second, Waidla asserts that he received ineffective assistance of counsel during the guilt phase. Reviewing under 28 U.S.C. § 2254(d), we agree with the district court’s assessment that Waidla’s claims lack merit.

A

Waidla argues that his confession was improperly admitted in violation of the Fifth Amendment. We provide factual background before turning to the claim.

Six weeks after the murder, Border Patrol agents apprehended Waidla in New York near the Canadian border and arrested him on suspicion of illegal entry into the country. *Waidla*, 996 P.2d at 69. During the interrogation at a Border Patrol station in Rouses Point, New York, Waidla invoked his right to counsel and was then moved to another facility where he was detained. *Id.* The next day, a Border Patrol agent transported Waidla back to Rouses Point, where he encountered Detective Pietrantonio. *Id.* At a suppression hearing held outside the jury's presence during Waidla's trial, Detective Pietrantonio and Waidla gave differing testimony regarding what transpired at Rouses Point. Because the trial court found Detective Pietrantonio more credible, we recount his version of events. *Waidla*, 996 P.2d at 71.

On August 29, 1988, officers moved Waidla from a holding cell at Rouses Point and took him into an administrative area where he saw Detective Pietrantonio dressed in civilian clothes. Detective Pietrantonio and another officer had flown to New York to interrogate Waidla and to take him back to Los Angeles following an extradition hearing. Detective Pietrantonio was unaware that Waidla would enter the administrative area at that moment. Speaking first, Waidla asked: "You're the detective from Los Angeles?" When Detective Pietrantonio confirmed that he was, Waidla asked either, "What do you want from me?" or "What can I do for you?" *Id.* A conversation ensued in which Waidla first provided an alibi and then admitted

minimal involvement in Viivi’s murder. The following day, August 30, Detective Pietrantonio met with Waidla again and administered *Miranda* warnings that Waidla waived. In a recorded statement, Waidla confessed that he was present when Viivi was murdered and that he was the first to strike her with the hatchet.

The trial court ruled that Waidla’s confession and pre-trial statements to the police were admissible because it found that, although Waidla had invoked his right to counsel, he later initiated the dialogue with Detective Pietrantonio at Rouses Point. *Id.* at 70. On direct appeal, the California Supreme Court upheld the trial court’s factual finding that Waidla had started the conversation although he had been given *Miranda* warnings and requested counsel. The California Supreme Court relied on *Edwards v. Arizona*, 451 U.S. 477 (1981), to conclude that, as a matter of law, Waidla’s question to Detective Pietrantonio amounted to initiation of interrogation that constituted waiver of *Miranda*. *Id.* at 71.

The California Supreme Court did not unreasonably apply *Edwards* and its progeny when it upheld the admission of Waidla’s pre-trial statements and confession. *Edwards* holds that a suspect who has invoked the right to counsel may not be “subject[ed] to further interrogation by the authorities until counsel has been made available[] to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.” 451 U.S. at 484–85. Initiating statements are those that “represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation.” *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983) (plurality opinion).

Fairminded jurists could conclude that law enforcement did not recommence interrogation in the sense relevant to the *Edwards* analysis. Cases finding *Edwards* violations involve police-initiated meetings that a suspect *understands* are interrogation attempts. See *Edwards*, 451 U.S. at 487 (recounting that police officers “told Edwards that they wanted to talk to him”); *Minnick v. Mississippi*, 498 U.S. 146, 149 (1990) (explaining that jailers told Minnick he would “have to talk” to an officer who arrived to interview him and “could not refuse”). Unlike the suspects in those cases, Waidla had little reason to expect that he would be questioned when he encountered Detective Pietrantonio. Waidla testified at the suppression hearing that he did not recognize Pietrantonio, and testified at trial that he had no idea why he had been transported to Rouses Point, and he maintained that position before the district court.⁶ Moreover, Detective Pietrantonio was not in uniform at the time, the encounter did not begin in an interrogation room, and Waidla does not argue that other contextual cues suggested to him that interrogation was requested or planned. Thus, it is reasonable to conclude that Waidla did not experience his encounter with Detective Pietrantonio as a coercive attempt at further interrogation.

⁶ Detective Pietrantonio’s explanation for Waidla’s behavior, credited by the trial court, was that Waidla may have seen Detective Pietrantonio when he went to an Estonian cultural center in New York looking for Waidla and therefore recognized Pietrantonio at Rouses Point. *Waidla*, 996 P.2d at 69. A fairminded jurist could still conclude, however, that even if Waidla recognized Detective Pietrantonio in New York, he may have been unaware that the detective was present for purposes of interrogating him. Thus, this court and the trial court can validly rely on Waidla’s testimony that he lacked awareness of the reason for his transport.

Considering that Waidla did not know the purpose for his transport, it is insufficient for him to observe that law enforcement brought about his encounter with Detective Pietrantonio. As the California Supreme Court recognized, no Supreme Court case has found an *Edwards* violation solely because the police initiated the meeting at which the suspect made incriminating statements. *Waidla*, 996 P.2d at 71. *Edwards* created a prophylactic rule to protect suspects from the coercive effect of persistent interrogation attempts. See *Maryland v. Shatzer*, 559 U.S. 98, 104–05 (2010). But not all police-initiated meetings following an invocation of rights carry coercive potential. A reasonable jurist could conclude that, absent a suspect’s belief that he will be questioned during an encounter, the coercive effect of a police-initiated interaction is minimal. Thus, even if law enforcement manufactured Waidla’s contact with Pietrantonio, that would not, on its own, render his statements and confession inadmissible.

We reach the same conclusion when considering the question, as Waidla urges us to, under *Rhode Island v. Innis*, 446 U.S. 291 (1980). *Innis* holds that law enforcement engages in the “functional equivalent” of interrogation when it takes action that is “reasonably likely to elicit an incriminating response.” *Id.* at 301. The *Innis* analysis “focuses primarily upon the perceptions of the suspect, rather than the intent of the police.” *Id.* Here, fairminded jurists could conclude that because Waidla did not know he was transported to facilitate further interrogation, simply encountering Detective Pietrantonio was not reasonably likely to draw any admissions from him. There is no evidence to suggest that any involved officer could have predicted that Waidla would recognize Pietrantonio as a detective when he was wearing civilian clothes. Waidla’s

response was therefore an “unforeseeable result[]” of delivering him into Pietrantonio’s presence. *Id.*

Finally, Waidla suggests that his question to Detective Pietrantonio was vague and possibly hostile, rather than a clear attempt to initiate further interrogation. But even the more ambiguous formulation of Waidla’s question—“What do you want from me?”—was no less ambiguous than the phrase that initiated further interrogation in *Bradshaw*: “Well, what is going to happen to me now?” 462 U.S. at 1045 (plurality opinion). The California Supreme Court reasonably concluded that Waidla’s question “represent[ed] a desire . . . to open up a more generalized discussion,” particularly considering Pietrantonio’s testimony that before he began his questioning, Waidla interrupted him several times with offers to discuss the investigation. *Waidla*, 996 P.2d at 69 (quoting *People v. Mickey*, 818 P.2d 84, 98 (Cal. 1991)).

B

Waidla also raises a claim of ineffective assistance at the guilt phase. He contends that counsel rendered ineffective assistance in four areas: (1) investigating and litigating the motion to suppress Waidla’s confession; (2) counseling Waidla to recant his confession and testify to an alibi; (3) failing to investigate alternative defenses; and (4) failing to rebut the State’s expert testimony regarding the lifespan of fingerprints.

To prevail on his ineffective assistance of counsel claim, Waidla must show that counsel’s performance “fell below an objective standard of reasonableness,” *Strickland v. Washington*, 466 U.S. 668, 688 (1984), and that “there is a reasonable probability that, but for counsel’s unprofessional

errors, the result of the proceeding would have been different,” *id.* at 694.

Because 28 U.S.C. § 2254(d) applies, we defer to a state court’s decision unless it “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” We may grant Waidla habeas relief only if “there is no possibility fairminded jurists could disagree that the state court’s decision conflicts with [the Supreme] Court’s precedents.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Our review is doubly deferential when we apply the *Strickland* and § 2254(d) standards in tandem. *See id.* at 101. Here, we do not hesitate to conclude that the California Supreme Court reasonably could have concluded that counsel met *Strickland*’s performance standard as to two of the alleged deficiencies and that the remaining alleged deficiencies did not prejudice Waidla.

Motion to Suppress. Waidla identifies two shortcomings in counsel’s litigation of the motion to suppress his confession: (1) the failure to press for an earlier decision on the motion; and (2) the failure to investigate more thoroughly. The first argument fails because it incorrectly presumes that counsel had control over the timing of the trial-court ruling on his motion to suppress. The second fails because it impermissibly relies on facts knowable only in hindsight.

Defense counsel filed a motion to suppress in advance of trial. At that point, it appeared possible that the State would not seek to introduce Waidla’s confession. The trial court had discretion to hear the motion at a time of its choosing,

and it acceded to the State's request to defer the issue. Waidla does not point to any feature of state law that would have allowed defense counsel to compel the court to hold a hearing sooner. Thus, counsel reasonably refrained from making a likely futile request for an earlier hearing.

Based on what he knew at the time, counsel reasonably could have determined that further investigation of the motion to suppress was unnecessary because it was reasonable to anticipate that Detective Pietrantonio would not testify. The prosecutor had given counsel full access to his files, and the files showed that the State had preliminarily concluded that Waidla's statement was likely obtained in violation of *Arizona v. Roberson*, 486 U.S. 675 (1988), a case applying the rule set out in *Edwards*. Defense counsel was surprised by Detective Pietrantonio's testimony at the suppression hearing, but that cannot be equated with deficient performance. Even the prosecutor was surprised by Detective Pietrantonio's testimony that Waidla initiated the conversation at Rouses Point. Nor was there any mention of this in police records. Thus, counsel had little reason to think that interviewing the officers involved or conducting additional investigation would inform his strategy for arguing the suppression motion. That is especially true because Waidla maintained that he had not initiated the interrogation. See *Strickland*, 466 U.S. at 691 ("[W]hen the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether."). *Strickland* cautions that we must not fall prey to the "distorting effects of hindsight" in assessing counsel's performance. 466 U.S. at 689. For these reasons, we cannot

say that the California Supreme Court unreasonably concluded that counsel's performance was not deficient.

Waidla's Testimony. Faced with the trial court's decision to admit Waidla's extremely damaging tape-recorded confession, counsel made a strategic decision to advise Waidla to testify. Waidla argues that counsel's choice fell short of objectively reasonable standards of representation. But reviewing under 28 U.S.C. § 2254(d), we cannot conclude that the California Supreme Court unreasonably applied *Strickland's* performance prong.

Counsel made the reasonable tactical judgment that letting the confession stand uncontested would have proved fatal to Waidla's defense. Waidla confessed not only to his presence during the crime, but to waiting for Viivi to enter her home and being the first one to strike her in the head with the murder weapon. Failing to dispute the validity of this confession would have left the jury with little room to form a reasonable doubt as to Waidla's guilt. Thus, defense counsel's advice that Waidla should testify did not fall below an objectively reasonable standard. Indeed, presenting Waidla's testimony "was the only way to potentially rebut" the State's overwhelming evidence of guilt. *Allen v. Woodford*, 395 F.3d 979, 1000 (9th Cir. 2005).

Failure to Investigate Alternative Defenses. Waidla argues that counsel rendered ineffective assistance by failing to investigate any alternative defense strategy. Counsel admitted in a postconviction declaration that he prepared just one approach—seeking suppression of Waidla's confession and casting doubt on the State's evidence of Waidla's involvement. Counsel was forced to abandon his original strategy when the trial court denied the motion to suppress. Waidla suggests that one viable alternative defense theory

was that he was at the scene of the crime because he intended to negotiate Viivi's debt to him. Another posited that he was at the house on the day of the crime but did not participate in Viivi's murder. *Id.* Waidla also argues that counsel should have investigated a mental state defense based on diminished capacity because the two pretrial psychological evaluations found only that Waidla was generally capable of forming an intent to kill, not that he in fact formed that intent.

Fairminded jurists could conclude that even if counsel had offered evidence that Waidla was at the Piirisilds' home but uninvolved in the murder, there was no reasonable probability the jury would have reached a different verdict. Waidla's argument that he could have offered testimony showing that his intent was to confront Viivi and obtain payment for his household work is contradicted by the evidence. The evidence strongly suggested that Viivi was hit in the head immediately after she entered the house, the coroner testified that she did not have defensive wounds, and there was no evidence that Waidla attempted to talk to her on the day of the murder about collecting the debt he claimed she owed him or anything else. This theory would have failed for the same reason Waidla's alibi at trial failed: it was swamped by his confession. The claim that he was there when Viivi was killed but uninvolved in her murder would have been undermined by objective evidence of Waidla's consciousness of guilt: Waidla fled after the crime, reacted strangely when an acquaintance told him about Viivi's death, and gave a series of changing and conflicting stories to the police about his presence during the crime. *Waidla*, 996 P.2d at 57, 69. Especially because we view this claim under the deferential standard demanded by AEDPA, Waidla does not show that fairminded jurists could not disagree that counsel's performance was deficient for failing

to advance an alternative defense based on Waidla's non-involvement.

As for a mental state defense, the evaluations available to defense counsel at the time of trial did not support such a theory, so counsel was not deficient for not pursuing it. Even at the post-conviction stage, Waidla offered minimal evidence of diminished capacity or severe emotional disturbance in support of his petition. Only one postconviction psychologist's evaluation assessed Waidla as suffering from dissociative disorder, and even that evaluation did not go so far as to suggest that Waidla's dissociative disorder prevented him from forming the requisite intent to kill Viivi.

Moreover, the evidence showed that the crime was planned and deliberate, making it less likely that a mental state defense would have been persuasive, and Waidla was not prejudiced by his counsel's failure to pursue it. Waidla waited until Avo was out of town to confront Viivi; he took the hatchet from the Piirisilds' cabin for the confrontation; he parked some distance from Viivi's house, presumably to avoid alerting her to their presence; and he stood inside the Piirisilds' home with the hatchet, waiting for Viivi to return. *Id.* at 56–57. These considered actions tend to show that Waidla acted with foresight and deliberation throughout the crime. Thus, fairminded jurists could conclude that a mental state defense would not have been persuasive. *See Crittenden v. Ayers*, 624 F.3d 943, 960–63 (9th Cir. 2010) (finding no prejudice when counsel presented an alibi defense over a mental state defense because the evidence overwhelmingly established deliberation and premeditation).

Fingerprint Lifespan. Waidla’s counsel did not present expert testimony to rebut testimony from a State witness that fingerprints have a “lifespan” of only ten days to three weeks. *Waidla*, 996 P.2d at 57. But at the post-conviction stage, counsel presented the declaration of a latent fingerprint examiner and fingerprint consultant who opined that there is no known lifespan for fingerprints, and “a latent impression can last indefinitely in a latent state.” Waidla argued that the State’s evidence on this point was false and that he could have left his fingerprint on the Piirisilds’ deadbolt when he was last in the Piirisilds’ home, more than six weeks before the crime. Even assuming counsel performed deficiently by failing to offer robust rebuttal testimony to counter the State’s fingerprint expert, the California Supreme Court reasonably could have concluded that Waidla was not prejudiced by counsel’s performance.

Without the fingerprint evidence, the State’s evidence still overwhelmingly showed that Waidla was present at the Piirisilds’ home during the crime. Most notably, Waidla confessed that he had been there. *Waidla*, 996 P.2d at 58. A neighbor also identified Waidla as one of two men he had seen walking to and from the Piirisilds’ home around the time of the crime. *Id.* at 56–57. The State presented evidence of cigarette butts found inside the house that matched Waidla’s (but not Sakarias’s) blood type, which was significant because Viivi did not allow smoking inside the house and therefore it was reasonable to infer an invited guest would not have left the cigarettes. *See id.* at 57. Waidla and Sakarias pawned green jade earrings and a black star sapphire pendant that they had taken from the Piirisilds’ home. *Id.* at 57. Finally, the evidence showed that Waidla had fled to the East Coast after the crime, *id.* at 57–58, showing consciousness of guilt. *See People v. Bradford*, 929

P.2d 544, 575 (Cal. 1997) (explaining relevance of flight to jury's determination of guilt).

From the outset, the defense theory that Waidla left a fingerprint over six weeks before the crime strained credulity. Witnesses testified that Viivi was a thorough and frequent cleaner. In line with that testimony, police investigators found only seven fingerprints in the entire home, suggesting that it had been recently cleaned. Yet Waidla argues that a jury would have concluded that a fingerprint on the deadbolt lock, a high-touch surface, somehow survived for over a month and that this would have added weight to his contention that he was not inside the house on the day of the murder. Considering the weakness of this theory and the overwhelming evidence of Waidla's presence at the scene of the crime, the California Supreme Court did not unreasonably conclude that there was no reasonable probability that the jury would have reached a different outcome had defense counsel offered evidence to refute the State's fingerprint lifespan testimony.

Cumulative Error. Finally, Waidla raises a claim of cumulative error, arguing that the aggregate effect of counsel's performance at the guilt phase prejudiced him. In assessing a cumulative error claim, we do not consider the prejudicial effect of nonexistent errors. *See United States v. Jeremiah*, 493 F.3d 1042, 1047 (9th Cir. 2007). Even assuming counsel performed deficiently by failing to investigate additional defenses and failing to present rebuttal testimony on the lifespan of fingerprints, Waidla cannot prevail on his claim of cumulative error. Waidla's fingerprint claim posits that he was robbed of an opportunity to convince the jury that he was *not* present during the crime, while his failure-to-investigate claim proceeds on the assumption that he *was* present. Thus, counsel's alleged

missteps lack the “symmetry” that would cause them to “amplify each other in relation to a key contested issue in the case,” resulting in cumulative prejudice. *Ybarra v. McDaniel*, 656 F.3d 984, 1001 (9th Cir. 2011).

III. The State’s Appeal

The State appeals the district court’s order granting penalty-phase relief on Waidla’s claim that his counsel rendered ineffective assistance by failing to investigate and present mitigation evidence that competent counsel would have discovered. We do not reach *Strickland*’s performance prong. We conclude, under AEDPA, that the California Supreme Court’s conclusion that Waidla was not prejudiced by his counsel’s alleged errors was not unreasonable, and we reverse.

A

When assessing prejudice, “we reweigh the evidence in aggravation against the totality of available mitigating evidence.” *Wiggins*, 539 U.S. at 534; *see Mickey v. Ayers*, 606 F.3d 1223, 1245 (9th Cir. 2010) (noting that the Supreme Court has “reaffirmed that the facts of the crime play an important role in the prejudice inquiry”). Prejudice is satisfied if, considering all the evidence adduced at trial and in the state habeas proceedings, “there is a reasonable probability that at least one juror would have struck a different balance.” *Wiggins*, 539 U.S. at 537. Considering the arguments or theories that “could have supported” the California Supreme Court’s summary denial of this claim, fairminded jurists could conclude that Waidla was not prejudiced by his counsel’s failure to present mitigating evidence. *Richter*, 562 U.S. at 102.

Background and Character Evidence. As an initial matter, it is unclear the extent to which the jury would have viewed the unpresented evidence of Waidla's psychosocial history and character as mitigating. The evidence of Waidla's background in Estonia suggests that he had a difficult childhood and that all three important women in his life died. *See Andrews*, 944 F.3d at 1117 (“[A] background of severe abuse, neglect, and disadvantage . . . is important to a sentencer’s accurate determination of the defendant’s moral culpability.”). On the other hand, he was taken in and raised by a caring great-uncle and did well at school, even gaining admission to a special sports school where he excelled in marksmanship. That Waidla was able to “achieve strong psychological and emotional bonding with his Great-Uncle Gunnar and other members of the family” suggests that he was capable of developing normal relationships with those who cared for him. *See Bell v. Cone*, 535 U.S. 685, 701–02 (2002) (observing that evidence of an unremarkable youth might “cut the other way”). In this light, reasonable jurors could have decided that Waidla’s premeditated murder of the woman who took him in and treated him like family after he escaped from the Soviet Army and was granted asylum in this country made him more morally culpable, not less. Further, emphasizing Waidla’s close relationships would have precluded one of the primary themes in counsel’s argument: that Waidla was “essentially alone in this world, and maybe because of that is to be a bit pitied rather than despised.”⁷

⁷ The more contemporaneous declarations of Estonian-Americans who met Waidla after he arrived in the United States are also not necessarily mitigating. One declarant stated that it appeared Waidla and Sakarias

Presenting evidence of Waidla's mental health would have been extraordinarily risky and likely counterproductive. Had Drs. Young and Ruumet testified at trial, the prosecutor could have cross-examined them about the very different versions of the crime that Waidla had relayed to them. *See Wong v. Belmontes*, 558 U.S. 15, 24–25 (2009) (per curiam) (considering potential rebuttal evidence that could counter potential mitigating evidence). In his interviews with Drs. Young and Ruumet, Waidla admitted only that he broke into the Piirisilds' house to collect a debt he believed he was owed, and he expressed remorse for his crimes. He also minimized his role and blamed Sakarias for instigating the crimes. When he talked with Dr. Ruumet, Waidla did not mention that he used the hatchet. When he talked to Dr. Young, Waidla said that he grabbed a hatchet he found outside the house and when Viivi came home, saw them and went "ballistic," this caused him to strike her once with it. Waidla told Dr. Young that after he and Viivi both fell, she grabbed the hatchet and Sakarias started stabbing her. All of these versions differed dramatically from Waidla's confession that he struck the first blow, and they certainly conflicted with his trial testimony that he was not in town at the time Viivi was murdered. Presenting the testimony of Drs. Young or Ruumet at trial would have opened the door to blistering cross-examination regarding the conflicting ways Waidla

lacked the maturity to handle being in the United States and that they were incapable of grasping available opportunities. Another declared that when Waidla and Sakarias arrived in the United States, they seemed to have some fantasy about what it was like to live in "the decadent West." These declarations could further support the prosecutor's description of Waidla as someone who had no desire to work or better himself and who believed he deserved to be cared for by others.

had described the crime and his statements deflecting blame to Sakarias. It also risked losing all credibility with the jury. *See* ABA Guidelines, 11.7.1(B) (1989) (“If inconsistencies between guilt/innocence and penalty phase defenses arise, counsel should seek to minimize them by procedural or substantive tactics.”).⁸ Reasonable jurists could decide that competent counsel would have chosen not to present the defense’s mental health expert opinions.

Given this backdrop, even if the additional evidence of Waidla’s background and character did have a net mitigating value, it is unclear how much weight jurors would have given to Waidla’s past life experiences. By the time the case got to the penalty phase, the jury had heard his recorded confession, *see Waidla*, 996 P.2d at 53, and Waidla had taken the witness stand and testified to the first version of events he relayed to Detective Pietrantonio, in which he claimed to be on the East Coast at the time of the murder, *id.* at 58. After extensive deliberation, the jury found Waidla guilty of first-degree murder beyond a reasonable doubt. In doing so, the jurors necessarily found that he had lied to them under oath. *See Bemore v. Chappell*, 788 F.3d 1151, 1172 (9th Cir. 2015) (“[A] good character defense was unlikely to

⁸ Introducing Dr. Ruumet’s testimony would have provided the prosecution with additional fertile ground for cross-examination because Dr. Ruumet was born in Estonia, and her declaration included the statement that in Estonian culture, it was typical for individuals to engage in “frontier justice.” For example, if someone refused to pay a debt even when confronted, “there would follow stages of physical retribution ranging from damage to the person’s property to, in extreme cases, physical injury which escalated until the debt was paid.” A jury could interpret this explanation of Estonian culture to support the prosecutor’s argument that because Waidla felt Viivi owed him more than she had given him, Waidla resorted to “frontier justice,” intending to beat her until she paid or died.

be persuasive to a jury that had just decided that Bemore had carried out a grizzly murder . . . and had lied on the stand to boot.”).

Experience in the Soviet Army. Waidla argues that had the jury heard more evidence about the difficulties and hardships he encountered while serving in the Soviet military, it might have made a difference to the outcome of the penalty phase. This argument fails because the jury had Waidla’s first-hand account of the inhumane conditions, bullying, and constant fear of death he experienced as a conscript through his article, “Escaping the Fog.” The jury also heard guilt-phase testimony that Estonia was under Soviet occupation and that Waidla received political asylum in the United States after escaping from the Soviet Army. Avo testified that draftees from the Baltic states were not treated well in the Soviet Army. Although additional corroborating evidence might have been helpful to this claim, fairminded jurists could disagree about whether the failure to offer it was prejudicial because additional evidence could be viewed as cumulative or as carrying insufficient mitigating weight, even when considered alongside Waidla’s other evidence. *See Cox v. Ayers*, 613 F.3d 883, 899–900 (9th Cir. 2010) (cumulative penalty evidence “adding to what was already there would have made little difference” (quoting *Belmontes*, 558 U.S. at 22)).

Positive adjustment to incarceration. Waidla argued that his counsel was ineffective for failing to offer admissible evidence showing that he had a good disciplinary record in pre-trial detention and that he had adjusted well to prison life. At the post-conviction stage, Waidla submitted a California Department of Corrections document dated March 15, 1991. It was initialed by two correctional officers at San Quentin prison and it memorialized Waidla’s security

classification when he was transferred to that facility. The document reflects that Waidla informed the correctional officers that he had no problems programming in the county jail while he awaited trial, knew of no enemies at San Quentin, and did not have a gang affiliation. The document also reflects that officers at San Quentin verified this information by contacting the county jail. An unidentified source there stated that Waidla was not a disciplinary problem and programmed well with other inmates.

Waidla raised his penalty-phase argument that defense counsel was ineffective for failing to offer evidence of his adjustment to incarceration in his first and second post-conviction petitions. The California Supreme Court denied Waidla's first petition on the merits and denied the second petition, which addressed penalty-phase claims, as untimely, repetitive, successive and on the merits. In our view, fairminded jurists could reasonably conclude that the omission did not prejudice Waidla.

Post-*Pinholster*, the district court recognized that its threshold ruling on Waidla's § 2254(d) petition could not consider evidence offered for the first time in federal court. In response to the court's request for filings on the impact of *Pinholster*, the State considered the arguments or theories that could have supported the state court's summary denial of this claim, *Richter*, 562 U.S. at 103, and argued that the California Supreme Court would have rejected the Department of Corrections document because it "consisted entirely of hearsay." The State's brief on appeal repeated the argument that the document could have been rejected by the California Supreme Court as hearsay. We agree that the California Supreme Court reasonably could have deemed this document inadmissible.

The remaining evidence offered in support of this claim was Waidla's own declaration describing his time as a pretrial detainee from June through August 1990. It described recognition Waidla received for his alleged good behavior in jail. Fairminded jurists could decide that the jury might have rejected his declaration because, in rejecting his alibi and finding him guilty, it had already determined that he was not a credible witness. Alternatively, the state court could have determined that this period of Waidla's pre-trial detention was too short to carry significant weight, even when considered with his other evidence, given the exceptionally violent nature of the murder.

That Waidla was not prejudiced by the failure to present this mitigating evidence becomes especially clear when comparing the mitigating evidence with the substantial aggravating evidence. On direct appeal, the California Supreme Court summarized the circumstances of the murder, "On Viivi's return, as she passed through the front door toward the living room, before she could even attempt to resist, Waidla and Sakarias set upon her, dispatched her toward death, and then dragged her to a bedroom where her body would subsequently be found." The court described in gruesome detail the multiple wounds Viivi suffered, the means and force used to inflict them, and concluded: "They caused her death through the combination of the throttling, bludgeoning, chopping and stabbing, and may have done so through any one of such means, because each was potentially fatal in and of itself." *Id.* at 57. When the California Supreme court resolved the procedural misconduct claims that Waidla and Sakarias presented in post-conviction petitions, the court emphasized the evidence that Viivi died in the living room entryway, that Waidla admitted to striking the first devastating blow, and the absence of evidence that

Waidla and Sakarias exchanged weapons. *In Re Sakarias*, 106 P.3d at 948. Though we do not think it necessary to repeat verbatim the state court’s unchallenged findings regarding the injuries that resulted in Viivi’s death or the force used to inflict them, we are mindful that the jury heard and saw the State’s evidence in grim detail. The horrific nature of this crime largely drives our prejudice analysis.

Even viewed cumulatively, the jury was left with no evidence that could explain the shocking and unexpected nature of the attack against Viivi. There was no indication of alcohol or drug use, and no evidence of any mental health diagnosis that sometimes explains a sudden outburst and act of violence. Given the strong evidence that Waidla was angry with Viivi, planned the attack, and waited with a hatchet for Viivi to enter her home, it is hard to see how a jury could view Viivi’s murder as a “momentary assaultive outburst.”

Our task is limited to determining whether fairminded jurists could disagree that Waidla was prejudiced by his counsel’s failure to present any of this mitigating evidence. *See Richter*, 562 U.S. at 102 (recognizing that “even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable”); *see also Pinholster*, 563 U.S. at 202 (observing that the unrepresented mitigating evidence was “not so significant” that “it was necessarily unreasonable for the California Supreme Court to conclude that Pinholster had failed to show a ‘substantial’ likelihood of a different sentence” (citation omitted)). Because the California Supreme Court’s denial of this claim was not objectively unreasonable, we reverse the district court’s order granting relief on this claim. *See* 28 U.S.C. § 2254(d).

B

As an alternative ground for affirming the district court’s order granting penalty-phase relief, Waidla argues that the prosecutor violated his Eighth Amendment right to heightened reliability in capital sentencing by presenting inconsistent factual theories at the seriatim trials of Waidla and Sakarias.

Under the Eighth Amendment, a capital sentencing determination requires a greater degree of scrutiny than other punishments. *See Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985); *Zant v. Stephens*, 462 U.S. 862, 884–85 (1983) (“[B]ecause there is a qualitative difference between death and any other permissible form of punishment, ‘there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.’”) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). To prevail on his Eighth Amendment claim, Waidla must show that the Supreme Court has previously decided the constitutional question at issue and established the “precise contours” of the rule he invokes. *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003); *see Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) (“[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.” (internal quotation marks omitted)). When the Supreme Court has not provided a clear answer to the question presented, “it cannot be said that the state court ‘unreasonabl[y] appli[ed] clearly established Federal law.’” *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (per curiam) (quoting *Carey v. Musladin*, 549 U.S. 70, 77 (2006)).

In support of his Eighth Amendment claim, Waidla cites to *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Beck v. Alabama*, 447 U.S. 625 (1980). Neither case clearly established that it is unconstitutional for a prosecutor to present inconsistent theories under the Eighth Amendment. *Woodson* held that a mandatory death penalty scheme violated the Eighth Amendment. 428 U.S. at 304. *Beck* held that a death sentence could not be imposed when the evidence could support a lesser-included offense and the jury was not instructed on the lesser-included offense. 447 U.S. at 638. Waidla has not shown that the California Supreme Court’s denial of his Eighth Amendment claim was contrary to or an unreasonable application of clearly established Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1).

Waidla also argued, in the district court and on appeal, that prosecutorial misconduct denied him his right to due process and a fair trial in violation of the Fourteenth Amendment.⁹ The district court correctly observed that there is no clearly established Supreme Court precedent prohibiting a prosecutor from presenting inconsistent theories to convict codefendants in separate trials. *See Bradshaw v. Stumpf*, 545 U.S. 175, 190 (2005) (Thomas, J., concurring) (noting that the Supreme Court “has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories”).

The California Supreme Court concluded that any false attribution to Waidla of hatchet blows inflicted by Sakarias was harmless. *In re Sakarias*, 106 P.3d at 950–51. And the district court concluded that Waidla’s prosecutorial

⁹ The district court considered Waidla’s prosecutorial misconduct claim as a guilt-phase claim.

misconduct argument did not satisfy § 2254(d)(2) because the California Supreme Court’s factual findings that Waidla: (1) inflicted the first hatchet blow when Viivi entered her home; (2) likely delivered the other chopping blows in the entryway; and (3) that Viivi died in the living room, were supported by the evidence presented in state court and were therefore reasonable. Whether we consider the alleged prosecutorial misconduct under the Eighth Amendment or the Fourteenth Amendment, we agree that the claim fails because the California Supreme Court’s factual findings were not unreasonable.

Waidla argues that the California Supreme Court unreasonably determined that he was the actual killer and struck the “fatal blow.” *See* 28 U.S.C. § 2254(d)(2). He argues that the court ignored the following facts to reach this conclusion: (1) Waidla’s confession was that “he only struck one blow, with the blunt part of the hatchet”; (2) Sakarias confessed to moving Viivi to the bedroom and “kill[ing] her with the sharp edge of the hatchet”; (3) the blood spatters in the bedroom showed that Viivi was alive when she was moved to the bedroom and Sakarias was the only attacker in the bedroom; and (4) Sakarias stabbed Viivi four times in the chest and two of those stabbings were potentially fatal.

To grant habeas relief on a claim of trial error, we assess the error for “actual prejudice” under *Brecht v. Abrahamson*, which requires the error to have “had [a] substantial and injurious effect or influence in determining the jury’s verdict.” 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

Waidla cannot meet this burden. To begin, the first two of Waidla’s contentions misinterpret the record: the California Supreme Court recounted that Waidla admitted

striking Viivi once but denied “any memory of how the rest of the attack proceeded,” and the court observed that, after the initial attack, the evidence showed that “at Waidla’s direction, [Sakarias] went to the bedroom and chopped Viivi’s head twice with the hatchet.” *In re Sakarias*, 106 P.3d at 936; *People v. Sakarias*, 995 P.2d 152, 161–62 (Cal. 2000) (summarizing Sakarias’s confession).

The court expressly considered Waidla’s latter two contentions, acknowledged that both men participated in the “fatal attack” against Viivi, and that Dr. Ribe found the cause of death to be from a combination of wounds. *In re Sakarias*, 106 P.3d at 934–36. In reviewing the evidence from both trials as well as the evidentiary hearing held at the postconviction stage, the California Supreme Court reasonably concluded that “the great weight of the evidence available—the statements of both petitioners, the physical crime scene evidence, and the medical examiner’s expert testimony—tended to show that Waidla wielded the hatchet in the initial attack, that the first chopping wound was inflicted before Viivi’s death, and that Viivi died in her living room from the initial attack before being dragged to the back bedroom.” *Id.* at 950. Given the impact of the evidence showing that Waidla waited for Viivi to enter through the front door, the large pool of blood in the living room, Waidla’s confession that he was the first to strike her in the head with the blunt end of the hatchet, and the absence of evidence that Waidla and Sakarias exchanged weapons in the initial attack, *see id.* at 948, we cannot say that the California Supreme Court unreasonably concluded that the prosecutor’s false attribution of all three chopping wounds to Waidla was not prejudicial. The prosecutor’s attribution to Waidla of all three hatchet blows inflicted in the entryway does not leave us with “grave doubt” about whether any false

attribution had a “substantial and injurious effect or influence in determining the jury’s verdict.” *Davis v. Ayala*, 576 U.S. 257, 268 (2015) (quoting *O’Neal v. McAninch*, 513 U.S. 432, 436 (1995)).

Whether considered as a penalty-phase Eighth Amendment claim or a guilt-phase due process claim, Waidla has not shown he is entitled to relief based on prosecutorial misconduct.

AFFIRMED in part and REVERSED in part.

CHRISTEN, Circuit Judge, concurring:

Though I conclude that the California Supreme Court’s prejudice analysis was not unreasonable, I also conclude that some aspects of Waidla’s counsel’s performance fell below an objectively reasonable standard. I write separately to avoid minimizing the requirement that counsel investigate a capital defendant’s available options before deciding not to pursue them. In doing so, I acknowledge that the burden of defending a capital case is extraordinary.

The applicable ABA practice guidelines stated that counsel’s investigation relating to the penalty phase of a capital trial “should begin immediately upon counsel’s entry into the case and should be pursued expeditiously.” ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(A) (1989) (hereinafter ABA Guidelines). *Strickland* requires that we view counsel’s performance with latitude that accounts for “the wide range of reasonable professional assistance,” *see Strickland v. Washington*, 466 U.S. 668, 689–90 (1984) (noting that strategic decisions are “virtually unchallengeable” if made

“after thorough investigation of law and facts[.]”). Hindsight makes it easy for others to second-guess difficult decisions that lawyers must make under circumstances that are far from ideal. And for the reasons explained in the majority opinion, my view is that Waidla did not suffer prejudice as a result of his lawyer’s performance. But the need to prepare sentencing-phase mitigation evidence was apparent from the outset of this case because the defense knew that Waidla had confessed to committing an exceptionally gruesome murder of a woman who had taken him in as a refugee and supported him for over a year.

The evidence and circumstances in many murder cases permit counsel to argue that a sudden, violent attack was the product of mental illness, drugs, or alcohol. The facts in this case were terribly difficult to defend because they included strong evidence that the crime was both premeditated¹ and brutal.² Counsel could not control when the trial court ruled on the motion to suppress Waidla’s pretrial statements, but counsel knew the risk that the pretrial statements and Waidla’s confession could be admitted, and the State’s case against Waidla was strong even without the pretrial statements. As such, it was critical that the defense muster reasonably available mitigation evidence to be prepared to

¹ In addition to the evidence that Waidla waited for Viivi inside her home on the day of the murder, the State offered a letter Waidla wrote to Sakarias in May of 1988 in which he stated that they had to “get rid of those dammed Estonians for once finally.”

² The California Supreme Court described in detail how Waidla and Sakarias “*throttled* [Viivi],” “*bludgeoned* her . . . delivering some blows with such force as to crush her skull,” “*chopped* her three times around the top of her head[.]” and “*stabbed* her four times[.]” *People v. Waidla*, 996 P.2d 46, 57 (Cal. 2000) (emphasis in original).

offer the most robust possible response to the prosecution's strong aggravating evidence. ABA Guidelines 11.4.1(C).

The district court did not fault the decision to forgo a mental state defense, and neither do I. The pretrial psychological assessments did not suggest that Waida's actions could be explained in whole or in part by a mental health diagnosis. More favorable assessments were offered at the postconviction stage, but as the district court recognized, they were offered by witnesses who were far from well-versed about the circumstances in which this murder occurred.

That said, I agree with our dissenting colleague that more should have been done to explore available mitigation evidence regarding Waidla's background and upbringing in Estonia. Waidla's concern for the safety of Estonian witnesses appears to have been both legitimate and genuinely held, but the record establishes that counsel "did not definitively resolve the issue" with Waidla, and counsel's decisions can only be deemed "strategic" if they were made after an adequate investigation. *Strickland*, 466 U.S. at 690–91; *Correll v. Ryan*, 539 F.3d 938, 948 (9th Cir. 2008).

The evidence that could have been uncovered does not show the type of extreme child abuse or neglect that has been found to be sufficiently mitigating in other cases, *see Williams v. Taylor*, 529 U.S. 362, 395 (2000); and it was not entirely one-sided. But I see no reasonable dispute that it would have humanized Waidla to explain his difficult upbringing in greater detail. More to the point, *Strickland*'s deficient performance prong required counsel to explore this possibility and explain the consequences of not doing so.

The State relies on *Burger v. Kemp*, 483 U.S. 776 (1987) and *Strickland*, but those cases are easily distinguished. In *Burger*, counsel interviewed all potential witnesses who had been called to his attention and reasonably decided against a mitigation strategy that required testimony from the defendant. *Burger*, 483 U.S. at 794–95. That decision was strategic because a psychologist had warned that the defendant might brag about the crime on the witness stand. *Id.* at 791–92. In *Strickland*, the defendant’s character and psychological evidence would have held little weight in light of the overwhelming aggravating circumstances, and the court found that counsel acted strategically to ensure evidence of his client’s character, criminal history, and psychology would not be admitted. *Strickland*, 466 U.S. at 699.

Here, counsel did not interview any potential witnesses from Estonia or conduct an investigation to discover what evidence might be available. Unlike counsel in *Burger*, there was no reasonable basis for counsel to conclude that additional evidence concerning Waidla’s personal history would be counterproductive. Waidla had no criminal history and the record does not show that there were other episodes in his past that counsel purposefully side-stepped. To the contrary, the evidence shows that despite initial hardships in his childhood, Waidla was well-liked by his peers in Estonia, performed reasonably well in school and in sports, and did not exhibit anti-social or violent behavior.

Separately, the defense was aware that there had been no disciplinary proceedings against Waidla while he awaited trial, but counsel did not pursue Waidla’s good behavior as potential mitigation evidence. In addition to having an infraction-free record during that initial period of incarceration, Waidla’s declaration stated that he obtained a

job working in the prison's kitchen and that he was given a different-colored uniform and a pass that allowed him to leave his cell and go to work. He was also one of few inmates allowed to read in the library. A memo to the district attorney corroborates Waidla's declaration, noting that unlike Sakarias, Waidla did not face disciplinary action during the first several months of his confinement. The record does not suggest a strategic reason for failing to investigate and present this admissible, mitigating evidence of Waidla's adjustment to incarceration.

Finally, I agree that counsel's failure to present evidence of Waidla's mistreatment in the Soviet Army was unreasonable. The State admitted Waidla's article, but defense counsel failed to present evidence explaining the hostility between Estonian and Russian soldiers and the specific conditions that Waidla experienced. Avo provided some testimony regarding the mistreatment that Estonian soldiers faced, but he did not testify about the practices in effect during Waidla's service. According to Dr. Ruumet, it was widely recognized that Estonian conscripts were abused, and units with more Russian soldiers, like the one Waidla ended up in, were especially dangerous. Evidence offered at the state post-conviction stage included Dr. Ruumet's explanation that Waidla feared he would die in the military, and that in one letter he sent to his family, "he pleaded with them to try to save him." Without this context, the jury could have failed to appreciate the extent of the hardships described in Waidla's article. I am unpersuaded by the State's argument that elaborating upon the article would have been entirely cumulative.

Mustering a successful counterweight to Waidla's violent crime would have been an uphill battle under any circumstances, but in my view, despite the deference we

afford to counsel's strategic choices, the failure to investigate these avenues and present this mitigation evidence fell below an objective standard of reasonableness.

WARDLAW, Circuit Judge, dissenting in part:

Consistent with our opinion issued May 23, 2023, I concur in that portion of the judgment denying habeas relief from Waidla's conviction, although I do not join the majority's opinion. However, I continue to believe that counsel performed deficiently during the penalty phase and that this deficient performance prejudiced Waidla. Therefore, I would affirm the district court's grant of habeas relief to Waidla on his penalty phase ineffective assistance of counsel claim.

To be clear, Waidla committed a heinous and gruesome crime that deserves punishment. Under our system, however, "[c]apital defendants have a constitutional right to the effective assistance of counsel at the guilt and penalty phases of trial." *Avena v. Chappell*, 932 F.3d 1237, 1247 (9th Cir. 2019); see *Strickland v. Washington*, 466 U.S. 668 (1984). This need for effective counsel is especially acute where, as here, the deficient performance is the difference between life and death. Cf. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate

punishment in a specific case.”). Therefore, with respect, I dissent from the majority’s opinion.¹

A.

Legal Standard

Waidla’s sole claim of error at the penalty phase is that his counsel rendered ineffective assistance by failing to investigate and present mitigation evidence that competent counsel would have discovered. *Strickland v. Washington*, 466 U.S. 668 (1984), sets out the standard for ineffective assistance of counsel claims. Under *Strickland*, Waidla must first show that his counsel’s performance “fell below an objective standard of reasonableness” under prevailing professional norms. *Id.* at 688. *Strickland* creates a strong presumption that counsel’s performance “falls within the wide range of reasonable professional assistance.” *Id.* at 689. Counsel’s strategic decisions, if “made after thorough investigation of law and facts,” are “virtually unchallengeable.” *Id.* at 690. Our court assesses a particular decision not to investigate or to limit the scope of investigation for reasonableness. *Id.* at 691.

If Waidla can show that counsel’s performance was deficient, he must then establish prejudice. *Id.* at 694. To assess prejudice at the penalty phase, we reweigh all of the evidence in aggravation and mitigation and ask whether, had counsel provided competent representation, “there is a reasonable probability that at least one juror would have struck a different balance.” *Wiggins v. Smith*, 539 U.S. 510, 537 (2003); *see also id.* at 534, 536.

¹ The following discussion is drawn largely from the original per curiam opinion.

When 28 U.S.C. § 2254(d) applies, we defer to a state court's decision unless it "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." When reviewing a state court decision for which there is no reasoned opinion, as here, we must consider any arguments that could have supported the state court's decision. *See Harrington v. Richter*, 562 U.S. 86, 102 (2011). We may grant Waidla habeas relief only if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." *Id.*

I would hold that the California Supreme Court unreasonably applied *Strickland*'s standard in evaluating Waidla's claim of ineffective assistance at the penalty phase. Had the three categories of evidence that counsel should have discovered been presented to the jury, there is a reasonable probability that at least one juror would have voted against the death penalty.

B.

The Admitted Inadequacy of Counsel's Investigation

Counsel admitted that he conducted no investigation into mitigation evidence beyond any incidental investigation he made of evidence relevant to the guilt phase. Competent counsel would have sought out and introduced evidence concerning Waidla's background and character, the hardship Estonians faced in the Soviet Army, and Waidla's good behavior while in custody awaiting trial. Counsel's disregard for all three possible mitigation strategies makes

clear that his incompetence is “beyond any possibility for fairminded disagreement.” *Harrington*, 562 U.S. at 103.

Background and Character Evidence. The record shows that counsel “abandoned [his] investigation of petitioner’s background after having acquired only rudimentary knowledge of his history from a narrow set of sources,” thereby violating basic professional standards. *Wiggins*, 539 U.S. at 524; *see also Apelt v. Ryan*, 878 F.3d 800, 831 (9th Cir. 2017) (“There can be no doubt that counsel was required to review a defendant’s background in preparation for sentencing.”). The duty to investigate a defendant’s social history was as foundational at the time of trial as it is now. Practice guidelines in effect in 1990, which guide our analysis of what qualifies as reasonable professional conduct, *Strickland*, 466 U.S. at 688, stated that “[c]ounsel in a capital case is obligated to conduct a thorough investigation of the defendant’s life history and background.” ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 8.1, commentary (1989). Abdicating this duty, counsel interviewed Waidla alone and did not procure any psychological or psychosocial evaluations.

Waidla’s resistance to having counsel perform a social history investigation did not eliminate counsel’s duty to investigate his background. To be sure, “[c]ounsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant.” *Strickland*, 466 U.S. at 691. But counsel “never made a serious attempt to educate [Waidla] about the consequences of his decision.” *Silva v. Woodford*, 279 F.3d 825, 841 (9th Cir. 2002). Although Waidla’s concern for the safety of Estonian witnesses was legitimate and genuinely held, that concern was only part of the calculus. Counsel himself admitted that, far from fully

advising Waidla on the benefits and drawbacks of an investigation, he “did not definitively resolve the issue” with Waidla. In fact, Waidla realized that one basis for his reluctance to have counsel contact witnesses in Estonia was unreasonable, showing that he continued to actively consider the issue. Failing to advise Waidla of the importance of mitigation evidence was especially detrimental because, as Waidla stated in his declaration, he “did not have an understanding of the American legal system [and] did not know what would constitute a presentation of ‘mitigation’ evidence.”

The State’s comparisons to the investigations held competent in *Strickland* and *Burger v. Kemp*, 483 U.S. 776 (1987), are unconvincing. Counsel in both cases made an informed strategic decision to limit their social history investigations because they knew that presenting social history evidence would prove harmful. In *Strickland*, counsel sought to avoid opening the door to evidence of the defendant’s criminal history, bad character, and intact psyche. *See* 466 U.S. at 672–74, 699. In *Burger*, counsel sought to keep the defendant’s criminal history from the jury, as well as testimony from family and acquaintances about his drug use and violent tendencies. 483 U.S. at 791–95. Counsel also reasonably decided against a mitigation strategy that required testimony from the defendant, who showed a lack of remorse and, according to a psychologist, might have bragged about the crime on the witness stand. *Id.*

No such concerns are evident in this case. Waidla had no criminal history and his social history would not have revealed any significant prior bad acts. Further, no psychological expert identified him as a liability on the stand and he expressed deep remorse for Viivi’s murder. Thus, *Strickland* and *Burger* are not instructive on this point.

Finally, although counsel would have faced logistical hurdles to investigating abroad, those challenges did not eliminate counsel's duty to investigate. In *Apelt*, a case governed by 28 U.S.C. § 2254(d), we considered whether counsel had performed deficiently in representing a capital defendant who had lived in Germany until six months before the crime. 878 F.3d at 805, 830–31. Since counsel was aware that a social history investigation could have revealed useful mitigation evidence, we held that he had rendered ineffective assistance because his co-counsel made only one trip to Germany and was unable to communicate with the defendant's German-speaking family while there. *Id.* As in *Apelt*, Waidla's counsel was on notice of the need for a social history investigation. He knew that Waidla's upbringing was not traditional in that Waidla had not been raised by his parents. That counsel broached the question of investigating in Estonia with Waidla multiple times shows that he was aware of the significance of a social history investigation. Yet, as in *Apelt*, counsel fell short of professional standards by abandoning his efforts to investigate through travel to Estonia or other means. *Id.*

Moreover, the record shows that investigating in Estonia, while more challenging than a domestic investigation, would not have been the "daunting task" the State claims. In 1989 and 1990, communication between the United States and Estonia was possible via fax, phone, and mail. Dr. Ruumet reports that by June 1990, "the Soviet regime had loosened enough to allow relatively unfettered travel in and out of the country." And although a personal visit by counsel to Estonia may have been possible, counsel need not have personally traveled to Estonia, as Professor Pork would have interviewed Waidla's family and acquaintances on counsel's behalf. Because California provides indigent defendants

with funding for efforts “reasonably necessary for the preparation or presentation of the defense” upon an application by counsel, Cal. Penal Code § 987.9(a), the costs of international investigation were not insurmountable. Notably, counsel in co-defendant Sakarias’s trial, which occurred within a year of Waidla’s trial, was able to obtain social history interviews from Sakarias’s family and friends in Estonia. *In re Sakarias*, 106 P.3d at 936, 949. Thus, counsel’s violation of minimum professional standards was not excused by logistical barriers.

Mistreatment in the Soviet Army. Counsel’s duty to investigate a defendant’s social history no doubt includes an obligation to seek out evidence of childhood hardship because “[e]vidence of abuse inflicted as a child is especially mitigating.” *Andrews v. Davis*, 944 F.3d 1092, 1117 (9th Cir. 2019) (en banc).

Waidla was still a teenager when he was conscripted into the Soviet Army. *People v. Waidla*, 996 P.2d 46, 54 (Cal. 2000). Counsel was aware of this chapter in Waidla’s life because Waidla’s article, *Escaping Through the Fog*, detailed the experience to an extent. Yet counsel did not argue that Waidla’s hardships were relevant to the jury’s decision, nor did he attempt to obtain additional contextual evidence about the indignities visited on Estonian conscripts in the Soviet Army.

Had counsel investigated, he would have found that in addition to the crowded lodging, repeated exposure to bitter cold, and inadequate medical care described in Waidla’s article, Estonian soldiers often encountered serious physical abuse and even death at the hands of Russian soldiers and officers. Counsel would have learned of the psychological impact that looming danger had on Waidla, whose letter to

his family begging for help spoke to his despondency and fear. Armed with this evidence, competent counsel would have argued that Waidla's time in an abusive institutional setting detracted from his culpability.

The State makes much of the fact that the jury had access to some evidence about Waidla's time in the Soviet Army. The article, *Escaping Through the Fog*, was introduced during the guilt phase and in his testimony, and Avo indicated he agreed with the statement that "traditionally draftees from the Baltic States were not treated very well in the Soviet Army." According to the State, the jury's awareness of this evidence eliminated any need for counsel to investigate cumulative evidence concerning the abuse endured by Estonian soldiers. I disagree. The State improperly emphasizes the mere existence of evidence in the record while disregarding counsel's obligation to explain how that evidence should be factored into a decision of whether to impose the death penalty. The State also overstates the cumulative nature of the postconviction evidence.

First, counsel's obligations do not end at ensuring that mitigation evidence is accessible to the jury. That is all that counsel did with respect to Waidla's time in the Soviet Army. Avo's testimony did not make an appearance in counsel's guilt or penalty phase arguments. Counsel also never argued at the penalty phase that Waidla's article evidenced hardship that ought to inform the jury's sentencing decision. Nor did this evidence feature in the State's case in a way that would alert the jury to its mitigating force. The State referenced the article for its discussion of Waidla's escape from the Soviet Army, not its description of his experiences prior to escape. It was incumbent on counsel not just to make sure that this

mitigation evidence made it to the jury, but to identify its existence and to argue its relevance. *See Rogers v. Dzurenda*, 25 F.4th 1171, 1189 (9th Cir. 2022) (finding deficient performance when counsel’s opening statement gave the jury “inadequate context for how the evidence would relate to the insanity defense”). Counsel failed to fulfill that aspect of his professional duty.

Perhaps the glaring omission of the argument that Waidla’s mistreatment in the Soviet Army reduced his culpability could be excused as a strategic decision. Such strategic decisions, when reasonably well-informed, are entitled to deference. *Strickland*, 466 U.S. at 690. But even if there was a hypothetical strategic purpose for leaving this mitigation evidence unmentioned, counsel did not make a decision with the benefit of all of the evidence at his disposal. After proper investigation, counsel could have made a significantly more forceful version of the argument that Waidla was mistreated in the Soviet Army, as discussed below. Thus, any strategic decision was fatally underinformed.

Nor could a fairminded jurist conclude that it was reasonable to eschew further investigation on the theory that only cumulative evidence could be obtained. Waidla’s article only vaguely references the hostility between Estonian and Russian soldiers and does not adequately convey the extent of the power disparity favoring the Russians. Avo attested to the power imbalance to some extent, but provided no detail about the nature of the abuse, nor did he testify about the practices in effect during Waidla’s service. This evidence left a significant gap in explaining the severity of the likely abuse as well as its systemic nature.

Bobby v. Van Hook, 558 U.S. 4 (2009), on which the State relies, is inapposite. There, because counsel had gathered significant evidence of the defendant’s abusive family life, he was reasonable to forego obtaining additional, likely cumulative, testimony on that topic from more distant relatives. *Id.* at 10–12. In contrast, it should have been clear to Waidla’s counsel that he could have sought out evidence not just corroborating Waidla’s article but providing much-needed context for it.

The State’s contention that “cumulative evidence that other soldiers were also mistreated lacked any real significance, especially if Waidla was not aware of the circumstances” is unpersuasive. First, according to Dr. Ruumet, the risks to Estonian conscripts were so widely known that Estonians frequently took measures to avoid placement in units with more Russian soldiers, like the one Waidla ended up in, which were especially dangerous. Thus, Waidla surely understood the scope of the danger that awaited him.

Second, it is highly relevant that Estonian soldiers were subjected to widespread, state-sanctioned abuse rooted in prejudice. Without that context, the jury could have misinterpreted Waidla’s account of harsh training tactics and fights between Estonian soldiers and their Russian counterparts as commonplace drills and roughhousing rather than sanctioned institutional abuse. The information provided by Dr. Ruumet would have also supported an argument that Waidla did not just endure run-of-the-mill discomforts while serving, but also suffered significant fear and emotional distress, as shown by Waidla’s desperate letter to family requesting that, as Dr. Ruumet paraphrased, they “try to save him.” Because context was so crucial to understanding Waidla’s experience, counsel could not have

reasonably forgone investigation into this mitigation strategy simply because the jury had access to Waidla's account.

Good Behavior in Custody Awaiting Trial. It is well established that “evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating.” *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986); *see also Williams v. Taylor*, 529 U.S. 362, 396 (2000) (failure to present, *inter alia*, prison guard testimony that defendant was not dangerous or violent as well as prison records demonstrating good behavior contributed to finding of deficient performance). The import of such mitigating evidence is particularly clear when the State argues for the death penalty on the ground that a defendant “could not be trusted to behave if he were simply returned to prison.” *Skipper*, 476 U.S. at 5 n.1. Here, the State made a similar argument by telling the jury that Waidla had a “violent nature” and that killing meant nothing to him.

Counsel was on notice that, contrasting with the State's narrative that Waidla posed a risk of future violence, Waidla had not encountered any disciplinary issues while incarcerated pending trial. Yet counsel ignored this “tantalizing indication[] in the record,” *Stankewitz v. Woodford*, 365 F.3d 706, 720 (9th Cir. 2004), of a possible mitigation strategy based at least in part on Waidla's good behavior. Counsel's failure to pursue this viable strategy was unreasonable. Each of the State's arguments to the contrary is unpersuasive.

First, the California Supreme Court could not reasonably have found counsel's performance adequate by disregarding Waidla's evidence as inadmissible or conclusory. To make out a *prima facie* case in a California habeas petition, a

petitioner must attach “reasonably available” documentation supporting his allegations. *People v. Duvall*, 886 P.2d 1252, 1258 (Cal. 1995). A petitioner may not rely on hearsay evidence to make out a prima facie case, *People v. Madaris*, 122 Cal. App. 3d 234, 241–42 (1981), *overruled on other grounds by People v. Barrick*, 654 P.2d 1243, 1250 (Cal. 1982), nor on “subjective, self-serving” statements, *In re Alvernaz*, 830 P.2d 747, 756–57 (Cal. 1992). Looking to this procedure, the State argues that the California Supreme Court could have declined to consider the CDC document noting that Waidla behaved well in county jail as hearsay and could have found Waidla’s remaining evidence conclusory.

Fairminded jurists would agree that Waidla offered enough admissible evidence to show that counsel rendered ineffective assistance. That is true even assuming the CDC document is inadmissible hearsay. Waidla’s declaration explaining the privileges he accrued in county jail for good behavior may be self-serving, but it is hardly conclusory. The declaration explains, based on Waidla’s personal knowledge, that he enjoyed freedoms reserved for well-behaved prisoners like the ability to read in the library and the ability to leave the dormitories for his job. That evidence is more than a bare allegation of good behavior. *See SEC v. Phan*, 500 F.3d 895, 909 (9th Cir. 2007) (differentiating self-serving declarations from conclusory ones that offer no admissible facts).

Waidla’s declaration, which speaks to three months of his confinement, is corroborated by other evidence. The memorandum authored by the District Attorney’s office in 1989 evaluated whether the death penalty was appropriate for Waidla and Sakarias. The memo recommends seeking the death penalty for Sakarias but not Waidla in part because Waidla, unlike Sakarias, did not face disciplinary action

during the first several months of his confinement, and he did not “evidence the same degree of danger to society” as Sakarias did. The State does not argue that the DA memo is inadmissible hearsay, and our court has previously considered the State’s decision to seek or not seek the death penalty against a co-defendant in this context. *See Sanders v. Davis*, 23 F.4th 966, 994 (9th Cir. 2022). The declaration is also corroborated by Waidla’s lack of criminal history and Dr. Young’s opinion concerning his nonviolent personality structure. Waidla’s evidence is, therefore, far from conclusory.²

Second, the State argues that the California Supreme Court properly denied this subclaim because counsel’s declaration “sheds no light on Waidla’s behavior while in custody or trial counsel’s decisions concerning such behavior.” Not so. Counsel was aware that “there were no disciplinary proceedings against Mr. Waidla.” True, he gave no explanation for his failure to investigate the matter, but he admitted that he conducted no investigation whatsoever. It is therefore clear that his decision not to pursue this strategy did not stem from strategic insight gained after

² Typically, upon finding that a state court decision violated 28 U.S.C. § 2254(d), the federal habeas court undertakes *de novo* review of the claim before granting relief. *See Frantz v. Hazey*, 533 F.3d 724, 737 (9th Cir. 2008) (en banc). The district court did not explicitly conduct *de novo* review. On appeal, the State takes issue only with the district court’s § 2254(d) analysis. Accordingly, the State has forfeited any objection that the district court erred by granting relief based on the evidence submitted in support of Waidla’s petition rather than evidence adduced in a new evidentiary hearing. To the extent the State makes an argument limited to this subclaim that the district court should have required *admissible* evidence of Waidla’s good behavior before granting relief, that argument is unavailing because Waidla’s evidence apart from the CDC document could have been rendered in admissible form.

additional investigation. The State cites no authority for the proposition that trial counsel must affirmatively state that he lacked a strategic purpose, nor should the court adopt that rule here.

Moreover, the record does not reveal any discernable strategy that might have justified counsel's inaction. Any suggestion that counsel could reasonably have decided against investigating on the theory that juries are usually unpersuaded by good behavior evidence is untenable. It would be difficult to reconcile that view with *Skipper's* holding that good behavior evidence must be admitted as mitigation, *see* 476 U.S. at 5, let alone *Williams's* holding that counsel was deficient in part for not gathering such evidence, 529 U.S. at 396. *See also Deck v. Missouri*, 544 U.S. 622, 633 (2005) (noting that whether the defendant is "a danger to the community" is "nearly always a relevant factor in jury decisionmaking, even where the State does not specifically argue the point").

Finally, the State contends that presenting good behavior evidence could have indicated to the jury that no better mitigation evidence was available. But had counsel conducted an adequate investigation, Waidla's good behavior in custody while awaiting trial would not have stood alone in Waidla's mitigation case. It would have stood alongside and complemented the other evidence counsel could have introduced as described above. Thus, counsel's failure did not stem from a reasonable strategic judgment, but from an oversight that cannot be squared with even *Strickland's* forgiving standard.

C.

Prejudice

Because counsel performed deficiently by failing to introduce and argue several categories of mitigation evidence, it is necessary to address whether counsel's incompetence prejudiced Waidla. To do so, courts reweigh the aggravation evidence against the mitigation evidence that ought to have been presented to the jury. *Wiggins*, 539 U.S. at 534.

One factor relevant to assessing whether a reasonable probability exists that one juror would have voted differently is the jury's behavior at trial. Long deliberations relative to the complexity of the case and indications of close jury deliberations "weigh against a finding of harmless error because [they] suggest a difficult case." *United States v. Velarde-Gomez*, 269 F.3d 1023, 1036 (9th Cir. 2001) (en banc) (internal quotation marks and citation omitted); *Noguera v. Davis*, 5 F.4th 1020, 1045 (9th Cir. 2021).³ We also consider the strength of the aggravation evidence and the nature and quality of the mitigation evidence originally

³ The State contends otherwise. In its view, lengthy jury deliberations do not necessarily signify jury indecision. But the jury notes indicating deadlock gave a clear picture about the reason for its long deliberations. The State also hypothesizes that the jury's deadlock could have been unrelated to the balance of mitigation and aggravation evidence and instead caused by, for instance, a juror's misunderstanding of an instruction. But jury questions indicating deadlock show that the death sentence "was not a foregone conclusion, especially given that the jurors' only task at that point was to decide between a sentence of life without parole and death." *Silva*, 279 F.3d at 849–50. Even if the jury had been preoccupied with a mitigation factor unrelated to Waidla's background or character, evidence relevant to those factors could have moved an uncertain jury to weigh the totality of the circumstances differently.

presented in comparison to the nature and quality of the new mitigation evidence. *See Wiggins*, 539 U.S. at 537–38.

With these factors in mind, the California Supreme Court could not reasonably have found that counsel’s failures were non-prejudicial. The jury delivered a death sentence knowing very little about Waidla’s background and positive qualities. Even so, it took the jury nine days of deliberation and two bouts of deadlock to reach a verdict. Indeed, a declaration of one of the jurors on Waidla’s jury explains that the jury was “looking for reasons to show mercy if possible,” and that the “penalty phase deliberations were very intense.” Yet, because Waidla’s counsel did not put on a case, the jury had nothing to seize upon in order to grant Waidla mercy. No fairminded jurist considering a jury so closely divided could discount the prejudicial effect of failing to present even modest evidence of Waidla’s background and good character. *See Wharton v. Chappell*, 765 F.3d 953, 978 (9th Cir. 2014) (“The jury’s notes and the fact that it deliberated over the course of three days suggest that the verdict was not an easy one to reach”); *Kipp v. Davis*, 971 F.3d 939, 959 (9th Cir. 2020) (three-day deliberation supported a finding of prejudice); *Thomas v. Chappell*, 678 F.3d 1086, 1103 (9th Cir. 2012) (five-day deliberation with several readbacks supported a finding of prejudice) (collecting cases).

The difference between the mitigation evidence actually presented and the evidence that competent counsel would have presented is significant. As the background evidence the jury heard was scant, it can readily be recounted again here: Waidla was born in Estonia, a country then occupied by the Soviet Union, and was raised by family members other than his parents. He testified that he had two encounters with the KGB as a teen in which he was detained

and beaten for allegedly protesting against the Soviet Union. At age 18, he was conscripted into the Soviet Army, where Estonians were generally not treated well. If the jury in fact read *Escaping Through the Fog*, which is not clear from the record, it would have learned that Waidla experienced harsh living conditions and once fled from a brawl between Russian and Estonian soldiers, before falling ill and ultimately escaping. While living with the Piirisilds, Waidla was typically friendly and demonstrated his construction skills by completing several home improvement projects. He was just 20 at the time of the crime and had committed no prior felonies. Finally, Waidla cooperated with law enforcement after his arrest.

Waidla's mitigation case at trial essentially amounted to an incomplete picture of the adversity he faced in the Soviet Army, his age, and his lack of criminal history. The sparseness of this evidence is akin to counsel's presentation in *Wiggins*, where the "sentencing jury heard only one significant mitigating factor—that Wiggins had no prior convictions," 539 U.S. at 537, as well as that in *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam), where the mitigation case consisted of "inconsistent testimony about Porter's behavior when intoxicated and testimony that Porter had a good relationship with his son," *id.* at 32.

If Waidla had been competently represented, the jury would have heard much more. To start, competent counsel would have made the jury aware of Waidla's many positive character traits. One such trait was Waidla's strong work ethic. Waidla worked hard at marksmanship as a teen, showing dedication and skill that surpassed his peers. He also excelled in photography, having worked under the tutelage of his great-uncle Gunnar to learn the proper techniques. In jail pending trial, Waidla worked

maintenance and kitchen duty jobs, which entailed physical labor like buffing floors. He spent free time in the library strengthening his English and reading newspapers.

Waidla's consistent dedication to his pursuits could have undercut the State's portrayal of Waidla as entitled and parasitic. Counsel would have also directly refuted the State's contention that Waidla was lazy by referring to the testimony from Dr. Ruumet, who opined that Waidla's perceived laziness was possibly attributable to depression brought on by "circumstances in which he had lost his whole support system and in which he felt helpless and overwhelmed." Dr. Ruumet's analysis was in line with Dr. Young's assessment, based on psychological testing, that "depression is an underlying component of Waidla's character."

Another character trait of note was Waidla's pro-social nature and his "characterological aversion to confrontation and violence." Loved ones, acquaintances, and coaches all attested to Waidla's distaste for conflict and his peaceable disposition. Dr. Young opined that Waidla was the least violence-prone prisoner she had ever evaluated in the context of criminal proceedings. This testimony would have complemented and added credibility to evidence counsel could have presented of Waidla's compliant and nonviolent behavior while in jail awaiting trial. There, guards and a librarian afforded him special privileges that would not have been fitting for a dangerous prisoner. The State suggests that evidence of Waidla's good behavior in jail would not influence jurors who knew that he carried a loaded gun and a threatening note at the time of his arrest. However, that assessment disregards the character evidence that likewise points to his peaceful nature.

Evidence of Waidla's lack of future dangerousness would have undermined the State's contention that Waidla had a "violent nature," and that "killing doesn't mean anything" to him. That much is clear from *Skipper*, in which the relevance of similar evidence was "underscored . . . by the prosecutor's closing argument, which urged the jury to return a sentence of death in part because petitioner could not be trusted to behave if he were simply returned to prison." 476 U.S. at 5 n.1.

Competent counsel would have introduced the evidence that Waidla was conscripted into the Soviet Army, where it was common knowledge that Estonians were targeted for serious physical and emotional abuse. Even if the jury took the time to review Waidla's article closely, which no one can be sure of, it would not have known the full extent of the possible danger to Waidla. Waidla's depiction of his experiences in the Soviet Army takes on new meaning when viewed in proper context, namely, a context of institutionalized and prejudice-based abuse that could prove fatal. The postconviction evidence therefore revealed the true nature of the psychological toll that conscription took on Waidla.

Finally, competent counsel would have presented the humanizing evidence about Waidla's strong bonds to family members, including his great-uncle Gunnar, whom Waidla idolized and, according to Gunnar, related to as "both mother and father." The jury would have learned that Waidla's connections to family enabled him to withstand the hardships of his early life. This evidence would have allowed the jury to view Waidla as a three-dimensional person with the ability to form meaningful connections, a stark contrast from the caricature of a callous murderer presented by the State. *See Porter*, 558 U.S. at 41 ("The

judge and jury . . . heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability.”).

In sum, competent counsel would have rounded out the jury’s understanding of Waidla’s humanity and positive qualities. At the same time, counsel would have marshalled the evidence to counter the State’s arguments that Waidla was lazy, dangerous, and cruel. Any confidence in the jury’s verdict is undermined because “the task [the jury] actually undertook differed so profoundly from the one it would have performed had [Waidla’s] counsel not been deficient.” *Boyd v. Brown*, 404 F.3d 1159, 1180 (9th Cir. 2005), *as amended*, 421 F.3d 1154 (9th Cir. 2005).

Waidla’s mild resistance to having counsel contact his loved ones and acquaintances in Estonia does not eliminate the prejudice associated with counsel’s failure to do so, as in *Schriro v. Landrigan*, 550 U.S. 465 (2007). “[W]e have held that the *Landrigan* prejudice holding does not apply when the defendant ‘did not threaten to obstruct the presentation of any mitigating evidence.’” *Sanders*, 23 F.4th at 981 (quoting *Hamilton v. Ayers*, 583 F.3d 1100, 1119 (9th Cir. 2009)). *Landrigan* is not controlling in this case.

Waidla’s reluctance pales in comparison to the opposition at issue in *Landrigan*. There, *Landrigan* hamstrung any and all attempts by counsel to present a mitigation argument, including by interrupting during counsel’s proffer of evidence to the judge and by asking the judge to impose the death penalty. *Landrigan*, 550 U.S. at 470, 476–80. By contrast, Waidla merely voiced concerns about conducting an investigation in Estonia in conversations with counsel. He never indicated that he would obstruct counsel. Additionally, counsel in *Landrigan*

advised his client strongly against his preferred course of action and attempted to present mitigation evidence over his client's objections. *Id.* at 479–80. Waidla received markedly less diligent representation, as counsel simply did not press the issue enough to reach resolution on it. In other words, *Landrigan* does not govern because the major gap in Waidla's mitigation case is attributable to counsel's actions rather than Waidla's.

The mitigation strategy outlined above is a modest one. Waidla's social history does not reveal facts that often support a finding of prejudice like abject abuse or serious mental incapacity. *See, e.g., Williams*, 529 U.S. at 395–98. And, to be sure, good character evidence sometimes lacks persuasive force in the face of a “gr[isly] murder.” *Bemore v. Chappell*, 788 F.3d 1151, 1172 (9th Cir. 2015). But crucially, the court must determine whether fairminded jurists could conclude that this mitigation evidence gives rise to a reasonable probability that at least one juror would have voted differently. Waidla meets that standard given the jury's deadlocking twice, its empty search for a reason to grant mercy, the extremely minimal mitigation evidence presented in the guilt phase, and the missed opportunity to rebut various aspects of the State's aggravation argument, which was itself modest.⁴

⁴ Waidla argues, as an alternative ground for affirmance, that he was deprived of due process by the State's presentation of false evidence against him. Because penalty phase relief is warranted on Waidla's ineffective assistance of counsel claim, I do not address whether the state court's determination violated 28 U.S.C. § 2254(d).

- 01/25/2024 ☐ 98 ARGUED AND SUBMITTED TO KIM MCLANE WARDLAW, MORGAN B. CHRISTEN and ERIC D. MILLER. The audio and video recordings of this hearing are available on our website at <http://www.ca9.uscourts.gov/media/>. [12852658] [18-99001, 18-99002] (WWP) [Entered: 01/25/2024 02:17 PM]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

NOV 21 2023

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

TAUNO WAIDLA,

Petitioner-Appellee,

v.

RONALD DAVIS, Warden,

Respondent-Appellant.

No. 18-99001

D.C. No. 2:01-cv-00650-AG
Central District of California,
Los Angeles

ORDER

TAUNO WAIDLA,

Petitioner-Appellant,

v.

RONALD DAVIS, Warden,

Respondent-Appellee.

No. 18-99002

D.C. No. 2:01-cv-00650-AG

Before: WARDLAW, CHRISTEN, and MILLER, Circuit Judges.

In light of the fact that Judge Morgan Christen has replaced Judge Paul Watford on the three-judge panel, the court has agreed to schedule additional argument on Thursday, January 25, 2024, at 10:00 a.m. at the Richard H. Chambers Courthouse in Pasadena, California.

IT IS SO ORDERED.

CA No. 18-99001
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TAUNO WAIDLA,
Petitioner-Appellee,
v.
RON DAVIS, Warden,
Respondent-Appellant.

D.C. No. 2:01-cv-650-AG
Central District of California,
Los Angeles
DEATH PENALTY CASE

RESPONSE TO APPELLANT’S PETITION FOR PANEL REHEARING

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA
HONORABLE ANDREW J. GUILFORD
United States District Judge

CUAUHTEMOC ORTEGA
Federal Public Defender
MARTA VANLANDINGHAM
Email: Marta_VanLandingham@fd.org
KATHERINE FARKAS
Email: Kathy_Farkas@fd.org
Deputy Federal Public Defenders
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-2854
Facsimile: (213) 894-0081

Attorneys for Petitioner-Appellee
TAUNO WAIDLA

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I. INTRODUCTION

In its per curiam opinion of May 5, 2023,¹ this Court affirmed the district court’s grant of habeas relief on Waidla’s claim of ineffective assistance of counsel (“IAC”) at the penalty phase. (Dkt. 91 at 48.) The Court based its affirmance on “the jury’s uncertainty, the extremely minimal mitigation evidence originally presented, and the missed opportunity to rebut various aspects of the State’s aggravation argument, which was itself modest.” (*Id.* at 37.)² The State, however, is asking this Court to reopen and rehear this case on the basis of what it claims is an error by this Court in its finding that the State waived an objection to an issue discussed in a footnote. (Dkt. 92 (“PFR”) at 3 *et seq.*, citing dkt. 91 at 29 n.1.)

The footnote at issue here was appended to a section of the opinion analyzing the admissibility of the evidence presented at the state court with regard to one of Waidla’s four subclaims for IAC-penalty relief regarding trial counsel’s

¹ Ninth Circuit case 18-99001, docket 85; corrected opinion entered May 31, 2023, docket 91, with a correction not relevant to this inquiry. Though *Waidla v. Davis* is docketed in this Court under two case numbers (18-99001 and 18-99002), citations herein will only refer to entries in case 18-99001, wherein Waidla is appellee, as the State is challenging only a portion of the Court’s opinion relevant to the outcome of the penalty-phase decision.

² In light of the affirmance of penalty phase relief on IAC grounds, the Court did not need to reach the question of whether Waidla was deprived of due process at the penalty phase by the State’s presentation of false evidence against him. (Dkt. 91 at 37.) This unresolved issue would likely need to be addressed should the Court grant the State’s PFR and revisit its affirmance of penalty phase relief.

failure to present evidence of Waidla's good behavior in custody (*see* dkt. 56 at 3152). But the Court's finding of waiver applied to any objection the State might have made as to the district court's procedure in granting relief without first holding an evidentiary hearing. In the Court's words, "the State has forfeited any objection that the district court erred by granting relief based on the evidence submitted in support of Waidla's petition rather than evidence adduced in a new evidentiary hearing." (Dkt. 91 at 29 n.1.) Instead of providing any proof, or even attempting to provide any proof, that the Court erred in finding this waiver, the State merely presents again its prior arguments that the evidence supporting this one subclaim of IAC should have been found inadmissible.

Because this Court did not err in finding the State waived any objection on appeal to the district court's grant of relief on the basis of the state-court record, Respondent-Appellant's petition for rehearing should be denied.

II. ARGUMENT

A. Respondent-Appellant has presented no evidence of error in this Court's opinion.

At oral argument, this Court expressed interest regarding the district court's analysis of Waidla's IAC penalty claim.³ The district court granted habeas relief

³ Judge Watford asked counsel for Waidla "[W]hy, in this posture, the result of your winning results in the grant of relief, right, as opposed to some further proceedings..." (Oral argument ("Arg.") at 33:23, *Waidla v. Davis*, 18-99001, <https://www.youtube.com/watch?v=ypX5yDZTxpU&t=1s>.) Counsel responded

explicitly on the basis of the evidence presented to the state court in Waidla's first habeas petition (1-ER-29, 1-ER-201–202), instead of separating its finding that the state's determination was unreasonable under § 2254(d) from a subsequent *de novo* review of the constitutional claim. As summarized in its opinion, "Typically, upon finding that a state court decision violated 28 U.S.C. § 2254(d), the federal habeas court undertakes *de novo* review of the claim before granting relief. *See Frantz v. Haze*, 533 F.3d 724, 737 (9th Cir. 2008) (en banc). The district court did not explicitly conduct *de novo* review." (Dkt. 91 at 29 n.1.) Though Waidla had argued, in his briefs and at oral argument, that Supreme Court law and this Court's practice allow for a simultaneous finding that § 2254(d) does not bar relief and that § 2254(a) mandates relief, the State never countered that argument, either in its briefs or during argument. Thus, because "[o]n appeal, the State takes issue only with the district court's § 2254(d) analysis. . . , the State has forfeited any objection that the district court erred by granting relief based on the evidence submitted in support of Waidla's petition rather than evidence adduced in a new evidentiary

that the district court had, in fact, held an evidentiary hearing, including on the claim of IAC-penalty. (*Id.* at 33:50.) Judge Wardlaw noted that the district court explicitly stated it was disregarding all evidence from that hearing in granting relief. (*Id.* at 34:48.) Judge Watford again expressed concern as to this posture, stating that, as the state-court record alone provided "the basis on which the district court granted your client relief, not granted some further proceedings . . . You were given an outright win on the penalty phase. That just strikes me as odd. I grant, I agree with you that our cases seem to allow it." (*Id.* at 36:56.) This issue was not, however, addressed at argument by counsel for Respondent-Appellant.

hearing.” (Dkt. 91 at 29 n.1.) The Court held that, whether or not the district court should more properly have taken evidence from an evidentiary hearing into account before granting relief, the issue was mooted by the State’s failure to object.

The State in its petition for rehearing, however, misapprehends that finding. It introduces its PFR by referring to this Court’s opinion, alleging that it “erred in concluding that the State had forfeited any objection that the district court erred by granting relief based on the evidence submitted in support of Waidla’s petition rather than the evidence that was developed at the federal evidentiary hearing.” (PFR at 1.) But the State does not provide any evidence at all that it ever objected on appeal to the district court determining Waidla’s right to relief on the basis of the evidence before the state court. Instead, the State rehashes its arguments, rejected by both the district court and this Court, that the evidence presented by Waidla in support of one of his subclaims was not admissible or “competent” evidence.

Respondent-Appellant begins his actual argument by misconstruing the finding of the Court. It alleges that “the majority erred in concluding the State waived any objection that the [sub]claim failed due to a lack of competent evidence presented in federal court in support of it.” (PFR at 5.) That was *not* the waiver the Court found. But this invented finding that the State alleges to be erroneous forms the basis for the entirety of the PFR.

The State goes on to support its misdirected argument by recourse almost entirely to the following quote from its first brief on cross-appeal:

But even if the district had not erred repeatedly in reaching its conclusion that Waidla had satisfied his burden under § 2254(d), that was not the end of the inquiry. Demonstrating an unreasonable denial of relief simply permits examination of the merits of the claim. To prove entitlement to relief, *Waidla was obligated to prove, with admissible evidence*, that he was well behaved in custody. He never did. *Never did he even submit a declaration, let alone present actual admissible testimony, from any state or county custody official confirming that Waidla was a well-behaved inmate.* Such evidence was crucial to a determination that trial counsel rendered deficient performance for failing to present such evidence. Without it, *there was no admissible evidence to prove the claim.* Thus, even if the district court had correctly concluded that § 2254(d)(1) was satisfied, *there is no evidentiary basis upon which the district court could competently conclude that Waidla's claim of being well-behaved was true.*

(PFR at 6-7; emphases in PFR.) Every statement in this paragraph, every sentence and clause emphasized by the State as proof that the Court erred in finding waiver, goes solely and directly to its arguments about the competency and admissibility of evidence supporting Waidla's subclaim regarding his good behavior in custody.

Nothing in the State's petition addresses this Court's finding that the State forfeited an objection to the procedures and order in which the district court analyzed the penalty claim. It merely reargues the sufficiency and admissibility of some of the evidence supporting one of the four subclaims. And such reprisal of arguments already raised and rejected by the courts does not constitute a basis for

panel rehearing under FRAP Rule 40. *See United States v. Mageno*, 786 F.3d 768, 775 (9th Cir. 2015) (“a petition for rehearing is not a vehicle for a party to ‘study and reargue his case anew.’”) (quoting *Anderson v. Knox*, 300 F.2d 296, 297 (9th Cir. 1962)).

B. The Court correctly held that Respondent-Appellant forfeited any objection to the district court granting relief without holding a new evidentiary hearing.

As Waidla argued in his second brief on cross-appeal (dkt. 56)—not in response to the State’s initial brief but in the interest of thoroughness—the district court’s grant of relief on Waidla’s IAC-penalty claim on the basis of the state-court record was proper, as would be this Court’s affirmance of that grant. In his brief Waidla discussed how the district court reviewed the evidence Waidla had presented to the state court, and found trial counsel’s deficient performance clearly prejudicial. (1-ER-218.) As the denial of the claim by the California Supreme Court (“CSC”) represented an unreasonable application of clearly established federal law, and, even just on the record before the state, trial counsel provided ineffective assistance per *Strickland*⁴ and its progeny, the district court could and did grant relief. (*See* dkt. 56 at 62.)

Waidla then demonstrated that this Court and other federal courts have granted relief on the basis of the state-court record without first granting an

⁴ *Strickland v. Washington*, 466 U.S. 668 (1984).

evidentiary hearing. *Frantz v. Hazey*, 533 F.3d 724, 739 (9th Cir. 2008), held that, after analyzing a state court’s reasoning in light of § 2254(d), the federal court should conduct separate de novo review “unless that identification [of state-court error] necessarily means that the state court’s determination of the ultimate constitutional or legal question is also wrong.” Thus, when the error reaches both the issue of unreasonable application of clearly established federal law under § 2254(d) and violation of federal constitutional rights under § 2254(a)—as it did here—a grant of relief without additional evidence is warranted. Waidla discussed numerous instances of this and other courts proceeding in this manner in his brief. (Dkt. 56 at 31, 63-64, discussing grants of relief without hearings in *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Robinson v. Schriro*, 595 F.3d 1086 (9th Cir. 2010); *James v. Ryan*, 679 F.3d 780 (9th Cir. 2012), *Bemore v. Chappell*, 788 F.3d 1151 (9th Cir. 2015); *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001); *Browder v. Director, Dep’t of Corrections*, 434 U.S. 257 (1978). In addition, since Waidla briefed this issue, the Ninth Circuit has affirmed a district court’s grant of habeas relief without an evidentiary hearing, after reviewing under the applicable abuse of discretion standard. *See Noguera v. Davis*, 5 F.4th 1020 (9th Cir. 2021) (“We conclude that the district court’s grant of habeas relief without an evidentiary hearing was not an abuse of its discretion and that remand for a hearing is not

necessary. The State repeatedly argued in the district court that no evidentiary hearing was warranted.”).

As discussed above, the Court raised this issue with counsel for Waidla during oral argument. (Arg. at 32:23-37:38.) Counsel responded with reference to *Frantz* and to this Court’s practice. (*Id.*) But Respondent-Appellant never addressed this issue, in briefing or in argument. Thus, while the Court could have ruled directly that federal law and practice allow for a grant of habeas without an evidentiary hearing, it held instead that the State had waived any objection it might have brought to the district court’s grant of relief on the state-court record.

The court’s finding of waiver is not in any way erroneous. But, even if it were, and the State had not waived an objection to the district court’s grant of relief solely on the record before the state court, such an objection would have been unavailing. Supreme Court law in *Frantz* and cases in this Court have established a precedent for grants of relief without evidentiary hearings, as Waidla demonstrated on appeal and as this Court acknowledged during argument. (*See* Arg. at 37:09 (Judge Watford’s statement that “I grant, I agree with you that our cases seem to allow it.”).) In this way, too, there is no error to rehear.

C. Respondent-Appellant’s evidentiary objections were substantively addressed by the Court and rejected.

As discussed above, the PFR misconstrues this Court’s statement regarding the State’s waiver of any objection to the district court’s process of using the state

court record to grant habeas relief. The State focuses its argument on whether it forfeited objections to two of the items of evidence filed by Waidla in support of his IAC subclaim regarding failure to present evidence at trial of good behavior in custody. It is accurate, but irrelevant, that the State did challenge the admissibility of: (1) Waidla's own declaration concerning his good behavior in Los Angeles County Jail, and (2) a report from the California Department of Corrections stating that Waidla was not a disciplinary problem in Los Angeles County Jail and programmed well with other inmates.

This Court did not treat the State's admissibility objections as forfeited; it directly addressed them and found that Waidla had presented sufficient admissible evidence to support this subclaim. The Court found, "even assuming the CDC document is inadmissible hearsay[,]" that "Waidla offered enough admissible evidence to show that counsel rendered ineffective assistance." (Dkt. 91 at 28.) Addressing the State's contention that Waidla's declaration was conclusory and self-serving, this Court found that "Waidla's declaration explaining the privileges he accrued in county jail for good behavior may be self-serving, but it is hardly conclusory." (Dkt. 91 at 28 (summarizing details of Waidla declaration).) This Court recognized that Waidla's declaration was corroborated by evidence that is

unquestionably admissible⁵—the District Attorney’s memo that recommended “seeking the death penalty for Sakarias but not Waidla in part because Waidla, unlike Sakarias, did not face disciplinary action during the first several months of his confinement.” (Dkt. 91 at 28-29.) Finally, the Court pointed to other corroborating evidence—“Waidla’s lack of criminal history and Dr. [Myla] Young’s opinion concerning his nonviolent personality structure.” (Dkt. 91 at 29.)

The PFR repeats the State’s prior argument that Waidla’s showing concerning his good behavior “should be rejected due to the lack of competent evidence supporting it” (PFR at 4-5), but fails to show any error in the Court’s detailed analysis concluding that “Waidla offered enough admissible evidence” to establish his right to penalty phase relief (dkt. 91 at 28). The Court’s determination that Waidla presented competent evidence of good behavior did not rest on any finding of forfeiture, but instead on the Court’s detailed examination of the evidence itself. (Dkt. 91 at 28-29.) The State does not dispute that the district attorney’s memo is admissible as a party admission. While the evidence from Waidla and Dr. Young was provided in the form of declarations, this Court recognized that “Waidla’s evidence [of his good behavior] apart from the CDC

⁵ The Court noted, “The State does not argue that the DA memo is inadmissible hearsay and we have previously considered the State’s decision to seek or not seek the death penalty against a co-defendant in this context.” (Dkt. 91 at 29 (citing *Sanders v. Davis*, 23 F. 4th 966, 994 (9th Cir. 2022).)

document could have been rendered in admissible form.” (Dkt. 91 at 29 n.1.) The State has neither presented, nor claimed to possess, any evidence that could cast doubt on Waidla’s showing of his good behavior. Nor has it ever disputed Waidla’s claim that he did indeed behave well in custody.

The State’s reargument “that the claim failed due to a lack of competent evidence presented in federal court in support of it” (PFR at 5) and its request that the Court to reweigh the sufficiency of some of Waidla’s evidence in support of a subclaim does not meet the standard to obtain rehearing. The State does not identify any “point of law or fact” that the Court has “overlooked or misapprehended.” FRAP Rule 40. Thus, this Court should deny its petition.⁶

III. CONCLUSION

This Court did not overlook or misapprehend any point of law or fact when it concluded that the State had forfeited an objection to the district court basing its

⁶ Since the Court issued its opinion, the Honorable Paul J. Watford has retired from the judiciary. Waidla urges the Court to adopt the procedure generally used in circuits outside the Ninth and Federal Circuits, in which panel rehearing is only granted upon a vote of both remaining members of the initial panel. *See, e.g. Williams v. Jones*, 583 F.3d 1254, 1256 n.1 (10th Cir. 2009) (Gorsuch, J. dissenting) (explaining vote for en banc rehearing but not for panel rehearing, given that “a vote among the remaining two panel members would likely result in a tie”). The majority approach is consistent with FRAP Rule 40 in that the members of the original panel are able to assess whether the panel has “overlooked or misapprehended” a point of law or fact. This approach is also consistent with the requirement that “[c]ases and controversies shall be heard and determined by a court or panel of not more than three judges” except where there is a vote for hearing en banc. *See* 28 U.S.C. § 46(c).

grant of relief on the evidence submitted in support of the petition rather than holding a new evidentiary hearing. Even if the argument had not been forfeited, under this Court's precedent, a new evidentiary hearing was not required.

The State also fails to identify any error in this Court's analysis of the State's evidentiary objections to some of the evidence supporting one of Waidla's subclaims. It is undisputed that Waidla submitted some admissible evidence of his good behavior while awaiting trial, and the State has never pointed to contrary evidence. Even if this Court were to accept the improper invitation to reweigh the evidence of Waidla's good behavior, it should not reach a different conclusion as to whether defense counsel's multiple failures at the penalty phase were prejudicial.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender

DATED: August 3, 2023

By s/ Marta VanLandingham
MARTA VANLANDINGHAM
KATHERINE FARKAS
Deputy Federal Public Defender

Attorneys for Petitioner-Appellant
TAUNO WAIDLA

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 11. Certificate of Compliance for Petitions for Rehearing/Responses

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9th Cir. Case Number(s)

18-99001

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FILED

UNITED STATES COURT OF APPEALS

JUL 17 2023

FOR THE NINTH CIRCUIT

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

TAUNO WAIDLA,

Petitioner-Appellee,

v.

RONALD DAVIS, Warden,

Respondent-Appellant.

No. 18-99001

D.C. No. 2:01-cv-00650-AG
Central District of California,
Los Angeles

ORDER

TAUNO WAIDLA,

Petitioner-Appellant,

v.

RONALD DAVIS, Warden,

Respondent-Appellee.

No. 18-99002

D.C. No. 2:01-cv-00650-AG
Central District of California,
Los Angeles

ORDER

Pursuant to G.O. § 3.2.h, Judge Christen has been randomly drawn as the replacement for Judge Watford. The panel for this case will now consist of: Judges WARDLAW, CHRISTEN, and MILLER.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUL 13 2023

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

TAUNO WAIDLA,

Petitioner-Appellee,

v.

RONALD DAVIS, Warden,

Respondent-Appellant.

No. 18-99001

D.C. No. 2:01-cv-00650-AG
Central District of California,
Los Angeles

ORDER

TAUNO WAIDLA,

Petitioner-Appellant,

v.

RONALD DAVIS, Warden,

Respondent-Appellee.

No. 18-99002

D.C. No. 2:01-cv-00650-AG

Before: WARDLAW and MILLER, Circuit Judges.

Petitioner-Appellee is directed to file a response to Respondent and Cross-Appellant's petition for panel rehearing (Dkt. 92), filed on July 6, 2023. The response shall not exceed fifteen (15) pages or 4,200 words and shall be filed within twenty-one (21) days of the date of this order.

IT IS SO ORDERED.

18-99001, 18-99002

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TAUNO WAIDLA,
v. Petitioner-Appellee,

RON DAVIS, Warden,
Respondent-Appellant.

DEATH PENALTY CASE

No. 18-99001

TAUNO WAIDLA,
v. Petitioner-Appellant,

RON DAVIS, Warden,
Respondent-Appellee.

DEATH PENALTY CASE

No. 18-99002

On Appeal from the United States District Court
for the Central District of California, No. CV 01-00650-AG
The Honorable Andrew J. Guilford, Judge

PETITION FOR REHEARING

ROB BONTA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
JAMES WILLIAM BILDERBACK II
Senior Assistant Attorney General
DANA MUHAMMAD ALI
Supervising Deputy Attorney General
SHIRA SEIGLE MARKOVICH
Deputy Attorneys General
SETH P. MCCUTCHEON
Deputy Attorneys General
State Bar No. 278234
300 South Spring Street, Suite 1702
Los Angeles, CA 90013-1230
Telephone: (213) 269-6133
Fax: (916) 731-2122
Email: DocketingLAAWT@doj.ca.gov
Seth.McCutcheon@doj.ca.gov
Attorneys for Respondent

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**TO THE HONORABLE JUDGES OF THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT:**

Respondent and Cross-Appellant (the State) petitions this Court for rehearing in this matter pursuant to Rule 40 of the Federal Rules of Appellate Procedure. Rehearing should be granted because the panel's May 23, 2023, published majority opinion erred in concluding that the State had forfeited any objection that the district court erred by granting relief based on the evidence submitted in support of Waidla's petition rather than the evidence that was developed at the federal evidentiary hearing.

INTRODUCTION AND STATEMENT OF COUNSEL

In 1991, a California jury convicted and sentenced Waidla to death for murdering Viivi Piirisild with an axe. The California Supreme Court affirmed the judgment on appeal. *People v. Waidla*, 22 Cal. 4th 690 (2000). In state habeas corpus proceedings before the California Supreme Court, Waidla presented ineffective assistance of counsel claims based on the failure to investigate and present at the penalty phase additional mitigating evidence related to his early childhood and character, his experiences in the Soviet Army, and his good behavior in jail while awaiting trial; the claims were rejected on the merits. (*See* 2-ER-274-76.)

The same claims were presented to the federal district court on habeas corpus review. (*See* 1-ER-14.) As relevant here, the district court held an evidentiary hearing on Waidla’s claims that counsel was ineffective in failing to investigate and present the aforementioned mitigating evidence during the penalty phase. (*Id.*; 2-SER-97-336; 3-SER-338-479; 4-SER-481-697; 5-SER-699-891; *see* Dkt. No. 41 at 32-34.) Subsequently, the United States Supreme Court issued its opinion in *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011), holding that the threshold determination under 28 U.S.C. Section 2254(d) is limited to the record presented to the state courts. As a result, in determining whether the California Supreme Court reasonably rejected Waidla’s ineffective assistance of counsel claims under Section 2254(d), the district court found “itself in the position of having to essentially ignore the testimony of several witnesses” and exhibits admitted in support of Waidla’s claims at the evidentiary hearing. (1-ER-28-29; *see also* 1-ER-14-15, 17-18.)¹ Ultimately, the district court granted relief on

¹ Although the district court purported to ignore the evidence adduced at the evidentiary hearing in determining the threshold inquiry of the reasonableness of the state court’s rejection of the claim under Section 2254(d), it nevertheless referenced a document contained in trial counsel’s file, which was only admitted into evidence at the evidentiary hearing and was not presented to the state court. (1-ER-187 (citing exhibit admitted at evidentiary hearing).) This was error. However, once any federal court

Waidla’s penalty phase ineffective assistance of counsel claims, concluding that the California Supreme Court unreasonably rejected them. (1-ER-201-02, 219.) The district court did not explicitly review the claims under de novo review after finding them outside of Section 2254(d). (*See id.*; *see also* Majority Opinion (Maj. Opn.) at 29 n.1.) Indeed, there was no further analysis under de novo review for any of the ineffective assistance of counsel at penalty phase claims upon which the district court granted relief.

The State appealed the district court’s grant of relief. (1-ER-1.) On federal appeal, the panel, in a two-to-one published opinion, affirmed the grant of penalty phase relief concluding that the California Supreme Court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984). (Maj. Opn. at 19-37.) Critically, after determining that the California state court unreasonably applied *Strickland*, and after acknowledging that once a federal habeas court finds a state court decision is outside of Section 2254(d) it “undertakes de novo review of the claim before granting relief,” the majority opinion held that the State “forfeited any objection that the district

concluded that the requirements of Section 2254(d) had been satisfied, consideration of this newly-developed evidence, as Waidla also acknowledged, would have been proper under de novo review. (Dkt. No. 56 at 80-84.) +

court erred by granting relief based on the evidence submitted in support of Waidla's petition rather than evidence adduced in a new evidentiary hearing." (Maj. Opn. at 29 n.1 (citing *Frantz v. Hazey*, 533 F.3d 724, 737 (9th Cir. 2008) (en banc)).)²

This was error. The State explicitly argued in its Opening Brief on cross-appeal with respect to the good behavior in jail claim that the claim

² Curiously, after articulating how a federal habeas court reviews the merits of a claim once Section 2254(d) has been satisfied by a petitioner, the majority acknowledged that "[t]he district court did not explicitly conduct *de novo* review." (Maj. Opn. at 29 n.1.) But even after articulating this important principle of federal law, *see Panetti v. Quarterman*, 551 U.S. 930, 1062-63 (2007) (stating that when "the requirement set forth in § 2254(d)(1) is satisfied[, a] federal court *must* then resolve the [constitutional] claim without the deference AEDPA otherwise requires." (italics added)); *Frantz v. Hazey*, 533 F.3d at 737 ("where the analysis on federal habeas, in whatever order conducted, results in the conclusion that § 2254(d)(1) is satisfied, then federal habeas courts *must* review the substantive constitutionality of the state custody *de novo*." (italics added)), the majority itself failed to explicitly conduct its own *de novo* review in concluding that Waidla was entitled to penalty phase relief and affirming the district court's judgment. (See, e.g., Maj. Opn. at 19 (holding the California Supreme Court unreasonably applied *Strickland* in denying Waidla's ineffective assistance of counsel claim); *id.* at 25 ("Nor could a fairminded jurist conclude that it was reasonable to eschew further investigation on a theory that only cumulative evidence could be obtained."); *id.* at 37 ("But crucially, we are called on to determine whether fairminded jurists could conclude that this mitigation evidence gives rise to a reasonable probability that at least one juror would have voted differently.")) Indeed, the majority was required to analyze the claim under *de novo* review, which necessarily includes in cases, such as this one, consideration of any additional evidence presented at an evidentiary hearing in the district court. See *Crittenden v. Chappell*, 804 F.3d 998, 1010 (9th Cir. 2015).

should be rejected due to the lack of competent evidence supporting it, as illustrated by Waidla’s failure to introduce competent evidence at the evidentiary hearing that supported his claim. (Dkt No. 41 at 68-69 (citing *Frantz* and emphasizing that where a petitioner demonstrates unreasonableness under Section 2254(d), the next step is “examination of the merits of the claim”).) Accordingly, the majority erred in concluding the State waived any objection that the claim failed due to a lack of competent evidence presented in federal court in support of it. Indeed, as noted, the evidence actually elicited at the evidentiary hearing demonstrated that Waidla, when given the opportunity to do so, could not produce competent evidence that would support his claim under de novo review.

Compounding the error, the majority rejected the State’s contention that Waidla failed to prove his good behavior claim at the evidentiary hearing and thus was not entitled to relief under de novo review because Waidla “*could have*” presented admissible evidence in this regard. (Maj. Opn. at 29 n.1 (italics added).) But that conclusion is demonstrably wrong; when Waidla actually had the opportunity to present admissible evidence in support of his claims at the evidentiary hearing he requested, he failed to do so.

The majority's erroneous conclusion that the State forfeited any objection to the evidence submitted in support of the federal petition was a clear misapprehension of the law and facts warranting panel rehearing.

ARGUMENT

THE MAJORITY ERRED IN CONCLUDING THE STATE FORFEITED ANY OBJECTION THAT THE DISTRICT COURT ERRED BY GRANTING RELIEF BASED ON THE EVIDENCE SUBMITTED IN SUPPORT OF WAIDLA'S PETITION

After holding Waidla satisfied Section 2254(d) as to his ineffective assistance of counsel claims, the majority opinion concluded that the State "forfeited any objection that the district court erred by granting relief based on the evidence submitted in support of Waidla's petition rather than evidence adduced in a new evidentiary hearing." (Maj. Opn. at 29 n.1.) This erroneous conclusion overlooked the State's arguments in its briefs and thus warrants rehearing. *See* Fed. R. App. P. 40(a)(2).

Specifically, in arguing that Waidla had failed to prove he received ineffective assistance of counsel with respect to the alleged failure to investigate Waidla's good behavior in jail, the State argued:

But even if the district had not erred repeatedly in reaching its conclusion that Waidla had satisfied his burden under § 2254(d), that was not the end of the inquiry. Demonstrating an unreasonable denial of relief simply permits examination of the merits of the claim. To prove entitlement to relief, *Waidla was obligated to*

prove, with admissible evidence, that he was well behaved in custody. He never did. Never did he even submit a declaration, let alone present actual admissible testimony, from any state or county custody official confirming that Waidla was a well-behaved inmate. Such evidence was crucial to a determination that trial counsel rendered deficient performance for failing to present such evidence. Without it, there was no admissible evidence to prove the claim. Thus, even if the district court had correctly concluded that § 2254(d)(1) was satisfied, there is no evidentiary basis upon which the district court could competently conclude that Waidla's claim of being well-behaved was true.

(Dkt. No. 41 at 68-69 (italics added) (citing *Frantz*).) It is plain that in the foregoing argument—set forth in the State's first brief on cross-appeal—that the State argued that Waidla's claim failed due to lack of competent evidence, noting that Waidla had failed to submit such competent evidence when given the opportunity to do so at the evidentiary hearing. (Dkt. No. 41 at 68-69; *see also* Dkt. No. 64 at 16 (in its third brief on cross-appeal, the State argued in connection with Waidla's good-jail-behavior ineffective assistance claim: "Despite having the chance to do so, Waidla *did not attempt to prove this claim with any evidence* at the federal evidentiary hearing. Rather, he relied solely on the allegations in the Petition and the meager support provided with it: Waidla's declaration and the hearsay report from the Department of Corrections saying Waidla would 'program

well’ in prison.” (italics added)); *id.* at 18 (“[T]he district court ordered an evidentiary hearing, providing Waidla the opportunity to prove his claims with admissible evidence. . . . However, Waidla *failed to submit admissible evidence to prove this claim. Thus, the claim should have been denied.* Instead, the district court wrongly credited the hearsay documents and the omission from trial counsel’s declaration on this subject to rule counsel had performed deficiently. *This was error.*” (italics added)); *id.* at 19 n.3 (“It is also noteworthy that Waidla *opted not to support his ‘good behavior’ claim with any evidence, including testimony from trial counsel,* at the federal evidentiary hearing. Thus, even if Waidla could rely on extra-record evidence to support his claim, there is none.” (italics added).)

Apparently acknowledging that the State did, in fact, make the very argument it deemed forfeited, the majority went on to reject the State’s argument that Waidla’s ineffective assistance of counsel claim with respect to his good behavior in jail failed under de novo review because when given the chance at the evidentiary hearing held in the district court, he failed to prove his claim with competent evidence. (Maj. Opn. at 29 n.1.) According to the majority, the fact that Waidla “*could have*” rendered evidence supporting his claim to the district court “in admissible form” meant he was not actually required to. (Maj. Opn. at 29 n.1 (italics added).) Not only does

this erroneous holding dispense with the burden of proof and persuasion on federal habeas, which lies squarely on the petitioner (*Walker v. Johnston*, 312 U.S. 275, 286 (1941); *Matylinsky v. Budge*, 577 F.3d 1083, 1091 (9th Cir. 2009)), it runs headlong into the reality that at the federal evidentiary hearing which Waidla was granted for the very purpose of proving up these allegations, and at which Waidla had every opportunity to present admissible evidence to support each allegation, he failed to do so. Stated another way, the State did argue the district court erred in granting relief without considering that Waidla has never presented competent, admissible evidence in support of his claims. (*Compare* Dkt. 41 at 68-69, and Dkt. No. 64 at 18, *with* Maj. Opn. at 29 n.1.) Simply put, the State did not forfeit its repeated objection that Waidla's claims should be rejected because the allegations in support of those claims have not been proved by competent evidence. The majority's conclusion to the contrary is wrong. Panel rehearing should be granted.

CONCLUSION

This Court should re-hear the appeal and reverse the district court's judgment with respect to the grant of penalty phase relief.

Dated: July 6, 2023

Respectfully submitted,

ROB BONTA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
JAMES WILLIAM BILDERBACK II
Senior Assistant Attorney General
DANA MUHAMMAD ALI
Supervising Deputy Attorney General
SHIRA SEIGLE MARKOVICH
Deputy Attorney General

S/ SETH P. MCCUTCHEON
SETH P. MCCUTCHEON
Deputy Attorney General
Attorneys for Respondent

SPM: nf
LA2018600683
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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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9th Cir. Case Number(s) 18-99001, 18-99002

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Signature s/Seth P. McCutcheon

Date Jul 6, 2023

(use "s/[typed name]" to sign electronically-filed documents)

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

TAUNO WAIDLA,

*Petitioner-Appellee/
Cross-Appellant,*

v.

RONALD DAVIS, Warden,

*Respondent-Appellant/
Cross-Appellee.*

Nos. 18-99001
18-99002

D.C. No.
2:01-cv-00650-
AG

OPINION

Appeals from the United States District Court
for the Central District of California
Andrew J. Guilford, District Judge, Presiding

Argued and Submitted March 1, 2023
Pasadena, California

Filed May 23, 2023

Before: Kim McLane Wardlaw, Paul J. Watford, and Eric
D. Miller, Circuit Judges.

Per Curiam Opinion;
Partial Concurrence and Partial Dissent by Judge Miller

SUMMARY*

Habeas Corpus / Death Penalty

In a case in which Tauno Waidla was found guilty in California state court of first-degree murder during the course of a burglary and robbery with personal use of a deadly and dangerous weapon, and was sentenced to death, the panel affirmed the district court's grant of habeas relief on Waidla's claim of ineffective assistance of counsel at the penalty phase, and affirmed the district court's denial of relief on claims at the guilt phase.

Reviewing under 28 U.S.C. § 2254(d), the panel held in the government's appeal that the California Supreme Court unreasonably applied the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), in evaluating Waidla's claim of ineffective assistance at the penalty phase. The panel concluded that had the three categories of evidence that counsel should have discovered been presented to the jury, there is a reasonable probability that at least one juror would have voted against the death penalty. The panel did not need to reach whether the denial of relief on Waidla's penalty-phase claim that he was deprived of due process by the State's presentation of false evidence violated 28 U.S.C. § 2254(d).

On Waidla's cross-appeal from the denial of relief at the guilt phase, the panel held that the California Supreme Court did not unreasonably apply *Edwards v. Arizona*, 451 U.S.

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

477 (1981), and its progeny in upholding the admission of Waidla's confession. The panel reached the same conclusion when considering the question under *Rhode Island v. Innis*, 446 U.S. 291 (1980). As to Waidla's claim of ineffective assistance of counsel in four areas at the guilt phase, the panel held that the California Supreme Court could reasonably have concluded that counsel met *Strickland*'s performance standard as to two of the alleged deficiencies and that the remaining alleged deficiencies did not prejudice Waidla.

Judge Miller concurred in part and dissented in part. He wrote that the majority correctly rejected Waidla's challenges to his murder conviction, but that he would also reject Waidla's challenge to his death sentence. Judge Miller emphasized that the California Supreme Court's rejection of Waidla's ineffective assistance of counsel claim requires this court's deference, and that whatever the merits of the majority's view that counsel could have done a better job presenting a "modest" case for mitigation, the California Supreme Court's contrary conclusion was not so obviously wrong that its error lies beyond any possibility for fairminded disagreement. He would reject Waidla's penalty-phase due-process claim for the reasons given by the California Supreme Court.

COUNSEL

Seth P. McCutcheon (argued), Scott Hayward, and Michael C. Keller, Deputy Attorneys General; Dana Muhammad Ali, Supervising Deputy Attorney General; James William Bilderback II, Senior Assistant Attorney General; Lance E. Winters, Chief Assistant Attorney General; Rob Bonta, Attorney General of California; Office of the California Attorney General; Los Angeles, California, for Respondent-Appellant.

Marta VanLandingham (argued), Tracy Casadio, Mark R. Drozdowski, Craig A. Harbaugh, and Katherine Farkas, Deputy Federal Public Defenders; Cuauhtemoc Ortega, Federal Public Defender; Public Defenders' Office; Los Angeles, California, for Petitioner-Appellee.

OPINION

PER CURIAM:

A California jury sentenced Tauno Waidla to death for the 1988 murder of Viivi Piirisild. The California Supreme Court affirmed his conviction on direct appeal, *People v. Waidla*, 996 P.2d 46 (Cal. 2000), and the United States Supreme Court denied his petition for a writ of certiorari, *Waidla v. California*, 531 U.S. 1018 (2000). This appeal arises from the district court's decision granting penalty phase relief on Waidla's petition for a writ of habeas corpus. The State has appealed that decision and Waidla cross-appeals the denial of guilt phase relief. We affirm.

I. Background

A

Tauno Waidla was born and raised in Estonia during its occupation by the Soviet Union. In 1986, when Waidla was 18 years old, he was conscripted into the Soviet Army, an institution known for mistreating Estonian soldiers. *Waidla*, 996 P.2d at 54. While stationed in East Germany, Waidla escaped with a fellow Estonian, Peter Sakarias, into West Germany. From there, Waidla and Sakarias sought and received asylum in the United States in 1987. *Id.*

Upon arriving in New York, Waidla and Sakarias were received warmly by the Estonian émigré community there. *Id.* In April 1987, Waidla moved to Los Angeles, where he met Avo and Viivi Piirisild. The Piirisilds had relocated to the United States from Estonia decades earlier and were active members of the Baltic American Freedom League, an organization devoted to fighting for the Baltic States' independence from the Soviet Union. *Id.* The Piirisilds

invited Waidla to live with them shortly after meeting him. He moved in and they paid for his food, clothes, and medical care. They also offered to help him find employment. *Id.* Waidla had applied for a radio broadcasting job and accepted occasional short-term jobs, but he was otherwise uninterested in finding work or returning to school. *Id.*

The Piirisilds asked Waidla to help them renovate their home in exchange for his room and board. *Id.* at 54–55. Waidla agreed and completed several significant projects. *Id.* at 55. At some point, Viivi indicated that Waidla could have the Piirisilds’ 1978 Triumph Spitfire if he started to attend school or obtained a job. *Id.* Later, she promised him the car for finishing certain home improvement projects.

Waidla sought to collect on Viivi’s promise in May 1988, claiming that he was owed for the work he had done on the house. *Id.* Viivi refused because Waidla showed no initiative to work or attend school and because the Piirisilds had paid for his work by supporting him. *Id.* Waidla became angry and threatened to report the Piirisilds for building without a permit. *Id.* He also threatened to kill Avo and to break his arm. *Id.* at 56. Viivi told him to pack and leave. *Id.* Rita Hughes, the Piirisilds’ daughter, was able to calm Waidla down and help him pack, after which he left peacefully. *Id.*

Waidla began traveling with Sakarias across the country by car. While in Arizona, they sent Viivi a postcard featuring a recipe for skinning, cutting up, and cooking rattlesnake, on which they wrote: “You are as wise as the rattlesnake.” Waidla also called the Piirisilds from the road several times to ask for the car or the proceeds from its sale. *Id.* During this period, Viivi expressed fear of Waidla and

Sakarias to several people, including her acquaintance George Charon, a Federal Bureau of Investigation agent. *Id.*

Waidla and Sakarias eventually made their way to Boston, where Sakarias accepted a job to deliver a pickup truck to San Francisco. *Id.* They drove to Los Angeles on their way to San Francisco. On July 4, 1988, they went to the Piirisilds' home to ask again for the car. Viivi refused to talk to them, so Avo spoke with them alone. *Id.* Avo told them that he was unable to get the car's title from the bank due to the holiday and that he would be leaving town the next day. He said that he would be gone for two weeks. Waidla and Sakarias persuaded Avo to buy gas for the pickup truck before they went on their way. *Id.* At some point, the two drove to the Piirisilds' cabin in Crestline, California, which Waidla had visited as the Piirisilds' guest in the past. *Id.* at 54, 56. They stayed there without permission for over a week, eating the Piirisilds' food and making calls. When they left, they took a hatchet and various other possessions that Sakarias later pawned. *Id.* at 56.

On July 12, the Piirisilds' neighbor saw two men that he later identified as Waidla and Sakarias walking toward the Piirisilds' home wearing jackets and carrying no bags. *Id.* at 56–57. When he saw them leave later, they carried bags and they no longer wore jackets. *Id.* On July 14, a friend checked on the Piirisilds' house at Avo's request because Avo had not been able to reach Viivi. The friend found that the kitchen door had been broken to allow entry and that Viivi had been murdered inside.

The crime scene showed that Viivi was attacked as soon as she walked into the house and was later moved from the entryway to a bedroom, where she was covered with a bedsheet. *Id.* at 57. She sustained multiple bludgeoning

wounds to the head consistent with blows from the blunt side of a hatchet. *Id.* As a result, all of the bones on one side of her face were broken. She had been stabbed four times in the chest and suffered three head wounds caused by the sharp edge of a hatchet. *Id.* One of the sharp-edged hatchet blows, which was inflicted pre-mortem, was so forceful that it cut through the top of her skull and left a flap of bone attached only by scalp tissue. The others, which had been inflicted post-mortem, left incisions on her forehead. *Id.* The medical examiner testified that post-mortem abrasions he observed on Viivi's back could have been caused by dragging her body from the entryway to the bedroom. The official cause of death was the combined effect of the bludgeoning, stabbing, and chopping wounds. *Id.*

Police found seven fingerprints at the residence. One, on the deadbolt cover of the kitchen door—the door that had been broken to allow entry—was a match for Waidla. *Id.* Police also obtained saliva samples from two cigarette butts found in the trash that matched Waidla's, but not Sakarias's, blood type. *Id.*

On July 12, Sakarias pawned two pieces of Viivi's jewelry and purchased two plane tickets to New York using Viivi's credit card. *Id.* While in New York, Waidla and Sakarias stayed with an Estonian acquaintance, Andres Juriado. When Juriado raised the news of Viivi's murder, Waidla and Sakarias changed the subject rather than engage on the topic. *Id.*

Over a month later, Waidla was arrested by United States Border Patrol in New York near the United States-Canada border on suspicion of crossing the border illegally. *Id.* He carried a loaded gun in a backpack as well as an unsent letter to Sakarias. The letter suggested that Waidla had considered

suicide but decided against it. He also wrote: “When you hear that I am dead, then you should know that I’ve [croaked] with a weapon in hand. If you hear that I have been taken alive . . . (almost impossible) . . . then you should know that I did my best.” *Id.* at 58.

While in custody in New York, Waidla initially invoked his right to counsel during interrogation by a Border Patrol agent. *Id.* at 69. However, he later waived his rights and made incriminating statements to Los Angeles Police Department (“LAPD”) Detective Victor Pietrantonio. *Id.* at 69–70. He initially denied any role in Viivi’s murder, telling Pietrantonio that he and Sakarias had parted ways after leaving the Piirisilds’ cabin in Crestline and that he had hitchhiked to New York where he met up with Sakarias. Confronted with incriminating evidence, he admitted greater involvement. Waidla confessed to breaking into the Piirisilds’ home with Sakarias with the intention of eating food and asking Viivi about the Triumph Spitfire. At first, he denied committing any acts of violence against Viivi, claiming that when Viivi came home, he ran outside in fear while Sakarias attacked Viivi. His retelling then changed a final time, at which point he admitted that when Viivi came home, he struck her once with a “hammer,” causing them both to fall backwards. He stated that he did not see the rest of the attack.

B

At trial, Waidla’s counsel sought to suppress his confession and “put the prosecution to it’s [sic] proof that Mr. Waidla was present and participated in the homicide.” Counsel argued in a motion to suppress that because Waidla had invoked his right to counsel when interrogated by a Border Patrol agent, his later waiver of the right to counsel

was invalid. In a suppression hearing held near the end of the State's case Detective Pietrantonio testified that Waidla had initiated their conversation. The trial court held that Waidla's waiver was therefore valid and admitted the confession. *Id.* at 68–70.

Waidla's counsel sought and obtained a short continuance at the close of the State's case to reformulate his strategy because he had not expected the court to admit Waidla's confession. Counsel did not pursue a mental state defense because two pretrial mental health evaluations had found that Waidla had no psychiatric condition that could have prevented him from forming the intent to kill. Without investigating any avenues of defense further, counsel advised Waidla that "he needed to testify to any bases for repudiating the validity of the confession and any alibi." Waidla confirmed that he could truthfully recant his confession.

At trial, Waidla testified that he was coerced by LAPD detectives, who he said had threatened to hang him if he did not repeat back a confession they fed to him. *Id.* at 58. Familiar with the violent interrogation style of the KGB from personal experience, Waidla said that he believed the threat and did not feel free to deny his guilt. *Id.* He testified that he had begun hitchhiking to New York before the murder occurred, as he initially told Detective Pietrantonio. *Id.*

After four days of deliberation, the jury found Waidla guilty of first-degree murder during the course of a burglary and robbery with personal use of a deadly and dangerous weapon, a capital crime.

C

Neither side presented additional evidence at the penalty phase. Defense counsel stated on the record that he had “sound tactical reasons” for resting on the mitigation evidence elicited during the guilt phase. The trial court agreed that counsel had put forth “a tremendous amount of evidence about the defendant’s background.” The court specifically referenced an article that Waidla published in a Canadian newspaper giving a first-hand account of his time in the Soviet Army. The article, entitled *Escaping Through the Fog*, detailed the harsh conditions Waidla experienced during his service. For example, he spent long periods in the bitter cold, was given ill-fitting, dirty clothes, slept in crowded spaces, and received abysmal medical care for a respiratory infection. Waidla wrote that while in the military hospital, “[a]ll wishes to exist disappear[ed].”

Waidla’s counsel later acknowledged that he had not investigated any mitigating evidence aside from that presented during the guilt phase. He did not seek out any evidence related to Waidla’s positive adjustment to incarceration, although he was aware that Waidla had not been subject to any disciplinary proceedings while awaiting trial. He also made no attempts to contact Waidla’s family, friends, or acquaintances from Estonia to obtain background or good character mitigation evidence. According to counsel, Waidla “expressed considerable reluctance” when it came to a social history investigation because he did not want his family to know about his situation and because he feared that Soviet authorities would retaliate against any Estonian who aided in his defense. When counsel revisited the question, Waidla acknowledged that his loved ones likely knew about the case, but he remained concerned about

their safety. Ultimately, counsel “did not definitively resolve the issue” with Waidla.

Counsel’s penalty phase argument principally pleaded for the jury’s mercy. Counsel’s discussion of Waidla’s struggles in the Soviet Army was limited to his observation that “after three weeks in a Russian Army hospital Mr. Waidla was so consumed by a desire for freedom . . . that he risked everything to run.” Counsel also referenced the limited information available about Waidla’s background and character. He drew the jury’s attention to Waidla’s lack of criminal history and youth. He recalled testimony from Avo and Rita that Waidla had been friendly, nonaggressive, and helpful around the house. Counsel argued that Waidla had been cooperative with law enforcement. Finally, counsel asked the jury to show Waidla mercy because he had no one who could testify to his character, from which the jury could infer that he was “essentially alone in this world.”

The State largely argued that the horrific nature of the crime warranted death. The prosecutor detailed the brutality of the attack. He described Viivi’s wounds in detail and argued that Waidla had struck the “death blow” with the sharp edge of the hatchet. He characterized the crime as planned, calculated, and especially callous given the kindness Viivi had shown Waidla.

The State also maligned Waidla’s character by portraying him as a deserter from the Soviet Army and as a lazy “parasite” who believed that “he deserved to be taken care of,” citing his refusal to look for work or attend school. The State suggested that Waidla had a propensity for violence because he had been willing to harm others during his escape from the Soviet Army if the need arose and because he carried a loaded gun when Border Patrol agents

arrested him, which his unsent letter to Sakarias suggested he might use to harm any officer who tried to arrest him. According to the State, these incidents “revealed his violent nature” and showed that “killing doesn’t mean anything to Mr. Waidla.”

After hearing no new evidence and less than a day’s worth of argument at the penalty phase, the jury went on to deliberate over the course of nine days. On day three, the jury sent a note asking what would happen if the jurors could not reach unanimity. *Waidla*, 996 P.2d at 80. On day five, the jury sent a note stating that it was deadlocked. *Id.* A poll of the jurors revealed that ten of twelve believed they could not come to a unanimous verdict. Still, the court asked the jury to continue deliberating. *Id.* On day nine, the jury returned a death verdict. *Id.*

D

Waidla filed state habeas corpus petitions in 1999 and 2001. In them, he asserted, among other claims, ineffective assistance of counsel at the guilt and penalty phases, prosecutorial misconduct, and failure to suppress his confession as required by the Fifth Amendment.

In support of his claim of ineffective assistance of counsel at the penalty phase, Waidla offered three categories of mitigation evidence that could have been presented had counsel conducted an adequate investigation: (1) evidence of his psychosocial history and character; (2) evidence of the abuse faced by Estonians serving in the Soviet Army; and (3) evidence that he had behaved well in custody prior to trial.

Mare Pork, a professor of clinical psychology in Estonia, interviewed Waidla’s family members, friends, and teachers.

Dr. Hillevi Ruumet, an Estonian-American clinical psychologist, conducted interviews that corroborated the information gleaned from Pork's interviews. We recount their relevant combined findings.

Waidla's parents asked Waidla's great-uncle Gunnar and Waidla's grandmother Linda to raise him when he was just one month old. Waidla saw his mother only occasionally after that, and essentially never saw his father. When Waidla was 11 years old, Linda developed a debilitating brain tumor. From that time until she passed several years later, she became "uncontrollably abusive" to those around her. Waidla became very attached to Gunnar, who "in many ways took the place of both mother and father" for Waidla. As a teen, Waidla's favorite cousin and an aunt who had taken on the role of his primary female caregiver died in a house fire, which devastated him. In all, three maternal figures—his mother, grandmother, and aunt—abandoned him or passed away before Waidla turned 15.

Waidla displayed a "strong will to succeed" and a "desire for excellence" in his athletic pursuits. He attended a prestigious sports school for marksmanship, where his coach recalled that Waidla "was the best shooter in his [grade] and the only one who spent more hours training than was required by the overall training schedule." Although he focused more on sports, he also maintained adequate grades. Waidla developed a "reputation among his teachers and coaches [for] having a lot of willpower and a desire to fight for justice." According to a family friend who was a well-known photographer, Waidla also showed a facility for photography. He published several photographs in magazines and newspapers.

According to Gunnar, Waidla “never showed a violent or aggressive nature” in social environments and was not one to get into fights with peers. Waidla’s primary marksmanship coach similarly recalled that Waidla “was a consistently peaceable and non-violent youth, who was never aggressive or bullying toward his classmates or other competitors.” Other coaches and students at the school concurred in that assessment.

Psychologist Dr. Myla Young evaluated Waidla to determine whether he posed a risk of violence in a carceral setting. Personality testing showed that Waidla had a “pro-social orientation” and was a “fundamentally non-violent, non-confrontational individual.” Over the ten years she had spent evaluating individuals in criminal proceedings, Waidla exhibited “fewer risk factors to violence than any individual [she had] ever examined.”

Dr. Young reviewed information about Waidla’s background, which supported her clinical findings. She opined that Waidla had “a very difficult and stressful early life.” She found it notable that despite the “traumatic separation” from his parents, Waidla “was able to achieve strong psychological and emotional bonding with his Great-Uncle Gunnar and other members of the family.” These connections “permitted Mr. Waidla to develop [an] intact personality structure.” Waidla’s well-formed personality structure was consistent with “the positive efforts he made within the family and in his academic and athletic efforts,” as well as his “impeccable record of peaceableness [sic]” outside of Viivi’s murder. Dr. Young concluded that Waidla’s was “a very unusual case in which an otherwise pro-social, law-abiding, and high-achieving individual lapsed into a momentary assaultive outburst . . . and has led an entirely non-violent life both before and afterward.”

Dr. Ruumet also conducted clinical interviews of Waidla. Based on those interviews and her assessment of Waidla's background, she confirmed the psychological conclusions reached by Dr. Young. Her clinical evaluation showed that Waidla was "passive, intelligent, socially appropriate and invested in giving a good impression, respectful of authority, diffident, and avoidant of any confrontation or physical violence." In fact, she found that Waidla displayed a "characterological aversion to confrontation and violence."

Next, Waidla offered postconviction evidence of the cruelty endured by Estonian conscripts in the Soviet Army. Dr. Ruumet declared that serving in the Soviet Army in the 1980s as an Estonian was "a guarantee of extended physical beatings and brutality" and carried a serious risk of death. Hazing was rampant and "any superior could, with total impunity, inflict any kind of physical or mental suffering on any inferior at any time and for any (or no) reason." Dr. Ruumet conveyed the story of an Estonian soldier who died of kidney failure because he was denied water as a form of punishment. Such stories were not "isolated incident[s]." These conditions were the product of Russians' longstanding prejudice against Estonians, with whom Russians had ethnic and linguistic differences. Waidla sent a letter to family during his service asking for their help, in which he expressed suicidal thoughts and fear for his life.

Finally, Waidla provided evidence that he had adjusted to incarceration without disciplinary incident. The State produced a memorandum authored by the District Attorney's office evaluating whether the death penalty was appropriate for Waidla and Sakarias in January 1989, several months after Waidla's arrest (the "DA memo"). The DA memo reported that while incarcerated, Sakarias had been

found in possession of weapons several times. Whereas Sakarias had been designated an escape risk and the DA memo concluded that he was “a danger to others even while in custody,” the memo was silent as to Waidla’s disciplinary history and observed that Waidla did not “evidence the same degree of danger to society.”

Waidla submitted a declaration detailing his positive experience in Wayside Maximum Security, where he was incarcerated for three months prior to trial. He applied for and obtained jobs in the kitchen and maintenance units. He received a uniform reserved for inmates with a clean behavioral record as well as a pass that allowed him to work outside of the dormitories. He swept, passed out toilet paper, and buffed floors. Waidla spent his free time in the library reading the newspaper and improving his English. Unlike most inmates, he was allowed to read in the library rather than taking his reading materials to his cell.

When Waidla was transferred to San Quentin State Prison after trial, California Department of Corrections officials conducted Waidla’s orientation review to assign him housing (the “CDC document”). The committee verified Waidla’s statement that he had “no problems programming in the county jail” by contacting the jail. Officials there “stated that Waidla was not a disciplinary problem and programmed well with other inmates.”

E

The California Supreme Court rejected Waidla’s Fifth Amendment claim on direct appeal, *Waidla*, 996 P.2d at 71, denied relief on Waidla’s prosecutorial misconduct claim in a reasoned opinion, *In re Sakarias*, 106 P.3d 931, 950 (Cal. 2005), and summarily denied his ineffective assistance of counsel claims on the merits. On federal habeas review, the

district court granted relief on Waidla's claim of ineffective assistance at the penalty phase and rejected Waidla's remaining claims. The State appeals the decision granting penalty phase relief and Waidla cross-appeals the denial of relief on his prosecutorial misconduct, Fifth Amendment, and guilt phase ineffective assistance claims. The Antiterrorism and Effective Death Penalty Act of 1996 governs our review because the California Supreme Court rejected each of the claims at issue here on the merits. *See* 28 U.S.C. § 2254(d). We begin our discussion with the State's appeal before turning to Waidla's cross-appeal.

II. Penalty Phase Claims

Waidla's sole claim of error at the penalty phase is that his counsel rendered ineffective assistance by failing to investigate and present mitigation evidence that competent counsel would have discovered. *Strickland v. Washington*, 466 U.S. 668 (1984), sets out the standard for ineffective assistance of counsel claims. Under *Strickland*, Waidla must first show that his counsel's performance "fell below an objective standard of reasonableness" under prevailing professional norms. *Id.* at 688. *Strickland* creates a strong presumption that counsel's performance "falls within the wide range of reasonable professional assistance." *Id.* at 689. Counsel's strategic decisions, if "made after thorough investigation of law and facts," are "virtually unchallengeable." *Id.* at 690. We assess a particular decision not to investigate or to limit the scope of investigation for reasonableness. *Id.* at 691.

If Waidla can show that counsel's performance was deficient, he must then establish prejudice. *Id.* at 694. To assess prejudice at the penalty phase, we reweigh all of the evidence in aggravation and mitigation and ask whether, had

counsel provided competent representation, “there is a reasonable probability that at least one juror would have struck a different balance.” *Wiggins v. Smith*, 539 U.S. 510, 537 (2003); *see also id.* at 534, 536.

When 28 U.S.C. § 2254(d) applies, we defer to a state court’s decision unless it “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” When reviewing a state court decision for which there is no reasoned opinion, we must consider any arguments that could have supported the state court’s decision. *See Harrington v. Richter*, 562 U.S. 86, 102 (2011). We may grant Waidla habeas relief only if “there is no possibility fairminded jurists could disagree that the state court’s decision conflicts with [the Supreme] Court’s precedents.” *Id.*

We hold that the California Supreme Court unreasonably applied *Strickland*’s standard in evaluating Waidla’s claim of ineffective assistance at the penalty phase. Had the three categories of evidence that counsel should have discovered been presented to the jury, there is a reasonable probability that at least one juror would have voted against the death penalty.

A

We begin with the adequacy of counsel’s investigation of mitigation evidence. Counsel admittedly conducted no investigation into mitigation evidence beyond any incidental investigation he made of evidence relevant at the guilt phase. Competent counsel would have sought out and introduced evidence concerning Waidla’s background and character,

the hardship Estonians faced in the Soviet Army, and Waidla's good behavior while in custody awaiting trial. Counsel's disregard for all three possible mitigation strategies makes clear that his incompetence is "beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

Background and Character Evidence. The record shows that counsel "abandoned [his] investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources," thereby violating basic professional standards. *Wiggins*, 539 U.S. at 524; *see also Apelt v. Ryan*, 878 F.3d 800, 831 (9th Cir. 2017) ("There can be no doubt that counsel was required to review a defendant's background in preparation for sentencing."). The duty to investigate a defendant's social history was as foundational at the time of trial as it is now. Practice guidelines in effect in 1990, which guide our analysis of what qualifies as reasonable professional conduct, *Strickland*, 466 U.S. at 688, stated that "[c]ounsel in a capital case is obligated to conduct a thorough investigation of the defendant's life history and background." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 8.1, commentary (1989). Abdicating this duty, counsel interviewed Waidla alone and did not procure any psychological or psychosocial evaluations.

Waidla's resistance to having counsel perform a social history investigation did not eliminate counsel's duty to investigate his background. To be sure, "[c]ounsel's actions are usually based, quite properly, on informed strategic choices made by the defendant." *Strickland*, 466 U.S. at 691. But counsel "never made a serious attempt to educate [Waidla] about the consequences of his decision." *Silva v.*

Woodford, 279 F.3d 825, 841 (9th Cir. 2002). We acknowledge that Waidla's concern for the safety of Estonian witnesses was legitimate and genuinely held. Still, that concern was only part of the calculus. Counsel himself admitted that, far from fully advising Waidla on the benefits and drawbacks of an investigation, he "did not definitively resolve the issue" with Waidla. In fact, Waidla realized that one basis for his reluctance to have counsel contact witnesses in Estonia was unreasonable, showing that he continued to actively consider the issue. Failing to advise Waidla of the importance of mitigation evidence was especially detrimental because, as Waidla stated in his declaration, he "did not have an understanding of the American legal system [and] did not know what would constitute a presentation of 'mitigation' evidence."

The State's comparisons to the investigations held competent in *Strickland* and *Burger v. Kemp*, 483 U.S. 776 (1987), are unconvincing. Counsel in both cases made an informed strategic decision to limit their social history investigations because they knew that presenting social history evidence would prove harmful. In *Strickland*, counsel sought to avoid opening the door to evidence of the defendant's criminal history, bad character, and intact psyche. See 466 U.S. at 672–74, 699. In *Burger*, counsel sought to keep the defendant's criminal history from the jury, as well as testimony from family and acquaintances about his drug use and violent tendencies. 483 U.S. at 791–95. Counsel also reasonably decided against a mitigation strategy that required testimony from the defendant, who showed a lack of remorse and, according to a psychologist, might have bragged about the crime on the witness stand. *Id.*

No such concerns are evident in this case. Waidla had no criminal history and his social history would not have

revealed any significant prior bad acts. Further, no psychological expert identified him as a liability on the stand and he expressed deep remorse for Viivi's murder. Thus, *Strickland* and *Burger* are not instructive on this point.

Finally, although counsel would have faced logistical hurdles to investigating abroad, those challenges did not eliminate counsel's duty to investigate. In *Apelt v. Ryan*, a case governed by 28 U.S.C. § 2254(d), we considered whether counsel had performed deficiently in representing a capital defendant who had lived in Germany until six months before the crime. 878 F.3d at 805, 830–31. Since counsel was aware that a social history investigation could have revealed useful mitigation evidence, we held that he had rendered ineffective assistance because his co-counsel made only one trip to Germany and was unable to communicate with the defendant's German-speaking family while there. *Id.* As in *Apelt*, Waidla's counsel was on notice of the need for a social history investigation. He knew that Waidla's upbringing was not traditional in that Waidla had not been raised by his parents. That counsel broached the question of investigating in Estonia with Waidla multiple times shows that he was aware of the significance of a social history investigation. Yet, as in *Apelt*, counsel fell short of professional standards by abandoning his efforts to investigate through travel to Estonia or other means. *Id.*

Moreover, the record shows that investigating in Estonia, while more challenging than a domestic investigation, would not have been the "daunting task" the State claims. In 1989 and 1990, communication between the United States and Estonia was possible via fax, phone, and mail. Dr. Ruumet reports that by June 1990, "the Soviet regime had loosened enough to allow relatively unfettered travel in and out of the country." And although a personal visit by counsel to

Estonia may have been possible, counsel need not have personally traveled to Estonia, as Professor Pork would have interviewed Waidla's family and acquaintances on counsel's behalf. Because California provides indigent defendants with funding for efforts "reasonably necessary for the preparation or presentation of the defense" upon an application by counsel, Cal. Penal Code § 987.9(a), the costs of international investigation were not insurmountable. Notably, counsel in Sakarias's trial, which occurred within a year of Waidla's trial, was able to obtain social history interviews from Sakarias's family and friends in Estonia. *In re Sakarias*, 106 P.3d at 936, 949. Thus, counsel's violation of minimum professional standards was not excused by logistical barriers.

Mistreatment in the Soviet Army. Counsel's duty to investigate a defendant's social history no doubt includes an obligation to seek out evidence of childhood hardship because "[e]vidence of abuse inflicted as a child is especially mitigating." *Andrews v. Davis*, 944 F.3d 1092, 1117 (9th Cir. 2019) (en banc).

Waidla was still a teenager when he was conscripted into the Soviet Army. *Waidla*, 996 P.2d at 54. Counsel was aware of this chapter in Waidla's life because Waidla's article, *Escaping Through the Fog*, detailed the experience to an extent. Yet counsel did not argue that Waidla's hardships were relevant to the jury's decision, nor did he attempt to obtain additional contextual evidence about the indignities visited on Estonian conscripts in the Soviet Army.

Had counsel investigated, he would have found that in addition to the crowded lodging, repeated exposure to bitter cold, and inadequate medical care described in Waidla's

article, Estonian soldiers often encountered serious physical abuse and even death at the hands of Russian soldiers and officers. Counsel would have learned of the psychological impact that looming danger had on Waidla, whose letter to his family begging for help spoke to his despondency and fear. Armed with this evidence, competent counsel would have argued that Waidla's time in an abusive institutional setting detracted from his culpability.

The State makes much of the fact that the jury had access to some evidence about Waidla's time in the Soviet Army. *Escaping Through the Fog* was introduced during the guilt phase and in his testimony, Avo indicated he agreed with the statement that "traditionally draftees from the Baltic States were not treated very well in the Soviet Army." According to the State, the jury's awareness of this evidence eliminated any need for counsel to investigate cumulative evidence concerning the abuse endured by Estonian soldiers. We disagree. The State improperly emphasizes the mere existence of evidence in the record while disregarding counsel's obligation to explain the relevance of that evidence to the jury. The State also overstates the cumulative nature of the postconviction evidence.

First, counsel's obligations do not end at ensuring that mitigation evidence is accessible to the jury. That is all that counsel did with respect to Waidla's time in the Soviet Army. Avo's testimony did not make an appearance in counsel's guilt or penalty phase arguments. Counsel also never argued at the penalty phase that Waidla's article evidenced hardship that ought to inform the jury's sentencing decision. Nor did this evidence feature in the State's case in a way that would alert the jury to its mitigating force. The State referenced the article for its discussion of Waidla's escape from the Soviet Army, not its

description of his experiences prior to escape. It was incumbent on counsel not just to make sure that this mitigation evidence made it to the jury, but to identify its existence and to argue its relevance. *See Rogers v. Dzurenda*, 25 F.4th 1171, 1189 (9th Cir. 2022) (finding deficient performance when counsel’s opening statement gave the jury “inadequate context for how the evidence would relate to the insanity defense”). Counsel failed to fulfill that aspect of his professional duty.

Perhaps the glaring omission of the argument that Waidla’s mistreatment in the Soviet Army reduced his culpability could be excused as a strategic decision. Such strategic decisions, when reasonably well-informed, are entitled to deference. *Strickland*, 466 U.S. at 690. But even if we could conceive of a strategic purpose for leaving this mitigation evidence unmentioned, counsel did not make a decision with the benefit of all of the evidence at his disposal. After proper investigation, counsel could have made a significantly more forceful version of the argument that Waidla was mistreated in the Soviet Army, as discussed below. Thus, any strategic decision was fatally underinformed.

Nor could a fairminded jurist conclude that it was reasonable to eschew further investigation on the theory that only cumulative evidence could be obtained. Waidla’s article only vaguely references the hostility between Estonian and Russian soldiers and does not adequately convey the extent of the power disparity favoring the Russians. Avo attested to the power imbalance to some extent, but provided no detail about the nature of the abuse, nor did he testify about the practices in effect during Waidla’s service. This evidence left a significant gap in

explaining the severity of the likely abuse as well as its systemic nature.

Bobby v. Van Hook, 558 U.S. 4 (2009), on which the State relies, is inapposite. There, because counsel had gathered significant evidence of the defendant's abusive family life, he was reasonable to forego obtaining additional, likely cumulative, testimony on that topic from more distant relatives. *Id.* at 10–12. In contrast, it should have been clear to Waidla's counsel that he could have sought out evidence not just corroborating Waidla's article but providing much-needed context for it.

We are not persuaded by the State's contention that "cumulative evidence that other soldiers were also mistreated lacked any real significance, especially if Waidla was not aware of the circumstances." First, according to Dr. Ruumet, the risks to Estonian conscripts were so widely known that Estonians frequently took measures to avoid placement in units with more Russian soldiers, like the one Waidla ended up in, which were especially dangerous. Thus, Waidla surely understood the scope of the danger that awaited him.

Second, it is highly relevant that Estonian soldiers were subjected to widespread, state-sanctioned abuse rooted in prejudice. Without that context, the jury could have misinterpreted Waidla's account of harsh training tactics and fights between Estonian soldiers and their Russian counterparts as commonplace drills and roughhousing rather than sanctioned institutional abuse. The information provided by Dr. Ruumet would have also supported an argument that Waidla did not just endure run-of-the-mill discomforts while serving, but also suffered significant fear and emotional distress, as shown by Waidla's desperate

letter to family requesting that, as Dr. Ruumet paraphrased, they “try to save him.” Because context was so crucial to understanding Waidla’s experience, counsel could not have reasonably forgone investigation into this mitigation strategy simply because the jury had access to Waidla’s account.

Good Behavior in Custody Awaiting Trial. It is well established that “evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating.” *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986); *see also Williams v. Taylor*, 529 U.S. 362, 396 (2000) (failure to present, *inter alia*, prison guard testimony that defendant was not dangerous or violent as well as prison records demonstrating good behavior contributed to finding of deficient performance). The import of such mitigating evidence is particularly clear when the State argues for the death penalty on the ground that a defendant “could not be trusted to behave if he were simply returned to prison.” *Skipper*, 476 U.S. at 5 n.1. Here, the State made a similar argument by telling the jury that Waidla had a “violent nature” and that killing meant nothing to him.

Counsel was on notice that, contrasting with the State’s narrative that Waidla posed a risk of future violence, Waidla had not encountered any disciplinary issues while incarcerated pending trial. Yet counsel ignored this “tantalizing indication[] in the record,” *Stankewitz v. Woodford*, 365 F.3d 706, 720 (9th Cir. 2004), of a possible mitigation strategy based at least in part on Waidla’s good behavior. Counsel’s failure to pursue this viable strategy was unreasonable. We consider in turn the State’s arguments to the contrary, finding each unpersuasive.

First, the California Supreme Court could not reasonably have found counsel's performance adequate by disregarding Waidla's evidence as inadmissible or conclusory. To make out a *prima facie* case in a California habeas petition, a petitioner must attach "reasonably available" documentation supporting his allegations. *People v. Duvall*, 886 P.2d 1252, 1258 (Cal. 1995). A petitioner may not rely on hearsay evidence to make out a *prima facie* case, *People v. Madaris*, 122 Cal. App. 3d 234, 241–42 (1981), *overruled on other grounds by People v. Barrick*, 654 P.2d 1243, 1250 (Cal. 1982), nor on "subjective, self-serving" statements, *In re Alvernaz*, 830 P.2d 747, 756–57 (Cal. 1992). Looking to this procedure, the State argues that the California Supreme Court could have declined to consider the CDC document noting that Waidla behaved well in county jail as hearsay and could have found Waidla's remaining evidence conclusory.

Fairminded jurists would agree that Waidla offered enough admissible evidence to show that counsel rendered ineffective assistance. That is true even assuming the CDC document is inadmissible hearsay. Waidla's declaration explaining the privileges he accrued in county jail for good behavior may be self-serving, but it is hardly conclusory. The declaration explains, based on Waidla's personal knowledge, that he enjoyed freedoms reserved for well-behaved prisoners like the ability to read in the library and the ability to leave the dormitories for his job. That evidence is more than a bare allegation of good behavior. *See SEC v. Phan*, 500 F.3d 895, 909 (9th Cir. 2007) (differentiating self-serving declarations from conclusory ones that offer no admissible facts).

Waidla's declaration, which speaks to three months of his confinement, is corroborated by other evidence. The DA memo recommends seeking the death penalty for Sakarias

but not Waidla in part because Waidla, unlike Sakarias, did not face disciplinary action during the first several months of his confinement. The State does not argue that the DA memo is inadmissible hearsay and we have previously considered the State's decision to seek or not seek the death penalty against a co-defendant in this context. *See Sanders v. Davis*, 23 F.4th 966, 994 (9th Cir. 2022). The declaration is also corroborated by Waidla's lack of criminal history and Dr. Young's opinion concerning his nonviolent personality structure. Waidla's evidence is, therefore, far from conclusory.¹

Second, the State argues that the California Supreme Court properly denied this subclaim because counsel's declaration "sheds no light on Waidla's behavior while in custody or trial counsel's decisions concerning such behavior." Not so. Counsel was aware that "there were no disciplinary proceedings against Mr. Waidla." True, he gave no explanation for his failure to investigate the matter, but he admitted that he conducted no investigation whatsoever. It is therefore clear that his decision not to pursue this strategy did not stem from strategic insight gained after

¹ Typically, upon finding that a state court decision violated 28 U.S.C. § 2254(d), the federal habeas court undertakes *de novo* review of the claim before granting relief. *See Frantz v. Hazey*, 533 F.3d 724, 737 (9th Cir. 2008) (en banc). The district court did not explicitly conduct *de novo* review. On appeal, the State takes issue only with the district court's § 2254(d) analysis. Accordingly, the State has forfeited any objection that the district court erred by granting relief based on the evidence submitted in support of Waidla's petition rather than evidence adduced in a new evidentiary hearing. To the extent the State makes an argument limited to this subclaim that the district court should have required *admissible* evidence of Waidla's good behavior before granting relief, we find that argument unavailing because Waidla's evidence apart from the CDC document could have been rendered in admissible form.

additional investigation. The State cites no authority for the proposition that trial counsel must affirmatively state that he lacked a strategic purpose, and we will not adopt that rule here.

Moreover, we cannot discern from the record any strategy that might have justified counsel's inaction. Any suggestion that counsel could reasonably have decided against investigating on the theory that juries are usually unpersuaded by good behavior evidence is untenable. It would be difficult to reconcile that view with *Skipper's* holding that good behavior evidence must be admitted as mitigation, *see* 476 U.S. at 5, let alone *Williams's* holding that counsel was deficient in part for not gathering such evidence, 529 U.S. at 396. *See also Deck v. Missouri*, 544 U.S. 622, 633 (2005) (noting that whether the defendant is "a danger to the community" is "nearly always a relevant factor in jury decisionmaking, even where the State does not specifically argue the point").

Finally, the State contends that presenting good behavior evidence could have indicated to the jury that no better mitigation evidence was available. But had counsel conducted an adequate investigation, Waidla's good behavior in custody while awaiting trial would not have stood alone in Waidla's mitigation case. It would have stood alongside and complemented the other evidence we have already found counsel could have introduced. Thus, counsel's failure did not stem from a reasonable strategic judgment, but from an oversight that cannot be squared with even *Strickland's* forgiving standard.

B

Having concluded that counsel performed deficiently by failing to introduce and argue several categories of

mitigation evidence, we must now determine whether counsel's incompetence prejudiced Waidla. To do so, we reweigh the aggravation evidence against the mitigation evidence that ought to have been presented to the jury. *Wiggins*, 539 U.S. at 534.

One factor relevant to assessing whether a reasonable probability exists that one juror would have voted differently is the jury's behavior at trial. Long deliberations relative to the complexity of the case and indications of close jury deliberations "weigh against a finding of harmless error because [they] suggest a difficult case." *United States v. Velarde-Gomez*, 269 F.3d 1023, 1036 (9th Cir. 2001) (en banc) (internal quotation marks and citation omitted); *Noguera v. Davis*, 5 F.4th 1020, 1045 (9th Cir. 2021).² We also consider the strength of the aggravation evidence and the nature and quality of the mitigation evidence originally presented in comparison to the nature and quality of the new mitigation evidence. *See Wiggins*, 539 U.S. at 537–38.

With these factors in mind, we conclude that the California Supreme Court could not reasonably have found

² The State contends otherwise. In its view, lengthy jury deliberations do not necessarily signify jury indecision. But the jury notes indicating deadlock gave a clear picture about the reason for its long deliberations. The State also hypothesizes that the jury's deadlock could have been unrelated to the balance of mitigation and aggravation evidence and instead caused by, for instance, a juror's misunderstanding of an instruction. But jury questions indicating deadlock show that the death sentence "was not a foregone conclusion, especially given that the jurors' only task at that point was to decide between a sentence of life without parole and death." *Silva*, 279 F.3d at 849–50. Even if the jury had been preoccupied with a mitigation factor unrelated to Waidla's background or character, evidence on those factors could have moved an uncertain jury to weigh the totality of the circumstances differently.

that counsel's failures were non-prejudicial. The jury delivered a death sentence knowing very little about Waidla's background and positive qualities. Even so, it took the jury nine days of deliberation and two bouts of deadlock to reach a verdict. No fairminded jurist considering a jury so closely divided could discount the prejudicial effect of failing to present even modest evidence of Waidla's background and good character.

The difference between the mitigation evidence actually presented and the evidence that competent counsel would have presented is significant. As the background evidence the jury heard was scant, we have no trouble recounting it again here: Waidla was born in Estonia, a country then occupied by the Soviet Union, and was raised by family members other than his parents. He testified that he had two encounters with the KGB as a teen in which he was detained and beaten for allegedly protesting against the Soviet Union. At age 18, he was conscripted into the Soviet Army, where Estonians were generally not treated well. If the jury in fact read *Escaping Through the Fog*, which is not clear from the record, it would have learned that Waidla experienced harsh living conditions and once fled from a brawl between Russian and Estonian soldiers, before falling ill and ultimately escaping. While living with the Piirisilds, Waidla was typically friendly and demonstrated his construction skills by completing several home improvement projects. He was just 20 at the time of the crime and had committed no prior felonies. Finally, Waidla cooperated with law enforcement after his arrest.

Waidla's mitigation case at trial essentially amounted to an incomplete picture of the adversity he faced in the Soviet Army, his age, and his lack of criminal history. The sparseness of this evidence is akin to counsel's presentation

in *Wiggins*, where the “sentencing jury heard only one significant mitigating factor—that Wiggins had no prior convictions,” 539 U.S. at 537, as well as that in *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam), where the mitigation case consisted of “inconsistent testimony about Porter’s behavior when intoxicated and testimony that Porter had a good relationship with his son,” *id.* at 32.

If Waidla had been competently represented, the jury would have heard much more. To start, competent counsel would have made the jury aware of Waidla’s many positive character traits. One such trait was Waidla’s strong work ethic. Waidla worked hard at marksmanship as a teen, showing dedication and skill that surpassed his peers. He also excelled in photography, having worked under the tutelage of his great-uncle Gunnar to learn the proper techniques. In jail pending trial, Waidla worked maintenance and kitchen duty jobs, which entailed physical labor like buffing floors. He spent free time in the library strengthening his English and reading newspapers.

Waidla’s consistent dedication to his pursuits could have undercut the State’s portrayal of Waidla as entitled and parasitic. Counsel would have also directly refuted the State’s contention that Waidla was lazy by referring to the testimony from Dr. Ruumet, who opined that Waidla’s perceived laziness was possibly attributable to depression brought on by “circumstances in which he had lost his whole support system and in which he felt helpless and overwhelmed.” Dr. Ruumet’s analysis was in line with Dr. Young’s assessment, based on psychological testing, that “depression is an underlying component of Waidla’s character.”

Another character trait of note was Waidla's pro-social nature and his "characterological aversion to confrontation and violence." Loved ones, acquaintances, and coaches all attested to Waidla's distaste for conflict and his peaceable disposition. Dr. Young opined that Waidla was the least violence-prone prisoner she had ever evaluated in the context of criminal proceedings. This testimony would have complemented and added credibility to evidence counsel could have presented of Waidla's compliant and nonviolent behavior while in jail awaiting trial. There, guards and a librarian afforded him special privileges that would not have been fitting for a dangerous prisoner. The State suggests that evidence of Waidla's good behavior in jail would not influence jurors who knew that he carried a loaded gun and a threatening note at the time of his arrest. We disagree because that assessment disregards the character evidence that likewise points to his peaceful nature.

Evidence of Waidla's lack of future dangerousness would have undermined the State's contention that Waidla had a "violent nature," and that "killing doesn't mean anything" to him. That much is clear from *Skipper*, in which the relevance of similar evidence was "underscored . . . by the prosecutor's closing argument, which urged the jury to return a sentence of death in part because petitioner could not be trusted to behave if he were simply returned to prison." 476 U.S. at 5 n.1.

Competent counsel would have introduced the evidence that Waidla was conscripted into the Soviet Army, where it was common knowledge that Estonians were targeted for serious physical and emotional abuse. Even if the jury took the time to review Waidla's article closely, which we cannot be sure of, it would not have known the full extent of the possible danger to Waidla. Waidla's depiction of his

experiences in the Soviet Army takes on new meaning when viewed in proper context, namely, a context of institutionalized and prejudice-based abuse that could prove fatal. The postconviction evidence therefore revealed the true nature of the psychological toll that conscription took on Waidla.

Finally, competent counsel would have presented the humanizing evidence about Waidla's strong bonds to family members, including his great-uncle Gunnar, whom Waidla idolized and, according to Gunnar, related to as "both mother and father." The jury would have learned that Waidla's connections to family enabled him to withstand the hardships of his early life. This evidence would have allowed the jury to view Waidla as a three-dimensional person with the ability to form meaningful connections, a stark contrast from the caricature of a callous murderer presented by the State. *See Porter*, 558 U.S. at 41 ("The judge and jury . . . heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability.").

In sum, competent counsel would have rounded out the jury's understanding of Waidla's humanity and positive qualities. At the same time, counsel would have marshalled the evidence to counter the State's arguments that Waidla was lazy, dangerous, and cruel. Our confidence in the jury's verdict is undermined because "the task [the jury] actually undertook differed so profoundly from the one it would have performed had [Waidla's] counsel not been deficient." *Boyd v. Brown*, 404 F.3d 1159, 1180 (9th Cir. 2005), *as amended*, 421 F.3d 1154 (9th Cir. 2005).

We are unpersuaded that Waidla's mild resistance to having counsel contact his loved ones and acquaintances in

Estonia eliminates the prejudice associated with counsel's failure to do so, as in *Schriro v. Landrigan*, 550 U.S. 465 (2007). “[W]e have held that the *Landrigan* prejudice holding does not apply when the defendant ‘did not threaten to obstruct the presentation of any mitigating evidence.’” *Sanders*, 23 F.4th at 981 (quoting *Hamilton v. Ayers*, 583 F.3d 1100, 1119 (9th Cir. 2009)). *Landrigan* is not controlling in this case.

Waidla's reluctance pales in comparison to the opposition at issue in *Landrigan*. There, Landrigan hamstrung any and all attempts by counsel to present a mitigation argument, including by interrupting during counsel's proffer of evidence to the judge and by asking the judge to impose the death penalty. *Landrigan*, 550 U.S. at 470, 476–80. By contrast, Waidla merely voiced concerns about conducting an investigation in Estonia in conversations with counsel. He never indicated that he would obstruct counsel. Additionally, counsel in *Landrigan* advised his client strongly against his preferred course of action and attempted to present mitigation evidence over his client's objections. *Id.* at 479–80. Waidla received markedly less diligent representation, as counsel simply did not press the issue enough to reach resolution on it. In other words, *Landrigan* does not govern because the major gap in Waidla's mitigation case is attributable to counsel's actions rather than Waidla's.

We acknowledge that the mitigation strategy outlined above is a modest one. Waidla's social history does not reveal facts that often support a finding of prejudice like abject abuse or serious mental incapacity. *See, e.g., Williams*, 529 U.S. at 395–98. We also recognize that good character evidence sometimes lacks persuasive force in the face of a “gr[isly] murder.” *Bemore v. Chappell*, 788 F.3d

1151, 1172 (9th Cir. 2015). But crucially, we are called on to determine whether fairminded jurists could conclude that this mitigation evidence gives rise to a reasonable probability that at least one juror would have voted differently. Waidla meets that standard given the jury's uncertainty, the extremely minimal mitigation evidence originally presented, and the missed opportunity to rebut various aspects of the State's aggravation argument, which was itself modest.

C

Waidla argues, as an alternative ground for affirmance, that he was deprived of due process by the State's presentation of false evidence against him. Specifically, the California Supreme Court found that the State misattributed the two post-mortem sharp-edged hatchet blows to Waidla at trial. *In re Sakarias*, 106 P.3d at 950. Nevertheless, the court denied relief due to lack of prejudice. *Id.* We need not decide whether that denial violated 28 U.S.C. § 2254(d) in light of our holding that penalty phase relief is warranted on Waidla's ineffective assistance of counsel claim.

III. Guilt Phase Claims

The district court denied relief on the two claims of error at the guilt phase that Waidla raises on cross-appeal. Waidla first contends that his Fifth Amendment rights were violated when the State introduced his confession at trial. Waidla also asserts that he received ineffective assistance of counsel during the guilt phase. Reviewing under 28 U.S.C. § 2254(d), we agree with the district court's assessment that these claims lack merit.

A

Waidla argues that his confession was improperly admitted in violation of the Fifth Amendment. We provide factual background before turning to the claim.

Background. Border Patrol agents apprehended Waidla in New York near the Canadian border and arrested him on suspicion of illegal entry into the country. *Waidla*, 996 P.2d at 69. During interrogation at a Border Patrol station in Rouses Point, New York, Waidla invoked his right to counsel and was then moved to another facility where he was detained. *Id.* The next day, a Border Patrol agent transported Waidla back to Rouses Point and placed him in a holding cell. *Id.*

During the suppression hearing, Detective Pietrantonio and Waidla testified differently as to what transpired at Rouses Point. As the trial court found Pietrantonio more credible, we recount his version of events.

Officers removed Waidla from the holding cell and took him into the adjoining administrative area where he saw Detective Pietrantonio dressed in civilian clothes. Pietrantonio was in New York to interrogate Waidla and to bring him to Los Angeles following an extradition hearing. *Id.* Speaking first, Waidla asked: “[Y]ou’re the detective from Los Angeles?” When Pietrantonio confirmed that he was, Waidla asked either, “What do you want from me?” or “What can I do for you?” *Id.* Pietrantonio took Waidla into another room where Waidla waived his *Miranda* rights before Pietrantonio questioned him and eventually obtained his confession. *Id.* at 69–70.

The trial court admitted Waidla’s confession because Waidla had initiated the dialogue with Detective Pietrantonio.

Id. at 70. On direct appeal, the California Supreme Court upheld the trial court’s factual finding that Waidla had started the conversation and concluded that, as a matter of law, Waidla’s question amounted to initiation of interrogation. *Id.* at 71.

Discussion. The California Supreme Court did not unreasonably apply *Edwards v. Arizona*, 451 U.S. 477 (1981), and its progeny in upholding the admission of Waidla’s confession. *Edwards* holds that a suspect who has invoked the right to counsel may not be “subject[ed] to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.” *Id.* at 484–85. Initiating statements are those that “represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation.” *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983) (plurality opinion).

Fairminded jurists could conclude that law enforcement did not recommence interrogation in the sense relevant to the *Edwards* analysis. Cases finding *Edwards* violations involve police-initiated meetings that a suspect understands are interrogation attempts. *See Edwards*, 451 U.S. at 487 (police “told Edwards that they wanted to talk to him”); *Minnick v. Mississippi*, 498 U.S. 146, 149 (1990) (jailers told Minnick he would “have to talk” to an officer who arrived to interview him and “could not refuse”). Unlike the suspects in those cases, Waidla had little reason to expect that he would be questioned when he encountered Detective Pietrantonio. Waidla testified at the suppression hearing and at trial that he had no idea why he had been brought to Rouses Point. He maintained that position before the district

court.³ Moreover, Pietrantonio was not in uniform at the time, the encounter did not begin in an interrogation room, and no other contextual cues suggested to Waidla that interrogation was forthcoming. Thus, it is reasonable to conclude that Waidla did not experience his encounter with Pietrantonio as a coercive attempt at further interrogation.

In light of Waidla's lack of knowledge of the purpose for his transport, it is not enough to observe that law enforcement brought about his encounter with Detective Pietrantonio. As the California Supreme Court recognized, no Supreme Court case has found an *Edwards* violation based on a police-initiated meeting alone. *Waidla*, 996 P.2d at 71. To be sure, snippets from some cases suggest that a suspect truly initiates only if he requests the meeting in which interrogation recommences. *See, e.g., McNeil v. Wisconsin*, 501 U.S. 171, 177 (1991) (police may not "approach[] for further interrogation" or "initiate an encounter" following a suspect's invocation of rights); *Patterson v. Illinois*, 487 U.S. 285, 290 (1988) ("[A] suspect may not be questioned again unless he initiates the meeting."). But we do not interpret those general statements in a vacuum. *Edwards* created a prophylactic rule to protect suspects from the coercive effect of persistent interrogation attempts. *See Maryland v. Shatzer*, 559 U.S. 98, 104–05 (2010). Not all police-initiated meetings following an invocation of rights carry coercive potential. A reasonable

³ Waidla invites us to discount his own testimony as inconsistent with Detective Pietrantonio's testimony that Waidla recognized him on sight as an LAPD detective. But Pietrantonio's explanation for Waidla's behavior, credited by the trial court, was that Waidla may have seen him before and therefore recognized him. *Waidla*, 996 P.2d at 69. Thus, the trial court could have validly relied on Waidla's testimony that he lacked awareness of the reason for his transport.

jurist could conclude that, absent a suspect's belief that he will be questioned during an encounter, the coercive effect of a police-initiated interaction is minimal. Thus, the fact that law enforcement manufactured Waidla's contact with Pietrantonio does not, on its own, render his confession inadmissible.

We reach the same conclusion when considering the question, as Waidla urges us to, under *Rhode Island v. Innis*, 446 U.S. 291 (1980). *Innis* holds that law enforcement engages in the "functional equivalent" of interrogation when it takes action that is "reasonably likely to elicit an incriminating response." *Id.* at 301. The *Innis* analysis "focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Id.* Fairminded jurists could conclude that because Waidla did not know he was transported to facilitate further interrogation, simply encountering Detective Pietrantonio was not reasonably likely to draw any admissions from him. Further, there is no evidence to suggest that any involved officer could have predicted that Waidla would recognize Pietrantonio as a detective when he was wearing civilian clothes. Waidla's response was therefore an "unforeseeable result[]" of delivering him into Pietrantonio's presence. *Id.*

Finally, Waidla suggests that his question to Detective Pietrantonio was vague and possibly hostile, rather than a clear attempt to initiate further interrogation. But even the more ambiguous formulation of Waidla's question—"What do you want from me?"—was no less ambiguous than the phrase that initiated further interrogation in *Bradshaw*: "Well, what is going to happen to me now?" 462 U.S. at 1045 (plurality opinion). The California Supreme Court reasonably concluded that Waidla's question "represent[ed] a desire . . . to open up a more generalized discussion," *id.*,

particularly in light of Pietrantonio's testimony that before he began his questioning, Waidla interrupted him several times with offers to discuss the investigation, *Waidla*, 996 P.2d at 69–71.

B

Waidla also raises a claim of ineffective assistance at the guilt phase. He contends that counsel rendered ineffective assistance in four areas: (1) investigating and litigating the motion to suppress Waidla's confession; (2) counseling Waidla to recant his confession and testify to an alibi; (3) failing to investigate alternative defenses; and (4) failing to rebut the State's expert testimony regarding the lifespan of fingerprints.

To prevail, Waidla must show that counsel's performance "fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. Because 28 U.S.C. § 2254(d) applies, we may grant relief only if we can answer both questions in the affirmative "beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. Here, the California Supreme Court could reasonably have concluded that counsel met *Strickland*'s performance standard as to two of the alleged deficiencies and that the remaining alleged deficiencies did not prejudice Waidla.

Suppression Motion. Waidla identifies two failures in counsel's approach to litigating the motion to suppress his confession: (1) counsel should have pressed for an earlier decision on the motion; and (2) counsel should have investigated more thoroughly. The first argument fails because it incorrectly presumes that counsel had control over

the timing of the suppression hearing. The second fails because it impermissibly relies on facts knowable only in hindsight.

Counsel adequately and timely litigated the motion to suppress. He filed moving papers in advance of trial and he acted reasonably by not pushing for a suppression hearing at that time because it appeared possible that the State would ultimately not seek to introduce Waidla's confession. Further, the trial court had discretion to hear the motion at a time of its choosing and it acceded to the State's request to defer the issue. Waidla does not point to any feature of state law that would have allowed counsel to compel the court to hold a hearing sooner. Thus, counsel reasonably refrained from making a likely futile request for an earlier hearing.

Based on what he knew at the time, counsel could reasonably have determined that further investigation into whether Waidla had initiated interrogation was unnecessary to litigating the suppression motion. *Strickland* cautions that we must not fall prey to the "distorting effects of hindsight" in assessing counsel's performance. 466 U.S. at 689. The prosecutor had given counsel full access to his files. Those files gave counsel no indication that Detective Pietrantonio would testify that Waidla had initiated the interrogation. In fact, the State had concluded preliminarily that Waidla's statement was likely obtained in violation of *Arizona v. Roberson*, 486 U.S. 675 (1988), a case applying the rule set out in *Edwards*. Even the prosecutor represented that Pietrantonio's testimony at the suppression hearing came as a surprise. Thus, counsel had little reason to think that interviewing the officers involved or conducting other investigation would inform his strategy in arguing the suppression motion. That is especially true because Waidla maintained that he had not initiated the interrogation. *See*

Strickland, 466 U.S. at 691 (“[W]hen the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether.”).

Waidla’s Testimony. Faced with the trial court’s decision to admit Waidla’s extremely damaging confession, counsel made a strategic decision to advise Waidla to recant his confession. Waidla argues that counsel’s strategic choice fell short of objectively reasonable standards of representation. Reviewing under 28 U.S.C. § 2254(d), we cannot conclude that the California Supreme Court unreasonably applied *Strickland*’s performance prong.

Counsel could have made the reasonable professional judgment that letting the confession stand uncontested would have proved fatal to Waidla’s defense. Waidla confessed not only to his presence during the crime, but to physically striking Viivi with the murder weapon. Failing to dispute the validity of this confession would have left the jury with little room to form a reasonable doubt as to Waidla’s guilt. Thus, it would have been reasonable for counsel to conclude that presenting Waidla’s testimony “was the only way to potentially rebut” the State’s overwhelming evidence of guilt. *Allen v. Woodford*, 395 F.3d 979, 1000 (9th Cir. 2005).

Failure to Investigate Alternative Defenses. Waidla argues that counsel rendered ineffective assistance by failing to investigate any alternative defense strategy. Counsel admitted that he prepared just one approach—suppressing Waidla’s confession and casting doubt on the State’s evidence of Waidla’s involvement—before having to abandon it upon the court’s denial of the suppression motion.

Waidla identifies as one viable alternative defense that Waidla was present at the scene of the crime because he intended to negotiate Viivi's debt to him, but that he did not ultimately participate in Viivi's murder. Additionally, he argues that counsel should have investigated a mental state defense based on diminished capacity because the two pretrial psychological evaluations found only that Waidla was generally capable of forming an intent to kill, not that he in fact formed that intent. These claims fail for lack of prejudice.

Fairminded jurists could conclude that even if counsel had offered evidence that Waidla was present at the Piirisilds' home but uninvolved in the murder, there was no reasonable probability the jury would have reached a different verdict. Waidla argues that he could have offered testimony showing that his intent in confronting Viivi was to obtain payment for his household work. But to the extent Waidla invites an inference from that evidence that he did not ultimately participate in Viivi's murder, that inference holds up no better than Waidla's alibi defense. Crucially, Waidla's confession cast doubt on that theory just as it cast doubt on Waidla's alibi. And the claim that he was there but uninvolved would have been undermined by evidence of Waidla's consciousness of guilt. Specifically, Waidla fled after the crime, reacted strangely when an acquaintance told him about Viivi's death, and initially lied to the police about his presence during the crime. *Waidla*, 996 P.2d at 57, 69. Thus, an alternative defense based on Waidla's non-involvement faced challenges similar to the defense actually mounted.

As for a mental state defense, Waidla offered extremely minimal postconviction evidence of diminished capacity or severe emotional disturbance. Only one postconviction

psychologist's evaluation assessed Waidla as suffering from dissociative disorder, and even that evaluation did not go so far as to suggest that Waidla's dissociative disorder prevented him from forming the requisite intent in killing Viivi.

Moreover, the evidence showed that the crime was planned and deliberate, severely undercutting a possible mental state defense. Waidla waited until Avo was out of town to confront Viivi; he took the hatchet from the Piirisilds' cabin for the confrontation; he parked some distance from Viivi's house, presumably to avoid alerting her to their presence; and he made some efforts to clean up the scene of the crime after killing Viivi. *Waidla*, 996 P.2d at 56–57. These considered actions tend to show that Waidla acted with foresight and deliberation throughout the crime. Thus, fairminded jurists could conclude that a mental state defense would not have proved persuasive. *See Crittenden v. Ayers*, 624 F.3d 943, 960–63 (9th Cir. 2010) (finding no prejudice when counsel presented alibi defense over mental state defense because the evidence overwhelmingly established deliberation and premeditation).

Fingerprint Lifespan. Waidla's counsel failed to present expert testimony to rebut erroneous testimony from a State witness that fingerprints have a "lifespan" of only ten days to three weeks. *Waidla*, 996 P.2d at 57. That testimony undermined the defense argument that Waidla's fingerprint on the Piirisilds' deadbolt could have been left when Waidla was last in the Piirisilds' home more than six weeks prior to the crime. Even assuming counsel performed deficiently by failing to offer rebuttal expert testimony, the California Supreme Court could reasonably have concluded that Waidla was not prejudiced by counsel's shortcoming.

The evidence overwhelmingly showed that Waidla was present at the Piirisilds' home during the crime even without the fingerprint evidence in question. Most notably, Waidla confessed that he had been there. *Waidla*, 996 P.2d at 58. A neighbor also identified Waidla as one of two men he had seen walking to and from the Piirisilds' home around the time of the crime. *Id.* at 56–57. The State presented evidence of cigarette butts found inside the house that matched Waidla's (but not Sakarias's) blood type, which was significant because Viivi did not allow smoking inside the house and therefore an invited guest would not have left the cigarettes. *See id.* at 57. Finally, the evidence showed that Waidla had fled the country after the crime, *id.* at 57–58, showing consciousness of guilt. *See People v. Bradford*, 929 P.2d 544, 575 (Cal. 1997) (explaining relevance of flight to jury's determination of guilt).

Moreover, the defense theory that Waidla left a fingerprint over six weeks prior to the crime strained credulity to begin with. Witnesses testified that Viivi was a thorough and frequent cleaner. In line with that testimony, police found only seven prints in the home while investigating, suggesting that the home had been cleaned recently. Yet Waidla argues that a jury would have concluded that a fingerprint on a high-touch surface, the door, somehow survived for over a month. Considering the weakness of this theory and the overwhelming evidence of Waidla's presence at the scene of the crime, the California Supreme Court could have concluded there was no reasonable probability of the jury reaching a different outcome had the State's fingerprint lifespan testimony been refuted.

Cumulative Error. Waidla raises a claim of cumulative error alleging that counsel's various inadequacies at the guilt

phase combined to prejudice him. In assessing a cumulative error claim, we do not consider the prejudicial effect of nonexistent errors. *See United States v. Jeremiah*, 493 F.3d 1042, 1047 (9th Cir. 2007). Even assuming counsel performed deficiently in failing to investigate additional defenses and failing to present rebuttal testimony on the lifespan of fingerprints, Waidla cannot prevail on his claim of cumulative error. The fingerprint claim posits that Waidla was robbed of an opportunity to convince the jury that he was *not* present during the crime, while the failure to investigate claim proceeds on the assumption that Waidla *was* present. Thus, counsel’s alleged missteps lack the “symmetry” of errors that “amplify each other in relation to a key contested issue in the case” and result in cumulative prejudice. *Ybarra v. McDaniel*, 656 F.3d 984, 1001 (9th Cir. 2011).

* * *

We affirm the district court’s grant of habeas relief on Waidla’s claim of ineffective assistance of counsel at the penalty phase. We also affirm the district court’s denial of Waidla’s remaining claims for relief.

AFFIRMED.

MILLER, Circuit Judge, concurring in part and dissenting in part:

Born in 1967 in Soviet-occupied Estonia, arrested as a dissident and beaten by the KGB, conscripted into the Soviet Army and violently abused by Russian soldiers, Tauno Waidla managed to escape from behind the Iron Curtain and find freedom in the West. He came to the United States, where he was welcomed by Viivi and Avo Piirisild, an Estonian émigré couple who gave him food, clothing, and a place to live. But Waidla was not satisfied with the Piirisilds' generosity. He became convinced that they also owed him a car. When they refused to give it to him, he broke into their house and murdered Viivi by splitting open her head with an axe.

Today, the court correctly rejects Waidla's challenges to his murder conviction, so I join Part III of its opinion. But unlike the court, I would also reject Waidla's challenge to his death sentence. The California Supreme Court considered Waidla's claim of ineffective assistance of counsel and rejected it on the merits. That decision requires our deference, and I would reverse the judgment below to the extent that it granted habeas relief. (Waidla also asserts that he was deprived of due process in the penalty phase of his trial; I would reject that claim for the reasons given by the California Supreme Court. *In re Sakarias*, 106 P.3d 931, 950 (Cal. 2005).)

The Sixth Amendment guarantees criminal defendants "the Assistance of Counsel." U.S. Const. amend. VI. In *Strickland v. Washington*, the Supreme Court held that to establish constitutionally ineffective assistance of counsel, a defendant must demonstrate that (1) his representation was deficient, or "fell below an objective standard of

reasonableness,” and (2) the deficiencies caused him prejudice, which requires “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S. 668, 688, 694 (1984). “Judicial scrutiny of counsel’s performance must be highly deferential,” and we “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689.

That deference is heightened where, as here, a federal court reviews a state-court conviction in habeas. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, provides that when a claim has been “adjudicated on the merits in State court proceedings,” a federal court may grant habeas relief only if the state court’s decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). Obtaining relief requires a petitioner to “show far more than that the state court’s decision was ‘merely wrong’ or ‘even clear error.’” *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) (per curiam) (quoting *Virginia v. LeBlanc*, 582 U.S. 91, 94 (2017) (per curiam)). Instead, it requires the petitioner to demonstrate “that the state court’s decision [was] so obviously wrong that its error lies ‘beyond any possibility for fairminded disagreement.’” *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)); see *Gibbs v. Covello*, 996 F.3d 596, 603 (9th Cir. 2021).

When we combine the deference that *Strickland* and AEDPA both require, our review becomes “doubly deferential.” *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). “Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with

unreasonableness under § 2254(d).” *Richter*, 562 U.S. at 105. To evaluate deficiency through the lens of AEDPA, we ask “whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.” *Id.* And even if we recognize a deficiency in counsel’s performance, we cannot say that prejudice resulted unless the state court’s contrary view would be erroneous “beyond any possibility for fairminded disagreement.” *Id.* at 103; *see Premo v. Moore*, 562 U.S. 115, 130 (2011).

Waidla argues that he was denied effective representation because trial counsel did not investigate or present three types of mitigating evidence, relating to (1) his early life, (2) his experiences in the Soviet Army, and (3) his good behavior in jail. Waidla has not established either deficient performance or prejudice with respect to any of his claims. He certainly has not shown that it was unreasonable for the California Supreme Court to reject them.

First, Waidla argues that counsel was ineffective because he did not obtain evidence about Waidla’s childhood in Estonia that could have humanized him to the jury. There was a good reason why counsel did not obtain such evidence: When counsel tried to investigate Waidla’s family background, Waidla told him not to do so. As counsel later explained, Waidla “expressed considerable reluctance in having me contact his family or calling them as witnesses” because “he was concerned about possible reprisals against his family by Soviet government or military authorities if they were to attempt to come to the United States and testify, because of his desertion from the Soviet army and escape from East Germany.” Waidla himself had been the victim of Soviet reprisals. At trial, Waidla testified that when he was a student, the KGB had twice arrested him for protesting the regime, on one occasion beating him so badly that they broke

his arm. Counsel repeatedly tested Waidla's reluctance and suggested alternatives such as contacting his childhood teachers or other community members, but Waidla expressed the same concerns about reprisals against them. Waidla's resistance was steadfast despite multiple conversations and proposals.

Counsel's ultimate decision to accede to Waidla's wishes was far from unreasonable. To the contrary, it was consistent with professional standards, which recognized that a lawyer "should defer to the client regarding . . . concern for third persons who might be adversely affected" by litigation tactics. Model Rules of Pro. Conduct r. 1.2 cmt. (Am. Bar Ass'n 1989). "Competence does not require an attorney to browbeat" the client into producing mitigating evidence, "especially when the facts suggest that no amount of persuasion would have succeeded." *Mirzayance*, 556 U.S. at 125; *cf. Schriro v. Landrigan*, 550 U.S. 465, 477 (2007).

Waidla now says, however, that "as Soviet control over . . . Estonia was diminishing in the late 1980s, the basis for Waidla's concern about possible reprisal was also eroding." The Supreme Court has cautioned against the "distorting effects of hindsight" in evaluating counsel's performance. *Strickland*, 466 U.S. at 689; *see also Richter*, 562 U.S. at 107; *Bell v. Cone*, 535 U.S. 685, 702 (2002). While the Court's cases have focused on litigation hindsight coming from knowledge of how the trial turned out ("examining counsel's defense after it has proved unsuccessful," *Strickland*, 466 U.S. at 689), Waidla's argument relies on a different but equally fallacious kind of hindsight: geopolitical hindsight coming from knowledge of how the Cold War ended.

Waidla's penalty-phase trial took place in January 1991. Evaluating his counsel's performance at a remove of more than three decades, it is easy to forget that the world was very different then. Estonia remained under Soviet occupation, and it was far from clear that the occupation would come to a peaceful end. As the Baltic states attempted to reassert their independence, the Soviet Union strongly resisted their efforts. Less than two weeks after the closing arguments in Waidla's trial, the Soviets sent tanks into Vilnius in response to the Lithuanian declaration of independence. Bill Keller, *Soviet Loyalists in Charge After Attack in Lithuania; 13 Dead; Curfew Is Imposed*, N.Y. Times, Jan. 14, 1991, at A1. Days later, a similarly violent military intervention took place in Latvia. Serge Schmemmann, *Soviet Crackdown: Latvia; Soviet Commandos Stage Latvia Raid; At Least 5 Killed*, N.Y. Times, Jan. 21, 1991, at A1. Against this backdrop, Waidla's observation that it would have been possible for his counsel to communicate with people in Estonia is entirely beside the point. The concern he expressed was not that communicating with his friends and relatives in Estonia would pose logistical hurdles; it was that doing so would put them at grave risk of Soviet reprisals. The brutality of the Soviet Union in its waning days vividly demonstrates the basis for that concern.

Not to worry, Waidla says, because "arrangements could have been easily made to meet in Finland" with potential Estonian witnesses to avoid Soviet detection. To be fair, there was recent precedent for such an operation: A few years earlier, Oleg Gordievsky, a high-level KGB officer and British double agent, had been exfiltrated from the Soviet Union to Finland in the trunk of a British diplomatic car. But if the Sixth Amendment does not guarantee a defendant the advocacy of Clarence Darrow, *see Yarborough v. Gentry*,

540 U.S. 1, 10 (2003) (per curiam), surely it does not guarantee him the tradecraft of MI6.

At the time of Waidla's trial, a reasonably competent attorney—one not assisted by clandestine operatives of Her Majesty's Government—would have struggled to determine how to obtain evidence from Soviet-occupied Estonia to assist a defector who had opposed the Soviet regime, while somehow not endangering those who remained under its rule. And the information that counsel had already collected about Waidla's childhood gave no indication that additional evidence would pay large dividends for his client. In addition to interviewing Waidla, who had little to say about his upbringing, counsel requested evaluations from two psychiatrists. Those evaluations were likewise unremarkable. They reported that Waidla's parents had divorced when he was young, that he had little contact with them and was instead raised by a maternal uncle and grandmother, that he had feared going out alone in public as a teenager, and that he was an average student who attended regular classes and had no behavior problems. There was no hint of childhood trauma, *e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 525 (2003), or mental illness, *e.g.*, *Porter v. McCollum*, 558 U.S. 30, 40 (2009) (per curiam). This was “not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face.” *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009) (per curiam).

“[T]he duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up.” *Rompilla v. Beard*, 545 U.S. 374, 383 (2005). “Questioning a few more family members and searching for old records can promise less than looking for a needle in a haystack,” and the prospects darken considerably when the haystack is

under Soviet occupation. *Id.* at 389. At a minimum, fairminded jurists could disagree about whether it was reasonable for counsel to respect Waidla's wishes and decline to pursue a line of inquiry that could jeopardize the safety of people he cared about in a Soviet-occupied country without any clear benefit for his defense.

Second, Waidla argues that counsel was ineffective because he did not present sufficient evidence of the hardship that he endured as a conscript in the Soviet Army. But the jury already had powerful evidence of the abuse that Waidla suffered. After he came to the United States, Waidla wrote a newspaper article—which Viivi helped him translate into English—describing in detail his experiences in the Soviet Army. During the guilt phase of Waidla's trial, the parties introduced the article into evidence, and Waidla testified about it at length.

In the article, *Escaping Through the Fog*, Waidla wrote that after being conscripted, he endured nights in bitterly cold weather in flimsy, overcrowded tents, “[b]ut we are not humans anymore—we are now Russian soldiers.” He was transported to East Germany in a cattle car. During marches, “[w]ho walks a little slower gets a boot on his backside.” After being forced to undress outside in the freezing cold for an apparent medical exam, he developed pneumonia. At the hospital, “there are not enough beds and there are too many sick people,” and the staff forced him to wash the floors even though he had “never felt worse in [his] life.” Waidla suffered abuse at the hands of Russian soldiers who were hostile to Estonians, and his despair was constant: “All wishes to exist disappear”; “No, two years of this dog[']s life I can not bear”; “I have to get out of this hell. That kind of life is not worth living.” Eventually, he and a fellow Estonian conscript escaped to West Germany by leaving their base,

stealing a car, driving to the inner German border, and climbing the fence.

Waidla's account in *Escaping Through the Fog* was bolstered by other evidence introduced at trial. Avo testified that he understood the Soviet Army to have mistreated conscripts like Waidla from the Baltic states. He also said that when Waidla arrived at the Piirisilds' home soon after his escape, he was "haggard" and "perhaps a little undernourished."

Given the force of that evidence, counsel reasonably decided not to seek additional evidence about Waidla's mistreatment in the army. As in *Strickland*, counsel's decision not to seek more evidence "than was already in hand" fell "well within the range of professionally reasonable judgments." 466 U.S. at 699.

Waidla objects that counsel did not do enough to explain to the jury the mitigating force of his experiences. During closing argument, however, counsel expressly argued that the hardship Waidla endured in the Soviet Army was a mitigating factor weighing against the death penalty. Counsel elicited the key points about Waidla's suffering in the Soviet Army and the bravery of his escape. He emphasized that Waidla had lived under "the dictatorial rule of the Soviet Union" and that "after three weeks in a Russian army hospital . . . was so consumed by a desire for freedom . . . that he risked everything . . . to run across East Germany to the West, to freedom." See *Gentry*, 540 U.S. at 6–7 (holding that counsel was not ineffective when his closing argument made "several key points," even if he omitted others that "would unquestionably have supported the defense"). Reviewing the transcript of closing argument 30 years later, one can come up with ways in which counsel

might have made even more compelling use of Waidla's vivid narrative, but "*Strickland* does not guarantee perfect representation." *Richter*, 562 U.S. at 110. Whatever counsel's shortcomings may have been, his performance fell well within "the broad range of legitimate defense strategy." *Gentry*, 540 U.S. at 6.

Third, Waidla argues that counsel was ineffective because he did not present evidence of Waidla's good behavior in jail before his trial. The Supreme Court has recognized that a capital defendant's good behavior in jail is "relevant evidence in mitigation of punishment" because the jury could infer that the defendant's good behavior would continue if he were sentenced to life in prison. *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986). Thus, counsel could have used such evidence as part of his case for mitigation. But "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." *Gentry*, 540 U.S. at 8. Counsel conducted sufficient investigation to be aware that "there were no disciplinary proceedings against Mr. Waidla" in jail. Counsel could reasonably have decided that even a perfect jail record would be only weakly mitigating and that it was therefore a better strategy to focus on other issues.

Even if counsel's performance was deficient in this respect—indeed, even if it was deficient with respect to the other two categories of mitigating evidence—Waidla cannot establish prejudice. When assessing prejudice, "we reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534. The aggravating evidence was horrendous. *See Mickey v. Ayers*, 606 F.3d 1223, 1245 (9th Cir. 2010) (noting that "the facts of the crime play an important role in the prejudice inquiry").

Waidla bludgeoned Viivi with the blunt end of an axe with such force that he crushed her skull, fractured several bones, and knocked out her teeth. He then broke open her skull with the blade of the axe, cutting a flap of skull and scalp from the top of her head. The jury saw gruesome photos of Viivi's wounds.

Was there provocation for this brutal attack? Not at all. Viivi had invited Waidla to live in her home when he had nowhere else to go, and she allowed him to stay for more than a year. She tried to find him work and offered to pay for his college education. She helped Waidla translate the article that he would use at his trial to argue that his life should be spared. And she brought him on trips to her family's cabin, where Waidla later stole the axe that he would use to kill her.

Did Waidla display remorse after the murder? Far from it. He wrote a note to his friend and accomplice celebrating his escape—"Right now I am drinking Bavarian beer with the proper strength in one of the better class bars in Montreal"—and promising to go down "with a weapon in hand" should he be apprehended: "If you hear that I have been taken alive . . . (almost impossible) . . . then you should know that I did my best." Despite having given a full confession shortly after being arrested, he then testified at trial and denied any involvement in the murder, offering an implausible story that the jury rejected.

Considered alongside the facts of the offense, Waidla's proffered mitigating evidence is feeble. Start with the evidence of his behavior in jail. Yes, Waidla had shown an apparent commitment to work and study. But the jury could easily have discounted that showing, given that he had repeatedly rebuffed Viivi's earlier attempts to help him get a job and an education. *See Skipper*, 476 U.S. at 14 (Powell,

J., concurring) (“One arrested for a capital crime, and particularly a convicted defendant awaiting sentencing, has every incentive to behave flawlessly in prison if good behavior might cause the sentencing authority to spare his life.”). Even if the jury believed his reforms to be genuine, it might have viewed his willingness to sweep the halls and distribute toilet paper as paltry recompense for the depravity of Viivi’s murder. At trial, counsel described Waidla’s construction projects for the Piirisilds as evidence of his work ethic and the contributions he could make to society; the jury was apparently unpersuaded. Similar evidence from his time in jail would have been unlikely to produce a different result.

The same is true of evidence of the oppressiveness of the Soviet Union. The guilt-phase testimony had already described the hardship Waidla experienced growing up in Soviet-occupied Estonia, his interrogations and beatings by the KGB, and his suffering in the Soviet Army. As the trial court observed, there was a “tremendous amount of evidence that was presented to the jury during the first phase that goes both towards sympathy and pity” for Waidla. Waidla now emphasizes an expert report on the Soviet Army, but for the most part it just retells *Escaping Through the Fog* in the third person. “Additional evidence on these points would have offered an insignificant benefit, if any at all.” *Wong v. Belmontes*, 558 U.S. 15, 23 (2009) (per curiam).

That leaves the suggestion that counsel should have done more to “humanize” Waidla. The postconviction efforts to do so are unimpressive, and, had they been employed at trial, could easily have been counterproductive. As a youth, Waidla apparently displayed skill in marksmanship and photography. That is of minimal mitigating value because it says essentially nothing about him as a person. And given

that Waidla possessed a gun and had threatened a shootout with law enforcement, emphasizing his skill in marksmanship had an obvious potential to backfire.

What of the psychological reports that Waidla had a “characterological aversion to confrontation and violence”? That assessment does say something about Waidla as a person, but what it says is highly implausible—someone genuinely averse to confrontation and violence would probably not have hacked a woman to death with an axe. Introducing the reports would have opened the door to a cross-examination revealing that they were based on Waidla’s false claims that Viivi’s killing was unplanned and unintended. *See Cullen v. Pinholster*, 563 U.S. 170, 201 (2011) (explaining that a psychiatric report had “questionable mitigating value” because it “would have opened the door to rebuttal”). The jury would not have been swayed by opinions premised on a view of the crime it had unanimously rejected. More likely, the reports would simply have confirmed the jury’s conclusion that Waidla was a liar.

The evidence about Waidla’s family is likewise as much aggravating as mitigating. Indeed, this case illustrates the Supreme Court’s caution that the effort to “‘humaniz[e]’ the defendant as the be-all and end-all of mitigation disregards the possibility that this may be the wrong tactic.” *Pinholster*, 563 U.S. at 197 (quoting *Pinholster v. Ayers*, 590 F.3d 651, 692 (9th Cir. 2009) (Kozinski, C.J., dissenting), *rev’d*, 563 U.S. 170 (2011)). Waidla’s close relationships with his relatives suggest some capacity for human connection, but discussion of those bonds would have undermined one of the primary themes in counsel’s closing argument: that Waidla was “essentially alone in this world, and maybe because of that is to be a bit pitied rather than despised.” Had the jury learned that Waidla had *not* lived a life of isolation and had

nonetheless chosen to commit murder, it would have had less reason to pity Waidla and correspondingly more reason to despise him.

The length of the jury deliberations provides little reason to believe that the postconviction evidence would have made a difference. The new evidence “would barely have altered the sentencing profile” for the jury, and some pieces might have made it worse. *Strickland*, 466 U.S. at 700. In the end, the jury still would have been presented with a person who, after growing up in a totalitarian regime, had the extraordinary good fortune to escape it and find freedom in the United States—and then squandered that by becoming an axe murderer. Nothing in Waidla’s habeas petition has made any sense of that incomprehensible offense. It would be far from unreasonable to conclude that, with or without the new evidence, the jury’s verdict would remain the same.

* * *

The Supreme Court has held that the AEDPA standard is “difficult to meet” because the statute “reflects the view that habeas corpus is a ‘guard against extreme malfunctions in the state criminal justice systems,’ not a substitute for ordinary error correction through appeal.” *Richter*, 562 U.S. at 102–03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in the judgment)). Reviewing Waidla’s trial more than 30 years after it took place, the court today decides that counsel could have done a better job, even though doing a better job would have involved presenting what even the court describes as a “modest” case for mitigation. Whatever the merits of that view, the California Supreme Court’s contrary conclusion was not “so obviously wrong that its error lies ‘beyond any

possibility for fairminded disagreement.”” *Shinn*, 141 S. Ct. at 523 (quoting *Richter*, 562 U.S. at 103).

We have repeatedly been reversed for failing to defer to reasonable determinations of state courts under AEDPA. It appears that we have yet to learn the lesson of those cases.

03/01/2023 ☐ 84 ARGUED AND SUBMITTED TO KIM MCLANE WARDLAW, PAUL J. WATFORD and ERIC D. MILLER. The audio and video recordings of this hearing are available on our website at <http://www.ca9.uscourts.gov/media/>. [12664750] [18-99001, 18-99002] (BG) [Entered: 03/01/2023 11:14 AM]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TAUNO WAIDLA,

Petitioner,

v.

RON DAVIS¹, Warden of California
State Prison at San Quentin,

Respondent.

Case No. CV 01-0650 AG

ORDER GRANTING IN PART AND
DENYING IN PART PETITION FOR
WRIT OF HABEAS CORPUS

DEATH PENALTY CASE

This matter is before the Court on Petitioner Tauno Waidla's Petition for Writ of Habeas Corpus ("Petition") arising from his state court murder conviction and death sentence. The Court has reviewed and considered the parties' pleadings, briefs, and the supporting documentation. For the reasons set forth below, the Court hereby DENIES the petition for relief from the judgment of conviction (guilt phase), and GRANTS relief from the sentence of death (penalty phase).

¹ Ron Davis is substituted for his predecessor Michael Martel pursuant to FED. R. CIV. P. 25(d).

1 **1. INTRODUCTION**

2 In 1990, after a jury trial in the Los Angeles County Superior Court,
 3 Petitioner Tauno Waidla (“Petitioner”) was convicted of first degree murder with
 4 felony murder and robbery murder special circumstances. The jury also convicted
 5 Petitioner of various felonies, including first degree robbery, two counts of first
 6 degree burglary, fraudulently obtaining telephone services, and the sale of stolen
 7 property. The jury found true allegations that Petitioner personally used a deadly
 8 weapon in the commission of several of these crimes. The jury recommended the
 9 death penalty, and the trial judge agreed. The California Supreme Court affirmed
 10 Petitioner’s conviction and sentence on direct appeal. Petitioner sought a writ of
 11 habeas corpus in California Supreme Court, which was ultimately denied.
 12 Petitioner now seeks federal habeas corpus relief. That petition is the subject of
 13 this Order.

14 **2. FACTUAL BACKGROUND²**

15 Beginning around April, 1987, Petitioner and his friend, Peter Sakarias,
 16 developed a friendship with a North Hollywood couple named Avo and Viivi
 17 Piirisild. Avo and Viivi, both Estonian, befriended Petitioner and Sakarias, also
 18 both Estonian, when the two men moved to Los Angeles as political refugees.
 19 Petitioner and Sakarias had first met in East Germany after both were conscripted
 20 into the Soviet Army. Together, they fled to West Germany, where they obtained
 21 political asylum and were permitted to move to the United States.

22 Avo and Viivi, who were both very active in the Estonian-American
 23 community, assisted Petitioner in particular with his transition to American life.
 24 They eventually invited him to live at their North Hollywood home, where they
 25

26 ² The factual background is primarily derived from the California Supreme Court opinion on
 27 Mr. Waidla’s direct appeal, *People v. Waidla*, 22 Cal. 4th 690, 704-713 (2000). Facts or
 28 allegations associated with specific claims are addressed in greater detail in relation to those
 claims.

1 provided him with free room and board, and saw to his other needs, including
2 clothing and medical care. They also took Petitioner with them during visits to
3 their cabin in Crestline, California.

4 After some months passed, during which Petitioner remained unemployed,
5 Avo asked him to perform some construction and other work around the Piirisilds'
6 home in exchange for room and board. Petitioner agreed. Unbeknownst to Avo,
7 Viivi promised to give Petitioner a non-operating Triumph Spitfire that belonged
8 to Avo for transportation if Petitioner got a job or enrolled in school. When Avo
9 learned that Viivi had promised to give the Triumph to Petitioner, he mistakenly
10 understood the agreement was that the car was in exchange for completing the
11 home improvement projects. While Avo was not happy about the agreement to
12 give the car to Petitioner, he agreed to abide by it.

13 By May 1988, Petitioner's relationship with the Piirisilds had deteriorated
14 due to a dispute over the construction work. During a time when Avo was not at
15 home, Petitioner confronted Mrs. Piirisild and demanded that she give him the
16 sports car or \$4,000 cash in exchange for the work he had performed. She refused
17 to comply with his demands and asked him to move out. Petitioner threatened
18 Mrs. Piirisild, saying that if he did not get what he wanted he might hurt or kill
19 Avo. The Piirisilds' adult daughter, Rita Hughes, was present and witnessed this
20 confrontation. She calmed Petitioner down and helped him gather his things to
21 leave. Sakarias came to the Piirisilds' home, picked up Petitioner and his
22 belongings, and the two departed.

23 After this confrontation, Mrs. Piirisild began to express her fear of
24 Petitioner and Sakarias to, among others, Avo and Rita, and also to George
25 Charon, an FBI Special Agent with whom Mrs. Piirisild was acquainted.

26 After the confrontation, Petitioner and Sakarias left the Los Angeles area
27 and traveled across the country by car. The two eventually traveled back to Los
28 Angeles in a pickup truck that Sakarias had contracted to drive to San Francisco

1 for its owner. During the journey, Petitioner contacted the Piirisilds several times
2 in an effort to get the sports car or the proceeds from its sale.

3 On July 4, 1988, Petitioner and Sakarias showed up unannounced at the
4 Piirisild home. Apparently fearful of Petitioner, Viivi stayed inside the house.
5 Avo spoke with Petitioner and Sakarias outside and learned that they had made
6 the coast to coast journey, and that they currently were driving a pickup truck they
7 intended to deliver to San Francisco. During this conversation, Petitioner told
8 Avo that he had come for the Triumph. Avo told Petitioner he could not give him
9 the car because the title documents were in a safe deposit box at a bank that was
10 closed for the Independence Day holiday, and because the car was not operable
11 anyway. Petitioner asked Avo to give him the car the next day. Avo responded
12 that he could not give Petitioner the car the next day because he was leaving on a
13 business trip in the morning and would be gone for about two weeks. Petitioner
14 said he had no money for the trip to San Francisco. Avo told Petitioner he did not
15 have any cash, but offered to purchase gas for the pickup truck using his credit
16 card. Petitioner and Sakarias drove with Avo to a service station, where Avo
17 purchased gas for the truck. Petitioner and Sakarias drove Avo back to his home,
18 and then departed.

19 Sometime between July 4 and 11, 1988, Petitioner and Sakarias broke into
20 the Piirisilds' unoccupied cabin in Crestline. They stayed at the cabin for some
21 time, consumed food and drink, used the telephone, and took several items when
22 they left, including a combination telephone/clock radio, along with a hatchet. On
23 July 11, 1988, the telephone/clock radio was pawned for \$15.

24 The next day, July 12, 1988, while Avo was away on his business trip, and
25 Viivi was at a dental appointment, Petitioner and Sakarias broke into the
26 Piirisilds' North Hollywood home. Before doing so, they were seen by one of the
27 Piirisilds' neighbors walking towards the house.
28

1 The evidence indicates that, upon Mrs. Piirisild's return from the dentist, as
2 she passed through the front door toward the living room of the home, she was
3 immediately assaulted. Her larynx and hyoid bone were fractured, indicating
4 strangling, and she was bludgeoned several times about her head, face and neck
5 with enough force to crush her skull, fracture her jaw and various facial bones,
6 with her teeth knocked back. She had three chopping wounds around the top of
7 her head, and four stabbing wounds, including two that were six inches deep in the
8 area of her vital organs.

9 At some point, Mrs. Piirisild was dragged from the living room into a
10 bedroom where her body was later found. When they left the house, Petitioner
11 and Sakarias took various items, including jewelry, credit cards, and telephone
12 charge cards. They were seen walking away from the house by the same
13 neighbor, who noticed the two were carrying bags that they were not carrying
14 earlier. Subsequent investigation of the crime scene revealed a thumb print
15 belonging to Petitioner on a deadbolt lock at the point of entry into the house, and
16 two cigarette butts that, when tested, revealed saliva that came from someone with
17 Petitioner's blood type.

18 On the day of the murder, the stolen jewelry was sold to a pawn shop for
19 \$20. The next day, Sakarias bought two airline tickets using Mrs. Piirisild's credit
20 card, and he and another person, apparently Petitioner, flew from Los Angeles to
21 New York City. During the ensuing days in New York, the men continued to use
22 Mrs. Piirisild's credit and telephone charge cards to make telephone calls and
23 purchase various items, including fine jewelry and an airplane ticket that they
24 unsuccessfully attempted to exchange for a cash refund. They then traveled,
25 together and separately, within and without the Estonian-American community.
26 When asked by an Estonian-American acquaintance whether they had heard about
27 Viivi's murder, they did not react or express surprise and instead changed the
28 subject.

1 Approximately six weeks later, on August 28, 1988, in a rural area near the
 2 United States-Canada border in upstate New York, a U.S. Border Patrol agent
 3 located and detained Petitioner on suspicion of illegal entry into the United States.
 4 When detained, Petitioner possessed a loaded handgun, a very small amount of
 5 American and Canadian money, and a letter that he had written to Sakarias but
 6 had never sent. The letter—translated from Estonian—read as follows:

7 “I am not sure, however, I hope that you will receive this letter
 8 sometime. At the last moment I did put the safety back on . . . the
 9 parabellum and I put [it] into the bag. What will come the future is
 10 unknown. Right now I am drinking Bavarian beer with the proper
 11 strength in one of the better class bars in Montreal. When you hear
 12 that I am dead, then you should know that I’ve cracked [sic] with a
 13 weapon in hand. If you hear that I have been taken alive . . . (almost
 14 impossible) . . . then you should know that I did my best. However,
 generally you may look for me in Key West. This is a small place.
 You will find me. Of course, when my death notice will appear,
 probably there is no reason to look for me. However,
 . . . well. Generally you are my best friend . . . (possibly the only
 friend ever), so that it would be nice if we should meet again
 sometime. I wish you a firm hand and a cool nerve

15 *Waidla*, 22 Cal. 4th at 711. The letter as translated was introduced at trial. 19 RT
 16 2035.

17 Shortly thereafter, in an area nearby, Sakarias was found and detained on
 18 the same charge by another U.S. Border Patrol agent.

19 The day after his Border Patrol arrest, Petitioner was visited by detectives
 20 from the Los Angeles Police Department (“LAPD”) who had traveled to upstate
 21 New York to meet with him. (The LAPD had already focused on Petitioner as a
 22 suspect in Mrs. Piirisild’s murder.) In the ensuing interviews with the LAPD
 23 detectives, Petitioner ultimately confessed to participating in Viivi’s murder.
 24 Petitioner, however, claimed he only dealt a single blow with the blunt end of the
 25 hatchet at the beginning of the attack. He accused Sakarias of doing everything
 26 else.

27 Petitioner and Sakarias were initially charged jointly for the Piirisild
 28 murder, but Petitioner was ultimately tried alone after Sakarias was found

1 incompetent. Petitioner's trial began on October 9, 1990. As will be discussed,
2 Sakarias was eventually deemed competent and tried separately.

3 Shortly before trial, Petitioner filed a motion to suppress, alleging that his
4 interrogation by the LAPD, which occurred after he invoked his right to counsel
5 during his initial arrest by the Border Patrol, violated his rights under the Sixth
6 Amendment and *Miranda*. The motion was later heard and denied during the
7 prosecution's case-in-chief at trial.

8 Petitioner testified on his own behalf at trial. Despite his confession to the
9 LAPD detectives, he testified that he was not involved in the murder in any way.
10 He offered an alibi, claiming that he left Los Angeles a few days before the
11 murder and hitchhiked alone to New York. In recanting his confession, Petitioner
12 said it was a lie fed to him by the detectives, and that he gave the confession
13 because the detectives threatened to "hang" him if he did not. Petitioner, who was
14 twenty years old at the time of his arrest, testified that the police acted like the
15 KGB officers who had harassed him as a teenager in Soviet Estonia.

16 At the penalty phase of the trial, the State presented no evidence in
17 aggravation, relying solely on the circumstances of the crime. Petitioner's counsel
18 presented no evidence in mitigation, and instead relied on evidence already
19 presented during the guilt phase, consisting entirely of Petitioner's own testimony
20 regarding certain aspects of his background.

21 **3. PROCEDURAL HISTORY**

22 On February 10, 1999, while his direct appeal was pending but not yet
23 decided, Petitioner's state-appointed appellate counsel filed an initial state habeas
24 corpus petition. That petition was summarily denied by the California Supreme
25 Court on November 10, 1999. *In re Waidla*, S076438 (1999) (unpublished). On
26 April 6, 2000, in a lengthy opinion, the California Supreme Court unanimously
27 affirmed Petitioner's conviction and sentence on direct appeal. *People v. Waidla*,

28

1 22 Cal. 4th 690 (2000). The U.S. Supreme Court denied the petition for writ of
2 certiorari on November 27, 2000. *Waidla v. California*, 531 U.S. 1018 (2000).

3 On January 22, 2001, Petitioner filed a request for stay of execution and
4 appointment of counsel in this Court. The stay of execution was granted on
5 January 23, 2001 and on February 2, 2001, the Federal Public Defender (“FPD”)
6 was appointed to represent Petitioner. [Docket (“Dkt.”) Nos. 1, 4, 5.]

7 On November 27, 2001, Petitioner filed a second state habeas petition, as
8 well as Petitioner’s initial federal habeas petition. Dkt. No. 6. On January 2,
9 2002, Judge Wilson dismissed two claims from the federal petition and stayed the
10 proceedings on the remainder to allow Petitioner to exhaust his unexhausted state
11 habeas claims. Dkt. No. 13.

12 On April 5, 2005, the California Supreme Court denied Petitioner’s second
13 state habeas petition without a hearing, except as to one issue. *In re Waidla*,
14 S102401 (2005) (unpublished). The California Supreme Court issued an order to
15 show cause and appointed a referee on one habeas claim asserted by both
16 petitioner and Sakarias regarding the prosecutor’s presentation of inconsistent
17 factual theories at their separate trials. In a lengthy opinion issued on March 3,
18 2005, the California Supreme Court decided the claim in favor of Sakarias, but
19 against Petitioner. *In Re Sakarias*, 35 Cal. 4th 140 (2005). (Petitioner raises the
20 issue again in Claim 4 of the current petition.) As mentioned, Petitioner’s
21 remaining state habeas claims were separately denied in the unpublished summary
22 decision issued April 5, 2005.

23 Each claim, save one, was summarily denied on the merits without
24 discussion, and most were also denied on alternative procedural grounds (as
25 discussed here when relevant). *Id.* The United States Supreme Court denied Mr.
26 Petitioner’s petition for writ of certiorari, relating to the denial of his second state
27 habeas petition, on October 11, 2005. *Waidla v. California*, 546 U.S. 939 (2005).

28

1 On November 29, 2005, this Court dissolved the stay of the federal habeas
 2 proceedings. Petitioner filed his First Amended Petition (“FAP”) on March 17,
 3 2006, alleging eleven claims for relief, some with multiple subparts. Respondent
 4 (also referred to herein as the “State”) filed an Answer on June 16, 2006, and on
 5 September 18, 2006, Petitioner filed a Traverse. Dkt. Nos. 17, 25, 31, 37.

6 On April 9, 2007, Petitioner filed a motion for an evidentiary hearing (Dkt.
 7 No. 42), seeking to develop facts concerning four of his claims:

8 (1) Claim 3, that petitioner was deprived of the effective assistance
 9 of counsel at the guilt phase of trial; specifically, petitioner sought to
 10 develop facts to establish that his counsel (a) failed to conduct any
 11 guilt phase investigation, (b) erred by focusing solely on suppressing
 12 petitioner’s confession to the exclusion of any other theory, (c)
 13 handled the suppression motion in a deficient manner, (d) erred by
 14 advising petitioner to take the stand and by failing to adequately
 15 prepare petitioner to testify, (e) failed to investigate, consider, or
 16 present a claim of right defense, and (f) failed to investigate or rebut
 17 the prosecution’s fingerprint evidence;

18 (2) Claim 6, that he was deprived of due process and equal
 19 protection by the alleged arbitrary and discriminatory decision of the
 20 Los Angeles County District Attorney’s Office to seek the death
 21 penalty against him;

22 (3) Claim 8, that he was deprived of effective assistance of counsel
 23 at the penalty phase of his trial; specifically, petitioner sought to
 24 develop facts to establish that counsel failed (a) to conduct any
 25 penalty phase investigation into mitigating evidence, (b) to provide
 26 mental health experts with relevant background information, and (c)
 27 to investigate petitioner’s physical and mental state at the time of the
 28 crime; and

(4) Claim 11, that petitioner was deprived of due process and an
 impartial jury, and was subjected to cruel and unusual punishment,
 due to the jury’s alleged discussion of and reliance upon the
 possibility of petitioner’s release as a basis for imposing the death
 penalty.

On July 7, 2008, the Court granted in part the Motion for Evidentiary
 Hearing. Dkt. No. 54. The Court ordered an evidentiary hearing on claims 3(a),
 (b), (c), (d) and (f) and Claim 8(a) and (b). The motion was denied as to all other
 claims and Claims 6 and 11 were denied on the merits. *Id.* The evidentiary
 hearing took place over four days, on March 17-18, and May 5-6, 2009. The
 hearing was granted and held before the Supreme Court’s decision in *Cullen v.*

1 *Pinholster*, 131 S.Ct. 1388 (2011), which, as discussed later, holds that federal
 2 habeas review under 28 U.S.C. §2254(d) is limited to the factual record that was
 3 before the state court. Various post-hearing briefs were filed and the case was
 4 ultimately taken under submission. Dkt. Nos. 125-126,130-132, 135, 142-144.

5 **4. LEGAL STANDARD AND SCOPE OF REVIEW**

6 The initial federal petition in this matter was filed in 2001, after the
 7 enactment of the Antiterrorism and Effective Death Penalty Act of 1996
 8 (“AEDPA”) codified at 28 U.S.C. §2254. Thus, AEDPA applies in this case.
 9 *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Under AEDPA, this Court may not
 10 grant relief to a habeas Petitioner on any claim “adjudicated on the merits” in state
 11 court, unless the state court’s adjudication of the claim:

- 12 (1) resulted in a decision that was contrary to, or involved an
 13 unreasonable application of, clearly established Federal law, as
 14 determined by the Supreme Court of the United States; or
- 15 (2) resulted in a decision that was based on an unreasonable
 16 determination of the facts in light of the evidence presented in
 the State court proceeding.

17 28 U.S.C. § 2254(d). The standards set by § 2254(d) are “highly deferential
 18 standard[s] for evaluating state-court rulings,” which require that state court
 19 decisions be given the benefit of the doubt, and Petitioner bears the burden of
 20 proof. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

21 Clearly established federal law refers to the holdings, as opposed to dicta,
 22 of decisions of the United States Supreme Court in existence at the time of the
 23 relevant state court decision. *Pinholster*, 563 U.S. at 1399. However, circuit
 24 precedent may be considered in assessing what constitutes “clearly established”
 25 federal law and whether the state court applied that law unreasonably. *Detrich v.*
 26 *Ryan*, 677 F.3d 958, 971 (9th Cir. 2012).

27 A state court decision is “contrary to” clearly established federal law if the
 28 state court arrives at a conclusion opposite that reached by the United States

1 Court's denial of this claim was not contrary to or involved an unreasonable
 2 interpretation of clearly established federal law. It also does not amount to an
 3 unreasonable interpretation of the facts in light of clearly established federal law.
 4 Claim 7 is therefore DENIED.

5 In addition, though Petitioner does not allege a freestanding claim of
 6 cumulative error in the guilt phase of his trial, he clearly references the issue in his
 7 petition and pleadings. *See, e.g.*, FAP ¶ 164; Petitioner's Brief, Dkt. 126, at 43.
 8 As shown above, however, almost all of the guilt phase claims are denied on their
 9 substantive merits (applying AEDPA's standards) and are thus excluded from any
 10 cumulative error analysis. *See Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir.
 11 2002). To the extent this Order discusses prejudice in connection with any guilt
 12 phase claims, such as the fingerprint-related claim, the Court finds the cumulative
 13 or aggregate impact of such prejudice is not a sufficient basis for guilt phase
 14 relief. Where "each error is, at best, marginal, we cannot conclude that their
 15 cumulative effect was 'so prejudicial' to [Petitioner] that reversal is warranted."
 16 *United States v. Karterman*, 60 F.3d 576, 579-80 (9th Cir. 1995) (citations
 17 omitted); *United States v. De Cruz*, 82 F.3d 856, 868 (9th Cir. 1996) (same). Any
 18 claim of cumulative error at the guilt phase is therefore also DENIED.

19 **5.6 Penalty Phase—Ineffective Assistance of Trial Counsel (Claim 8)**

20 **5.6.1 Relevant Facts**

21 In his Eighth Claim, Petitioner asserts that he received ineffective assistance
 22 of counsel in connection with the penalty phase of his trial. FAP ¶¶ 279 *et seq.*
 23 The California Supreme Court, in its opinion on Petitioner's direct appeal, noted
 24 that Petitioner put on no evidence at the penalty phase of the trial. The state also
 25 declined to introduce any further evidence. *Waidla*, 22 Cal. 4th at 712.

26 Petitioner's counsel presented no evidence, instead relying entirely on
 27 evidence he introduced during the guilt phase "in anticipation of" the penalty
 28 phase. The relevant colloquy, which occurred in chambers, was as follows:

1 The Court: Gentlemen, today we're going to begin the penalty
2 phase. The first question I have is do you intend to introduce
any evidence in this matter?

3 Mr. Ipsen: I do not on behalf of the people.

4 Mr. Gladstein: I do not.

5 The Court: And let me ask you this, Mr. Gladstein: I assume
6 you're not seeking to introduce any further evidence on the
issue of penalty based upon sound tactical reasons?

7 Mr. Gladstein: That's correct, your honor.

8 The Court: And I would also note for the record
9 that you have presented a tremendous amount of evidence about
10 the defendant's background in the first phase of this trial, both
11 by reason of the article that he wrote and secondly by other
testimony which he gave which goes to sympathy and the
issues which would be favorable to your client; is that correct?

12 Mr. Gladstein: That's correct. It was done in anticipation
of not presenting further evidence at the penalty phase.

13 The Court: Very good. I find that to be a sound tactical
14 decision on your part since there is a tremendous amount of
15 evidence that was presented to the jury during the first phase
that goes both towards sympathy and pity to the defendant and
which does show certain positive aspects. Okay.

16 The discussion then moved on to other matters. 31 RT 3043-44.

17 As the record shows, the judge raised the question of whether there were
18 "sound tactical reasons" for presenting no mitigation case, to which defense
19 counsel simply responded: "That's correct, your honor." The judge then
20 elaborated, *sua sponte*, that it indeed was a "sound tactical decision" because
21 "there is a tremendous amount of evidence that was presented to the jury during
22 the first phase." The judge, on behalf of defense counsel, identified the mitigation
23 evidence as (1) an article written by Petitioner before the murder, apparently for a
24 Canadian newspaper, regarding his defection from the army and escape to West
25 Germany and (2) Petitioner's own testimony in the guilt phase regarding his
26 personal background. Petitioner's article, entitled "Escaping Through the Fog,"
27 was actually introduced by the prosecution. 8 RT 940-43.

28

1 To the extent it reflected anything about his personal background,
2 Petitioner's testimony during the guilt phase was as follows:

3 Q. [By defense counsel] Mr. Waidla, you were born where?

4 A. In Estonia.

5 Q. And Estonia is one of the Baltic States annexed by the Soviet
6 Union in the Second World War?

7 A. Yes.

8 Q. Were you raised in Estonia?

9 A. Yes, I was raised there.

10 Q. And at some time did you commence military service?

11 A. Yes, in 1986.

12 Q. How old were you at that time?

13 A. I was 18.

14 Q. And did you volunteer for the military or were you drafted?

15 A. I was drafted.

16 Q. Was that into the Soviet Army?

17 A. Yes.

18 23 RT 2401.

19 At this point, defense counsel elicited details of Petitioner's movements
20 between various Soviet military locations in Eastern Europe until his eventual
21 assignment to a base in East Germany, where he fell ill and was admitted to a
22 military hospital. It was there that Petitioner first met Peter Sakarias, who was a
23 fellow Estonian conscript. *Id.* at 2401-2405. The testimony then continued:

24 Q. At some point in your army experience did you decide to part
ways with the Soviet Army?

25 A. Yes.

26 Q. And was that while you were still hospitalized?

27 A. Yeah.

28

- 1 Q. And I take it in doing that the Soviet Army didn't just let you
2 go, did they?
3 A. No, they didn't let people go just like that.
4 Q. And how did you leave the Soviet Army?
5 A. I'd say I escaped from the Soviet Army.
6 Q. You snuck out in the middle of the night?
7 A. Yeah, I snuck out in the middle of the night and crossed the
8 border to West Germany.
9 Q. How many days later?
10 A. It took me about three days.
11 Q. And did you cross the border with somebody else?
12 A. Yeah, I crossed the border with Mr. Sakarias.
13 Q. That's Peter?
14 A. Peter, yeah.
15 Q. Just the two of you?
16 A. Just the two us.
17 Q. Once you crossed the border into West Germany, did you ask
18 for and receive some sort of asylum?
19 A. Yes, I asked for political asylum, and I asked to get permission
20 to come to the United States.
21 Q. And eventually was permission granted for you to come to the
22 United States?
23 A. Yes.
24 Q. And when did you first come to the United States?
25 A. In January, 1987.
26 Q. And where did you first arrive in the United States?
27 A. New York City.
28 Q. Was there any particular reason you decided not to stay in West
Germany?
A. Well, I didn't speak German that well and I spoke English, you
know, and that's the main reason.

1 Q. Okay. Now, after some period in New York, did you finally
come out to the west coast, to Los Angeles?

2 A. Yes, I did.

3 23 RT 2401-2406.

4 Defense counsel's examination then moved on to Petitioner's introduction
5 to Avo and Viivi Piirisild and other such matters directly related to the criminal
6 charges. *Id.* at 2406 *et seq.* The quoted testimony occurred at the very beginning
7 of Petitioner's lengthy direct examination.

8 Thus, Petitioner's initial testimony simply established that he was born and
9 raised in Estonia, whereupon counsel moved on to his experience at age 18 when
10 he was drafted into the Soviet Army and later fled to West Germany. *Id.* at 2401,
11 lines 3-9. Notably, the other significant piece of "background" evidence,
12 Petitioner's article "Escaping Through the Fog" (8 RT 1039, Trial Exh. 41), also
13 focused entirely on Petitioner's experiences in the Soviet military and his escape
14 therefrom with Sakarias, albeit with more detail.

15 Petitioner's counsel made virtually no reference to the article, which the
16 prosecutor introduced and used aggressively against Petitioner. During cross-
17 examination, the prosecutor repeatedly suggested Petitioner was nothing more
18 than a "deserter" from the Soviet Army, 24 RT 2480-2482, 2489-2496; in the
19 closing arguments, the prosecutor continued to refer to him as a "deserter," and
20 called his flight from the Soviet Army a "desertion." 28 RT 2816, 2821-2825,
21 2838; 29 RT 2909, 2911 (guilt phase); 31 RT 3064 (penalty phase).

22 The only other testimony relating to Petitioner's background came out on
23 the second day of his direct examination, when defense counsel (in an apparent
24 effort to explain Petitioner's "false" confession) elicited the following:

25 Q. Had you ever had dealings with police officers before?

26 A. Yes.

27 Q. From what agency?

28 A. From KGB.

1 Q. From the KGB?

2 A. Yes.

3 Q. And where did you have dealings with the KGB?

4 A. In Estonia.

5 Mr. Ipsen: Objection, your honor. Irrelevant.

6 The Court: Overruled.

7 Mr. Ipsen: But interesting.

8 Q. By Mr. Gladstein: On how many occasions did you have
9 dealings with the KGB in Estonia?

10 A. How many times?

11 Q. Yes.

12 A. Twice.

13 Q. And were you in fact detained or arrested by KGB agents?

14 A. Yes, I was arrested twice.

15 Q. For what?

16 A. For suspicious [sic] of some demonstrations and stuff like that.

17 Q. What kind of demonstrations were you involved in?

18 A. Anti Soviet.

19 Q. How old were you at the time?

20 A. I was about 16.

21 Q. A student?

22 A. Yes.

23 Q. On each of those two occasions when you were detained by the
24 KGB, were you read any rights such as appear on this form that
were read to you by Agent Tripi?

25 A. No.

26 Q. Did the KGB agents ask you if you wanted to talk to an
attorney?

27 A. No, they didn't ask.

28 Q. Did they ask you questions?

1 A. Yeah, they asked questions.

2 Q. Did you answer the questions?

3 A. Well, I did.

4 Q. Why?

5 A. Because I got beat up several times and broke my arm.

6 Q. So, when the KGB asked questions you simply had to answer
7 them?

8 A. Yeah.

9 Q. Or suffer a beating at their hands?

10 A. Yeah.

11 Q. On each of those two occasions that you were detained by the
12 KGB, how long were you held in custody?

13 A. About four – five days each time.

14 Q. And during any of that time on either of those occasions, did
15 you talk to an attorney?

16 A. No I never.

17 Q. Brought to a courtroom?

18 A. No, I was held in the basement.

19 Q. Of a KGB police station?

20 A. Yes.

21 24 RT 2464-66. The direct examination then moved on to Petitioner's arrest and
22 detention by the Border Patrol.

23 The prosecutor focused his closing argument almost exclusively on the
24 nature of Mrs. Piirisild's murder. He emphasized the lack of evidence on which
25 the jury could rely to find "sympathy and pity" for Petitioner. 30 RT 3060. He
26 also stressed the lack of evidence regarding any domination of Petitioner by Mr.
27 Sakarias. 30 RT 3060-62. He further called the jurors' attention to the absence of
28 evidence showing that Petitioner had any mental disorders or emotional
disturbance, 30 RT 3062-63, and also noted that when Petitioner was arrested, he

1 was armed and “ready to kill.” 30 RT at 3065. He also reminded the jury of
 2 Petitioner’s letter to Sakarias: “If I get arrested I’ll go down with weapon in hand.”
 3 30 RT 3065.

4 In his penalty phase argument, defense counsel briefly commented on
 5 Petitioner’s youth (age 20 when the offense occurred) and his lack of prior felony
 6 convictions. 30 RT 3077-78, 3080. Defense counsel, like the prosecutor, noted
 7 the lack of evidence of any psychological issues, and advised the jury to simply
 8 disregard the subject as a potential mitigating factor. 30 RT 3079. Concerning
 9 Petitioner’s upbringing, defense counsel told the jury:

10 You know from the evidence Mr. Waidla was born in Estonia, raised
 11 in a socialist system that’s totally foreign to us, a system that is
 12 dominated by the dictatorial rule of the Soviet Union that may be
 coming apart at the seams now, but was not in 1986.

13 Mr. Waidla was not raised with the same freedoms and rights which
 14 we all take for granted. As a high school student, he demonstrated
 15 against that regime. You can take that into consideration. You know
 from the testimony and the evidence that he was raised by a great
 uncle, someone I assume to be a grandparent’s age, not by a mother
 and a father.

16 We don’t know why, and you can’t speculate why, but you might
 17 consider what his life would have been like, whether or not he would
 have ended up near this courtroom had he been raised in a household
 with a mother and a father.

18 *Id.* at 3082.

19 Then, after the court recited the penalty phase instructions, the case went to
 20 the jury to determine the appropriate sentence. The guilt phase of the trial had
 21 lasted eight weeks. The entire penalty phase, consisting of counsels’ arguments
 22 and the final jury instructions, began and ended in one afternoon. 31 RT 3053-
 23 3101.

24 The jury’s penalty deliberations are described in the California Supreme
 25 Court’s opinion on the direct appeal:

26 The jury deliberated on the question of penalty over nine court days.
 27 On the third day, it sent a note to the superior court requesting
 28 “instructions regarding a jury who cannot come to a unanimous
 decision in the penalty phase”; [after the court and counsel conferred,

1 the jury was told] that “there are no instructions regarding a jury who
 2 cannot come to a unanimous decision in the penalty phase.” On
 3 the fifth day, the jury sent a note to the superior court stating that it
 4 was deadlocked and was unable to reach a unanimous verdict;
 5 summoning the jury into open court, the superior court polled each
 6 juror as to whether he believed that there was a reasonable probability
 7 that the jury would reach a unanimous verdict if it continued to
 8 deliberate, received one “yes,” 10 “noes,” and one “not sure,” and
 9 then asked the jury to resume its deliberations, commenting that the
 10 “issue which you are to decide is a very difficult issue because it
 11 involves intense moral reflection.” On the ninth day, the jury returned
 12 the verdict of death.

13 *Id.* at 745; see 31 RT 3105-A, 3099-3128.

14 The trial judge later denied an automatic motion for reduction of the
 15 sentence to life without parole, based on the aggravating circumstances of the
 16 Piirisild murder, and the one additional fact that Petitioner possessed a gun when
 17 arrested by the Border Patrol. 32 RT 3146-3148. The judge found those
 18 aggravating circumstances substantially outweighed the evidence of mitigation in
 19 the form of Petitioner’s youth and lack of priors, as well as his “hard life under
 20 Soviet domination of Estonia and [his] arduous escape from the Soviet Army to
 21 freedom in the West.” 32 RT at 3148.

22 Petitioner’s appellate counsel sought to raise a penalty phase IAC claim in
 23 the direct appeal but the California Supreme Court declined to address it, saying
 24 “it must be raised, if at all, by petition for writ of habeas corpus rather than on
 25 appeal.” *Waidla, supra*, at 744. Accordingly, Petitioner asserted the claim in his
 26 state habeas proceedings, where it was summarily denied on both the merits and
 27 procedural grounds. *In re Waidla*, S102401 (2005).

28 In the instant federal habeas case, Petitioner has divided his penalty phase
 IAC claim (Claim 8) into several sub-claims, as he did with his guilt phase IAC
 claim (Claim 3):

- 1 (1) Sub-claim 8(b):⁹ Failure to investigate and present evidence of
Petitioner's good behavior in custody (FAP ¶¶ 287-295);
- 2 (2) Sub-claim 8(c): Failure to investigate and present evidence of
3 Petitioner's pro-social behavior (FAP ¶¶ 296-310);
- 4 (3) Sub-claim 8(d): Failure to investigate and present evidence of
5 adversities encountered by Petitioner during his upbringing (FAP
6 ¶¶ 311-320);
- 7 (4) Sub-claim 8(e): Failure to investigate and present evidence of
8 brutal treatment of Petitioner in the Soviet Army (FAP ¶¶ 321-
9 326);
- 10 (5) Sub-claim 8(f): Failure to introduce portions of a statement by
11 Mr. Sakarias that allegedly exculpated Petitioner (FAP ¶¶ 327-
12 335);
13 and
- 14 (6) Sub-claim 8(g): Cumulative effect of counsel's errors during the
15 guilt phase of trial.

16 In contrast to the guilt phase IAC sub-claims raised in Claim 3, each of
17 which involve relatively distinct legal and factual issues, the penalty phase IAC
18 sub-claims in Claim 8 mostly share the common denominator of "failure to
19 investigate and present" certain evidence. The sole exception, sub-claim 8(g),
20 asserting cumulative impact of guilt phase error on the penalty phase, will be
21 addressed separately. Therefore, because the factual and legal analysis will
22 naturally overlap, and prejudice (if any) must be weighed cumulatively, the sub-
23 claims will be discussed both individually and as a group. Also, the State argues
24 that at least sub-claims 8(f) and (g) are procedurally defaulted on timeliness
25 grounds, which will be addressed herein to the extent necessary. (See
26 Respondent's Brief, Dkt. No. 135 at 2-3.)

27 **5.6.2 Applicable Law**

28 A successful claim of IAC requires a showing that (1) counsel's conduct
fell below an objective standard of reasonableness, and (2) the client was

⁹ There is no sub-claim designated "8(a)" as that section in the First Amended Petition is devoted to introductory matters. The State's unilateral re-designation of the sub-claims in its filings, such that "8(b)" becomes "8A" and so on, is needlessly confusing.

1 prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In
2 determining the first prong—deficient performance—a court “must indulge a
3 strong presumption that counsel’s conduct falls within the wide range of
4 reasonable professional assistance; that is, the defendant must overcome the
5 presumption that, under the circumstances, the challenged action might be
6 considered sound trial strategy.” *Id.* at 689 (citations omitted). The reviewing
7 court must affirmatively entertain the range of possible reasons counsel may have
8 had for proceeding as he did. *Pinholster*, 131 S.Ct. at 1407.

9 Proof of the second prong—prejudice—requires a showing of “a reasonable
10 probability that, but for counsel’s unprofessional errors, the result of the
11 proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A
12 reasonable probability is a probability sufficient to undermine confidence in the
13 outcome.” *Id.* at 694. In the context of a penalty phase IAC claim in a capital
14 case, the Supreme Court has described the standard for *Strickland* prejudice as “a
15 reasonable probability that at least one juror would have struck a different
16 balance.” *Wiggins v. Smith*, 539 U.S. 510, 537 (2003) (based on the jury
17 unanimity requirement for the penalty verdict).

18 On federal habeas review of an IAC claim, “[a] state court must be granted
19 a deference and latitude that are not in operation when the case involves review
20 under the *Strickland* standard itself.” *Richter*, 562 U.S. at 101. “The standards
21 created by *Strickland* and § 2254(d) are both highly deferential, and when the two
22 apply in tandem, review is doubly so.” *Richter*, 562 U.S. at 105.

23 In a death penalty case, effective representation fundamentally requires that
24 counsel undertake a reasonable investigation of mitigation evidence for use in the
25 penalty phase. *Wiggins*, 539 U.S. at 522-523. However, in some cases, the issue
26 is “not whether counsel should have presented a mitigation case,” but whether
27 “the investigation supporting counsel’s decision not to introduce mitigating
28 evidence was itself reasonable.” *Id.* at 511. *Strickland* itself was a death penalty

1 habeas case in which the Supreme Court addressed a claim that counsel's failure
 2 to investigate and present mitigation evidence constituted deficient performance.
 3 *Strickland*, 466 U.S. at 697. In that context, the Court stated:

4 [S]trategic choices made after a thorough investigation of
 5 law and fact relevant to plausible options are virtually
 6 unchallengeable; and strategic choices made after a less
 7 than complete investigation are reasonably precise to the
 8 extent that reasonable professional judgments support the
 9 limitations on investigation. In other words, counsel has
 10 a duty to make reasonable investigation or to make a
 11 reasonable decision that a particular investigation is
 12 unnecessary.

13 *Id.* at 690-91. Stated another way, a decision to forgo mitigation evidence (or
 14 entire categories thereof) may be excused *if* that decision was based on a
 15 reasonable determination not to investigate or consider it further. *See id.*

16 The mitigation investigation "should comprise efforts to discover all
 17 reasonably available mitigating evidence and evidence to rebut any aggravating
 18 evidence that may be introduced by the prosecutor." Guideline 11.4.1(c), ABA
 19 Guidelines for the Appointment and Performance of Counsel in Death Penalty
 20 Cases 1989 ("Guidelines"). "Prevailing norms of practice as reflected in
 21 American Bar Association standards ... are guides to determining what is
 22 reasonable." *Strickland*, 466 U.S. at 688-689; *see also Rompilla v. Beard*, 545
 23 U.S. 374, 375 (2005). The standards and guidelines cited herein were in effect at
 24 the time of Petitioner's trial. ABA Guidelines for Appointment and Performance
 25 of Counsel in Death Penalty Cases (1989), and ABA Standards for Criminal
 26 Justice (2d Ed. 1982). However, the ABA standards provide guidance only and
 27 should not be viewed as a litmus test for determining reasonableness. *Bobby v.*
 28 *Van Hook*, 558 U.S. 4, 8-9 (2009) (per curiam). In *Van Hook*, the Supreme Court

disapproved of the Sixth Circuit’s reliance on the ABA standards as “inexorable demands” with which defense counsel “must fully comply.” *Id.* at 8. (To make matters worse, the Sixth Circuit had applied standards that were published years after Van Hook’s trial. *Id.*)

The duty to conduct an independent penalty phase investigation arises before the start of trial. *Porter v. McCollum*, 558 U.S. 30, 38 (2009) (*per curiam*) (regarding trial conducted in 1988) (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). “It is unquestioned that under the prevailing professional norms at the time of [petitioner’s] trial, counsel had an ‘obligation to conduct a thorough investigation of the defendant’s background.’” *Id.*

Though not clearly established federal law for the purposes of AEDPA, Court of Appeals decisions can provide guidance in determining what level of representation is required. “[P]enalty phase investigations in capital cases should include inquiries into social background, including investigation of any family abuse, mental impairment, physical health history, and substance abuse history” and “should include examination of mental and physical health records, school records, and criminal records.” *Correll v. Ryan*, 539 F.3d 938, 943 (9th Cir. 2008) (quoting *Summerlin v. Schriro*, 427 F.3d 623, 630 (9th Cir. 2005) (*en banc*)). “[E]vidence about the defendant’s background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background ... may be less culpable.” *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989).

5.6.3 Discussion

Ineffective Assistance of Counsel—Introduction

The trial court accurately described the *sources* of Petitioner’s mitigation evidence: “[There was] evidence about the defendant’s background in the first phase of this trial, *both by reason of the article that he wrote and secondly by other testimony which he gave*” 31 RT 3044 (emphasis added). This Court

1 agrees—that was indeed the entirety of the evidence at Petitioner’s trial that might
2 be labeled as “mitigation.” This Court, however, cannot agree with the
3 characterization of it as a “tremendous amount of evidence.” No amount of
4 judicial deference can transform that description into an accurate—or
5 reasonable—statement of fact. This mitigation evidence was extremely brief, and
6 was essentially devoid of any facts other than those describing Petitioner’s two
7 arrests by the KGB as a teenager, and his brief conscription into the Soviet Army
8 and defection therefrom. Nothing else was offered: nothing about his family,
9 childhood, education, accomplishments, history of violence—or any other such
10 evidence —was presented to the jury in either phase of the trial. The jury did not
11 hear testimony from a single defense expert, relative, or friend of Petitioner. It is
12 also worth noting that Petitioner’s *entire* trial testimony lasted four days, covering
13 more than 300 pages of transcript (RT 2401-2722), and the combined testimony of
14 all the witnesses during the eight-week trial exceeds 2,000 pages. In light of that,
15 the relatively small amount of background testimony elicited from Petitioner,
16 devoted entirely to very limited aspects of his past, clearly does not amount to “a
17 tremendous amount of evidence.” Indeed, it is hardly any evidence at all.

18 This Court is aware, however, that the standard for effective assistance of
19 counsel at the penalty phase does not *require* the presentation of “a tremendous
20 amount of [mitigation] evidence” in every case. As discussed herein, there may
21 well be sound tactical reasons that might prompt effective counsel to avoid or
22 forgo certain types of mitigation evidence, or perhaps forgo any mitigation
23 evidence at all. For the same reason, it also cannot be assumed that the California
24 Supreme Court, in denying habeas relief on this claim, necessarily agreed with the
25 trial court’s assessment of the quantum of mitigation evidence. Nonetheless, it
26 remains apparent that (1) the amount of mitigation evidence was extremely slight,
27 and (2) despite the scarcity of such evidence, it took the jury nine court days—
28 with obvious difficulties along the way—to finally agree upon a verdict of death.

1 In any event, the California Supreme Court’s denial of the penalty phase
 2 IAC claim on the merits required that Court to find that counsel’s penalty phase
 3 performance was either (1) not deficient, or (2) deficient, but not prejudicial. The
 4 question in this federal habeas proceeding, then, is whether either of those
 5 determinations could have been reasonably made, based on the record before the
 6 state court.

7 A determination of whether a mitigation presentation was constitutionally
 8 inadequate, and whether prejudice resulted, is necessarily fact-specific and not
 9 susceptible to any bright-line standards. “A standard of reasonableness applied as
 10 if one stood in counsel’s shoes spawns few hard-edged rules” *Rompilla*, 545
 11 U.S. at 381. Nonetheless, a review of U.S. Supreme Court cases analyzing
 12 penalty phase IAC claims is helpful and indeed necessary for such a
 13 determination.

14 *Ineffective Assistance of Counsel—Supreme Court Cases*
 15 *Granting Relief*

16 In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court applied
 17 AEDPA in reviewing an IAC claim alleging counsel’s failure to adequately
 18 investigate and present mitigating evidence at the penalty phase of a 1986 murder
 19 trial. The evidence offered at the sentencing hearing consisted of the testimony of
 20 the defendant’s mother and two neighbors, and an excerpt from a tape-recorded
 21 statement by a psychiatrist. The mother and neighbors testified only briefly,
 22 indicating that the defendant was a “nice boy” who was not inclined to violence,
 23 while the psychiatrist’s statement did little more than relate a story that, in the
 24 course of one of the defendant’s numerous prior felonies, he had removed the
 25 bullets from his gun so as not to injure anyone. *Id.* at 369. In addition, the
 26 defendant’s counsel elicited statements from prosecution witnesses that his
 27 cooperation helped them solve the charged murder, as well as identify him as the
 28 perpetrator of other unrelated offenses. In closing, defense counsel asked the jury

1 to give weight to the fact that defendant had “turned himself in, not on one crime
2 but on four ... that the [police otherwise] would not have solved.” *Id.* (brackets in
3 original). However, defense counsel’s closing was otherwise rambling and not
4 helpful. *Id.*

5 The Supreme Court, noting that a capital defendant has a constitutionally-
6 protected right to present mitigating evidence, held that trial counsel’s
7 presentation was inadequate. The Court observed that trial counsel failed to
8 prepare for sentencing until a week beforehand, and failed to discover extensive
9 records describing the defendant’s nightmarish childhood, evidence that he was
10 “borderline mentally retarded” and did not advance beyond sixth grade, prison
11 records of his commendations for helping to crack a prison drug ring and for
12 returning a guard’s missing wallet, and testimony of prison officials who would
13 have described him as among the inmates least likely to act violently and most
14 likely to adjust well to a regimented environment. *Id.* at 395-396. The Court
15 found that, while not all of the additional evidence was entirely favorable to
16 defendant, trial counsel’s failure to uncover and present the favorable evidence
17 was not justified by a “tactical decision,” but rather a simple failure to conduct a
18 thorough investigation of the defendant’s background. *Id.* at 396. The Court
19 further found that the defendant was prejudiced by trial counsel’s deficient
20 performance. *Id.* at 396-397. The Court adopted the view expressed by the trial
21 judge who granted post-trial relief to the defendant, finding that “the entire post-
22 conviction record, viewed as a whole and cumulative of mitigation evidence
23 presented originally, raised ‘a reasonable probability that the result of the
24 sentencing proceeding would have been different’ if competent counsel had
25 presented and explained the significance of all the available evidence.” *Id.* at 399
26 (quoting *Strickland*, 466 U.S. at 694).

27 Notably, the majority in *Williams* found prejudice despite a *substantial*
28 amount of evidence in aggravation, including several instances of prior

1 misconduct by the defendant, such as his two attacks upon elderly victims
2 (including a woman he beat into a coma), stabbing a man during another robbery,
3 setting fire to a residence and a city jail (in separate events), plus *more* evidence of
4 extremely bad behavior and violent tendencies. Noting this evidence, Chief
5 Justice Rehnquist drily commented in his dissent: “It was not unreasonable,
6 therefore, for the Virginia Supreme Court to decide that a jury would not have
7 been swayed by evidence demonstrating that Petitioner had a terrible childhood
8 and a low IQ.” *Id.* at 419.

9 The Supreme Court more recently cautioned about the application of the
10 prejudice analysis in *Williams, supra*, and *Rompilla, infra*, because in those cases,
11 due to errors of law by the lower courts, the prejudice issue was reviewed *de novo*,
12 without applying AEDPA’s deferential standards. *Pinholster*, 563 U.S. at 203.
13 Keeping that limitation in mind, the analysis of prejudice in each case remains
14 informative.

15 The Supreme Court again addressed a claim of penalty phase IAC in
16 *Wiggins v. Smith*, 539 U.S. 510 (2003), which involved a 1989 murder trial in
17 which the two defense attorneys introduced virtually no mitigation evidence. The
18 attorneys had moved to bifurcate the penalty phase to first address their argument
19 that the defendant was not a “principal in the first degree” and then, if necessary,
20 to present mitigation evidence at a later date. *Id.* at 515. On the date of the
21 hearing, however, the trial court denied the motion to bifurcate, and the matter
22 proceeded directly to the presentation of aggravating and mitigating evidence.
23 Defense counsel, not fully prepared, argued to the jury that defendant was a
24 productive, hard-working citizen, and had reached the age of 27 with no prior
25 convictions. Beyond that, however, counsel failed to offer any evidence of the
26 defendant’s life history or family background. The jury returned a sentence of
27 death. *Id.* at 515-516. The trial judge, at a post-conviction hearing, “observed
28 from the bench that he could not remember a capital case in which counsel had

1 not compiled a social history of the defendant, explaining, ‘not to do a social
2 history, at least to see what you have got, to me is absolute error. I just—I would
3 be flabbergasted if the Court of Appeals said anything else.’” However, the
4 defendant’s petition for post-conviction relief, which was heard by a different
5 judge, was denied. *Id.* at 517; *Wiggins v. State*, 352 Md. 580, 584 (1999). The
6 Maryland Court of Appeals (Maryland’s highest court) affirmed, finding among
7 other things that, while the defense attorneys were aware of the client’s difficult
8 background, they “knew that at least one uncontested mitigating factor—Wiggins’
9 lack of prior convictions—would be before the jury” The Maryland high
10 court found that counsel “made a reasoned choice to proceed with what they
11 thought was their best defense.” *Id.* at 518 (quoting *Wiggins v. State, supra*, at
12 611-612).

13 The defendant later sought federal habeas relief, eventually winding up
14 before the U.S. Supreme Court, which held that trial counsel’s performance was
15 prejudicially ineffective. The Court recognized the high level of deference
16 accorded to the judgments of trial counsel when they are based on a “thorough
17 investigation of the law and the facts,” citing *Strickland*, 466 U.S. at 690
18 (describing such judgments as “virtually unchallengeable”). *Wiggins*, at 521-522.
19 Thus, review for reasonableness in the context of a decision to forgo mitigation
20 evidence is not concerned so much with the question of “whether counsel should
21 have presented a mitigation case” but, rather, “whether the investigation
22 supporting counsel’s decision not to introduce mitigating evidence of [the
23 defendant’s] background *was itself reasonable*.” *Id.* at 522-523 (emphasis in
24 original). The level of deference to be accorded to counsel’s judgment in this
25 regard depends on “the adequacy of the investigations supporting those
26 judgments.” *Id.* at 521.

27 The Court found that sufficient information was available to put defense
28 counsel on notice that further investigation might be fruitful, yet they did not

adequately follow up on those leads, which would have revealed the client’s “bleak life history,” including a broken home, and extensive physical and sexual abuse. *Id.* at 516-517. Applying the test articulated above (“whether the investigation ... was itself reasonable”), the Court found that counsel’s failure to expand their mitigation investigation amounted to deficient performance, and was prejudicial enough to warrant relief. *Id.* at 534-535.

The *Wiggins* Court placed significant emphasis on trial counsels’ failure to obtain a “social history report” covering the client’s background. *Id.* at 524. In that regard, the Court stated:

Counsel’s conduct...fell short of the standards for capital defense work articulated by the American Bar Association (ABA) – standards to which we long have referred as “guides to determining what is reasonable.” [*Strickland* at 688; *Williams v. Taylor*, 529 U.S. at 396]. The ABA Guidelines provide that investigations into mitigating evidence “should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.” ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner’s background after having acquired only rudimentary knowledge of his history from a narrow set of sources. Cf. *id.*, 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences (emphasis added)).

Wiggins at 524-525 (emphasis added in original).

In finding prejudice, the Court noted Maryland’s law requiring juror unanimity, and stated:

Wiggins’ sentencing jury heard only one significant mitigating factor – that *Wiggins* had no prior convictions. Had the jury been able to place petitioner’s excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.

Moreover, in contrast to the petitioner in *Williams v. Taylor* [*supra*], *Wiggins* does not have a record of violent conduct that could have been introduced by the State to offset this powerful mitigating narrative. As the Federal District Court found, the mitigating evidence in this case is stronger, and the State’s evidence in support of

1 the death penalty far weaker, than in *Williams*, where we found
2 prejudice as the result of counsel's failure to investigate and present
3 mitigating evidence. We thus conclude that the available mitigating
evidence, taken as a whole, "might well have influenced the jury's
appraisal" of Wiggins' moral culpability.

4 *Wiggins*, 539 U.S. at 537-538 (citations omitted).

5 In *Rompilla*, the defendant was found guilty and sentenced to death for
6 killing a barkeeper by stabbing him several times and then setting fire to his body.
7 The Supreme Court found prejudicial ineffectiveness based on the failure of the
8 two defense lawyers to examine readily available records regarding their client's
9 prior criminal offenses, and their unreasonable reliance on feedback from their
10 client and members of his family, as well as three mental health experts, all
11 indicating that mitigation evidence was not available. *Rompilla*, 545 U.S. at 377-
12 380. "[T]he overwhelming response from the family was that they didn't really
13 feel as though they knew him all that well since he had spent the majority of his
14 adult years and some of his childhood years in custody." *Id.* at 382. The Court
15 based its finding of IAC primarily on the lawyers' failure to examine the prior
16 offense records, especially given that they were clearly on notice those materials
17 would be a centerpiece of the aggravation case, and the records were easily
18 obtainable. Failure to obtain and review those records meant the defense team
19 could not develop arguments regarding any "circumstances extenuating" the prior
20 conduct, insure that the prosecutor was not "quoting [the records] selectively," or
21 otherwise "anticipate the details" of the aggravation evidence and thus be
22 prepared to respond. *Id.* at 385-86.

23 The *Rompilla* Court further observed that the records ignored by counsel
24 also contained certain prison files that "would have [revealed] a range of
25 mitigation leads that no other source had opened up." *Id.* at 390. According to
26 the Court, "[t]he accumulated entries would have destroyed the benign conception
27 of Rompilla's upbringing and mental capacity defense counsel had formed from
28 talking with Rompilla himself and some of his family members, and from the

1 reports of the mental health experts.” *Id.* at 391. The prison files included
2 information on Rompilla’s difficult childhood, learning disabilities, alcohol abuse,
3 and indications of schizophrenia. *Id.* at 390-91. The Court found that the failure
4 to discover and present the mitigating evidence was prejudicial, despite the strong
5 evidence in aggravation, which included Rompilla’s lengthy history of violent and
6 brutal crimes, and the notable fact that he committed the charged murder just three
7 months after his release from prison for a virtually identical crime, in which he
8 stabbed another barkeeper to death and set fire to the body. *Id.* at 397 (dissent).

9 Finally, in *Porter v. McCollum*, 558 U.S. 30 (2009), the Supreme Court
10 reviewed a penalty phase IAC claim that had been granted by the federal district
11 court but later reversed by the Eleventh Circuit on the basis that the district court
12 had not shown sufficient deference to the state court’s findings. *Id.* at 38. Porter
13 was convicted of two counts of first-degree murder for the shooting of his former
14 live-in girlfriend, Evelyn Williams, and her new boyfriend. Porter had attempted
15 to visit Williams in the preceding days, but she had refused to see him and called
16 the police. Porter got “quite drunk” one evening and, in the early morning hours,
17 went to Williams’ house where he shot her and her boyfriend to death. *Id.* at 31.

18 Porter represented himself, with standby counsel, during pretrial
19 proceedings and most of the guilt phase of his 1988 trial. *Id.* at 32. However,
20 during the state’s case in chief, Porter pleaded guilty, changed his mind about
21 representing himself, and his standby counsel was appointed to handle the penalty
22 phase. *Id.* At the penalty phase, almost all of the state’s aggravating evidence
23 pertained to the circumstances of the charged murders. *Id.* In mitigation, the
24 defense presented one live witness, Porter’s ex-wife. As later described by the
25 Supreme Court, the defense presentation amounted to “inconsistent testimony
26 about Porter’s behavior when intoxicated and testimony that Porter had a good
27 relationship with his son.” *Id.* Porter’s lawyer (who had one month to prepare
28 after being elevated from “standby” status) told the jury that Porter “has other

1 handicaps that weren't apparent during the trial" and was not "mentally healthy,"
2 but did not present evidence in support of those claims. *Id.*

3 The Supreme Court, in a *per curiam* holding, reversed the Eleventh Circuit
4 and reinstated the district court's grant of relief. Though *Porter* was decided after
5 the California Supreme Court's 2005 denial of Waidla's state habeas claims, so its
6 relevance to the issue of state court reasonableness is limited. But to the extent it
7 discusses and follows *pre*-2005 case law, it remains instructive. As the Supreme
8 Court stated:

9 Petitioner George Porter is a veteran who was both wounded and
10 decorated for his active participation in two major engagements
11 during the Korean War; his combat service unfortunately left him a
12 traumatized, changed man. His commanding officer's moving
description of those two battles was only a fraction of the mitigating
evidence that his counsel failed to discover or present during the
penalty phase of his trial in 1988.

13 *Id.* at 30-31. Other evidence the jury never heard included Porter's difficult
14 childhood, long-term substance abuse issues, and impaired mental health. *Id.* at
15 32.

16 Because the state court denied relief based on lack of prejudice and never
17 reached the question of deficiency, the Supreme Court reviewed the deficiency
18 prong *de novo*. *Id.* at 39. The Court started out: "It is unquestioned that under the
19 prevailing professional norms at the time of Porter's trial [1988], counsel had an
20 obligation to conduct a thorough investigation of the defendant's background."
21 *Id.* (internal quotations omitted). The Court then observed that defense counsel
22 "did not even take the first step of interviewing witnesses or requesting records."
23 *Id.* Despite the advisory attorney's belated appointment as primary counsel, the
24 Court faulted him for having "only one short meeting with Porter regarding the
25 penalty phase," and not obtaining "any of Porter's school, medical, or military
26 service records or interview[ing] any members of his family." *Id.* The Court
27 stated bluntly: "The decision not to investigate did not reflect reasonable
28 professional judgment." *Id.* at 40 (citing *Wiggins, supra*, 539 U.S. at 534 (2003)).

1 Acknowledging that Porter had instructed his counsel not to interview his
 2 ex-wife or son, the Court nonetheless stated: “Porter may have been fatalistic and
 3 uncooperative, but that does not obviate the need for defense counsel to conduct
 4 some sort of investigation.” *Id.* (emphasis in original) (citing *Rompilla, supra*,
 5 545 U.S. at 381-82 (2005)). The Court observed:

6 The judge and jury at Porter’s original sentencing heard almost
 7 nothing that would humanize Porter or allow them to accurately gauge
 8 his moral culpability. They learned about Porter’s turbulent
 relationship with Williams, his crimes [*i.e.*, the charged murders], and
 almost nothing else.

9 *Porter, supra*, at 454. Thus, the Court found that defense counsel was deficient,
 10 and that Porter was prejudiced as a result. *Id.*

11 *Ineffective Assistance of Counsel—Supreme Court Cases*
 12 *Denying Relief*

13 *Williams, Wiggins, Rompilla* and *Porter* illustrate circumstances in which a
 14 majority of the Supreme Court has found sufficient grounds to vacate death
 15 sentences based on ineffectiveness by counsel. There are, of course, Supreme
 16 Court cases on the other side of the ledger. Among them is *Strickland* itself.

17 *Strickland*, arose from a ten-day crime spree in which David Leroy
 18 Washington and two accomplices “planned and committed three groups of crimes,
 19 which included three brutal stabbing murders, torture, kidnaping, severe assaults,
 20 attempted murders, attempted extortion, and theft.” *Strickland*, 466 U.S. at 671-
 21 72. After his accomplices were arrested, Mr. Washington turned himself in and
 22 (against his attorney’s advice) pleaded guilty to all three capital murder charges.
 23 During the plea colloquy, Washington told the judge he had no significant prior
 24 criminal record, and committed the offenses while under extreme stress caused by
 25 his inability to provide for his family. *Id.* at 672. The judge responded that, while
 26 he could not yet indicate what sentence he might impose, he had “a great deal of
 27 respect for people who are willing to step forward and admit their responsibility.”
 28 *Id.*

1 In preparation for sentencing, the attorney did not interview family
2 members or seek out character witnesses and, seeing no outward indications of
3 psychological disorders, did not request a psychiatric examination of his client.

4 *Id.* at 673. However, there were articulable reasons for this approach:

5 [Counsel's decision] reflected the judgment that it was advisable to
6 rely on the plea colloquy for evidence about respondent's background
7 and about his claim of emotional stress: the plea colloquy
8 communicated sufficient information about these subjects, and by
9 forgoing the opportunity to present new evidence on these subjects,
10 counsel prevented the State from cross-examining respondent on his
11 claim and from putting on psychiatric evidence of its own.

12 Counsel also excluded from the sentencing hearing other evidence he
13 thought was potentially damaging. He successfully moved to exclude
14 respondent's "rap sheet." Because he judged that a presentence report
15 might prove more detrimental than helpful, as it would have included
16 respondent's criminal history and thereby would have undermined the
17 claim of no significant history of criminal activity, he did not request
18 that one be prepared.

19 *Id.* at 673 (citations to record omitted).

20 In keeping with this strategy, the scope of evidence and argument at the
21 sentencing hearing did not extend much beyond Mr. Washington's statements to
22 the judge. The prosecution's evidence of aggravation was mostly limited to
23 testimony describing the details of the crimes to which Washington had pleaded
24 guilty. *Id.* at 673-674. Defense counsel thus succeeded in avoiding the
25 introduction of damaging evidence regarding the details of his client's prior
26 criminal history (which was, in truth, substantially worse than Washington had
27 indicated to the judge) and also potentially damning reports by the state's
28 psychiatric experts. Ultimately, however, the strategy did not work well
enough—the judge sentenced Washington to death. Among the several
aggravating factors recited by the judge were the number and severity of the
charged crimes, the defendant's role as the main planner, and the finding that he
"knowingly subjected numerous persons to a grave risk of death by deliberately
stabbing and shooting the murder victim's sisters-in-law, who sustained severe—
in one case, ultimately fatal—injuries." *Id.* at 674.

1 The case eventually reached the Supreme Court via Washington's federal
 2 habeas corpus petition, in which one of his numerous claims was that his counsel
 3 had been prejudicially deficient in connection with his sentencing.

4 The familiar legal standards enunciated in *Strickland* have already been
 5 described in this Order and need not be repeated here. With respect to the facts
 6 unique to the case before it, the Supreme Court ultimately found:

7 Application of the governing principles is not difficult in this case.
 8 The facts as described above make clear that the conduct of
 9 respondent's counsel at and before respondent's sentencing
 10 proceeding cannot be found unreasonable. They also make clear that,
 even assuming the challenged conduct of counsel was unreasonable,
 respondent suffered insufficient prejudice to warrant setting aside his
 death sentence.

11 *Id.* at 698-99. In essence, the Court recognized that while the defense attorney's
 12 efforts might at first appear to have been inadequate, closer analysis reveals his
 13 approach was in fact based on reasonable (albeit unsuccessful) strategy choices.
 14 Moreover, the evidence of mitigation which *could* have been presented, including
 15 testimony of family, friends, and psychiatric experts, was not so overwhelming as
 16 to outweigh the aggravating factors, and would have opened the door to
 17 potentially devastating rebuttal evidence from the prosecution. Finally, the
 18 horrific circumstances of Washington's ten-day crime spree, including evidence
 19 describing the *three* cold-blooded murders he committed, were clearly viewed by
 20 the Supreme Court as an almost insurmountable barrier to any showing of
 21 prejudice. *Id.* at 699 ("The aggravating circumstances were utterly
 22 overwhelming."). The Court therefore found that trial counsel's strategy choices
 23 were "well within the range of professionally reasonable judgments," and were
 24 not prejudicial in any event. *Id.* at 699-700.

25 In *Burger v. Kemp*, 483 U.S. 776 (1987), another habeas matter arising
 26 from a state court death penalty case, the Supreme Court initially dealt with
 27 substantive guilt phase issues (relating to an alleged burden-shifting jury
 28 instruction and a conflict of interest claim involving defense counsel), both of

1 which were decided adversely to the Petitioner. The remaining claim addressed
2 by the Court was Petitioner's penalty phase IAC claim. *Id.* at 788-796. While
3 *Burger* was decided before the passage of AEDPA, it remains instructive. The
4 case arose from a murder wherein the Petitioner, Christopher Burger, a young
5 Army private stationed in Georgia, along with an accomplice, kidnapped, robbed,
6 and sexually assaulted a taxi driver, and then murdered him by locking him in the
7 trunk of his cab (alive) and pushing it into a pond. After his arrest, Burger
8 confessed and led police to the pond where the victim's body was then recovered.
9 *Id.* at 778-79. Trial commenced in 1978, and Burger was convicted. Burger's
10 lawyer conducted an investigation of possible mitigation evidence and testimony,
11 but ultimately decided not to present any of what he had found. After his death
12 sentence was upheld in the state court, Burger sought federal habeas relief, which
13 was denied by the district court and Sixth Circuit Court of Appeals.

14 According to the Supreme Court, the evidence that could have been
15 presented would have been provided mostly by Burger's mother, who would have
16 described his exceptionally unstable and unhappy childhood. *Id.* at 789. When
17 Burger was a child, his parents divorced, and his mother remarried twice; neither
18 stepfather wanted him in the household. *Id.* at 790. One of them beat Petitioner's
19 mother in his presence and the other, according to his mother, "got him involved
20 with marijuana, and that was the whole point of his life, where the next bag was
21 coming from, or the next bottle of beer. And, this was the kind of influence that
22 he had." *Id.* When his mother moved away to Florida, Burger was placed with
23 his biological father in Indiana, but he ran away and hitchhiked to Florida to rejoin
24 his mother. She returned him to Indiana, where he ended up in a juvenile
25 detention home until being released to his father's custody. *Id.*

26 According to the Supreme Court, Burger's trial counsel conducted a fairly
27 thorough investigation:
28

1 He talked with petitioner's mother on several occasions, an attorney in
 2 Indiana who had befriended petitioner and his mother, and a
 3 psychologist whom [trial counsel] had employed to conduct an
 4 examination of petitioner in preparation for trial. He reviewed
 5 psychologists' reports that were obtained with the help of petitioner's
 6 mother. He also interviewed [petitioner's accomplice] and other men
 7 at [petitioner's Army base]. Based on these interviews, [trial counsel]
 8 made the reasonable decision that his client's interest would not be
 9 served by presenting this type of evidence.

10 *Id.* at 790-91 (citations to record omitted). Counsel declined to put Petitioner on
 11 the witness stand at the sentencing hearing because he seemed to be unremorseful
 12 and, as one of the psychologists had warned, might even appear to brag about the
 13 murder. *Id.* at 791. He chose not to call Petitioner's mother because her
 14 testimony could reveal that Petitioner had a history of minor scrapes with the law,
 15 which might undermine counsel's "no prior criminal record" argument. (As far as
 16 the jury was told, Petitioner had *no* prior criminal record.) *Id.* at 792. As for his
 17 failure to call Petitioner's Indiana lawyer-friend, trial counsel claimed he could
 18 not remember the reason but recalled deciding it would not be helpful. *Id.* As
 19 noted in the *Burger* dissent, the Indiana lawyer was African-American, and trial
 20 counsel was concerned that his testimony about his close friendship with
 21 Petitioner and Petitioner's mother (who were white) might alienate the all-white
 22 jury in Wayne County, Georgia. *Id.* at 814-15 (dissent), 792-93. In that regard, the
 23 Supreme Court noted the absence of evidence, such as a declaration from the
 24 Indiana attorney, as to what mitigating testimony he could have provided if called.
 25 *Id.* at 793. In light of trial counsel's fairly thorough mitigation investigation, and
 26 the tactical reasons he offered for declining to call the witnesses or present the
 27 evidence he found, the Supreme Court upheld the denial of the IAC claim. *Id.* at
 28 796.

29 In *Landrigan, supra*, the Supreme Court focused primarily on a procedural
 30 issue, *i.e.*, a federal habeas Petitioner's entitlement to an evidentiary hearing.
 31 *Landrigan*, 550 U.S. at 474-75. However, the Court also addressed the substance
 32 of the *Landrigan*'s claim that his counsel was ineffective in the penalty phase of

1 his capital trial. Mr. Landrigan was convicted at a 1989 trial for the fatal stabbing
 2 and robbery of Chester Dean Dyer in Phoenix, Arizona. This was not Landrigan's
 3 first offense. Seven years before, Landrigan killed a man and was sentenced to an
 4 Oklahoma prison. While in prison, Landrigan suffered another conviction for
 5 stabbing a fellow inmate. While serving those two sentences, Landrigan escaped
 6 from prison, travelled to Arizona, and befriended Mr. Dyer, whom he later robbed
 7 and stabbed to death. *Id.* at 469. In a lower court opinion, the crime scene was
 8 described as follows:

9 [Dyer] was fully clothed, face down on his bed, with a pool of blood
 10 at his head. An electrical cord hung around his neck. There were
 11 facial lacerations and puncture wounds on the body. A half-eaten
 12 sandwich and a small screwdriver lay beside it. [....] [A]n ace of
 hearts ... was carefully propped on Dyer's back, and the rest of the
 deck was strewn across the bed.

13 *Landrigan v. Stewart*, 272 F.3d 1221, 1223 (9th Cir. 2001). Despite these facts,
 14 the sentencing judge observed that the murder of Mr. Dyer was itself "not out of
 15 the ordinary when considering first degree murders;" however, the judge observed
 16 that Mr. Landrigan "appears to be to be somewhat of an exceptional human being.
 17 It appears [he] has no scruples and no regard for human life.... [He] appears to be
 18 an amoral person." *Id.* at 1224.

19 A three-judge panel of the Ninth Circuit affirmed the district court's denial
 20 of federal habeas relief, but *en banc* review was granted and the three-judge panel
 21 decision was reversed. The Supreme Court thereupon reversed the Ninth Circuit
 22 *en banc* holding, and upheld the decisions of the district court and the initial three-
 23 judge panel against Landrigan.

24 The various court opinions all agree on at least one fact: Mr. Landrigan was
 25 not a cooperative client. The level of his apparent disdain for lawyers and the
 26 legal system was impressive, as was his tenacity in undermining his counsel's
 27 efforts to present mitigation evidence. The Supreme Court opinion quotes a
 28 description given by the three-judge Ninth Circuit panel:

1 In the constellation of refusals to have mitigating evidence presented
 2 ..., this case is surely a bright star. No other case could illuminate the
 3 state of the client's mind and the nature of counsel's dilemma quite as
 brightly as this one. No flashes of insight could be more fulgurous
 than those which this record supplies.

4 *Id.* at 477 (quoting *Landrigan v. Stewart*, 272 F.3d 1221, 1226 (9th Cir. 2001)).

5 The three-judge panel opinion continued:

6 Landrigan was not willing to merely express his opinions to counsel
 7 and, once having given those indications about his feelings, recede
 into comparative silence as counsel went about the business of
 8 conducting the proceeding. Quite the contrary; Landrigan took an
 actively aggressive posture, which ensured that counsel's attempts to
 9 place mitigating factors before the sentencing court would come a
 cropper. Each of counsel's feints in the mitigation direction brought a
 10 statement from Landrigan that painted an even bleaker picture and
 made matters even worse.

11 *Stewart*, 272 F.3d at 1226.

12 The Supreme Court stated it had never before decided a case involving a
 13 client's *active* interference with counsel's efforts to present mitigating evidence.

14 *Id.* at 478. Therefore, said the Court, it was not objectively unreasonable for the
 15 state court to determine that a client who effectively prevented *any* mitigation
 16 presentation could not later claim *Strickland* prejudice based on his trial counsel's
 17 failure to *continue* digging for *more* such evidence. *Id.* "If Landrigan issued such
 18 an instruction [not to offer any mitigating evidence], counsel's failure to
 19 investigate further could not have been prejudicial under *Strickland*." *Id.* at 475.

20 The Court also found that, in light of the "poor quality" of the potentially
 21 mitigating evidence later gathered by habeas counsel, it was reasonable for the
 22 state court to find that Petitioner did not make a colorable showing of prejudice.

23 *Id.* at 480. Also, most of the additional mitigation evidence would have come
 24 from Petitioner's mother and ex-wife (had Petitioner allowed them to testify),
 25 which the Court found was already known to the sentencing judge by way of
 26 counsel's unopposed proffer. Thus it was reasonable to conclude that the
 27 additional testimony would not have made a difference. *Id.* at 480-481. Finally,
 28 the Court found it was not unreasonable for the state court to make a factual

determination that, no matter how much evidence his counsel might have gathered, Landrigan would not have *allowed* him to present it at sentencing. *Id.*

In *Bobby v. Van Hook*, 130 S.Ct. 13 (2009), the Supreme Court addressed a Sixth Circuit decision granting penalty phase IAC relief. Petitioner Van Hook was tried in 1987 in Ohio state court for the robbery, murder, and post-murder mutilation of David Self, a man petitioner had picked up at a bar. Having waived jury, he was convicted and sentenced to death by a three-judge panel. On federal habeas, he asserted that his trial attorneys did not adequately investigate and present mitigating evidence.

The Supreme Court disagreed, finding that the defense attorneys had done a reasonably thorough investigation, and presented a substantial amount of evidence to the sentencing court:

Between Van Hook's indictment and his trial less than three months later, they contacted their lay witnesses early and often: They spoke nine times with his mother (beginning within a week after the indictment), once with both parents together, twice with an aunt who lived with the family and often cared for Van Hook as a child, and three times with a family friend whom Van Hook visited immediately after the crime. As for their expert witnesses, they were in touch with one more than a month before trial, and they met with the other for two hours a week before the trial court reached its verdict. Moreover, after reviewing his military history, they met with a representative of the Veterans Administration seven weeks before trial and attempted to obtain his medical records. And they looked into enlisting a mitigation specialist when the trial was still five weeks away.

Nor was the scope of counsel's investigation unreasonable. [....] The trial court learned, for instance, that Van Hook (whose parents were both "heavy drinkers") started drinking as a toddler, began "barhopping" with his father at age 9, drank and used drugs regularly with his father from age 11 forward, and continued abusing drugs and alcohol into adulthood. The court also heard that Van Hook grew up in a "combat zone": He watched his father beat his mother weekly, saw him hold her at gun- and knife-point, "observed" episodes of "sexual violence" while sleeping in his parents' bedroom, and was beaten himself at least once. It learned that Van Hook, who had "fantasies about

1 killing and war” from an early age, was deeply upset
2 when his drug and alcohol abuse forced him out of the
3 military, and attempted suicide five times (including a
4 month before the murder).

5 *Id.* at 18. Given this relative wealth of investigation and evidence presented to the
6 sentencing panel, the Court found the attorneys’ performance was not deficient.

7 *Id.* at 19.

8 As for prejudice, the *Van Hook* Court found that the new mitigation
9 evidence gathered by habeas counsel was largely duplicative of the facts heard by
10 the sentencing court. *Id.* The prosecution’s evidence in aggravation, in contrast,
11 was substantial. *Id.* at 20. It included evidence that “Van Hook had previously
12 pursued the same strategy—of luring homosexual men into secluded settings to
13 rob them—many times since his teenage years, and he employed it again even
14 after Self’s murder in the weeks before his arrest.” *Id.* Accordingly, the Court
15 found prejudice was lacking. *Id.*

16 Most recently, in *Cullen v. Pinholster*, *supra*, the Supreme Court again
17 reversed a grant of federal habeas relief on a claim of penalty phase IAC. As
18 previously stated, *Pinholster* is significant primarily for its clear statement that
19 post-AEDPA federal habeas review under §2254(d) must, in most cases, be
20 confined to the record that was before the state court. (See discussion *supra*.)
21 According to a majority of the Court, the correct application of that rule to the
22 particular facts of Mr. Pinholster’s case required a denial of relief.

23 The case arose from a 1982 double murder by Scott Lynn Pinholster and
24 two cohorts, whom he had solicited to help rob a local drug dealer. *Id.* at 1394.
25 Along the way, they stopped at the house of a female acquaintance, where
26 Pinholster put his buck knife through her front door and scratched a swastika into
27 her car after she refused to talk to him. The three men, all armed with buck
28 knives, then went to the drug dealer’s house and, finding no one there, broke in
29 and began to ransack it. They came across only a small amount of marijuana
30 before being interrupted by the arrival of two of the drug dealer’s friends, Johnson

1 and Beckett. Pinholster and his accomplices tried to escape through the rear door,
2 but Johnson blocked their path. *Id.* at 1395. Pinholster backed Johnson onto the
3 patio, striking him in the chest and demanding drugs and money. Johnson
4 dropped his wallet on the ground and stopped resisting. Beckett then came around
5 the corner, and Pinholster attacked him, stabbing him repeatedly in the chest. *Id.*
6 Pinholster forced Beckett to the ground, took both men's wallets, and began
7 kicking Beckett in the head. One of Pinholster's cohorts stabbed Johnson.
8 Beckett and Johnson died from their injuries. *Id.* Pinholster later advised his two
9 accomplices to "lay low," and when one of them later turned himself in,
10 Pinholster threatened to kill him if he did not "keep quiet." *Id.*

11 At the 1984 trial, Pinholster testified on his own behalf, claiming he had
12 robbed the drug dealer's house but was not present when the murders occurred.
13 *Id.* He told the jury that he was a "professional robber" but not a murderer. He
14 bragged of committing hundreds of robberies over the previous six years but
15 insisted that he always used a gun, never a knife. The jury convicted Pinholster
16 on both counts of first-degree murder. *Id.*

17 For the penalty phase, the prosecution sought to present evidence in
18 aggravation, including testimony from several witnesses. *Id.* The defense moved
19 to exclude the aggravating evidence on the ground the prosecution had not given
20 proper notice as required under California law. *Id.* The trial court denied the
21 defense motion, and the prosecution introduced testimony of eight witnesses who
22 all testified about Pinholster's extensive history of threatening and violent
23 behavior. *Id.* at 1396. In mitigation, the defense team presented Pinholster's
24 mother, who "gave a detailed account" of his troubled childhood and adolescence,
25 including difficulties at school, getting into fights, and head injuries he suffered as
26 a small child followed by epilepsy as an adult. *Id.* at 1408-1409. Additional
27 mitigating evidence had been elicited during the guilt phase of trial from
28 petitioner's brother, "who testified that Pinholster was 'more or less in institutions

1 all his life,’ suffered from epilepsy, and was ‘more or less’ drunk on the night of
2 the murders.” *Id.* at 1409. Defense counsel did not call a psychiatrist, though
3 they had consulted with one who diagnosed Pinholster with antisocial personality
4 disorder. The jury recommended the death penalty, and Pinholster was sentenced
5 to death. *Id.* at 1396.

6 Pinholster sought habeas relief from the California Supreme Court,
7 claiming among other things that trial counsel had failed to adequately investigate
8 and present mitigating evidence. *Id.* Among the additional evidence presented in
9 support of his claim were school, medical, and legal records, declarations from
10 family members, and a report by a new psychiatrist who diagnosed Pinholster as
11 having bipolar and seizure disorders. *Id.* After the California Supreme Court
12 summarily denied the claim on the merits, Pinholster pursued a federal habeas
13 petition. *Id.* at 1396-1397. The district court granted relief as to the penalty
14 phase, and the Ninth Circuit ultimately affirmed *en banc*. *Id.* at 1397-1398. The
15 Supreme Court reversed.

16 The Court found that the defense attorneys’ conduct reflected a possible
17 strategy to “rely on the fact that they never got [the required] notice and hope the
18 judge would bar the state from putting on their aggravation witnesses.” *Id.* at 1404
19 (quoting Judge Kozinski’s dissent in the Ninth Circuit *en banc* decision, *Pinholster*
20 *v. Ayers*, 590 F.3d 651, 701-702 (9th Cir. 2009)). Furthermore, when their motion
21 to exclude was denied, the defense attorneys were prepared to present Pinholster’s
22 mother in the penalty phase to create sympathy—not for Pinholster, but for his
23 mother:

24 After all, the “family sympathy” mitigation defense was known to the
25 defense bar in California at the time and had been used by other
26 attorneys. Rather than displaying neglect, we presume that
27 [counsel’s] arguments were part of this trial strategy. There is a
28 strong presumption that counsel took certain actions for tactical
reasons rather than through sheer neglect.

1 *Id.*, 131 S.Ct. at 1404 (internal citations and punctuation omitted). The Court also
 2 relied on evidence in the state court record including timesheets which tended to
 3 show defense counsel had spent substantial time preparing for the penalty phase
 4 long before the guilt phase trial began. Indeed, the evidence reflected that one of
 5 Pinholster’s two attorneys worked exclusively on penalty phase matters. *Id.* at
 6 1405.

7 The Court noted that Pinholster himself had created major obstacles for his
 8 counsel:

9 The record also shows that Pinholster’s counsel confronted a
 10 challenging penalty phase with an unsympathetic client, which limited
 11 their feasible mitigation strategies. By the end of the guilt phase, the
 12 jury had observed Pinholster “glor[y]” in “his criminal disposition”
 13 and “hundreds of robberies.” During his cross-examination,
 14 Pinholster laughed or smirked when he told the jury that his
 15 “occupation” was “a crook,” when he was asked whether he had
 16 threatened a potential witness, and when he described thwarting police
 efforts to recover a gun he had once used. He bragged about being a
 “professional robber.” To support his defense, Pinholster claimed that
 he used only guns not knives to commit his crimes. But during cross-
 examination, Pinholster admitted that he had previously been
 convicted of using a knife in a kidnaping. Pinholster also said he was
 a white supremacist and that he frequently carved swastikas into other
 people’s property as “a sideline to robbery.”

17 *Id.* (citations to record omitted).

18 According to the Court, the petitioner in *Pinholster* submitted little
 19 additional evidence on habeas to support his IAC claim. *Id.* at 1406. One item
 20 presented was a declaration from one of his two trial counsel (the other having
 21 died), indicating a lack of recollection about locating witnesses or obtaining
 22 evidence other than the mother’s testimony. The Court characterized the
 23 declaration as “a *post-hoc* nondenial by one of [Pinholster’s] lawyers.” *Id.* In
 24 light of the entire state court record, said the Court, “[t]he California Supreme
 25 Court could have reasonably concluded that Pinholster had failed to rebut the
 26 presumption of competence mandated by *Strickland*—here, that counsel had
 27 adequately performed at the penalty phase of trial.” *Id.*

1 The Court also found that, even assuming trial counsel had performed
 2 deficiently, the state court's determination of insufficient prejudice was
 3 reasonable. *Id.* at 1408. Among other things, the Court pointed to the
 4 "extensive" aggravating evidence presented by the prosecution:

5 [T]he jury watched Pinholster revel in his extensive criminal history.
 6 Then, during the penalty phase, the State presented evidence that
 7 Pinholster had threatened to kill the State's lead witness, assaulted a
 8 man with a straight razor, and kidnapped another person with a knife.
 9 The State showed that Pinholster had a history of violent outbursts,
 10 including striking and threatening a bailiff after a court proceeding at
 11 age 17, breaking his wife's jaw, resisting arrest by faking seizures,
 12 and assaulting and spitting on police officers. The jury also heard
 about Pinholster's involvement in juvenile gangs and his substantial
 disciplinary record in both county and state jails, where he had
 threatened, assaulted, and thrown urine at guards, and fought with
 other inmates. While in jail, Pinholster had been segregated for a time
 due to his propensity for violence and placed on a "special
 disciplinary diet" reserved only for the most disruptive inmates.

13 *Id.* at 1408 (citations to record omitted). Given such evidence in aggravation, and
 14 the sparse showing of mitigating factors to rebut it, Pinholster did not prove the
 15 California Supreme Court's implicit determination of "no prejudice" was
 16 unreasonable. *Id.* at 1408-09.

17 Of particular note is a statement by the *Pinholster* majority that warrants
 18 quoting:

19 The Court of Appeals held that the California Supreme Court had
 20 unreasonably applied *Strickland* because Pinholster's attorneys
 21 "w[ere] far more deficient than ... the attorneys in *Terry Williams*,
 22 *Wiggins* [v. *Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471
 (2003)], and *Rompilla* [v. *Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162
 L.Ed.2d 360 (2005)], where in each case the Supreme Court upheld
 23 the petitioner's ineffective assistance claim." 590 F.3d at 671. The
 court drew from those cases a "constitutional duty to investigate," *id.*,
 24 at 674, and the principle that "[i]t is prima facie ineffective assistance
 for counsel to 'abandon[] their investigation of [the] petitioner's
 25 background after having acquired only rudimentary knowledge of his
 history from a narrow set of sources,'" *ibid.* (quoting *Wiggins v.*
 26 *Smith*, 539 U.S. 510, 524-525, 123 S.Ct. 2527, 156 L.Ed.2d 471
 (2003)). The court explained that it could not "lightly disregard" a
 27 failure to introduce evidence of "excruciating life history" or
 28 "nightmarish childhood." 590 F.3d at 684 (internal quotation marks
 omitted).

1 The Court of Appeals misapplied *Strickland* and overlooked “the
 2 constitutionally protected independence of counsel and ... the wide
 3 latitude counsel must have in making tactical decisions.” 466 U.S., at
 4 689, 104 S.Ct. 2052. Beyond the general requirement of
 5 reasonableness, “specific guidelines are not appropriate.” *Id.*, at 688,
 6 104 S.Ct. 2052. “No particular set of detailed rules for counsel’s
 7 conduct can satisfactorily take account of the variety of circumstances
 8 faced by defense counsel or the range of legitimate decisions” *Id.*,
 9 at 688–689, 104 S.Ct. 2052. *Strickland* itself rejected the notion that
 10 the same investigation will be required in every case. *Id.*, at 691, 104
 11 S.Ct. 2052 (“[C]ounsel has a duty to make reasonable investigations
 12 or to make a reasonable decision that makes particular investigations
 13 unnecessary” (emphasis added)). It is “[r]are” that constitutionally
 14 competent representation will require “any one technique or
 15 approach.” *Richter*, 562 U.S., at —, 131 S.Ct., at 779. The Court of
 16 Appeals erred in attributing strict rules to this Court’s recent case law.

17 *Id.* at 1406-1407 (brackets and parentheticals in original).

18 *Ineffective Assistance of Counsel—Analysis*

19 Though no two cases are identical, the absence of an identical or nearly-
 20 identical U.S. Supreme Court case does not mean that the California Supreme
 21 Court had no “clearly established” federal law on which to guide its
 22 determinations.

23 To show that clearly established federal law dictates a particular outcome, a
 24 petitioner is *not* required to identify a U.S. Supreme Court case with essentially
 25 the same facts as his or her own. The Supreme Court need not have applied a
 26 specific legal rule to an identical or even a closely analogous fact pattern for the
 27 state court’s decision to be considered an unreasonable application of clearly
 28 established federal law. *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). Also,
 “even a *general* standard may be applied in an unreasonable manner.” *Id.*
 (emphasis added). As the Supreme Court stated in *Williams v. Taylor*: “[R]ules of
 law may be sufficiently clear for habeas purposes even when they are expressed in
 terms of a generalized standard rather than as a bright-line rule.” *Williams, supra*,
 529 U.S. at 382. Indeed, as a general proposition, the Supreme Court’s rulings are
intended to be used in evaluating a *myriad* of factual contexts, and thus novel

1 factual situations may nonetheless be dictated by existing Supreme Court
2 precedent. *Id.*.

3 Conversely, a district court must be wary about classifying a particular
4 statement by the Supreme Court as “controlling” authority or a bright-line rule
5 that conclusively determines whether a petition must be granted or denied. This
6 cautiousness is prudent in light of the inevitably unique facts and circumstances
7 that can materially “distinguish” the Supreme Court case from the matter before
8 the district court. As noted, the Court in *Pinholster* found fault with Ninth
9 Circuit’s interpretation of prior Supreme Court cases, saying it erred by attributing
10 strict rules to the Supreme Court’s recent case law. The Court then noted:

11 The Court of Appeals was not necessarily wrong in looking to other
12 precedents of this Court for guidance, but the *Strickland* test of
necessity requires a case-by-case examination of the evidence.

13 *Pinholster*, 563 U.S. at 196, n.17 (citing *Williams*, 529 U.S. at 391) (internal
14 quotation marks omitted). Therefore, proper analysis of a penalty phase IAC
15 claim requires a lower court to remain faithful to the relevant Supreme Court
16 cases, while not attributing strict rules to them.

17 While an analysis of the federal law as determined by the Supreme Court of
18 the United States might not yield any strict rules that would easily guide
19 resolution of this claim, the relevant body of case law provides substantial
20 guidance. Some of the recurring themes and guidelines that are most relevant to
21 the present case are as follows:

22 (1) Determining whether to impose a death sentence is not an ordinary
23 legal determination which turns on the establishment of hard facts. Under
24 California law, the statutory factors are intended to give the jury broad latitude to
25 consider amorphous human factors, to weigh the worth of one’s life against his
26 culpability. *Caro v. Calderon*, 165 F.3d at 1227; *Hendricks v. Calderon*, 70 F.3d
27 at 1044.

1 (2) Effective representation requires that counsel undertake a reasonable
2 investigation of mitigation evidence, including the client's background, for use in
3 the penalty phase. *Williams*, 429 U.S. at 396; *Wiggins*, 539 U.S. at 522-23

4 (3) "Counsel has a duty to either conduct reasonable investigations or
5 make a reasonable decision that makes particular investigations unnecessary."
6 *Strickland*, 466 U.S. at 690-91.

7 (4) Standing alone, a decision not to present a mitigation case at the
8 penalty phase is not conclusive proof of deficient performance. There is no *per se*
9 requirement that such a presentation be made, and indeed this Court must find
10 counsel was not deficient if it can find *any* reasonable basis to forgo such a
11 presentation. *See Strickland*, 466 U.S. at 688-89; *Wiggins*, at 533.

12 (5) The issue is "not whether counsel should have presented a mitigation
13 case," but whether "the investigation supporting counsel's decision not to
14 introduce mitigating evidence was itself reasonable." *Wiggins*, 539 U.S. at 521.

15 (6) "Strategic choices made after thorough investigation of law and facts
16 relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S.
17 at 690.

18 (7) The same amount of investigation is not required in every case.
19 Competent representation will rarely require any one particular technique or
20 approach. *Strickland*, 466 U.S. at 691; *Richter*, 562 U. S. at 106.

21 (8) No particular set of detailed rules for counsel's conduct can
22 satisfactorily take account of the variety of circumstances faced by defense
23 counsel or of the range of legitimate decisions regarding how best to represent a
24 criminal defendant. *Strickland*, 466 U.S. at 691.

25 (9) There may be many good reasons not to present mitigation evidence
26 collected after reasonably thorough investigation, including the poor quality of the
27 evidence found, the danger of alienating the jury, the risk of opening the door to
28 harmful rebuttal, and so forth. *Landrigan*, 550 U.S. at 480.

1 (10) “The duty to investigate does not force defense lawyers to scour the
 2 globe on the off chance something will turn up; reasonably diligent counsel may
 3 draw a line when they have good reason to think further investigation would be a
 4 waste.” *Rompilla*, 545 U.S. at 383 (citing *Wiggins* 539 U.S. at 525, *Strickland*,
 5 466 U.S. at 699, and *Burger*, 483 U.S. at 794).

6 (11) There is a strong presumption that counsel’s actions were the product
 7 of tactical reasons rather than sheer neglect. *Pinholster*, 131 S.Ct. at 1404.
 8 However, the level of “deference owed [to counsel’s] strategic judgments”
 9 depends on “the adequacy of the investigations supporting those judgments.”
 10 *Wiggins*, 539 U.S. at 521 (citing *Strickland*, 466 U.S. at 690-91).

11 (12) A failure to present mitigation evidence may not be justified as a
 12 “tactical decision” when it is caused by a failure to conduct a reasonably thorough
 13 investigation. *Williams*, 429 U.S. at 396.

14 This Court is mindful of these points in evaluating the mitigation record as
 15 a whole, considering the evidence presented at Petitioner’s trial and the evidence
 16 that was properly presented in his state habeas proceedings. As stated in
 17 *Williams*, a district court should look to “the entire [state] post-conviction record,
 18 viewed as a whole and cumulative of mitigation evidence presented originally,
 19 [and determine whether it] raise[s] ‘a reasonable probability that the result of the
 20 sentencing proceeding would have been different’ if competent counsel had
 21 presented and explained the significance of all the available evidence.” *See Id.* at
 22 399.

23 In his post-conviction declaration, Petitioner’s trial counsel addressed the
 24 penalty phase issues as follows:

25 Regarding penalty mitigation evidence, I had asked Mr. Waidla about
 26 his family and background early in the case, and he responded,
 27 although I don’t believe he gave me his families’ names and
 28 addresses. My recollection is that he was somewhat reluctant and
 inconsistent in describing his upbringing, stating at one point that he
 was raised by an uncle, at another that he was raised by his
 grandmother, and at some point indicating that the three of them lived

1 together. He mentioned seeing his mother only intermittently during
 2 his upbringing, but not his father. He expressed considerable
 3 reluctance in having me contact his family or calling them as
 4 witnesses for two reasons: first, that his relatives did not know he was
 5 in trouble and he didn't want them to know; and second, that he was
 6 concerned about possible reprisals against his family by Soviet
 7 government or military authorities if they were to attempt to come to
 8 the United States and testify, because of his desertion from the Soviet
 9 army and escape from East Germany. At a later point Mr. Waidla
 10 acknowledged that his family probably knew about his arrest through
 11 information filtering back through Estonian nationals, although he
 12 remained concerned about reprisals should I attempt to contact them.
 13 We discussed his reluctance on several occasions, and did explore to
 14 some degree alternative presentations through his teachers and others
 15 in the community where he was raised in Estonia, but Mr. Waidla
 16 expressed the same concerns for them, and we otherwise did not
 17 definitively resolve the issue.

18 Mr. Waidla did not give any indication that he wanted to facilitate the
 19 imposition of the death penalty. I did not investigate or develop any
 20 other mitigating evidence apart from that which was presented at the
 21 guilt phase and incorporated into the penalty trial.

22 FAP Exh. 98 at ¶ 5.

23 Analysis—Positive Adjustment to Incarceration

24 Petitioner's first assertion of penalty phase IAC focuses on counsel's failure
 25 to obtain or present any evidence of Petitioner's so-called "positive adjustment to
 26 incarceration." FAP ¶¶ 287-295. As Petitioner notes, by the date of the penalty
 27 phase of his trial, January 2, 1991, he had been in custody for a substantial period
 28 of time, effectively since the date of his arrest on August 28, 1988, or about 28
 months. Evidence was presented in the state court post-conviction proceedings by
 way of Petitioner's own declaration, and documents obtained from a "Counselor
 B. Ham" of the California Department of Corrections ("CDC"). Petitioner's
 declaration states:

23 While waiting for trial in county jail, I was housed from June 11
 24 through August, 1990, in Wayside Maximum security.... Shortly
 25 after arriving..., I applied for a job, which I obtained after undergoing
 26 a blood test and other screening. I began working in the kitchen, and
 27 was assigned after a brief period to maintenance work.... As an
 28 inmate worker with a good behavior record, I was given a light blue
 outfit to distinguish me from the normal dark blue outfits worn by
 most inmates, and was issued a yellow pass which allowed me to
 leave the dormitories to carry out my assigned work. I was known by
 the nickname "Finn", for Finland, as people asked me where I was

1 from because of my halting English, and I explained that Estonia was
2 near Finland, which everyone had heard of.

3 After wake-up call every morning, I went with other inmates in the
4 maintenance crew, to [the supervising deputy's] office for coffee and
5 work assignments.... My jobs typically were to sweep hallways, and
6 to pass out toilet paper in the dormitories. After finishing my work, I
7 went to the library on days it was open to read the Los Angeles Times,
8 or would return to [the deputy's] office until lunch count time. After
9 lunch I swept hallways again.

10 The librarian was a civilian employee ... whom I believe viewed me
11 as a quiet and peaceable inmate. I was one of the few inmates who
12 was allowed to stay in the library and read (rather than just order
13 books and leave) because I sat quietly reading the newspaper and
14 studying English.

15 At night, I sometimes had other work assignments, including
16 sweeping and buffing the officers' dining room....

17 My attorney did not ask me about my conduct in county jail, other
18 than to ask how I was doing when we conferred.

19 FAP Exh. 86 at 5-6.

20 Petitioner's statement appears to be limited to his conduct while housed at
21 the Wayside facility, a period of less than 3 months. However, documents
22 obtained from the California Department of Corrections, dated March 15, 1991
23 (after Petitioner's arrival at San Quentin), reflect that Petitioner "stated that he had
24 no problems programming in the county jail," a claim that Counselor B. Ham
25 "verified by contacting the Los Angeles County Jail, whereby they stated that
26 Petitioner was not a disciplinary problem and programmed well with other
27 inmates." FAP Exh. 88.

28 Petitioner's trial counsel presented none of this evidence, and made no
reference to Petitioner's incarceration history in the penalty phase closing
argument. The nearest he came to the issue was a brief reference to Petitioner's
future incarceration if spared from death:

He can make a contribution. He can do useful things even in prison.
He speaks several languages. He's handy with tools. He has skills in
construction trades, and who better to teach the value of freedom, the
value of remaining crime free to other prisoners than one in his
circumstance, than one who has come so far to end up where he is
now.

1 31 RT 3084. Counsel argued that particular point reasonably well, but offered no
 2 evidence of Petitioner's behavior during his two-plus years in custody to back up
 3 the point. As shown above, trial counsel's post-conviction declaration says
 4 nothing about such potential mitigation evidence. It appears that counsel never
 5 considered it, much less sought it out.

6 Petitioner argues that there was no tactical reason to forgo such evidence,
 7 asserting that "no harm to petitioner could conceivably have arisen from
 8 presenting unimpeachable evidence that petitioner was peaceful, well-behaved
 9 and productive in county jail." FAP ¶ 293. Petitioner also argues that his trial
 10 counsel was aware from discovery materials that Mr. Sakarias, by contrast, was
 11 not so "well-behaved" in pretrial custody, having been found more than once in
 12 possession of home-made weapons, and for other serious violations. FAP Exh.
 13 89. Petitioner urges that such evidence at least put his counsel on notice that he
 14 had no such problems in custody. FAP ¶¶ 290-291.

15 The State does not dispute whether Petitioner displayed positive adjustment
 16 to incarceration, and instead proposes that "[d]efense counsel may have
 17 reasonably believed that presentation of Petitioner's unremarkable behavior while
 18 in custody awaiting trial might leave an impression that nothing better could be
 19 said about Petitioner." Answer at 50. Respondent also questions whether the
 20 jury would have given much weight to such evidence in light of Petitioner's
 21 "incentive to behave while awaiting trial." Respondent's Brief, Dkt. 125 at 75.

22 The prevailing law at the time of Petitioner's 1990 trial clearly established
 23 at least the legal relevance and potential worth of such evidence—the Supreme
 24 Court had plainly stated as much in *Skipper v. South Carolina*, 476 U.S. 1 (1986).
 25 In that case, after Skipper was convicted by a jury of capital murder and rape, his
 26 defense counsel presented penalty phase testimony from Skipper's mother, sister,
 27 grandmother, and former wife, as well as from Skipper himself. But when
 28

1 defense counsel then sought to introduce testimony of two jailers and a “regular
2 visitor” at the jail to the effect that Skipper had “made a good adjustment” during
3 the seven and one-half months he spent there between his arrest and trial, the trial
4 court excluded it as irrelevant. *Id.* at 2-3. Skipper’s death sentence was affirmed
5 by the South Carolina Supreme Court, which found no constitutional error in the
6 exclusion of such evidence. *Id.* at 3-4. The U.S. Supreme Court reversed, holding
7 that the exclusion of the evidence denied Skipper his right to place before the
8 sentencing jury *all* relevant evidence in mitigation, citing *Lockett v. Ohio*, 438
9 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). According to
10 *Lockett* and *Eddings*, “the Eighth and Fourteenth Amendments require that the
11 sentencer ... not be precluded from considering, *as a mitigating factor*, any aspect
12 of a defendant’s character or record and any of the circumstances of the offense
13 that the defendant proffers as a basis for a sentence less than death.” *Lockett*, at
14 604 (emphasis in original); *Eddings*, at 110 (quoting same). The Court rejected the
15 state’s argument that exclusion of the evidence was proper because it did not
16 prevent Skipper from introducing evidence of *past* good conduct in jail, but only
17 foreclosed introduction of “irrelevant” evidence of his *future* adaptability to prison
18 life. The Court found that *both* types of evidence are relevant to mitigation, and
19 also found the exclusion of the future adaptability evidence was prejudicial. *Id.* at
20 4-8. The Court said “it can hardly be disputed” that Skipper’s behavior while in
21 custody was “relevant evidence in mitigation of punishment.” *Id.* at 4. The Court
22 continued:

23 Although it is true that any such inferences would not relate
24 specifically to petitioner’s culpability for the crime he committed,
25 there is no question but that such inferences would be “mitigating” in
26 the sense that they might serve “as a basis for a sentence less than
27 death.” Consideration of a defendant’s past conduct as indicative of
28 his probable future behavior is an inevitable and not undesirable
element of criminal sentencing: “any sentencing authority must
predict a convicted person’s probable future conduct when it engages
in the process of determining what punishment to impose.” The Court
has therefore held that evidence that a defendant would in the future

pose a danger to the community if he were not executed may be treated as establishing an “aggravating factor” for purposes of capital sentencing. Likewise, evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating.

Id. at 4-5 (citations omitted). The Court’s holding rested in part on the broader proposition that mitigation evidence need not “relate specifically” to the charged offense, or otherwise tend to “justify” or “excuse” the defendant’s crime. *See Tennard v. Dretke*, 542 U.S. 274, 287 (2004); *McKoy v. North Carolina*, 494 U.S. 433 (1990) (state law may not require a “nexus” between mitigation evidence and the murder, citing *Skipper*, *supra*). Petitioner’s jury was instructed properly in this regard. It was told it could consider any mitigating evidence “whether or not related to the offense for which he is on trial.” 31 RT 3095.

Thus, before Petitioner’s 1990 trial, the U.S. Supreme Court had upheld a capital defendant’s right to present such evidence in mitigation. Not long after *Skipper* was decided, the California Supreme Court reached the same result relying heavily on *Skipper* in its decision. *See People v. Lucero*, 44 Cal. 3d 1006, 1027 (1988). Notably, in *Lucero*, the State attempted to distinguish *Skipper* because in that case the jury had heard evidence of Mr. Skipper’s prior violent crimes (while *Lucero* had no such history); therefore, unlike in *Skipper*, *Lucero*’s lack of violent propensities was not a contested issue. *Lucero*, at 1028. The California Supreme Court saw it differently: “Because of *Lucero*’s lack of prior violent conduct, the predictions of his good behavior in prison would be far more credible than Skipper’s.” *Id.* (emphasis added). The same may be said in this case, as there was no evidence of any prior violent conduct by Petitioner. The Court is mindful however that, after the murder, Petitioner was found carrying a loaded gun, and had penned a letter to Sakarias indicating he might not be taken alive and would die “with weapon in hand.” While he may have been referring to suicide, as elsewhere implied in the letter, these facts (along with the murder,

1 obviously) tend to rebut the evidence that he is generally a peaceful and compliant
2 individual.

3 While *Skipper* and *Lucero* made it clear that evidence of positive
4 adjustment in jail is relevant and admissible, neither case held that defense
5 attorneys have a *duty* to present such evidence in every case where it exists.
6 *Skipper* and *Lucero* simply held that such evidence could not be excluded, but
7 neither case involved claims of IAC for failure to present it. The issue of whether
8 and when a defense attorney reasonably *should* present such evidence still
9 depends on the unique circumstances of any given case.

10 As a general proposition, a decision to forgo any particular type of
11 mitigation evidence, including positive adjustment to incarceration, can certainly
12 be “reasonable.” Clearly, if a defense attorney obtains and assesses potential
13 mitigation evidence, weighs its potential “upside” and “downside” and ultimately
14 decides not to present it for a tactical reason, such a decision will indeed be
15 “virtually unchallengeable.” See *Strickland*, at 690. As noted, the State posits
16 that a reasonable defense counsel could have decided the positive adjustment
17 evidence in this case lacked weight given Petitioner’s “incentive to behave” while
18 awaiting trial. The State also suggests a reasonable counsel might conclude the
19 evidence could leave the jury with the belief that “nothing better could be said”
20 about Petitioner. Hence, argues the State, an attorney could reasonably choose to
21 stay away from the evidence.

22 Respondent’s arguments overlook some important considerations. For
23 starters, the State’s position begs the ultimate question, *i.e.*, whether, in the first
24 place, a reasonably-thorough defense counsel would have ended up with the same
25 paucity of mitigation evidence as was presented in this case, such that “nothing
26 better could be said about petitioner.” That question requires an examination of
27 *all* of Petitioner’s penalty phase claims. But even assuming the evidence of
28 Petitioner’s good conduct in jail had indeed been the *only* matter presented during

1 the penalty phase, that evidence would not have stood alone, because the jury had
2 been informed during the guilt phase about Petitioner's young age and lack of
3 criminal history. In fact, the additional evidence of Petitioner's good conduct in
4 jail would have complemented and even enhanced the mitigation value of his
5 youth and clean record, both of which counsel mentioned in his closing argument.
6 Thus, any fear that rational jurors would have concluded that "nothing better
7 could be said" about Petitioner would have been unfounded.

8 In addition, the assumption that a reasonable attorney *could* decide, under
9 the circumstances, that the evidence of Petitioner's positive adjustment during his
10 lengthy stay in jail was so lacking in weight as to be not worth presenting is
11 dubious. It is not so easy to dismiss the potential impact of such evidence in the
12 present case. The Supreme Court in *Skipper* clearly acknowledged that evidence
13 of positive adjustment to incarceration can be persuasive, and is precisely the type
14 of evidence a jury must not be prevented from hearing: "Such evidence of
15 adjustability to life in prison unquestionably goes to a feature of the defendant's
16 character that is highly relevant to a jury's sentencing determination." *Id.* at 7.
17 The evidence is also relevant to whether a defendant poses a "danger to the
18 community," which in a death penalty case is "nearly always a relevant factor in
19 jury decision-making, even when the State does not specifically argue the point."
20 *Deck v. Missouri*, 544 U.S. 622, 633 (2005).

21 Moreover, in addition to reflecting his positive adjustment and good
22 behavior, the facts regarding Petitioner's time in custody would have provided the
23 jury with some additional evidence that he had a positive work ethic, and worked
24 even without compulsion or financial reward. See FAP Exh. 86, p. 5. The
25 evidence also reflected at least some effort by Petitioner to "better himself" by
26 reading and studying English. *Id.* He was one of the few inmates who was
27 allowed to stay in the library and read, rather than just order books and leave,
28 because he sat quietly reading the newspaper and studying English. These facts

1 were significant, particularly considering that the prosecutor presented a much
 2 different image of Petitioner during the penalty phase closing argument:

3 Mr. Waidla . . . never spoke of a desire for freedom or a belief in
 4 capitalism, and the way he lived his life in the United States reflected
 5 his reasons for leaving. Simply a desire to escape something, to take
 6 advantage of the West and the stories of the West. No efforts to work,
 to better himself, to go to school, only intent [*sic*] to become a parasite
 off of the Piirisilds, and a belief that he deserved to be taken care of.

7 31 RT 3064. The evidence of Petitioner’s conduct while in jail would have helped
 8 neutralize that powerful theme. This added benefit arguably makes the evidence
 9 even more relevant and weighty than the evidence at issue in *Skipper* and *Lucero*.

10 Moreover, the fact that a defendant awaiting trial might, as the State argues,
 11 have an “incentive to behave” does not nullify the potential impact of such
 12 evidence. Indeed, the same criticism would apply in *every* case where there is
 13 evidence of an incarcerated defendant’s good behavior pending trial.

14 Significantly, the majority of the justices in *Skipper* did not join in the
 15 concurrence of Justice Powell in which he complained that a capital defendant
 16 “has every *incentive to behave* flawlessly in prison if good behavior might cause
 17 the sentencing authority to spare his life,” and that “[a]fter today’s decision
 18 competent defense counsel in capital cases will instruct their clients to behave like
 19 Eagle Scouts while awaiting trial, and particularly while awaiting sentencing.”
 20 *Skipper*, 476 U.S. at 14 and n.3 (J. Powell, concurring) (emphasis added). Even
 21 accepting Justice Powell’s concern, it appears that Petitioner’s attorney gave no
 22 such instructions to Petitioner, particularly since counsel ultimately presented no
 23 such evidence, even though Petitioner apparently *did* “behave like an Eagle
 24 Scout” in jail. The circumstances more strongly suggest that counsel simply
 25 overlooked the potential value of the evidence. Further, while one could surmise
 26 otherwise, there is no evidence suggesting Petitioner actually knew that good jail
 27 behavior could have a direct impact on his sentence. Indeed, the record reflects
 28

1 that Petitioner's good behavior in custody continued well *after* his sentencing.
2 FAP Exh. 81, Declaration of Dr. Hillevi Ruumet, at 11.

3 Notably, in both *Skipper* and *Lucero*, the exclusion of such "positive
4 adjustment" evidence was deemed not only error, but also prejudicial, despite the
5 countervailing presence of some especially unpleasant aggravating factors in each
6 of those cases (including a history of sexual assaults before the rape and murder in
7 *Skipper*, and the fatal bludgeoning and strangling of two little girls in *Lucero*).
8 *See id.* Also, prejudice was found even though the duration of good jail behavior
9 in each case was substantially shorter than Petitioner's: Skipper spent just 7½
10 months in custody before his penalty trial, and Lucero not more than about 20
11 months, while Petitioner's custody and concomitant good behavior lasted 28
12 months.

13 Finally, perhaps the most common tactical reason to forgo such evidence is
14 the fear of "opening the door" to a litany of bad facts which any competent
15 prosecutor will be ready to introduce in rebuttal if handed the opportunity. The
16 State, quite properly, does not suggest that this common tactical consideration
17 applied in this instance, because it did not. It is undisputed that Petitioner had no
18 prior record, and it appears there was no other evidence of violent conduct,
19 damaging behavior, or uncharged bad acts before the murder to which the "door"
20 could be "opened."

21 In sum, trial counsel completely failed to investigate Petitioner's positive
22 behavior in custody, which had been unmistakably identified by the U.S. and
23 California Supreme Courts as an easy source of relevant and potentially powerful
24 mitigation evidence. Viewing that failure in a vacuum, a finding of deficiency
25 might be a close call. But when viewed with counsel's errors in other penalty
26 phase matters, as discussed later, a definite pattern emerges. Considering the trial
27 and penalty record as a whole, as this Court must, counsel's total lack of inquiry
28 in this area constitutes deficient performance under *Strickland* and its progeny.

1 Any contrary finding by the California Supreme Court (if it occurred, as next
2 discussed) would be unreasonable for the purposes of §2254(d).

3 Because the California Supreme Court's reasoning is not conveyed in its
4 summary denial of this claim, it cannot be seen whether there was an unreasonable
5 (1) application of law, or (2) determination of facts. But upon reviewing the same
6 factual record that was before that court and applying clearly established federal
7 law, this Court finds a rejection of this claim could not be reasonable under either
8 prong of 28 U.S.C. 2254(d).

9 Analysis—Petitioner's Background

10 In sub-claims 8(c), (d), and (e), Petitioner asserts that trial counsel
11 unreasonably failed to investigate and present evidence of various aspects of
12 Petitioner's background and social history. Specifically, Petitioner points to three
13 categories of evidence: (1) his pro-social behavior (sub-claim 8(c), FAP ¶¶ 296-
14 310); (2) adversities he encountered during his upbringing (sub-claim 8(d), FAP
15 ¶¶ 311-320); and (3) his brutal treatment while in the Soviet Army (sub-claim
16 8(e), FAP ¶¶ 321-326). For the most part, these sub-claims may be analyzed as a
17 group, because all involve evidence of Petitioner's background. There are also
18 common issues or problems relating to this evidence, including Petitioner's
19 concerns about whether to pursue it, the potential risks and difficulties in
20 obtaining evidence from Soviet-ruled Estonia, the weight and quality of the
21 evidence, and the prejudice (if any) resulting from the failure to present it.

22 As stated previously, "[i]t is unquestioned that under the prevailing
23 professional norms at the time of [Petitioner's] trial, counsel had an 'obligation to
24 conduct a *thorough investigation of the defendant's background.*'" *Porter, supra*,
25 130 S. Ct. at 452 (quoting *Williams v. Taylor, supra*, 529 U.S. at 396) (emphasis
26 added). In *Wiggins v. Smith, supra*, the Supreme Court highlighted the
27 significance of a trial counsel's failure to investigate such evidence:
28

1 Counsel's conduct...fell short of the standards for capital defense
 2 work articulated by the American Bar Association (ABA) – standards
 3 to which we long have referred as “guides to determining what is
 4 reasonable.” [citing *Strickland* at 688; *Williams* at 396]. The ABA
 5 Guidelines provide that investigations into mitigating evidence
 6 “should comprise efforts to discover *all reasonably available*
 7 mitigating evidence and evidence to rebut any aggravating evidence
 8 that may be introduced by the prosecutor.” ABA Guidelines for the
 9 Appointment and Performance of Counsel in Death Penalty Cases
 10 11.4.1(C), p. 93 (1989) (emphasis added). Despite these well-defined
 11 norms, however, counsel abandoned their investigation of petitioner's
 12 background after having acquired only rudimentary knowledge of his
 13 history from a narrow set of sources. Cf. *id.*, 11.8.6, p. 133 (noting
 14 that among the topics counsel should consider presenting are medical
 15 history, educational history, employment and training history, *family*
 16 *and social history*, prior adult and juvenile correctional experience,
 17 and religious and cultural influences.

18 *Id.* at 524-525 (emphasis added).

19 As stated before, the Court recognizes that the ABA Guidelines are just
 20 that—guidelines—and may not be viewed as hard and fast rules of conduct. *See*
 21 *Bobby v. Van Hook*, 130 S.Ct. at 18; *see also Strickland*, 466 U.S. at 688 (“They
 22 are only guides.”). To be clear, however, the Supreme Court has never indicated,
 23 in *Van Hook* or elsewhere, that any of its prior habeas cases are suspect merely
 24 because they included a reference to the ABA Guidelines.

25 In his declaration, Petitioner's trial counsel bluntly states: “I did not
 26 investigate or develop any other mitigating evidence apart from that which was
 27 presented at the guilt phase and incorporated into the penalty trial.” FAP Exh. 98
 28 at ¶ 5. Despite this admission, trial counsel's declaration does not otherwise
 reflect a calculated effort to “fall on his sword in order to derail a death sentence.”
See Littlejohn v. Trammell, 704 F.3d 817, 872 n.2 (10th Cir. 2013) (quoting *Allen*
v. Mullin, 368 F.3d 1220, 1240 (10th Cir. 2004)). Unlike such cases, there is no
 evidence here to contradict the assertions regarding counsel's failure to
 investigate.

As should be clear from this Court's previous discussion, there was very
 little evidence from the guilt phase that might charitably be described as
 “mitigating.” A fair reading of the guilt phase trial record raises serious doubts as

1 to whether defense counsel even had mitigation in mind when he elicited the
 2 background testimony “which was presented at the guilt phase and incorporated
 3 into the penalty trial.” The brief questioning at the beginning of Petitioner’s direct
 4 examination, which constituted an exceedingly small fraction of his entire
 5 testimony, appears to be little more than a foundational recitation of the
 6 circumstances that brought him to the U.S. and into contact with the Piirisilds.
 7 The even briefer testimony regarding Petitioner’s teenage encounters with the
 8 KGB seems to have been elicited primarily to support the claim that his
 9 confession to the LAPD was involuntary, as his counsel later argued in his guilt
 10 phase closing. 28 RT 2860-2861. The trial record contains no explicit indication
 11 during the guilt phase, such as sidebars or chambers conferences, that counsel
 12 intended for any particular evidence to be “incorporated” into the penalty phase
 13 (assuming the case got that far). The very first indication of any such
 14 understanding occurred on the first day of the penalty phase, when Petitioner’s
 15 counsel announced he would present no new evidence and would rely instead on
 16 guilt phase evidence: “It was done in anticipation of not presenting further
 17 evidence at the penalty phase.” 31 RT 3044.

18 Another significant problem with this so-called mitigation evidence was
 19 that it came entirely from Petitioner’s own mouth, mostly without a shred of
 20 corroboration. As shown by its verdict after the guilt phase, the jury clearly
 21 disbelieved critical part of Petitioner’s testimony, including his alibi story and the
 22 recantation of his confession. Indeed, the prosecutor had justifiably characterized
 23 his testimony during the guilt phase argument as a “preposterous lie.” 28 RT
 24 2850. And when the trial judge instructed the jury, he properly included the
 25 standard “false in part, false in whole” instruction regarding witness credibility:

26 A witness who is willfully false in one material part of his or her
 27 testimony is to be distrusted in others. You may reject the whole
 28 testimony of a witness who willfully has testified falsely as to a
 material point, unless from all the evidence you believe the
 probability of truth favors his or her testimony in other particulars.

1 29 RT 2974 (reciting CALJIC 2.21.2 “Witness Willfully False”).

2 In short, the sole witness on whom trial counsel chose to rely for mitigation
3 was found by the jury to be a willful liar. According to the judge’s instruction, the
4 jury was therefore entitled to reject essentially all of his testimony, including the
5 so-called “mitigation” portions. In defending any death penalty case, the dangers
6 associated with relying *entirely* on one’s own client for mitigation testimony
7 should be self-evident to counsel. It appears those dangers were fully realized
8 here.

9 If the relevant factual inquiry ended here, counsel’s failure to conduct any
10 real investigation into Petitioner’s background would clearly constitute deficient
11 performance under *Strickland*. *See id.*; *see also Williams, Wiggins, Rompilla and*
12 *Porter, supra*. It would not be a close call. The facts in this case, however, are
13 not so straightforward. The record indicates there may have been obstacles to the
14 collection of mitigation evidence, due in part to Petitioner’s reluctance and fear of
15 government reprisals, as well as certain logistical difficulties in obtaining it.

16 The record clearly shows that Petitioner expressed legitimate concerns
17 about any efforts to contact his family or others in Estonia. As stated by his trial
18 counsel:

19 [Petitioner] expressed considerable reluctance in having me contact
20 his family or calling them as witnesses for two reasons: first, that his
21 relatives did not know he was in trouble and he didn’t want them to
22 know; and second, that he was concerned about possible reprisals
23 against his family by Soviet government or military authorities if they
24 were to attempt to come to the United States and testify, because of
25 his desertion from the Soviet army and escape from East Germany.

26 FAP Exh. 98 at ¶ 5. Counsel continues:

27 At a later point Mr. Waidla acknowledged that his family probably
28 knew about his arrest through information filtering back through
Estonian nationals, although he remained concerned about reprisals
should I attempt to contact them. We discussed his reluctance on
several occasions, and did explore to some degree alternative
presentations through his teachers and others in the community where
he was raised in Estonia, but Mr. Waidla expressed the same concerns
for them, and we otherwise did not definitively resolve the issue.

1 *Id.* Petitioner’s own declaration states:

2 [My attorney] asked me in interviews about my family background,
 3 and I answered his questions as fully as I could.... I did initially
 4 express concern to him about contacting my Uncle Gunnar and my
 5 mother because of my worry about reprisals to them by Soviet
 6 authorities, and because I was ashamed and horrified at having been
 7 involved in the homicide and did not want them to know if I could
 8 help it. I subsequently realized that news of the homicide and our
 9 arrest must certainly have filtered back to Estonia, particularly as
 10 communications became much more open in 1989 and 1990. I also
 11 realized that the KGB knew exactly who my family was, given that
 the KGB had questioned Gunnar after I escaped from the Soviet army,
 and that Viivi Piirisild would have been viewed by the Soviets as a
 fierce opponent if known to them at all. I did not have an
 understanding of the American legal system, did not know what
 would constitute a presentation of “mitigation” evidence, and
 essentially served my time in county jail and left the legal work to my
 attorney.... I never asked or told him not to present mitigating
 evidence on my part, and I certainly did not want to facilitate the
 imposition of the death penalty.

12 FAP Exh. 86 at 6-7.

13 As discussed, the Supreme Court has held that a client’s recalcitrance
 14 generally does not excuse counsel’s failure to investigate. For example, as the
 15 Court said in *Porter, supra*, “Porter may have been fatalistic and uncooperative,
 16 but that does not obviate the need for defense counsel to conduct *some* sort of
 17 investigation.” *Porter*, 558 U.S. at 40 (emphasis in original). Similarly, in
 18 *Rompilla*, where the petitioner was “uninterested in helping” counsel with
 19 mitigation strategy, and sometimes even “actively obstructed” counsel’s efforts,
 20 the Court nonetheless found that such conduct did not excuse counsel’s failure to
 21 investigate. *Rompilla*, 545 U.S. at 381. In contrast, in *Landrigan*, the Court held
 22 that a client’s steadfast interference with his counsel’s efforts, such that an
 23 effective mitigation presentation became nearly impossible, excused counsel in
 24 that case from conducting *further* investigation to augment the mitigation
 25 evidence already gathered. Clearly, the situation in *Landrigan* is not presented
 26 here, but the case remains helpful in showing the extremes to which a client’s
 27 reluctance must escalate before counsel’s inaction begins to look reasonable.

28

1 In addition to the Supreme Court precedents, the ABA Guidelines that were
2 in effect in 1990 spoke to this issue: “The investigation for preparation of the
3 sentencing phase should be conducted regardless of any initial assertion by the
4 client that mitigation is not to be offered.” ABA Guideline 11.4.1(c)
5 “Investigation” (1989). Also, the California Supreme Court itself stated in 1985
6 that a client’s opposition to presenting a mitigation case does not wholly excuse
7 defense counsel from investigating such evidence. *People v. Deere*, 41 Cal. 3d
8 353, 364 (1985), *disapproved on other grounds in People v. Bloom*, 48 Cal. 3d
9 1194, 1228 (1989).

10 Thus, at the time of Petitioner’s trial, clearly-established U.S. Supreme
11 Court authority, along with California Supreme Court case law and the ABA
12 Guidelines, stated that it is unreasonable for an attorney to completely forgo
13 investigation of an entire category of potentially crucial mitigation evidence,
14 based solely on a client’s expression of disdain, fear, or general reluctance about
15 it. In this case, however, Petitioner’s fears were not insignificant or unjustified.
16 Indeed, trial counsel’s file materials included a 1987 newsletter from a pro-
17 Estonian freedom group, which contained within it a short article indicating that
18 members of Petitioner’s family had been visited by KGB agents not long after his
19 defection. Resp. Exh. 106 at 1175. It therefore appears that counsel had at least
20 some independent verification of the basis for Petitioner’s fears. Fortunately,
21 there is no indication in the record that any of Petitioner’s family members or
22 friends ever suffered actual harm based on their association with him.

23 But the question remains whether it was reasonable for counsel to simply
24 dismiss *any* effort to investigate and obtain evidence regarding Petitioner’s social
25 history and background while growing up in Estonia. It appears counsel made no
26 effort to investigate whether Petitioner’s fears were well-founded, whether the
27 article in the anti-Soviet newsletter was accurate, or whether the threat of reprisal
28 remained genuine after the two to three years that had passed since Petitioner’s

1 defection, especially since Soviet control in Estonia and elsewhere had been
2 steadily and publicly unraveling. See FAP Exh. 85 (concerning significant
3 lessening of restrictions in 1989-1990, and complete formal independence by
4 1991); FAP Exh. 96 (same). Even Petitioner himself was aware that
5 communications with Estonia became much more open in 1989 and 1990. FAP
6 Exh. 86.

7 Defense counsel conducted no real investigation into alternative means of
8 obtaining such testimony, including the option of hiring an investigator or
9 mitigation specialist with experience, or residence, in Estonia, Finland, or Soviet-
10 bloc countries in Europe, who could more freely travel and meet with potential
11 mitigation sources. Also, counsel conducted no investigation into whether there
12 were witnesses *outside* of Estonia, including in the U.S., who could have provided
13 helpful testimony. These are just a few matters that would occur to any
14 reasonable counsel, and would necessarily remain high-priority items in the
15 overall trial preparation strategy. Even if a reasonable counsel might not
16 *independently* conceive of such options or strategies, a competent mitigation
17 expert most likely would.

18 Instead, counsel and Petitioner merely continued to “*discuss*” the matter for
19 some unspecified length of time, and “otherwise did not definitively resolve the
20 issue.” FAP Exh. 98 at ¶ 5, *supra*. Counsel’s statement is less than clear, but if
21 “the issue” was whether to even attempt to pursue such potentially critical
22 evidence, then that is surely an issue reasonable counsel in a death penalty case
23 *must* “definitively resolve” one way or the other. Moreover, it must be resolved
24 early enough to allow time to *act*, if needed, before the penalty phase begins. The
25 relevant Supreme Court authority admits of no other response. A failure to *make*
26 a decision cannot qualify as a reasonable tactical judgment. (Ultimately,
27 counsel’s omission may be of no consequence if it fails to cause prejudice, but
28 that is a different issue.) At best, counsel’s inaction reflects an inexplicably casual

1 attitude about potentially critical evidence, which is all the more troubling
 2 considering his failure to seek out and obtain any *other* mitigation evidence. As
 3 the U.S Supreme Court stated two years before the denial of Petitioner’s state
 4 habeas petition:

5 In light of [the *Strickland*] standards, our principal concern in
 6 deciding whether [trial counsel] exercised “reasonable professional
 7 judgment” is not whether counsel should have presented a mitigation
 8 case. Rather, we focus on whether the investigation supporting
 9 counsel’s decision not to introduce mitigating evidence of
 [petitioner’s] background *was itself reasonable*. *Ibid.* Cf. *Williams v.*
Taylor, supra, at 415, 120 S.Ct. 1495 (O’Connor, J., concurring)
 (noting counsel’s duty to conduct the “requisite, diligent”
 investigation into his client’s background).

10 *Wiggins*, 539 U.S. at 522-23 (emphasis in original). Importantly, the level of
 11 deference to be accorded to counsel’s judgment in this regard depends on “the
 12 adequacy of the investigations supporting those judgments.” *Id.* at 521.

13 In contrast to trial counsel, Petitioner’s post-conviction counsel was able to
 14 investigate and obtain a substantial amount of background evidence that reflected
 15 positively on Petitioner. True, it could be reasonably argued that Petitioner’s
 16 habeas counsel, compared to trial counsel, had the benefit of greater time and
 17 resources, and also—significantly—good timing, given the final downfall of
 18 Soviet rule in Estonia in 1991 (see *infra*). In assessing the reasonableness of trial
 19 counsel’s investigation, therefore, this Court must be wary of the “distorting
 20 effects of hindsight,” *Strickland*, 466 U.S. at 769, and always bear in mind that the
 21 “standard of reasonableness [is] applied as if one stood in [trial] counsel’s shoes
 22” *Rompilla*, 545 U.S. at 381.

23 The evidence reflects that, during the 1989-1990 time period, it was indeed
 24 difficult for outsiders to visit Estonia and perhaps even more difficult for Estonian
 25 nationals to travel to the U.S. However, the evidence also indicates that such
 26 travel was certainly not impossible, and that a substantial amount of investigation
 27 could have been safely accomplished. Petitioner’s initial post-conviction counsel
 28 states:

1 Notwithstanding the fact that his native country, Estonia, was not
 2 officially independent until 1991, after the judgment in this case, I
 3 found that there were many resources available at the time of trial to
 4 develop and obtain information from Estonia, to communicate with
 5 relatives, teachers, and acquaintances in Estonia, and that there were a
 number of individuals in the United States who were willing to
 provide their observations and testimony regarding appellant's
 conduct and behavior in the United States

6 FAP Exh. 85, Declaration of Eric Multhaup, at p. 1. The same post-conviction
 7 counsel sought and obtained considerable assistance from a local Estonian-
 8 American attorney and member of California bar, Jaak Treiman, who served in the
 9 1980's and 1990's as the Estonian consul in Los Angeles:

10 Mr. Treiman described the opportunities for communication and
 11 travel between California and Estonia in 1989 and 1990. He
 12 described them as vastly improved during those years compared to the
 13 mid-1980 and earlier years of more repressive Soviet domination. In
 14 1989 and 1990, there was essentially unrestricted telephone and fax
 15 communication between the two countries, dependent of course on the
 16 access of an Estonian individual to a telephone or fax, as they were by
 17 no means as widespread throughout households as in the United
 18 States. He did recall one particularly noteworthy event in October
 19 1988, when the local organization of the Baltic American Freedom
 20 League had its annual award dinner and gave the year's "Freedom
 Award" to an Estonian scientist ... who had recently been released
 from prison where he had been imprisoned for some 16 years for
 dissident activities. Mr. Treiman arranged a telephone call to him in
 Estonia during the banquet so that the award could be made orally,
 and the recipient's responses disseminated to the gathering through a
 speaker phone. By 1990, there was also a significant amount of
 personal travel between California and Estonia, although it was easier
 for a Californian to get a visa to enter Estonia than for an Estonian to
 get a visa to visit the United States.

21 Declaration of Eric Multhaup, at 3-4. The state post-conviction attorney further
 22 states that he sought and obtained advice from Estonian-American academics
 23 working at universities in the U.S., including one in Irvine who directed him to a
 24 psychiatrist located in Tallinn (Petitioner's hometown) who asserts he was
 25 available and willing to help obtain testimony in 1989 and 1990, as hereinafter
 26 discussed. Declaration of Eric Multhaup, at 5. Counsel continues:

27 [A]ppellant's family, particularly his mother and
 28 Great-Uncle Gunnar, were extremely helpful in obtaining and
 providing school records, medical records, photographs of family

occasions, and other materials relevant to [mental state evaluations]. They also would have been equally willing and enthusiastic to provide this assistance in 1989 or 1990, but were not contacted by trial counsel or anyone acting on appellant's behalf. Appellant's Great-Uncle Gunnar Vaidla¹⁰, who was perhaps the most extensively and continuously involved in raising him, had communicated with appellant regularly from the time appellant went to the United States until his arrest. Because appellant was concerned that the Soviet authorities might be disapproving if he corresponded directly with his uncle, because of his escape from the Soviet Army, he communicated through a longstanding family friend in Finland, who had essentially unfettered access to travel between Helsinki and Tallinn, and delivered appellant's letters to Gunnar. Thus, appellant, along with many other Estonians, had an active channel of communication available to relatives and friends in Estonia through mutual friends in Finland during the pretrial period.

Declaration of Eric Multhaup, at 5-6. Additional evidence regarding access to Estonia via Finland, and the ease of travel between the countries, was presented in Petitioner's state habeas case by the Tallinn-based psychiatrist:

Regarding personal visits, there was a considerably greater amount of travel between the United States and Estonia in 1989 and 1990 than previously, although visas were still needed. During that period, several American Fulbright [sic] scholars came to Estonia to give educational programs, many of which I attended If during that period a problem had arisen obtaining either a visa for an Estonian citizen to leave Estonia, or for an American citizen to enter, arrangements could have been easily made to meet in Finland, where there was always ferry service for the short trip across the Gulf of Finland from Tallinn to Helsinki.¹¹ Because the Estonians and Finns are historically, culturally, and ethnically very close, there was always a great deal of travel between the two countries, even during the Soviet regime. Thus, if an American lawyer had wanted to directly interview me or other Estonian citizens during the 1989-1990 period, it could *probably have been done in Estonia or certainly done in Finland*.

FAP Exh. 96, Declaration of Mare Pork, at 2-3 (emphasis added).

Investigation by trial counsel would have also revealed that, as Soviet control over member states such as Estonia was diminishing, the basis for Petitioner's fear of reprisal was also eroding. In addition to the above-referenced

¹⁰ "Vaidla" is apparently the correct Estonian spelling of Petitioner's family name. FAP at p. 13 n.5.

¹¹ Tallinn and Helsinki, the largest cities and primary travel hubs in Estonia and Finland respectively, are 51 miles apart. See www.timeanddate.com/worldclock/distanceresult.html.

1 evidence, there is no indication that anyone contacted by the KGB shortly after
2 Petitioner's 1987 defection suffered any resulting harm, or was still at risk by the
3 time of Petitioner's trial in 1990. See, *e.g.*, FAP Exh. 24, Janis Aarne Declaration;
4 see also FAP Exh. 81, Hillevi Ruumet Declaration. For example, declarant
5 Hillevi Ruumet fled Estonia in 1944 and later worked for Radio Free Europe (a
6 distinctly anti-Soviet agency) but was nonetheless allowed to visit relatives in
7 Estonia in 1975, and then again in June 1990 "when the Soviet regime had
8 loosened enough to allow *relatively unfettered* travel in and out of the country."
9 *Id.* (emphasis added).

10 Thus, as shown by evidence presented in the state habeas proceeding, the
11 practical obstacles and risks in gathering evidence from Estonia were not
12 insurmountable, which a reasonably competent counsel (or mitigation expert)
13 would have discovered after a fairly simple and straightforward preliminary
14 investigation. Petitioner's counsel, however, did not inquire into such basic
15 matters.

16 Furthermore, as noted previously, it was already common practice at the
17 time of Petitioner's trial for defense attorneys to obtain and present one or more
18 expert reports bearing on things such as the defendant's psychological issues,
19 substance abuse, and social history. Concerning such presentations, "social
20 history reports" have long been recognized as being particularly useful. See, *e.g.*,
21 *Wiggins v. Smith, supra*, at 523-524. In this case, such a report would have been
22 especially suitable for distilling and presenting a wide range of information
23 obtained from sources in Estonia and elsewhere. In the present action, Petitioner's
24 trial counsel did not commission such a report, even though there appears to have
25 no tactical reason to avoid doing so.

26 While the parties have not raised the issue, it might reasonably be
27 questioned whether trial counsel's options were circumscribed by a lack of funds
28 to pay for experts, including the travel costs for such experts, as well as lay

witnesses (*e.g.*, family members such as Petitioner’s mother and great-uncle), to travel to and from Estonia. While it is obviously not without limits, funding to cover such expenses for indigent defendants in death cases is provided by statute. *See* Cal. Penal Code §987.9; *see also Gardner v. Superior Court*, 185 Cal. App. 4th 1003, 1010 (2010) (discussing State Legislature’s intent, when it re-instated the death penalty in 1977, to properly fund defense costs in capital cases). Notably, trial counsel prepared an application to hire two investigators to assist him, but never filed it. FAP ¶ 282. Petitioner’s attorney appears to have handled the case solo, from preliminary hearing to jury trial to death verdict, without assistance from investigators or penalty experts. *Cf. Hamilton v. Ayers*, 583 F3d 1100 (9th Cir. 2009) (finding penalty phase IAC at 1982 trial in part because counsel “never even thought about retaining a mitigation expert or a mental health expert.”). As noted in the ABA Guidelines in effect at the time of the trial: “Counsel should secure the assistance of experts where it is necessary or appropriate for: (A) preparation of the defense; (B) adequate understanding of the prosecution’s case; (C) rebuttal of any portion of the prosecution’s case at the guilt/innocence phase or the sentencing phase of the trial; [and] (D) presentation of mitigation.” ABA Guidelines 11.4.1(D)(7), “Expert Assistance” (1989).

The sole exception to counsel’s go-it-alone approach was his utilization of the two psychologists who met with Petitioner and provided reports before the trial regarding his mental capacity. According to Respondent, the obtaining of such reports is evidence of counsel’s effectiveness, and his later decision not to use the reports was tactically sound because they indicated Petitioner was free from mental illness. Counsel himself states: “Based on these reports and my follow-up conversations with both psychologists, I did not pursue any further mental state investigation or mental state defenses for the guilt or penalty phase.” FAP Exh. 98, ¶ 1. Notably, counsel only asked the doctors to determine whether Petitioner had any *guilt* phase defenses based on legal insanity or diminished

1 capacity (he did not). *See* FAP Exhs. 82 & 83 (Reports of Drs. Liebhauser and
2 Gillick). At some point, counsel perhaps should have requested a broader
3 psychological examination into disorders that might be useful in mitigation, even
4 if not relevant to guilt. *See, e.g., Hendrick v. Calderson*, 70 F.3d 1032, 1043 (9th
5 Cir. 1995) (lack of basis for guilt phase defenses of insanity or diminished
6 capacity does not foreclose potential mitigation based on mental condition).
7 However, given the conclusions set forth in the two reports, which indicated that
8 Petitioner’s mental health was generally unremarkable, it would not be
9 unreasonable to find that counsel was justified in forgoing additional investigation
10 of psychiatric defects or disorders. *See Raley v. Ylst*, 470 F.3d 792, 801-803 (9th
11 Cir. 2006) (not ineffective for counsel to forgo mental defect evidence at penalty
12 phase where initial psychiatric examinations indicated absence of significant
13 disorders).

14 In the Order on Petitioner’s Motion for Evidentiary Hearing, this Court
15 stated that the failure to pursue mental defenses at the penalty phase might have
16 constituted deficient performance. Order dated July 7, 2008, Dkt. 54, at 23-24.
17 As discussed in the current Order, evidence of Petitioner’s pro-social personality
18 and lack of dangerousness, as expressed by both lay witnesses *and psychologists*,
19 is indeed quite relevant. *Wallace*, 184 F.3d at 1117 & n.5 (“Although the lawyer’s
20 failure to develop and relay medical evidence did not constitute ineffective
21 assistance at the guilt phase, we concluded that sentencing—where mitigation
22 evidence may well be the key to avoiding the death penalty—is different.”); *id.* at
23 n.5 (“[A]ll potentially mitigating evidence is relevant at the sentencing phase of a
24 death case, so a troubled childhood and mental problems may help even if they
25 don’t rise to a specific, technically-defined level.”). The discussion
26 accompanying this footnote is focused more narrowly on the reasonableness of
27 counsel’s decision to forgo investigation of mitigation evidence in the form of
28 serious mental *disorder* or *defect*.

1 Concerning Petitioner’s background in general, the evidence gathered by
2 habeas counsel reflects a life that was certainly less than idyllic. However, the
3 facts describing Petitioner’s upbringing are not nearly as compelling as many of
4 the epic horror stories that seem all too prevalent among capital murder
5 defendants. Even Petitioner’s habeas counsel concedes as much: “Admittedly,
6 Waidla did not suffer a ‘nightmarish childhood.’” Pet. Brief Dkt. No. 131 at 29
7 (quoting *Williams*, 529 U.S. at 395). The evidence reflects that Petitioner’s
8 biological parents separated shortly after his birth, his mother essentially handed
9 him off as an infant to her extended family, and his great-uncle Gunnar in
10 particular raised him to adulthood. Petitioner’s mother remained in another town
11 where she pursued her career interests. She played a very limited role in his
12 upbringing despite living a fairly short distance away. Petitioner’s father was not
13 a part of Petitioner’s life. FAP at 13-15. Based on these facts, habeas counsel
14 attempts to portray Petitioner’s childhood history in the most negative light
15 possible—mostly in vain. The evidence (as discussed more fully below) generally
16 shows that Petitioner, despite some hardships, was raised by his extended family
17 in a loving and secure environment, was well-liked by his peers and their parents,
18 did reasonably well in school and in sports, and exhibited absolutely no violent or
19 antisocial behavior. Indeed, Petitioner’s character for non-violence is by far the
20 most pervasive theme in the evidence presented in support of his habeas petition.
21 *Id.* at 15-27.

22 However, the absence of a horrific childhood history or a significant mental
23 defect or disorder does not mean that a reasonably effective defense lawyer has
24 nothing left to investigate. The critical importance of any mitigation evidence
25 which might “humanize” the defendant was abundantly clear to any reasonable
26 defense attorney at the time of Petitioner’s trial. See *Porter*, 130 S. Ct. at 454
27 (“The judge and jury at Porter’s original sentencing [in 1988] heard almost
28 nothing that would humanize Porter or allow them to accurately gauge his moral

culpability.”); *Mayfield v. Woodford*, 270 F.3d 915, 932 (9th Cir. 2001) (finding that petitioner therein was prejudiced by defense counsel’s failure to present mitigation evidence at 1983 trial, including “friends and family members relating additional humanizing stories”). As stated, the use of a social history report and other such materials, perhaps with the assistance of a mitigation specialist, would have unquestionably presented a much more comprehensive and sympathetic picture of Petitioner’s background. Indeed, the exhibits supporting the state habeas petition contain a relative wealth of information about Petitioner’s social history, and describe various cultural and historical factors that are potentially relevant to his character and personality.

For example, as mentioned above, Dr. Hillevi Ruumet was willing to testify on Petitioner’s behalf if called upon to do so. An American psychologist born in Estonia, Ruumet interviewed Petitioner and members of his family, and various documentary materials pertaining to Petitioner, including his school records. He states:

There is no evidence from any of my sources of any tendency toward violence, or any history of violent or even aggressive behavior. Rather, his social and psychological history indicates that his personality veers more toward the polar opposite: quiet, passive, intelligent, socially appropriate and invested in giving a good impression, respectful of authority, diffident, and avoidant of any confrontation or physical violence. This represents a consensus of all the sources interviewed, both in Estonia and in the United States, as well as my clinical impression from face to face interviews with him.

FAP Exh. 81 at 5. Dr. Ruumet later continues:

Mr. Waidla’s growing up years were difficult, and yet, by all accounts, he did well in school and socially. He was separated from his mother shortly after birth and raised mostly by other (reportedly loving) family members, and a number of close relatives died from illness or accident when he was young. In view of this, his positive accomplishments as a youth in the face of these difficulties, his positive psychological adjustment while being raised by relatives other than his natural parents, his pursuit of artistic talents, and his never getting into conflicts (either verbal or physical) with other children, indicate an ability to deal constructively with adversity. He has shown the same ability during his years in prison, where he has managed to stay apart from inmate culture without being scapegoated or harassed. He has used the time to learn English (he now speaks

1 very well) by reading voraciously, learn to appreciate classical music,
 2 and, atypically for someone in his circumstances, write a full length
 3 book manuscript he hopes to publish. He says writing this book, and
 4 creating scenarios for subsequent books, keeps his mind creatively
 occupied so he does not dwell on the past or the future. This surely
 reflects a good capacity for self-rehabilitation under extremely
 inhospitable conditions.

5 *Id.* at 10-11. Concerning Petitioner's academic performance, Dr. Ruumet states:

6 In spite of these somewhat unusual and difficult circumstances, as has
 7 been noted above, Tauno performed well in school, and was by all
 8 accounts an appropriately adjusted boy of considerable intelligence
 9 and aptitude. He attended the Tallinna 4. Keskkool through 8th grade,
 10 and thereafter attended and graduated from the Spordi-Internaatkool
 11 of Tallinn, which is a fairly prestigious and select school with high
 12 academic and athletic standards. At the school, all the students
 participated intensively in one of three athletic activities: track and
 field, basketball, or marksmanship. Tauno was involved in
 marksmanship, and performed well in national competitions in
 Estonia and in international competitions in Latvia and the Soviet
 Union, where he competed on behalf of Estonia.

13 *Id.* at 134. Dr. Ruumet was also capable of testifying about the plight of Estonian
 14 conscripts in the Soviet Army, which would have provided confirmation of
 15 Petitioner's testimony and article on the subject, *and* explain why his escape was
 16 not merely a "desertion":

17 Much was made of the fact that Mr. Waidla was a "deserter" from the
 18 Soviet Army, with the implication that this reflected badly on his
 19 character and loyalty to his country. However, it is important to
 20 understand that Tauno's defection from the Soviet Army while he was
 21 in East Germany is a qualitatively different act than what Americans
 22 might consider to be "draft dodging" or desertion. Enlisting in a
 23 peacetime army in the United States during the 1980s was an
 24 opportunity for self-improvement and the acquisition of valuable
 25 technical skills. Being drafted into the Soviet Army as an Estonian in
 26 the 1980s was a guarantee of extended physical beatings and brutality.
 27 The practice of hazing was rampant in all Soviet military units, which
 28 in that context meant that any superior could, with total impunity,
 inflict any kind of physical or mental suffering on any inferior at any
 time and for any (or no) reason. Estonians who were sent to units
 with a heavy Russian majority suffered more severely than ethnic
 Russians, and therefore it was very dangerous for Estonian youths to
 be drafted into the Soviet army. There was serious risk of injury and
 even death. Therefore, if at all possible, Estonian youths tried to get
 assignments with the Border Guard or other local units where there
 were more Estonians and the persecution was less severe. This
 situation is largely attributable to centuries of animosity between the
 Russians, who have had a propensity toward conquering smaller
 nations, and the ethnically and linguistically very different Estonians,

1 a Nordic people closely related to the Finns, who have not enjoyed
 2 being conquered and enslaved. When the Soviet Union invaded and
 3 occupied Estonia following World War II, Estonian youths fared
 miserably in the Soviet Army. [....] [Waidla] did not feel he owed
 any loyalty to the foreign military forces occupying his country, into
 which he had been drafted involuntarily.

4 *Id.* at 14-16.

5 Estonian-based psychologist Mare Pork (referenced above) was also
 6 available before and during Petitioner's trial to interview family members and
 7 other witnesses in Estonia. Dr. Pork initially states: "Mr. Waidla's family were all
 8 very cooperative and willing to discuss his background freely with me. I also
 9 received excellent cooperation from the other individuals that I contacted." FAP
 10 Exh. 96, at 2. Of particular note is her testimony regarding Petitioner's
 11 relationships with his great-uncle Gunnar and his mother Tiina:

12 Gunnar Vaidla described raising Tauno in Tallinn, while his mother
 13 Tiina lived and worked in the City of Tartu. Gunnar Vaidla described
 14 Tauno as being extremely small and fragile when he was an infant,
 and that he suffered a number of bone breaks during his youth.
 15 Outside of school, Gunnar Vaidla took Tauno with him as an almost
 constant companion, who accompanied him on his photographic
 16 assignments around the country and in the Soviet Union. Tauno was
 very attached to Gunnar Vaidla when young, and Gunnar
 17 acknowledged that he in many ways took the place of both mother and
 father for Tauno.

18 Gunnar describes Tauno as having a strong will to succeed in
 competitions from the time he was very young. Gunnar describes
 19 Tauno's strong desire and great effort to do well in a skiing contest for
 children in the suburb of Mustamae, where the family was living
 20 when Tauno was six or seven years old.

21 Tauno applied the same determination and desire for excellence on his
 marksmanship team at the Tallinn Sportskool during high school.
 22 Tauno devoted his efforts more to sports than to academics, but he
 was always able to pull himself together to do what was needed to get
 23 adequate or even better grades. Gunnar describes Tauno's reputation
 among his teachers and coaches as having a lot of willpower and a
 24 desire to fight for justice.

25 Tauno learned the techniques of photography from accompanying and
 assisting Gunnar on his photographic assignments, and had his own
 26 photographs published in various Estonian magazines and newspapers
 during his teenage years.

27 In social contexts, Tauno was a very accommodating and cooperative
 28 young man, and never showed a violent or aggressive nature. Gunnar

1 does not recall any instances of Tauno getting involved in fights,
much less starting fights, during any time in his youth.

2 *Id.* at 3-5. Concerning Petitioner's mother, Dr. Pork states:

3 I interviewed Tiina Vaidla, Tauno's mother, who lives in the City of
4 Tartu. Tiina Vaidla described Tauno's birth on November 26, 1967.
5 She described how she was studying and working in Tartu at the time
6 of the birth, and her mother agreed to take Tauno to raise when he was
7 a month or two old. Tiina's mother was then 44 years old, and
developed a debilitating brain tumor when Tauno was 11. She
became very difficult and contentious under the effects of the tumor,
and their relationship suffered.

8 Tiina saw Tauno intermittently on special occasions such as
graduations or vacations, but got most of her information about Tauno
9 from Gunnar and her mother. Tauno's biological father, Peep
Sillandi, had virtually no direct contact with him during his entire
10 upbringing, although he inquired of Gunnar Vaidla periodically about
Tauno.

11 Tauno suffered other emotionally traumatic events during his youth,
12 as did the rest of the family, particularly the loss of his grandmother,
his Aunt Reet, and his cousin Mauri, in a devastating fire in June
13 1981. At the time, Tauno was in the hospital being treated for a
compound fracture of his arm, and was devastated by the news of the
14 loss of his close relatives.

15 *Id.* at 5.

16 Dr. Pork also interviewed several former coaches and classmates of
17 Petitioner who knew him as a teenager, all of whom had positive things to say
18 about him, including his non-violent and generally passive demeanor. *Id.* at 5-9.

19 Another potential expert witness whose declaration was included in the
20 state court habeas proceedings is Dr. Myla Young, a psychologist who was a
21 contract employee at the Correctional Medical Facility in Vacaville, California,
22 where she tested and evaluated state prison inmates. FAP Exh. 84 at 1-2. In that
23 capacity, Dr. Young conducted various research studies on inmates, including
24 "risk factors to high community violence." FAP Exh 84 at 2. As part of her
25 private practice, Dr. Young was hired by Petitioner's habeas counsel to interview
26 and administer various tests on Petitioner. FAP Exh. 84 at 3-5. Like most of the
27 other experts, Dr. Young concluded that Petitioner, while suffering occasionally
28

1 from depression, had no major mental or psychopathic disorders. Her declaration
2 states:

3 To the contrary, he has a prosocial orientation; does not have
4 characteristics suggestive of psychopathy; and does not have risk
5 factors associated with violence. To the best of my recall, in the ten
6 years that I have been evaluating individuals in the context of criminal
7 proceedings, he has fewer risk factors to violence than any individual
8 I have ever examined in this context.

9 FAP Exh. 84 at 1. After describing various tests conducted with Petitioner, as
10 well as her observations on his background as well as the Piirisild murder, Dr.
11 Young's statement concludes:

12 In sum, Mr. Waidla is the most pro-social and non-criminally oriented
13 individual I have evaluated in the context of criminal proceedings.
14 All of the psychological data are consistent with his history of non-
15 assaultive and nonviolent conduct, and in my opinion constitute one
16 of the strongest conceivable cases in mental state mitigation that could
17 be presented in a capital proceeding. He has turned to writing fiction
18 while in jail, and has applied himself to it with an admirable diligence.
19 I have read one chapter of a 550-page work he has completed, one of
20 two novels, and have spoken to him regarding the diligence with
21 which he applies himself to his writing. This is a very unusual case in
22 which an otherwise pro-social, law-abiding, and high-achieving
23 individual lapsed into a momentary assaultive outburst under
24 unusually if not uniquely mitigating circumstances, and has led an
25 entirely non-violent life both before and afterward.

26 FAP Exh. 84 at 10.

27 Dr. Young also commented on Petitioner's expressions of remorse over the
28 murder of Mrs. Piirisild. FAP Exh. 84 at 7. However, it would have been
reasonable for counsel to avoid such evidence for tactical reasons, mainly because
Petitioner did not admit to the killing at trial. It could be tactically reasonable to
forgo testimony that might well be viewed as just another opportunistic "about-
face" by Petitioner, given his denial of his confession and his false alibi. Thus,
while counsel may not have acted unreasonably in declining to pursue evidence of
serious mental defect or disorder at the penalty phase, that does not mean that he
was reasonable in forgoing any and all psychological testimony, such as that
consistently offered by Ruumet, Pork, and Young.

1 [A petitioner's] [m]ental state is relevant at the guilt phase for issues
2 such as competence to stand trial and legal insanity-technical
3 questions where a defendant must show a specific and very substantial
4 level of mental impairment. Most defendants won't have problems this
5 severe, and counsel can't be expected to know that further
6 investigation is necessary to develop these issues. By contrast, all
7 potentially mitigating evidence is relevant at the sentencing phase of a
8 death case, so a troubled childhood and mental problems may help
9 even if they don't rise to a specific, technically-defined level.

10 *Wallace v. Stewart*, 184 F.3d 1112, 1117 n.5 (9th Cir. 1999).

11 Petitioner's initial state habeas filing included other evidence that reflected
12 generally commendable academic performance, various accomplishments in
13 sports and photography, and his graduation from the Estonian equivalents of
14 middle school and high school. See FAP Exhs. 16, 17, 18, 19, 63, 90 and 91.

15 The evidence summarized above was developed, gathered, and presented in
16 the initial state habeas proceedings in 1999. None of it was presented solely in the
17 federal proceedings or at the federal evidentiary hearing. None of it is subject to
18 procedural bar on timeliness grounds. While Petitioner's trial counsel need not
19 have used the very same witnesses, experts, or other sources of evidence identified
20 in the habeas proceedings, the overall presentation reflects that, *had trial counsel*
21 *investigated*, he would have discovered and had reasonable access to a substantial
22 amount of compelling mitigation evidence. But trial counsel did *not* investigate,
23 and therefore never even reached the stage of making "tactical" assessments as to
24 which evidence to present and which to avoid.

25 These circumstances fall squarely within the standards clearly established
26 by the U.S. Supreme Court in *Strickland* itself and as further clarified and refined
27 in the capital habeas cases decided by the Court since *Strickland*. Petitioner made
28 a strong showing in state court of the existence and availability of helpful
evidence regarding his personal background. And it is virtually impossible to
conjure up any corresponding tactical reasons to *forgo* such evidence, except as
noted with a few narrow aspects of the proffered evidence. Because trial counsel
did not conduct anything close to an adequate investigation, and because the

1 record before the state court clearly reflected the availability of relevant mitigation
 2 evidence, this Court find counsel’s performance was deficient under *Strickland*
 3 and its progeny. This Court further finds that the evidence before the State court
 4 was so clear, and of such weight, that any determination to the contrary was
 5 “unreasonable” under 28 U.S.C. §2254(d).

6 Once again, however, the California Supreme Court theoretically could
 7 have found trial counsel’s performance was deficient, but not prejudicially
 8 harmful. This Court will look to Petitioner’s remaining claims before attempting
 9 to conduct an overall assessment of prejudice.

10 Analysis—Skarias’ “Exculpation” of Petitioner

11 In sub-claim 8(f), Petitioner claims that trial counsel was deficient at the
 12 penalty phase because he failed to introduce a statement by Mr. Sakarias that
 13 showed Petitioner was not the “actual killer.” FAP ¶ 327. Petitioner states:

14 Immediately accessible, relevant, and admissible on this crucial point
 15 was the declaration against interest portion of Sakarias’ confession
 16 that it was he, not petitioner, who had killed Mrs. Piirisild with the
 17 sharp hatchet blows. Since the prosecution had argued repeatedly that
 18 petitioner had struck all the blows with the hatchet, both sharp and
 blunt, while Sakarias inflicted only non-fatal knife wounds, this
 evidence would have undermined the prosecution’s assertion that
 petitioner was the actual killer and mastermind of the crime.

19 FAP ¶ 328.

20 Petitioner asserts that the relevant portion of the Sakarias confession was
 21 admissible as a declaration against interest under California Evidence Code
 22 §1230. Petitioner further argues that such evidence was “constitutionally
 23 mandated” under *Green v. Georgia*, 442 U.S. 95, 97 (1979), where the Supreme
 24 Court held it was error to exclude penalty phase evidence showing that the “actual
 25 killing” was carried out by the petitioner’s partner in crime.

26 Offered in support of this claim is an excerpt of Mr. Sakarias’ confession, in
 27 which he says that after he and Petitioner dragged Ms. Piirisild’s body into the
 28

1 bedroom, he (Sakarias) returned to the bedroom with the hatchet and hit her twice
2 on the head. FAP ¶ 328, n.15.

3 The California Supreme Court described Sakarias' confession in more
4 detail. As summarized by that court, the confession included the following:

5 When Viivi came in the door, Waidla hit her on the head
6 with the hatchet. She fell, begging Waidla to stop.
7 Waidla then said to defendant, "What you waiting for,
8 stab her." [Sakarias] stabbed Viivi "five times or more"
9 in the chest with the knife, until the handle broke off.
10 Viivi's body was still "shaking" when he stabbed her.
11 [Sakarias] retrieved the blade, reassembled the knife and
12 put it in his pocket. Waidla then hit her "a couple more
13 times."

14 The pair dragged Viivi to the bedroom and covered her
15 with a blanket, then returned to the kitchen. Waidla
16 handed the hatchet to defendant and told him to go hit her
17 again. [Sakarias] went back into the bedroom and struck
18 Viivi on the top of her head two times. He then returned
19 to the kitchen and ate some liverwurst from the Piirisilds'
20 refrigerator.

21 *People v. Sakarias*, 22 Cal. 4th 596, 612-14 (2000).

22 These additional details make it readily apparent that Petitioner's argument
23 fails. Preliminarily, in terms of hearsay analysis, the overall statement is arguably
24 *not* a declaration against interest on the part of Mr. Sakarias, because it mostly
25 deflects blame onto Petitioner. He states that Petitioner essentially *ordered* him to
26 stab Mrs. Piirisild, apparently in the midst of Petitioner's own attack on her with
27 the hatchet. Then, sometime after they dragged her body to the bedroom,
28 according to Sakarias, it was Petitioner who handed him the hatchet and instructed
him to go back to the bedroom and hit her some more. Thus, in his version of the
murder, Sakarias never touched the victim except at Petitioner's urging. Clearly,
a reasonable jurist might find the declaration against interest exception would *not*
apply. See *People v. Lawley*, 27 Cal. 4th 102, 153 (2002) (self-inculpatory
aspects of statement do not make it admissible under §1230).

Apart from any issues of admissibility, however, the more important point
is that the evidence is hardly "mitigating" for Petitioner. Even if Mrs. Piirisild

1 was somehow still clinging to life when Sakarias delivered the final hatchet blows
 2 in the bedroom —such that he was literally “the actual killer”—his version of the
 3 attack indicates he delivered those final blows on Petitioner’s command. It is
 4 therefore highly unlikely that this story would somehow have left the jury with a
 5 more *positive* impression of Petitioner. A competent defense attorney could
 6 reasonably decide to avoid such potentially harmful evidence.

7 The California Supreme Court’s denial of this claim on the merits was not
 8 contrary to clearly established federal law, nor was it an unreasonable
 9 determination of the facts. Sub-claim 8(f) is therefore DENIED.

10 Analysis—Cumulative Impact of Trial Counsel’s Guilt
 11 Phase Errors

12 In his final assertion of penalty phase IAC, sub-claim 8(g), Petitioner looks
 13 back to the *guilt* phase IAC claims, and briefly asserts that they cumulatively
 14 warrant penalty phase relief. FAP ¶¶ 336-337. But as shown in the prior
 15 discussion of the guilt phase IAC claims, AEDPA review requires that virtually all
 16 of those claims be denied on the merits. Accordingly, they must be excluded from
 17 any cumulative error analysis. *See Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th
 18 Cir. 2002). To the extent trial counsel was perhaps deficient on the fingerprint-
 19 related claim, that error and any prejudice suffered therefrom has no real bearing
 20 on any matters relating to the *penalty* phase. Where the guilt phases errors are “at
 21 best, marginal, [the Court] cannot conclude that their cumulative effect was ‘so
 22 prejudicial’ to [Petitioner] that reversal is warranted.” *United States v. Karterman*,
 23 60 F.3d 576, 579-80 (9th Cir. 1995) (citations omitted); *United States v. De Cruz*,
 24 82 F.3d 856, 868 (9th Cir. 1996) (same).

25 To support sub-claim 8(g), Petitioner provides few specifics on how the
 26 alleged guilt phase errors may have contributed to the jury’s decision on
 27 Petitioner’s sentence. Petitioner focuses almost exclusively on the harm that
 28 flowed from the jury’s rejection of Petitioner’s false alibi, and presumes that if

Petitioner had testified “truthfully,” the outcome of the penalty phase might have been different. See FAP 336.¹² Petitioner’s argument implies that counsel should have presented a defense based on such theories as the “claim-of-right” defense, or that Petitioner lacked the intent to kill. For reasons already stated, those defense theories lacked sufficient factual and legal support. The California Supreme Court’s denial of this argument was thus not unreasonable.

The California Supreme Court’s denial of this claim on the merits was not contrary to clearly established federal law, nor was it an unreasonable determination of the facts. Sub-claim 8(g) is DENIED.

5.7 Penalty Phase—The Trial Court’s Handling of the Jury’s Deadlock During the Penalty Phase Deliberations (Claim 9)¹³

5.7.1 Relevant Facts

In Claim Nine, Petitioner alleges he was deprived of due process and subjected to cruel and unusual punishment based on the trial court’s handling of a jury note indicating it was deadlocked in its penalty deliberations. FAP ¶¶ 338-344. The actual colloquy on the matter, which occurred on the third day of penalty deliberations, was as follows:

The Court: I received a missal today which I do have to contact counsel about, and I have called you here for this reason. The jury has asked the following:

“We, the jury in the above-entitled action, request the following: Instructions regarding a jury who cannot come to a unanimous decision in the penalty phase, signed this 4th day of January, 1991, Los Angeles, [name of foreperson]”

¹² As already discussed, counsel’s use of Petitioner’s uncorroborated guilt phase testimony as the sole source of mitigation evidence, especially given the jury’s disbelief of his other testimony, is one of several factors that reflect counsel’s deficient performance at the penalty phase. Such a finding, however, has little relevance to the merits of sub-claim 8(g).

¹³ Petitioner’s Ninth and Tenth Claims raise issues that, to some extent, may implicate the overall penalty phase IAC claim. Accordingly, the Court will defer the penalty phase prejudice analysis until after it rules on those claims.

1 Of course, the answer is quite simple. There are no instructions.

2 Also, the law -- there is a case on a similar topic which I should bring
3 to your attention, because it may be more pertinent down the line. I
4 may even want to tailor my response in light of this case. The case is
People versus Kimble, K-I-M-B-L-E, 44 Cal. 3d 480 at page 511. In
that case the jury -- the court received the following question from the
jury during the penalty phase, and I quote:

5 “The jury feels the possibility at this time that we will not be able to
6 find a unanimous decision. What will then be the court’s decision?”
The Supreme Court upheld the following answer of the trial judge to
the jury, and I quote:

7 “That is not your province.”

8 What I am going to tell the jury now is that there are no instructions
9 relating to this issue and go from there. I can do it one of two ways,
10 and I’ll let counsel make the decision. I can bring the jury in and tell
them myself personally, or I can have the bailiff go in and tell them
that’s my response.

11 Whatever you gentlemen want to do, that’s fine.

12 Mr. Gladstein: Your honor, I have no problem just having the bailiff
13 give the jury that response.

14 Mr. Ipsen: Whatever the court decides is acceptable to the People.

15 The Court: Very good, okay. Okay. Is that agreeable with you, Mr.
16 Waidla, as well, that the bailiff give the response to the jury in the
deliberation room?

17 Defendant Waidla: Yes.

18 The Court: Very good. Mr. Bailiff, will you please tell the jury that
19 there are no instructions regarding a jury who cannot come to a
unanimous decision in the penalty phase.

20 The Bailiff: Yes, your honor.

21 The Court: And that will be it. Okay.

22 RT 3105A-3105C.

23 Two days later (on the fifth days of deliberations), the jurors sent another
24 note stating “we have come to the definite conclusion we are deadlocked and
25 cannot come to a unanimous conclusion.” 31 RT 3109. This time, the judge
26 summoned the jury and polled each juror on whether there was a “reasonable
27 probability” that they could reach a unanimous verdict if it continued to
28

1 deliberate, and received one “yes,” ten “noes,” and one “not sure.” 31 RT at
2 3110-11. With no objection from defense counsel, the judge told the jury:

3 Ladies and gentlemen, the issue which you are to decide is a very
4 difficult issue because it involves intense moral reflection. I believe,
5 however, based upon your responses, that I would ask you to continue
6 deliberations. I appreciate your thoughts, but I’m going to ask you to
7 continue.

8 31 RT at 3112. On the ninth day, the jury returned its death verdict. 31 RT at
9 3126.

10 **5.7.2 Applicable Law**

11 According to Petitioner, the trial judge’s “non-response...invited the jury to
12 impose a death sentence” because it did not answer the jurors’ question about the
13 consequences of a hung jury. FAP at ¶¶ 341-42. While Petitioner asserts that a
14 more complete response was required, he does not specify *what* response should
15 have been given. He alleges only that the judge should have at least given “a
16 cautionary instruction ... not to deliberate or speculate regarding the consequences
17 of a hung jury.” See FAP at ¶ 342 (stating that the judge’s response “does not
18 even rise to the level of” such a cautionary instruction). Petitioner claims the
19 judge’s failure to give a more proper instruction left the jury “to its own devices to
20 discuss, speculate, and ultimately to decide petitioner’s fate.” See FAP at ¶ 342
(As Petitioner’s trial counsel did not object, the issue is whether the judge had a
21 *sua sponte* obligation to advise the jury differently.)

22 The State argues that the trial court was not constitutionally required to
23 instruct the jury about the consequences of a deadlock in the penalty phase. The
24 State further argues that, even if the jury may have speculated on the
25 consequences of a hung jury, such “intrinsic jury processes” may not be grounds
26 for reversal. Answer at 57-58.

27 In the case cited by the trial judge, *People v. Kimble*, 44 Cal. 3d 480 (1988),
28 the California Supreme Court held that a trial judge was under no duty to instruct
a jury, *sua sponte*, that if it remained deadlocked, the defendant would be

1 sentenced to life imprisonment without possibility of parole in accordance with
 2 then-existing state law, because those statutory provisions concerned only a
 3 procedural matter directed to trial administration. *Id.* at 511-15. The Court also
 4 observed that if jurors were advised of the statutorily-directed result of a hung
 5 jury, a single juror opposed to the death penalty would in effect have veto power
 6 over any death sentence. *Id.* at 515-16. The analysis set forth in *Kimble* is
 7 repeated in *Jones v. United States*, 527 U.S. 373 (1999), where the U.S. Supreme
 8 Court found such an instruction was not constitutionally compelled, and would be
 9 “an open invitation for the jury to avoid its responsibility and to disagree.” *Id.* at
 10 384.

11 Petitioner raised this claim in his direct appeal. However, in that instance he
 12 argued with some specificity what the jury should have been told:

13 Waidla contends that the superior court erred by effectively refusing
 14 to instruct the jury ... that, under California statutory law, if a jury
 15 “has been unable to reach a unanimous verdict as to what the penalty
 16 shall be, the court shall dismiss the jury and shall order a new jury
 17 impaneled to try the issue as to what the penalty shall be. If such new
 18 jury is unable to reach a unanimous verdict as to what the penalty
 19 shall be, the court in its discretion shall either order a new jury or
 20 impose a punishment of confinement in state prison for a term of life
 21 without the possibility of parole” (Pen. Code, § 190.4, subd. (b)).

18 *People v. Waidla*, *supra*, 22 Cal. 4th at 745.

19 By the time of Petitioner’s trial in 1990, the statute described in *Kimble*,
 20 *supra*, had been amended to substitute the limited retrial procedure described in
 21 Petitioner’s direct appeal. The California Supreme Court rejected Petitioner’s
 22 argument in a lengthy and reasoned discussion, with references to the federal
 23 Constitution and U.S. Supreme Court authority:

24 [W]e find no error. It was not at all unreasonable for the superior court
 25 effectively to refuse to instruct the jury as it deliberated in response to
 26 its request, which went to the consequences of a jury’s inability to
 27 reach a unanimous verdict as to penalty. As the superior court itself
 28 commented, the choice between death and life imprisonment without
 possibility of parole that is demanded of a jury after the penalty phase
 as its fundamental and ultimate act is “very difficult . . . because it
 involves intense moral reflection.” An instruction of the sort refused,
 if given, might disturb the task and invite its avoidance, having as it

1 does a “potential for unduly confusing and misguiding the jury in their
 2 proper role and function in the penalty determination process.”
 3 (*People v. Belmontes* (1988) 45 Cal. 3d 744, 814; *accord, e.g., People*
 4 *v. Hines* (1997) 15 Cal. 4th 997, 1075; *cf. Jones v. United States*
 5 (1999) 527 U.S. 373, 382 [implying as much for a jury at the so-called
 6 “selection phase” of a federal capital trial, which is similar to the
 7 penalty phase here].) The proper focus of the jury’s deliberations is
 8 which penalty to choose, and not whether to make the choice in the
 9 first place. We recognize that, under California statutory law, a trial
 10 court is required to instruct a deliberating jury on its request “on any
 11 point of law arising in the case.” (Pen. Code, § 1138.) But it is not
 12 required so to instruct on any “point of law” merely associated
 13 therewith. The consequences of a jury’s inability to reach a
 14 unanimous verdict as to penalty is a point of the latter kind and not the
 15 former. (*Cf. Jones v. United States, supra*, 527 U.S. at p. 382
 16 [implying as much for a jury at the selection phase of a federal capital
 17 trial: the consequences of a jury’s inability to reach a unanimous
 18 verdict as to penalty “has no bearing on [its] role in the sentencing
 19 process”].) To repeat: The proper focus of a jury’s deliberations as to
 20 penalty is which penalty to choose, and not whether to make the
 21 choice in the first place.

22 Waidla argues against our conclusion. We agree that, as a general
 23 matter, the superior court may instruct a deliberating jury in response
 24 to a request going to the consequences of its inability to reach a
 25 unanimous verdict as to penalty. (*See People v. Belmontes, supra*, 45
 26 Cal. 3d at p. 814.) But we cannot agree that, in this cause, the
 27 superior court had to do so, whether under the compulsion of the cruel
 28 and unusual punishments clause of the Eighth Amendment to the
 United States Constitution, as applied to the states through the due
 process clause of the Fourteenth Amendment;²² the due process clause
 of the Fifth Amendment, as applied to the states through the due
 process clause of the Fourteenth Amendment; the due process clause
 of the Fourteenth Amendment itself; or otherwise.

Waidla asserts that the superior court was required to act in order to
 dispel a concern by the jury that its inability to reach a unanimous
 verdict as to penalty might undermine its verdicts and findings as to
 guilt or, at least, result in a sentence of some term of imprisonment
 that might in fact allow parole. Any such concern, however, is solely
 a matter of speculation, and is altogether without basis in the record
 on appeal. The superior court was not obligated to act in the
 premises. Waidla says that its effective refusal to instruct “derail[ed]”
 the jury as it deliberated. Quite the opposite. It kept it on track.

Id. at 745-47 (parallel citations omitted) (brackets in original).

5.7.3 Discussion

Petitioner’s ninth claim appears to be closely related to his eleventh claim,
 in which he asserts that the jurors mistakenly believed he could be sentenced to
 something *less* than life without parole if he did not receive a sentence of death.

1 See FAP 351-358. However, Petitioner's eleventh claim was previously denied
 2 by this Court on the merits. See Order dated July 7, 2008, Dkt. No. 54 at 29-31.
 3 In describing the grounds for denying Claim 11, this Court's Order included the
 4 following:

5 [T]he trial court instructed the jury, among other things, that "[i]t is
 6 the law of [California] that the penalty for a defendant found guilty of
 7 murder of the first degree shall be death or confinement in the state
 8 prison *for life without possibility of parole* in any case in which the
 9 special circumstances alleged in this case have been specially found to
 10 be true." 31 RT 3091 (emphasis added). The trial court also stated, "It
 11 is now your duty to determine which of the two penalties, death or
 12 confinement in the state prison *for life without possibility of parole*,
 13 shall be imposed on the defendant." 31 RT 3096 (emphasis added). In
 14 addition, the trial court instructed the jury that it must "accept and
 15 follow the law" as stated and that "[b]oth the People and the defendant
 have a right to expect that you will consider all of the evidence, follow
 the law, exercise your discretion conscientiously, and reach a just
 verdict." 31 RT 3092; 2 CT 407-08 (CALJIC 1.00). The Court must
 presume that the jurors followed the instructions as given. *Francis v.*
Franklin, 471 U.S. 307, 324 n. 9 (1985) ("The Court presumes that
 jurors, conscious of the gravity of their task, attend closely the
 particular language of the trial court's instructions in a criminal case
 and strive to understand, make sense of, and follow the instructions
 given them.").

16 July 7, 2008 Order at 30-31.

17 Thus, as this Court has already found, the evidence clearly indicates that
 18 jurors were *not* "left to speculate" as to whether a hung jury would somehow
 19 make Petitioner eligible for release. Any contrary evidence or testimony is less
 20 than plausible and, as stated in the prior Order, clearly inadmissible. *Id.*; see Fed.
 21 R. Evid. 606(b); *Raley v. Ylst*, 470 F.3d 792, 803 (9th Cir. 2006).

22 Even if the jurors *did* engage in speculation regarding the possibility of
 23 Petitioner being released from prison, federal law does not require that relief be
 24 granted. In *Raley*, a capital case, the petitioner asserted that the jury considered
 25 improper topics, including the petitioner's possible eligibility for release if
 26 sentenced to life without parole. *Id.* at 803. The Ninth Circuit held that the jury's
 27 discussion did not constitute reversible error, because such discussions are
 28 "intrinsic jury processes," and thus are not treated the same as improper "extrinsic"

1 matters. *Id.* The Court also noted a reviewing court may not inquire into a jury’s
2 deliberations on intrinsic factors. *Id.*; *see also Jones, supra.*

3 The cases cited by Petitioner do not state otherwise. In *Bollenbach v.*
4 *United States*, 326 U.S. 607 (1946), the Supreme Court held that a trial judge
5 erred when, faced with a deadlocked jury, he provided “manifest misdirection” to
6 the jury on an evidentiary issue, effectively creating a new and legally-unfounded
7 presumption that worked to the detriment of the defendant. *Id.* at 614. In
8 *McDowell v. Calderon*, 130 F.3d 833 (9th Cir. 1997), the trial judge failed to
9 respond effectively to a note revealing that several jurors held fundamentally
10 erroneous views on what qualified as mitigating evidence. *Id.* at 835-38. In
11 Petitioner’s case, by contrast, the jury’s note and the trial court’s response did not
12 involve such fundamental errors of substantive law.

13 Given the vagueness of Petitioner’s current claim, including his failure to
14 clearly specify what the trial judge *should* have said, and his list of the supposed
15 evils caused by the judge’s response (i.e., it left the jury “to its own devices to
16 *discuss, speculate, and ultimately to decide* petitioner’s fate”), it is difficult to
17 determine just what Petitioner is arguing for here. In any case, Petitioner fails to
18 demonstrate how the California Supreme Court unreasonably misapplied or
19 ignored clearly established federal law on this issue. As shown in its reasoned
20 opinion on the direct appeal (quoted above), that Court fully considered and
21 properly applied the relevant federal constitutional provisions and U.S. Supreme
22 Court case law to Petitioner’s claim.

23 Accordingly, Claim Nine is DENIED.

24 **5.8 Penalty Phase—The Jury’s Discussion of and Reliance on**
25 **Petitioner’s Non-Testimonial Demeanor (Claim 10)**

26 In his final penalty phase claim, Petitioner asserts that “the jurors discussed,
27 and used as a basis for their death penalty decision, their perception of Waidla’s
28 demeanor as detached, aloof, and indicative of a lack of remorse,” which

1 Petitioner claims is “an unconstitutional basis for imposition of the death penalty.”
 2 FAP ¶¶ 347-48. Petitioner claims his apparent lack of remorse was caused by
 3 dissociative disorder, and by cultural factors due to his upbringing in Estonia:

4 Counsel’s failure to investigate dissociative disorder and to have his
 5 experts opine on the condition constituted ineffective assistance of
 6 counsel. Furthermore, the jurors’ improper reliance on petitioner’s
 7 apparent lack of remorse was compounded by petitioner’s background
 8 and upbringing. It is an Estonian cultural trait to present as stoic and
 9 detached in difficult situations, rather than emotional or volatile.
 10 Estonians are linguistically and culturally related to the Finns and the
 11 other Scandinavian peoples. Thus, petitioner’s trial demeanor made a
 12 bad impression on the jury because of his apparent detachment,
 13 aloofness, and lack of remorse, even though petitioner’s demeanor
 14 was a cultural artifact, not a reflection of his actual feelings and
 15 emotions. Counsel was ineffective for not presenting expert
 16 testimony to educate the jury about these cultural differences.

17 FAP ¶ 349.

18 Petitioner’s fleeting assertion of a “dissociative disorder” presumes that trial
 19 counsel was deficient for not providing enough material to enable the psychiatric
 20 experts to diagnose it. This Court has already rejected Petitioner’s claims in that
 21 regard. (See discussion of Claim 3(d), *supra*.) As for the “cultural artifact” aspect
 22 of Petitioner’s claim, it is true that “the failure to present evidence necessary to
 23 bridge a cultural gap may constitute IAC.” *Caro*, 165 F.3d at 1227 (citing
 24 *Siripongs v. Calderon*, 35 F.3d 1308, 1316 (9th Cir. 1994)). However,
 25 Petitioner’s tenth claim is without factual foundation. He presents no citation to
 26 evidence in the record, either at trial or on habeas review, that even remotely
 27 indicates that jurors discussed his allegedly “detached” and “aloof” demeanor.
 28 Indeed, the trial record is entirely devoid of any type of reference to the issue, and
 the juror declarations submitted in the habeas proceedings make no mention of it.
 In any case, evidence of juror comments on such intrinsic matters would be
 inadmissible.

Because the trial and habeas records contain zero evidence of any
 culturally-based “demeanor” issues, negative or otherwise, any claim of IAC

1 regarding how trial counsel should have handled such a problem is a hypothetical
2 question. Accordingly, Claim Ten is DENIED.

3 **5.9 Penalty Phase—Prejudice**

4 As discussed above, the Court finds that trial counsel's performance at the
5 penalty phase of Petitioner's trial was clearly deficient in light of counsel's
6 complete failure to investigate or present mitigation evidence, which includes
7 information regarding Petitioner's childhood and background (beyond the very
8 limited guilt phase references), his pro-social behavior, lack of future
9 dangerousness, and positive adjustment to incarceration. Indeed, the existence of
10 such mitigating evidence is not seriously disputed by Respondent.

11 However, as noted previously, the California Supreme Court could have
12 found counsel's performance was indeed deficient, but not sufficiently prejudicial.
13 Assuming such a determination could be reasonably made, AEDPA would dictate
14 that the Court deny relief.

15 In determining the question of prejudice, it is helpful to summarize some of
16 the evidence that the jury might have heard had it not been for counsel's failure to
17 investigate potential mitigation factors:

- 18 • Petitioner's good behavior and positive adjustment to incarceration
19 during his two-plus years in jail prior to his trial.
- 20 • His at least somewhat difficult upbringing, with absentee parents.
- 21 • His commendable academic and athletic achievements.
- 22 • The total absence of any history reflecting a violent predisposition or
23 any significantly anti-social behavior.
- 24 • Testimony by a California BOP-contracted expert in prisoner
25 behavior that, in her ten years in that position, Petitioner had fewer risk
26 factors to violence than any inmate she had ever examined in that
27 context.

- The testimony and/or declarations of numerous family members and friends who knew Petitioner well, cared deeply about him, and were shocked by his involvement in the murder.
- Independent corroboration of Petitioner’s otherwise-unsupported claims of mistreatment in the Soviet military.
- Contextual evidence tending to rebut the characterization of Petitioner’s flight from the Soviet military as a “desertion.”
- Evidence that reinforced the showing that Petitioner is not averse to labor, tending to rebut the prosecutor’s “freeloader” arguments.

At a minimum, the evidence that was available but not presented would have “humanized” Petitioner to the jury, and would have come from the testimony of *persons other than Petitioner himself*, as is clearly important for such testimony. Any attempt at self-praise by a capital murder defendant in an effort to “humanize” himself is obviously vulnerable to attack as self-serving and lacking credibility. This axiom applies even more forcefully where, as here, the jury disbelieved other key components of the defendant’s testimony in the guilt phase.

Another important aspect of Petitioner’s case which cannot be ignored is the undisputed evidence regarding the duration and difficulty of the jury’s penalty phase deliberations. Those deliberations were very lengthy (nine court days—nearly two calendar weeks), during which the jury appeared to struggle greatly before it finally returned a verdict of death. The cases are unanimous in recognizing that such facts are quite relevant in determining penalty phase prejudice. *See United States v. Velarde-Gomez*, 269 F.3d 1023, 1036 (9th Cir. 2001) (*en banc*) (“[l]onger jury deliberations weigh against a finding of harmless error because lengthy deliberations suggest a difficult case.”); *Murtishaw v. Woodford*, 255 F.3d 926, 973-974 (9th Cir. 2001) (jury’s notes to judge, and its two days of deliberations, among other facts, raised grave doubt about harmlessness of error); *Daniels v. Woodford*, 428 F.3d 1181, 1209-1210 (9th Cir.

2005) (deliberation of two days before returning death verdict “suggests that the jury may have been influenced by mitigation evidence had it been offered.”); *Mayfield v. Woodford*, 270 F.3d 915, 932 (9th Cir. 2001) (in light of limited mitigation presentation, jury’s note about whether unanimity was required, and the length of its deliberations—1½ days—undermined the court’s confidence in death verdict). It is worth noting that each of the cited cases involved much shorter deliberations than those in the present case.

Besides the sheer *length* of the deliberations, the jury’s notes regarding the unanimity requirement and its indications of deadlock are likewise significant. *See Murtishaw* and *Mayfield*, *supra* (describing jury deadlock before verdict). Confronted with similar circumstances in *Sandoval v. Calderon*, 241 F.3d 765 (9th Cir. 2001), the Ninth Circuit stated:

This is not a case where the evidence overwhelmingly supported the jury’s [penalty] verdict. The issue was life or death and the jury was sharply divided. After over three days of deliberations, the jury informed the trial judge that it was hopelessly deadlocked. In response to the judge’s question whether the jury could possibly reach a result if it deliberated further or perhaps had portions of the transcript read back to it, each juror individually answered “no.” Upon being returned to its deliberations, the jury took only an hour and forty minutes to go from a deadlock to four unanimous verdicts.

Id. at 779. Based in part on the jury’s apparent difficulties, the reviewing court in *Sandoval* concluded: “At a minimum, we have *grave doubts* about the harmlessness of the error and therefore grant relief.” *Id.* (citing “grave doubts” language from *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir.1997) (*en banc*)). Likewise, in *Bean v. Calderon*, 163 F.3d 1073 (9th Cir. 1998), which involved a double murder, the court stated:

In assessing the potential implication of the mitigating evidence [petitioner’s] counsel failed to present, we find it noteworthy that the jury was initially divided over the appropriateness of the death penalty, deadlocking as to both murders before ultimately returning a death verdict for [one] and a verdict of life without parole for [the other].

All of these considerations “undermine confidence in the outcome” of [petitioner’s] penalty phase hearing. Faced with more compelling

1 evidence of [petitioner's] mental impairments, therefore, it is
2 reasonably likely that the jury "would have concluded that the balance
of aggravating and mitigating circumstances did not warrant death."

3 *Id.* at 1082 (quoting *Strickland*, 466 U.S. at 694-696).

4 These authorities clearly underscore the significance of evidence tending to
5 show a reluctant or divided jury, or both. Such evidence is undoubtedly present in
6 this case, and is arguably more compelling than in any of the just cited cases.

7 Another important issue relates to possible "tactical" or "strategic" reasons
8 counsel may have considered in deciding to forgo mitigating evidence that was
9 otherwise within reach. Perhaps the most common reason to do so is the risk the
10 evidence may "open the door" to harmful rebuttal evidence of other crimes or
11 misdeeds by the defendant that might otherwise remain inadmissible. *See Wong v.*
12 *Belmontes*, 558 U.S. 15, 22-24 (2009); *Stankewitz v. Wong*, 698 F.3d 1163, 1173
13 (9th Cir. 2012). But as previously noted, it appears there was no such rebuttal
14 evidence in this case to cause defense counsel concern.

15 Moreover, it appears counsel did not conduct enough investigation to be in
16 a position to even *make* "strategic" choices. As stated in *Strickland*:

17 [S]trategic choices made *after a thorough investigation* of law and
18 fact relevant to plausible options are virtually unchallengeable; and
19 strategic choices made *after a less than complete investigation* are
20 reasonably precise to the extent that reasonable professional
judgments support the limitations on investigation. In other words,
counsel has a duty to make reasonable investigation or to make a
reasonable decision that a particular investigation is unnecessary.

21 *Strickland*, 466 U.S. at 690 (emphasis added). Thus, the making of a "strategic"
22 decision presupposes that counsel has performed at least some amount of
23 investigation, whether it is "thorough" or "less than complete." *Id.* Thus, a
24 decision to forgo potentially-helpful mitigation evidence (or entire categories
25 thereof) might be excused only if the decision is based on *some* amount of
26 investigation. *Id.*

1 In this case, as admitted by trial counsel himself, no such investigation,
2 even of a preliminary nature, was ever carried out. Trial counsel does not state,
3 nor is there any independent showing, that he was too busy tending to other
4 professional or personal matters to devote adequate time to Petitioner's case.
5 While counsel completed the necessary forms to hire professional private
6 investigators, who obviously could have conducted a mitigation investigation, he
7 inexplicably failed to follow through and thus obtain such readily-available
8 assistance.

9 Also notable is the fact that the State's evidence in aggravation was limited
10 to the circumstances of the murder of Viivi Piirisild. To be sure, the murder itself
11 was violent and gruesome. It was enough for the jury, absent any mitigation
12 presentation, to ultimately decide to impose the death penalty. However, many
13 death-eligible murders can be described in such terms. A particularly aggravated
14 or depraved murder is not always a bar to relief on a penalty phase IAC claim.
15 *See, e.g., Hamilton v. Ayers, supra*, 583 F.3d at 1134; *Douglas v. Woodford*, 316
16 F.3d 1079, 1091 (9th Cir. 2003) (noting "the gruesome nature of the killing did
17 not necessarily mean the death penalty was unavoidable" where defendant raped,
18 tortured, and killed two teenage girls and buried them in the desert); *Lambright v.*
19 *Schriro*, 490 F.3d 1103, 1106-07, 1127-28 (9th Cir. 2007) (defendant watched as
20 codefendant repeatedly raped the victim; defendant then killed victim by stabbing
21 her multiple times and smashing her head with a rock); *Hovey v. Ayers*, 458 F.3d
22 892, 898, 930 (9th Cir. 2006) (defendant abducted and killed eight-year old girl,
23 inflicted numerous skull fractures and laceration wounds); *Smith v. Stewart*, 189
24 F.3d 1004, 1006, 1013-14 (9th Cir. 1999) (defendant raped two women, then
25 stabbed both repeatedly and punctured them with needles; bound them with rope,
26 forced dirt in their mouths, which were then taped shut; left them naked in the
27 desert to die); *Silva v. Woodford*, 279 F.3d 825, 849 (9th Cir. 2002) (defendant
28

1 abducted, robbed, raped and murdered two college students, then dismembered
2 one of their bodies).

3 In habeas cases alleging penalty phase IAC where the murder itself was *not*
4 particularly depraved or horrific (in relative terms, of course), courts often deny
5 relief in light of significant aggravating evidence *apart* from the murder, which
6 even competent counsel could not overcome. In Petitioner’s case, however, the
7 prosecution apparently found no such evidence, and therefore offered no
8 aggravating factors beyond the circumstances of the murder itself.

9 Moreover, simply because this Court found no error in the Petitioner’s
10 conviction after the guilt phase does not mean that it can be any less wary about
11 errors in the penalty phase:

12 Because of the potential consequences of deficient performance
13 during capital sentencing, we must be sure not to apply a more lenient
14 standard of performance to the sentencing phase than we apply to the
15 guilt phase of trial. As the district court noted, “[t]he issue for the jury
16 is whether the defendant will live or die.... The sentencing hearing is
17 defense counsel's chance to show the jury that the defendant, despite
the crime, is worth saving as a human being.... To fail to present
important mitigating evidence in the penalty phase – if there is no risk
in doing so – can be as devastating as a failure to present proof of
innocence in the guilt phase.”

18 *Mak v. Blodgett*, 970 F.2d 614, 619 (9th Cir. 1992) (quoting *Mak v. Blodgett*, 754
19 F. Supp. 1490 (1991)) (ellipses in original).

20 Viewing all the mitigating facts and circumstances discussed above—all of
21 which were presented in Petitioner’s initial state habeas proceedings—this Court
22 finds that trial counsel’s deficient penalty phase performance was clearly
23 prejudicial. A finding of prejudice requires a showing of a reasonable probability
24 that, but for counsel’s errors or omissions, the result of the proceeding would have
25 been different. *Strickland*, 466 U.S. at 693. “A reasonable probability is a
26 probability sufficient to undermine confidence in the outcome.” *Id.* at 694. “The
27 benchmark for judging any claim of ineffectiveness must be whether counsel’s
28

1 conduct so undermined the proper functioning of the adversarial process that the
2 trial cannot be relied on as having produced a just result.” *Id.* at 686.

3 It does not matter that the jury might have reached the same conclusion
4 even if counsel had presented a mitigation case. “Although we suppose a jury
5 could have heard it all and still voted for death, that is not the test.” *Rompilla*,
6 *supra*, at 393. Or, as stated by the Ninth Circuit:

7 Of course, we cannot be certain what the jury would have done had it
8 been given all of the relevant mitigating information But the fact
9 that the task it actually undertook differed so profoundly from the one
10 it would have performed had [petitioner’s] counsel not been deficient
11 is enough to undermine our confidence in the sentence it ultimately
delivered. We find a reasonable probability that the jury would have
imposed a different sentence but for the errors [petitioner’s] counsel
made. *See Strickland*, 466 U.S. at 694 (“A reasonable probability is a
probability sufficient to undermine confidence in the outcome.”).

12 *Boyde v. Brown*, 404 F.3d 1159, 1180 (9th Cir.), *as amended*, 421 F.3d 1154 (9th
13 Cir. 2005).

14 In the context of a penalty phase IAC claim, the Supreme Court itself has
15 described the standard for determining prejudice as “a reasonable probability that
16 at least *one* juror would have struck a different balance.” *Wiggins*, 539 U.S. at
17 537 (based on the jury unanimity requirement for the penalty verdict) (emphasis
18 added). The jury in this case deliberated for a very long time, and indicated not
19 once but twice (several days apart) that it was hopelessly deadlocked. The
20 mitigation evidence which it never heard was not insubstantial. The Court finds
21 that it is unreasonable to conclude there was *no* “reasonable probability” that just
22 one of Petitioner’s juror’s “would have struck a different balance.”

23 Based on the foregoing, this Court finds that the California Supreme
24 Court’s rejection of Petitioner’s penalty phase claim was an unreasonable
25 application of clearly established federal law as determined by the United States
26 Supreme Court in *Strickland v. Washington*, as well as the subsequent opinions of
27 the Supreme Court applying *Strickland* in this context.
28

1 **6. CERTIFICATE OF APPEALABILITY**

2 On its own motion, the Court deems Petitioner to have requested a certificate
3 of appealability as to those claims on which the Court has denied relief. The
4 issuance of certificates of appealability in habeas corpus cases is controlled by 28
5 U.S.C. § 2253. Unless a judge issues a certificate of appealability, an appeal may
6 not be taken from the final order in a habeas corpus proceeding in which the
7 determination complained of arises out of a process issued by a state court. 28
8 U.S.C. § 2253(c)(1)(A). A certificate of appealability may issue only if the
9 applicant has made a substantial showing of the denial of a constitutional right. 28
10 U.S.C. § 2253(c)(2). Because Petitioner has not made a substantial showing of the
11 denial of a constitutional right as to those claims for relief, the Court declines to
12 issue a certificate of appealability.

13 **7. ORDER**

14 Pursuant to 28 U.S.C. section 2254(d), Petitioner's claim of Ineffective
15 Assistance of Counsel with regard to the penalty phase of his trial is GRANTED.
16 All other claims for relief are DENIED. Within 120 days of the date of this order,
17 the State of California shall either commence retrial of the penalty phase of
18 Petitioner's case or convert his sentence to life in prison without the possibility of
19 parole.

20 IT IS SO ORDERED.

21 Dated: December 18, 2017



22
23 HONORABLE ANDREW J. GUILFORD
24 UNITED STATES DISTRICT JUDGE
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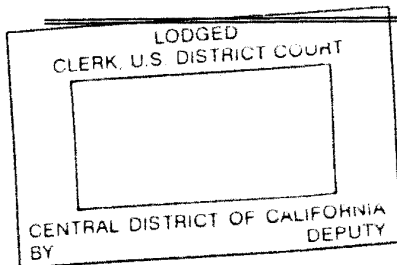
CV 01-00650-SVW
SUPREME COURT
FILED

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Robert Vandrom Clerk
DEPUTY

S076438

IN THE SUPREME COURT OF CALIFORNIA



IN RE TAUNO WAIDLA

ON

HABEAS CORPUS

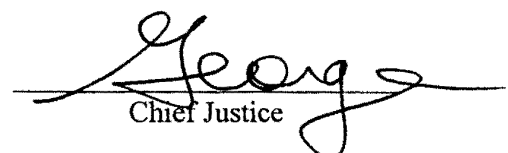
The petition for writ of habeas corpus is denied on the following grounds:

All claims are denied on the merits.

The following claims are each denied on the ground that it was raised and rejected on appeal: Claim IX, to the extent that it is based on the record on appeal; and Claim XI, to the extent that it asserts error on the part of the superior court.

(*In re Waltreus* (1965) 62 Cal.2d 218, 225; *In re Harris* (1993) 5 Cal.4th 813, 829–841.)

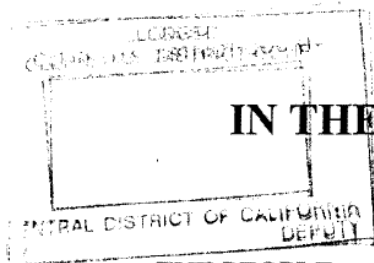
Mosk, J., and Brown, J., would deny the petition solely on the merits.


Chief Justice

B5

CV 01-00650-SVW

Filed 4/6/00



IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

TAUNO WAIDLA,

Defendant and Appellant.

S020161

County of Los Angeles
Super. Ct. No. A711340

This cause involves an appeal, which is automatic, from a judgment including a sentence of death against Tauno Waidla. A separate cause involves a similar appeal from a similar judgment against Peter Sakarias. (*People v. Sakarias* (Mar. 27, 2000, S024349) ___ Cal.4th ___.)¹

¹ Waidla has represented that he has “separately fil[ed],” or perhaps would separately file, a “request” for judicial notice of the record on appeal in Sakarias’s cause. He has apparently failed to do so. Treating his representation as a request, however, we deny it nonetheless. Judicial notice of the record there would “improperly augment” the record here. (*People v. Sanchez* (1995) 12 Cal.4th 1, 59, fn. 5.)

Prior to oral argument, Waidla made a motion for us to consolidate the proceedings involving this appeal and those involving a petition for writ of habeas corpus that he had submitted. We denied that request. At oral argument, he made another such motion. We deny this request as well. The premise of each of his submissions is that consolidation is necessary for consideration and decision of his appeal and his habeas corpus petition *inter se*. It is unfounded. An appeal is “limited

(footnote continued on next page)

I. Procedural History

On November 28, 1988, on behalf of the People of the State of California, the District Attorney of the County of Los Angeles presented an information to the superior court thereof against Waidla and Sakarias, accusing them of various felonies committed during the preceding summer. As subsequently illuminated by the evidence, the information — which was pleaded, according to custom, in the conjunctive (*In re Bushman* (1970) 1 Cal.3d 767, 775) — is to the following effect.

In count 1, the district attorney charged that Waidla and Sakarias murdered Viivi Piirisild in the home that she shared with her husband Avo Piirisild in North Hollywood. To make them subject to the penalty of death, he alleged that they committed the murder under the special circumstances of felony murder-robbery and felony murder-burglary. To enhance any noncapital sentence that they might receive, he alleged that, in committing the murder, they personally used a deadly and dangerous weapon in the form of a knife. For the same purpose, he similarly alleged that, in committing the murder, they personally used a deadly and dangerous weapon in the form of a hatchet. *In count 2*, he charged that, in the same incident, they robbed her at home. Among his allegations were separate ones for sentence-

(footnote continued from previous page)

to the four corners of the [underlying] record on appeal . . .” (*In re Carpenter* (1995) 9 Cal.4th 634, 646.) Habeas corpus is not. (See, e.g., *People v. Pope* (1979) 23 Cal.3d 412, 426–427, fn. 17.) Hence, consolidation is not necessary for consideration and decision of his appeal *vis-à-vis* his *habeas corpus* petition. Indeed, it is inappropriate, inasmuch as the habeas corpus petition extends far beyond the record on appeal. Neither is consolidation necessary for consideration and decision of his habeas corpus petition *vis-à-vis* his *appeal*. The habeas corpus petition is not confined to the record on appeal.

enhancement against both men, one for personal use of a deadly and dangerous weapon in the form of a knife, the other for personal use of a deadly and dangerous weapon in the form of a hatchet. *In count 3*, he charged that, also in the same incident, they burglarized the home. Here as above, his allegations included separate ones for sentence-enhancement against both men, one for personal use of a deadly and dangerous weapon in the form of a knife, the other for personal use of a deadly and dangerous weapon in the form of a hatchet. *In count 4*, he charged that, in an earlier incident, they burglarized a cabin that the Piirisilds owned in Crestline in San Bernardino County. *In count 5*, he charged that they fraudulently obtained telephone services. *In count 6*, he charged that they concealed, sold, and withheld stolen property that they took from the cabin. *In count 7*, he charged that Sakarias alone committed grand theft by taking an automotive vehicle.

Waidla and Sakarias (see *People v. Sakarias, supra*, ___ Cal.4th at p. ___ [p. 2]) each pleaded not guilty to the charges, and denied the allegations.

Subsequently, the superior court found that Sakarias was not mentally competent to stand trial, and suspended criminal proceedings against him alone. (See *People v. Sakarias, supra*, ___ Cal.4th at p. ___ [p. 12].) It severed Waidla's and Sakarias's cases, and allowed Waidla's to go forward.

Trial of Waidla was by jury. After the guilt phase, by its verdicts and findings, the jury found him guilty of the following felonies under the following special and other circumstances: Murder in the first degree against Viivi, under the felony-murder-robbery and felony-murder-burglary special circumstances, with the personal use of a deadly and dangerous weapon in the form of a hatchet but not a knife; robbery in the first degree against her, again with the personal use of a deadly and dangerous weapon in the form of a hatchet but not a knife; burglary in the first

degree as to the Piirisilds' home, yet again with the personal use of a deadly and dangerous weapon in the form of a hatchet but not a knife; burglary in the first degree as to their cabin; fraudulently obtaining telephone services; and sale of stolen property. After the penalty phase, by its verdict, it fixed the punishment for Viivi's murder at death instead of a term of imprisonment for life without possibility of parole.

The superior court rendered judgment against Waidla accordingly, sentencing him to death for Viivi's murder and also to a term of imprisonment for each of the other felonies, whose execution it stayed, totaling 18 years.

Later, having found that Sakarias had recovered mental competence, the superior court reinstated criminal proceedings. (*People v. Sakarias, supra*, ____ Cal.4th at p. ____ [p. 12].) Trial was by jury. (See *id.* at p. ____ [p. 11].) After the guilt phase, the superior court apparently dismissed the charge of grand theft. (See *id.* at p. ____ [p. 1].) Thereupon, the jury found him guilty of the same felonies, under the same special and apparently other circumstances, as had Waidla's jury with respect to Waidla. (See *ibid.*) After the penalty phase, it fixed the punishment for Viivi's murder at death. (See *ibid.*) The superior court rendered judgment accordingly, sentencing him to death for her murder and also to a term of imprisonment for each of the other felonies, whose execution it stayed, totaling 18 years. (*Ibid.*)

II. The Facts

At the guilt phase, the People introduced evidence, including a confession that Waidla made to the police, to prove to the jury that he was guilty beyond a reasonable doubt of all of the felonies charged under all of the special and other circumstances alleged, including first degree murder both on a theory of willful,

premeditated, and deliberate murder and also on theories of felony murder-burglary and felony murder-robbery.

Avo and Viivi Piirisild were born in the Baltic state of Estonia. In 1951, they came to the United States. They subsequently married, and had a single child, their daughter Rita. They were active in the Baltic American Freedom League, a volunteer organization whose purposes included securing the independence of the Baltic states of Estonia, Latvia, and Lithuania, which were then occupied by the former Union of Soviet Socialist Republics. They owned a home in North Hollywood and a cabin in Crestline. By the time pertinent here, Rita had grown to adulthood, left home, and married, taking her husband's surname Hughes, and living with him in the general area.

Around April of 1987, Avo and Viivi met Waidla and Sakarias. It appears that Viivi was then vice-president and secretary of the Baltic American Freedom League, and that Avo had formerly been its president. According to evidence including testimony that he himself would give bearing on his background and character, Waidla was born in Estonia apparently in 1967, and was reared there; he was conscripted into the Soviet Army, an altogether brutal environment, in 1986; he was sent to what was then East Germany for basic training; he ended up in a military hospital; once there, he met Sakarias, himself an Estonian conscript, who was assigned to drive a paramedic vehicle; they decided to desert; they left one night under the cover of darkness; after completing a journey of about three days, they crossed the border into what was then West Germany; apparently together with Sakarias, Waidla asked for, and received, political asylum, and sought, and obtained, permission to go to the United States; also apparently together with Sakarias, Waidla arrived in New York City in January of 1987, to the welcome of the Estonian-

American community there, and arrived in due course in Los Angeles in April of 1987, to the welcome of the Estonian-American community *there*. Both Waidla and Sakarias spoke and understood English. Of the two, Sakarias was more outgoing and outspoken, Waidla less so.

After meeting Avo and Viivi around April of 1987, Waidla and Sakarias moved into an apartment close to their home. Viivi invited them to dinner, and they accepted. Soon thereafter, she arranged for Waidla to interview for a position as a translator with the Voice of America in Washington, D.C.; he went there, something unfortunate apparently happened, and he returned about a week later.

Later in the spring of 1987, at Viivi's suggestion, Avo invited Waidla to move into their home — Viivi had told Avo, "He has no where [*sic*] to go, so we have to help him." Waidla accepted. He moved in immediately. In the time that followed, Avo and Viivi would take him with them to their cabin. They provided him with room and board; they also saw to his other needs, including clothing, medical care, cigarettes, etc. He got a little bit of money from other sources — for example, he sold to a Canadian newspaper an article that he wrote, and Viivi helped translate, relating to his flight with Sakarias from the Soviet Army to the West; he took some photographs for the Baltic American Freedom League; and he did various odd jobs. He expressed no interest in finding work or in furthering his education; indeed, he expressed an interest in *not* doing so: Not only did he make no efforts on his own behalf, he even frustrated efforts made by others, including Avo and Viivi, as by remaining only a week at a job that they had gotten for him and by refusing to cooperate in obtaining a scholarship that they had attempted to arrange. He indicated a desire to get money — but without working. So too did Sakarias, with whom he continued to associate when he was able, Sakarias moving from place to place around

the country. As Waidla and Sakarias themselves told Rita, they “wanted to get rich quickly,” and discussed “living on the beach in Hawaii and traveling all around the world making money and living the high life”; but they “didn’t want to be working stiffs”; they “frowned upon” the “American work ethic”; and they “felt that they were treated better financially in Estonia,” where, Sakarias said, a person could obtain “government money because the government was so corrupt.”

In the summer or fall of 1987, Avo asked Waidla to do certain construction and related work in and around the Piirisilds’ home in order to cover his room and board, and not for pay; Waidla agreed. Without Avo’s knowledge, Viivi promised to give Waidla, who did not have a driver license, a non-running Triumph Spitfire sports car belonging to Avo for his transportation needs if he should get a job or enroll in school. On learning of the promise, which he thought was conditioned on Waidla’s completion of the work in question, Avo expressed displeasure, apparently to both Viivi and Waidla, but agreed to abide by its terms.

By the fall of 1987, Viivi began to express an interest in paying for all of Waidla’s and Sakarias’s educational and perhaps other expenses if they wished to attend college. She expressed this interest to Waidla and, apparently, Sakarias and to others as well. Evidently, neither Waidla nor Sakarias had such a wish. On one occasion, when she spoke of the matter, Waidla simply rolled his eyes. On the same occasion, she indicated a concern that he was being influenced — negatively, it appears — by Sakarias.

By mid-May of 1988, Waidla had become angry with Avo and especially Viivi, and also, apparently, with the Estonian-American community generally; he had become desperate for money; and he had begun to scheme to resolve matters in his favor. So too had Sakarias.

In a letter dated May 14, 1988, and written to Sakarias, who was then evidently in or around New York, Waidla related (in Estonian, as subsequently translated) that he had “sent an application to the Munich Radio” — referring, apparently, to Radio Free Europe in Munich. “If you want, send one also. There they are looking for workers . . . (announcers).” He cautioned: “Look, don’t breath[e] about this to anybody, otherwise the same may happen what happened to me at V.O.A. When one jerk knows, then all know. This is the way of the expatriot [*sic*: for “expatriate”] Estonians. You know yourself just as well.” He added: “Generally my situation is shitty . . . (more than shitty).” “I do not believe that I can stand to stay here until end of June. I believe that if we cannot get to Germany for some reason, then we could do something together. Of course, . . . we must get rid of those dammed [*sic*: for “damned”] Estonians for once finally. This is like the Mafia, only the likes of us are the normal Estonians. I believe that to [*sic*: for “we”?] know the language and we can get along without those jerks.” He continued: “I believe that maybe we should go to Hawaii. Of course, if we can get to Munich, then definitely to there. I have nothing against it if we could go skiing in the Alps or chase women in Monte Carlo. Next week I will sell this wheelbarrow” — an evident reference in slang to Avo’s Triumph. “I cannot do anything with it. I cannot obtain driver’s licenses [*sic*], since Viivi’s insurance apparently does not cover it. This is all, of course, bullshit, but that’s the way it goes, and in Germany or in Hawaii, one does not need an automobile.” He asked: “Listen, how can one purchase such license in New York? Can it be done this way, that I will send you money, a photo and a signature. I have not found such a place here, and I do not care to come to New York. Such a forged license can be easily exchanged in Hawaii or in Germany” “for a correct license.” He closed: “Write. What do you think of such plans?”

In late May of 1988, in the presence of Rita, Viivi and Waidla had an angry encounter about construction work around the Piirisilds' home. For the work that he had in fact completed, which was substantial, Waidla demanded Avo's Triumph, put into running condition, or \$4,000, which he apparently believed was its value, a demand that he had made some days earlier. Viivi refused: She stated, "No, you show no incentive to work or go to school, and therefore you can't have the car or the money"; she added, "You've brought this topic up before, and I don't want to hear about it anymore." He threatened that, if he did not get what he demanded, he would report her to the building authorities for nonpermitted construction, a threat that he made some days earlier as well. She stated that he had brought up this topic too previously, and did not wish to hear about it again. She made out a list of the cost of his room and board and other needs, which amounted to between \$10,000 and \$15,000. He became angry, and said, "Everyone knows what kind of person you are all around town." She responded, "Get packed and get out of here." She made a telephone call to Avo. Waidla threatened that, if he did not get what he demanded, he would kill Avo or break his arm. Rita calmed Waidla down, gave him a sandwich and some soda, and told him to go peacefully and not to do anything to provoke Avo. With her help, he packed, and then left. Sakarias picked him up, and together they departed.

After, if not before, Viivi and Waidla's angry encounter, Viivi began to express fear of Waidla and Sakarias. She expressed such fear to a number of persons, including Avo and Rita and also George Charon, a Special Agent for the Federal Bureau of Investigation with whom she was acquainted.

In addition, after, if not before, Viivi and Waidla's angry encounter, Waidla and Sakarias found themselves cut off, at least in part, from the Estonian-American

community and that community's resources, and also from Estonians outside of the United States and *their* resources. According to testimony that Waidla himself would give, after the encounter he and Sakarias set out from the Los Angeles area in an automobile that Sakarias was driving; they went to Phoenix — from whose environs, apparently, they sent Viivi a postcard picturing a rattlesnake — then to Key West, Miami, New York City, Jersey City, and finally Boston; from Boston, they headed back to the Los Angeles area in a pickup truck that Sakarias contracted to deliver to San Francisco by a specified date for its owner; driving by turns, they arrived in the Los Angeles area. During the journey, again according to his own ensuing testimony, Waidla telephoned the Piirisilds several times in an effort to get Avo's Triumph or the proceeds from its sale.

On July 4, 1988, Waidla and Sakarias drove in the pickup truck to the Piirisilds' home. They appeared at the front door unannounced. Avo and Viivi were within. Afraid, Viivi stayed out of sight inside the house. Avo went to talk to the pair outside. In the conversation that followed, Waidla and Sakarias told Avo that they had made a coast-to-coast-to-coast journey; they also told him that they had caused damage to the pickup truck in an accident, and that they had to deliver it soon to San Francisco. In the course of the conversation, Waidla announced to Avo that he had come to get Avo's Triumph. Avo responded that he could not give him the automobile that day: The vehicle's title documents, which were in a bank safety deposit box, were not accessible because the bank was closed for Independence Day, and the vehicle itself was not in running condition. Waidla apparently asked whether he could give him the automobile the next day. Avo answered that he could not: He had to leave on a business trip the following morning — as he actually did — and would not return for about two weeks — as he actually did not. Waidla commented

that he did not know whether he would be back from the trip to San Francisco at that time. Displaying a bank book with a balance of \$18, he added that he had no money and needed some for the trip. Avo stated that he did not have any cash on hand. Waidla said that he would pay him back. Avo stated, again, that he had no cash. Instead, he offered to purchase gasoline for the pickup truck by means of a credit card. Waidla and Sakarias drove Avo to a service station. Avo made the purchase. Waidla and Sakarias drove him back home. They then departed themselves.

Between July 4 and 11, 1988, Waidla and Sakarias broke and entered the Piirisilds' cabin, which was unoccupied. As Waidla himself would testify in admitting the deed, they did not have much money. They stayed for some time, consuming food and drink and making telephone calls. Before they went off, with things in disarray, they took various items of the Piirisilds' personal property, including a combination telephone/clock radio and a hatchet.

On July 11, 1988, Waidla and Sakarias sold to a pawnbroker the combination telephone/clock radio that they had taken from the Piirisilds' cabin, obtaining only \$15 for the item.

On July 12, 1988, while Avo was away on his business trip, and after Viivi left for a dental appointment, Waidla and Sakarias broke and entered the Piirisilds' home. Before doing so, they had been seen in the area by one of the Piirisilds' neighbors walking towards the house, wearing jackets and not carrying bags, and displaying hard looks. On Viivi's return, as she passed through the front door toward the living room, before she could even attempt to resist, Waidla and Sakarias set upon her, dispatched her toward death, and then dragged her to a bedroom where her body would subsequently be found. They *throttled* her, fracturing her larynx and hyoid bone; *bludgeoned* her several times about her head and face and neck with

perhaps the butt of the head of a hatchet, delivering some blows with such force as to crush her skull, fracture her jaw and various facial bones with her teeth knocked back, and generally deform her features; *chopped* her three times around the top of her head perhaps with the edge of the head of a hatchet, delivering one blow with similar crushing, fracturing, and deforming force to penetrate her skull completely, delivering the other two blows with less force and, evidently, peri- or postmortem; and *stabbed* her four times in the left chest area perhaps with a knife, inflicting two wounds that were six inches deep in the environs of vital organs, one that was three inches deep, and one that was only one-half inch deep and, evidently, peri- or postmortem. They caused her death through the combination of the throttling, bludgeoning, chopping, and stabbing, and may have done so through any one of such means, because each was potentially fatal in and of itself. Before they went off, with things in disarray but apparently with their hands washed, they took various items of the Piirisilds' personal property, including a purse, wallet, green jade earrings, black star sapphire pendant, and credit and telephone charge cards, all belonging to Viivi. After doing so, they were seen in the area by the same neighbor walking away from the house, now carrying bags and not wearing jackets, acting suspiciously. Within the house, near the place at which they had broken and entered, Waidla left behind his right thumbprint for later discovery. He could not have made the impression while he was living there up to about a month and a half earlier, because such an impression has a "life span" of only 10 days to three weeks. Apparently, he also left behind two cigarette butts. Tobacco smoking was not permitted in the house because Viivi was allergic to the fumes. Saliva on the butts matched Waidla's, but not Sakarias's.

Later on July 12, 1988, Waidla and Sakarias sold to another pawnbroker the green jade earrings and the black star sapphire pendant that they had taken from Viivi at the Piirisilds' home, obtaining only \$20 for the items. With one of Viivi's credit cards, they purchased two airline tickets for one-way travel from Los Angeles to New York City. They abandoned the pickup truck.

On July 13, 1988, Waidla and Sakarias flew from Los Angeles to New York City. In the days that followed, they used Viivi's credit and telephone charge cards to make various telephone calls and to purchase various items, including a substantial amount of fine jewelry and an airplane ticket that they unsuccessfully attempted to exchange for a cash refund. They traveled, together and separately, within the Estonian-American community and without. When asked by an Estonian-American acquaintance whether they had heard that Viivi had been murdered, they made no response, and turned to talk about the weather.

On August 28, 1988, near the United States-Canada border in New York, a border patrol agent employed by the United States Immigration and Naturalization Service detained Waidla on suspicion of illegal entry into the country. Later that day, another border patrol agent detained Sakarias on the same basis at another location nearby. Seized from Sakarias was a very small amount of money, only 2 cents in American currency and 68 cents in Canadian. Seized from Waidla was a similarly small amount of money, only a few dollars in American currency and hardly anything at all in Canadian. Also seized from Waidla was a letter, dated August 26, 1988, that he had written to Sakarias, but had not sent, stating (in Estonian, as subsequently translated): "I am not sure, however, I hope that you will receive this letter sometime. At the last moment" — evidently turning back from suicide — "I did put the safety back on . . . the parabellum" — a kind of nine-

millimeter semiautomatic pistol — “and I put” it “into the bag. What will come the future is unknown. Right now I am drinking Bavarian beer with the proper strength in one of the better class bars in Montreal. When you hear that I am dead, then you should know that I’ve coracked [*sic*: for “croaked”] with a weapon in hand. If you hear that I have been taken alive . . . (almost impossible) . . . then you should know that I did my best. However, generally you may look for me in Key West. This is a small place. You will find me. Of course, when my death notice will appear, probably there is no reason to look for me. However, . . . well. Generally you are my best friend . . . (possibly the only friend ever), so that it would be nice if we should meet again sometime. I wish you a firm hand and a cool nerve” In his own testimony, Waidla would admit that he had the “parabellum” in his possession when he was detained, and had it loaded.

On August 29, 1988, Waidla made statements to the police, in the person of detectives employed by the Los Angeles Police Department. The next day, August 30, he made further statements to them and, ultimately, his confession. In his confession, he admitted participation in Viivi’s murder and the related burglary and robbery, but attempted to limit his involvement in the attack to a single bludgeoning blow delivered at its inception, and to expand Sakarias’s involvement to encompass all of the rest.

For his part, Waidla introduced evidence to raise a reasonable doubt in the mind of the jury as to his guilt of each of the felonies charged under each of the special and other circumstances alleged. In summation, however, his counsel would argue that, if the jury did not entertain such a doubt, it should find him guilty of first degree murder on a theory of willful, premeditated, and deliberate murder only, and not on a theory of either felony murder-burglary or felony murder-robbery.

Taking the stand in his own behalf, Waidla, among other things, denied any participation in Viivi's murder and the related burglary and robbery, asserting as an alibi that he had left the Los Angeles area three days earlier to hitchhike to New York alone without Sakarias. He recanted his confession. He stated that he merely parroted back a story that the police schooled him in. He stated further that he did so because they threatened to hang him if he did not, and had persuaded him that they would follow through, since they behaved like interrogators of the Komitet Gosudarstvennoy Bezopasnosti or KGB, the erstwhile Soviet "Committee for State Security," into whose hands he said he had fallen in Estonia. He presented evidence, including the testimony referred to above spanning his birth in Estonia to his arrival in Los Angeles, bearing on his background and character. He also relied on evidence that the People presented, including his article on his flight with Sakarias from the Soviet Army to the West, bearing on the same matter.

At the penalty phase, the People declined to introduce any further evidence. Relying on guilt phase evidence for aggravation, they urged the jury to fix the punishment for Viivi's murder at death.

Having introduced, or not opposed, evidence of his background and character at the guilt phase in anticipation of the penalty phase, Waidla likewise declined to introduce any further evidence. Relying on such guilt phase evidence for mitigation, which included no prior felony convictions and no other criminal activity involving the use or threat of force or violence, he urged the jury to fix the punishment for Viivi's murder at a term of imprisonment for life without possibility of parole.

III. Discussion

A. Issues Relating to Guilt and Eligibility for the Penalty of Death

Waidla raises a number of claims against the determination of guilt and eligibility for the penalty of death. As will appear, none is meritorious.

1. Conduct of Voir Dire of Prospective Jurors

Section 223 of the Code of Civil Procedure provides, among other things, that, “[i]n a criminal case,” the trial court has “discretion in the manner in which” it conducts the voir dire of prospective jurors. (Code Civ. Proc., § 223.) But it also provides that, in all such cases, including those involving the death penalty, the trial court must conduct the voir dire of “any prospective jurors . . . , where practicable, . . . in the presence of the other” prospective “jurors . . .” (*Ibid.*) In doing so, it “abrogates” (*Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1171) the holding of *Hovey v. Superior Court* (1980) 28 Cal.3d 1, wherein we “declare[d], pursuant to [our] supervisory authority over California criminal procedure, that in future capital cases that portion of the voir dire of each prospective juror which deals with” his views on the death penalty “should be done individually and in sequestration” (*id.* at p. 80, fn. omitted).

Waidla moved the superior court to conduct the voir dire of the prospective jurors concerning their views on the death penalty individually and in sequestration, in accordance with *Hovey*. The superior court denied the motion. In setting out its reasons, it stated that section 223 of the Code of Civil Procedure “abrogated” *Hovey*; under the provision’s terms, it had the authority to conduct individual and sequestered voir dire in the “exercise” of its “discretion”; except in areas that were “sensitive in nature,” it chose not to do so; it believed that individual and sequestered voir dire was simply not “necessary in this case”; it also believed that it had

“fulfill[ed]” any “policy” underlying individual and sequestered voir dire by obtaining from each prospective juror, on its order, a completed 25-page questionnaire answered in writing under penalty of perjury, wherein he expressed, inter alia, his “opinion on the death penalty,” “individually” and “in private.”

Waidla contends that the superior court erred under California statutory law by denying his motion to conduct the voir dire of the prospective jurors concerning their views on the death penalty individually and in sequestration, in accordance with *Hovey*.

An appellate court applies the abuse of discretion standard of review to a trial court’s granting or denial of a motion on the conduct of the voir dire of prospective jurors. (See Code Civ. Proc., § 223.) A trial court abuses its discretion when its ruling “fall[s] ‘outside the bounds of reason.’ ” (*People v. Ochoa* (1998) 19 Cal.4th 353, 408, quoting *People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.)

Employing that test, we find no error. The superior court’s denial of Waidla’s motion to conduct the voir dire of the prospective jurors concerning their views on the death penalty individually and in sequestration, in accordance with *Hovey*, was not unreasonable. We shall assume that the superior court might have conducted the voir dire as requested. But we cannot conclude that it had to do so. The reasons that it set out for its ruling were altogether reasonable. Devoting but a handful of words to the issue, Waidla makes essentially no argument to the contrary. We shall not endeavor to make one on his behalf.²

² Waidla claims that the superior court’s “erroneous” denial of his motion to conduct the voir dire of the prospective jurors concerning their views on the death penalty individually and in sequestration, in accordance with *Hovey*, “deprived” him of “due process and a fair and impartial jury” As explained in the text, the

(footnote continued on next page)

2. Overruling of Challenges for Cause Against Prospective Jurors

Waidla challenged five prospective jurors for cause: Dorothy Gelles, Beatrice Martinek, Fred English, Brent Weston, and Darrow Bruck. The superior court overruled each challenge. The jury that was eventually sworn and impaneled included Bruck, but not Gelles, Martinek, English, or Weston. When it was sworn and impaneled, Waidla had peremptory challenges remaining against its members and made no objection to its composition.

Waidla contends that, by overruling his challenges for cause against Prospective Jurors Gelles, Martinek, English, and Weston, and then-Prospective Juror Bruck, the superior court erred under the impartial jury trial clause of the Sixth Amendment to the United States Constitution, as applied to the states through the due process clause of the Fourteenth Amendment. Under the Sixth Amendment's impartial jury trial clause, the "crucial question is 'whether the [prospective] juror's views [on the death penalty] would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." ' " (*People v. Clair* (1992) 2 Cal.4th 629, 653, fn. 2, quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 424, quoting in turn *Adams v. Texas* (1980) 448 U.S. 38, 45.)

We reject the claim at the threshold. To preserve a point based on the overruling of a challenge for cause against a prospective juror, a defendant "must either exhaust" his "peremptory challenges and object to the jury as finally

(footnote continued from previous page)

ruling was in fact not erroneous.

To the extent that Waidla claims generally and broadly that the superior court erred by conducting an assertedly "inadequate" voir dire of the prospective jurors, the record on appeal is otherwise.

constituted” at trial, or else “justify” his “failure to do so” on appeal. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005; accord, *People v. Lucas* (1995) 12 Cal.4th 415, 480.) Waidla did not exhaust and object below, nor does he justify here.

We also reject the claim on the merits. An appellate court applies the abuse of discretion standard of review to a trial court’s sustaining or overruling of a challenge for cause against a prospective juror. (Cf. 2 Childress & Davis, *Federal Standards of Review* (2d ed. 1992) Trial Judge: Supervision and Discretion, § 11.19, pp. 11-83 to 11-84 [stating abuse of discretion as the federal standard of review].) As for each of the subordinate determinations, it employs the test appropriate thereto. Thus, it examines for substantial evidence any finding as to “whether and how the prospective juror’s views on” the death penalty “would affect his performance as a juror.” (*People v. Ashmus* (1991) 54 Cal.3d 932, 962.) It also examines for substantial evidence any “finding on what those views actually are.” (*Ibid.*) Having scrutinized the record on appeal, we find no error. The superior court’s overruling of Waidla’s challenges for cause against Prospective Jurors Gelles, Martinek, English, and Weston, and then-Prospective Juror Bruck was not unreasonable. Certainly, there was more than substantial evidence for any finding, whether express in fact or implied at law, that none held views on the death penalty, whatever their precise contours, that “would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath . . .’ ” (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424, quoting *Adams v. Texas*, *supra*, 448 U.S. at p. 45).³

³ Again, to the extent that Waidla claims generally and broadly that the superior court erred by conducting an assertedly “inadequate” voir dire of the prospective jurors, the record on appeal is otherwise. (See *ante*, at p. 18, fn. 2.)

3. Admission of Evidence of Waidla's Views on Money and Work

During their direct examination of Rita Hughes, Avo and Viivi Piirisild's daughter, the People attempted to ask questions including, in the prosecutor's words, whether Waidla had "mention[ed]" any "feelings" that he may have had "about his economic situation in the United States." Through counsel, Waidla objected, evidently under California statutory law, on the grounds that the question was vague and ambiguous and that any answer would be irrelevant.

Outside of the presence of the jury, the superior court requested an offer of proof from the People. The prosecutor represented that the People would elicit testimony from Rita to the effect that, in the course of a conversation that she had had with Waidla and Sakarias, Waidla made statements expressing, among other things, a desire to get money without working. Through counsel, Waidla objected to the admission of such testimony, again evidently under California statutory law, as irrelevant. The superior court overruled the objection. It determined that the testimony in question was indeed relevant. It did so because it effectively concluded that the testimony had at least some tendency in reason to prove the disputed material fact whether Waidla had a motive for the murder of Viivi and the related burglary and robbery and for the other offenses and, therefore, whether he was the perpetrator thereof. It thereupon ruled the testimony admissible.

Under the People's direct examination, now resumed before the jury, Rita testified, in pertinent part, as follows: In the course of a conversation that she had had with Waidla and Sakarias, in which Sakarias "did most of the talking" and Waidla "basically nodded or smoked a cigarette, and . . . nodded occasionally," the two men stated that they "wanted to get rich quickly," and discussed "living on the beach in Hawaii and traveling all around the world making money and living the high life"; but

they “didn’t want to be working stiff[s]”; they “brought up the example of” a man who was apparently an acquaintance who had “acquired” a “Jaguar” or Peugeot” “at the age of 60,” and they “thought what a waste, that he is too old to appreciate such a fine car, and that it would be nice to have a fancy Cadillac or a Mercedes or whatever at an early age”; they “frowned upon” the “American work ethic,” “us[ing] the example of [a] man back east on the east coast who had two Buicks and [a] house in the suburbs and [a] country home, and . . . that was all he amounted to after 50 years of hard work, and what a waste of a life”; they “felt that they were treated better financially in Estonia,” where, Sakarias said, a person could obtain “government money because the government was so corrupt.” At one point, Rita was asked by the prosecutor to identify the speaker of certain statements to which she testified, but she failed to do so.

Waidla now contends that the superior court erred under California statutory law in its ruling on the admissibility of Rita’s testimony about his desire to get money without working, on the ground that such testimony was inadmissible hearsay outside of any exception, including that for admissions and adoptive admissions.

Hearsay is evidence of a statement made by a declarant outside of court and offered in court for its truth. (Evid. Code, § 1200, subd. (a).) As a rule, it is inadmissible. (*Id.*, § 1200, subd. (b).) Exceptions, however, exist. (See generally *id.*, § 1220 et seq.) One covers admissions, which involve a statement by a declarant introduced against the declarant himself in an action to which he is a party. (*Id.*, § 1220.) Another covers adoptive admissions, which involve a statement by a declarant introduced against a party who, with knowledge thereof, manifested his adoption of it or his belief in its truth. (*Id.*, § 1221.)

Waidla has not preserved the claim for review. “It is, of course, ‘the general rule’ ” — which we find applicable here — “ ‘that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal.’ ” (*People v. Benson* (1990) 52 Cal.3d 754, 786, fn. 7, quoting *People v. Rogers* (1978) 21 Cal.3d 542, 548; accord, e.g., *People v. Alvarez* (1996) 14 Cal.4th 155, 186.) Here, Waidla rests his point on an assertion of inadmissible hearsay. Below, however, he never made any objection whatsoever on that basis. Because of his omission, we are without evidence to identify precisely what parts of Rita’s testimony about his desire to get money without working might have amounted to otherwise inadmissible hearsay. Likewise, because of his omission, we are without evidence to judge confidently what parts of the testimony in question that might have amounted to otherwise inadmissible hearsay might have come within one or more exceptions, including the apparently available ones covering admissions and adoptive admissions. He alone must bear the consequences of the evidentiary void for which he alone is responsible.

To the extent that Waidla has indeed preserved a claim for review — albeit not the one that he attempts to raise — he fails on the merits.

Broadly speaking, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence. (*People v. Alvarez, supra*, 14 Cal.4th at p. 201; accord, *People v. Rowland* (1992) 4 Cal.4th 238, 264.) Speaking more particularly, it examines for abuse of discretion a decision on admissibility that turns on the relevance of the evidence in question. (E.g., *People v. Alvarez, supra*, 14 Cal.4th at p. 201; *People v. Clair, supra*, 2 Cal.4th at pp. 670–671.) That is because it so examines the underlying

determination as to relevance itself. (E.g., *People v. Alvarez, supra*, 14 Cal.4th at p. 201; *People v. Rowland, supra*, 4 Cal.4th at p. 264.) Evidence is relevant if it has any tendency in reason to prove a disputed material fact. (Evid. Code, § 210.)

Any claim by Waidla that the superior court erred under California statutory law in its ruling on the admissibility of Rita's testimony about his desire to get money without working, on the ground that such testimony was irrelevant, would not succeed. The superior court did not err on that basis. For it did not abuse its discretion in determining that the testimony in question was indeed relevant. Plainly, it would not have been unreasonable for the superior court to have concluded, as it effectively did, that the testimony had at least some tendency in reason to prove the disputed material fact whether Waidla had a motive for the murder of Viivi and the related burglary and robbery and for the other offenses and, therefore, whether he was the perpetrator thereof.⁴

Waidla complains that his counsel provided ineffective assistance under the counsel clause of the Sixth Amendment to the United States Constitution, as applied to the states through the due process clause of the Fourteenth Amendment, and also

⁴ Waidla claims, in substance, that, in its ruling on the admissibility of Rita's testimony about his desire to get money without working, the superior court erred under the United States Constitution as well as California statutory law — specifically, under the free speech and peaceable assembly clauses of the First Amendment, as applied to the states through the due process clause of the Fourteenth Amendment; the impartial jury trial and confrontation clauses of the Sixth Amendment, each as applied to the states through the due process clause of the Fourteenth Amendment; and the due process clause of the Fourteenth Amendment itself. This point, too, he has not preserved for review. As to none of such grounds did he satisfy the general rule, which we find applicable here, requiring specific and timely objection.

under the counsel clause of section 15 of article I of the California Constitution, by failing to object to the admissibility of Rita's testimony about his desire to get money without working on grounds in addition to irrelevance, including inadmissible hearsay.

To establish ineffective assistance under the Sixth Amendment's counsel clause, Waidla must demonstrate both deficient performance under an objective standard of professional reasonableness and prejudice under a similarly objective standard of reasonable probability of an adverse effect on the outcome. (E.g., *Strickland v. Washington* (1984) 466 U.S. 668, 687–696.) To establish ineffective assistance under the counsel clause of article I, section 15, he must do the same. (E.g., *People v. Ledesma* (1987) 43 Cal.3d 171, 215–218.)

Even if Waidla can demonstrate deficient performance, a point on which we do not pass, he cannot demonstrate prejudice. It is not reasonably probable that his counsel's failure to object on grounds including inadmissible hearsay, even if professionally unreasonable, adversely affected the outcome. That is because it is not reasonably probable that any such objection, even if sustained by the superior court in the face of the apparently available exceptions covering admissions and adoptive admissions, would have resulted in the returning of any more favorable verdict or finding by the jury. Although unflattering, the testimony in question was hardly determinative of the balance between inculcation and exculpation or aggravation and mitigation. Waidla may be right to state that the testimony presented him as "feeling entitlement to an elevated standard of living" and as "disrespecting the American work ethic itself." But he is simply wrong to state that it was "inflammatory."

4. Admission of Evidence of Viivi Piirisild's Fear of Waidla

During their direct examination of Rita Hughes, the People asked, in the prosecutor's words, "[P]rior to" the date of Viivi Piirisild's murder and the related burglary and robbery, "did you discuss with [Viivi] possibly visiting her at . . . home?," and Rita answered, "Yes. . . . I called her early" one morning, "and I wanted to go home to her, and she said for me not to come home." "Did you discuss why you should not go home?" "She said it would not be safe." "And what was the reason for her not wanting you to come home?" "She was afraid of" Waidla and Sakarias "coming by, and that I might be hurt." "Did she tell you what the basis of her fears were, why she thought they might come by?"

At this point, the superior court called the prosecutor and Waidla's counsel to the bench. Outside of the presence of the jury, it requested an offer of proof. The prosecutor represented that Rita would testify that Viivi told her that she feared Waidla and Sakarias because "she was alone" while Avo was away on his business trip, and "believed" or "thought" that "she had seen them driving by . . . the house." As for Rita's testimony about Viivi's statement declaring her fear of Waidla and Sakarias, he argued that, under California statutory law, it was admissible hearsay within the state-of-mind exception because the statement was offered to prove that, in the burglary and robbery related to her murder, she did not engage in certain conduct, that is, she did not consent to the entry in the burglary or the taking by means of force or fear in the robbery. By doing so, he effectively argued that, under California statutory law, it was relevant because it had at least some tendency in reason to prove the disputed material fact of consent for the burglary and robbery. Waidla's counsel objected, evidently under California statutory law, on the ground that Rita's expected testimony about Viivi's statement declaring the *basis* of her

fear would be inadmissible hearsay, adding that it would be “totally beyond” his “ability to cross-examine” Viivi on the matter. He also objected, again evidently under California statutory law, that Rita’s expected testimony about Viivi’s statement of the basis of her fear would be substantially more prejudicial than probative. He apparently extended his hearsay and undue-prejudice objections to reach Rita’s testimony about Viivi’s statement of her fear itself, suggesting that it was irrelevant because lack of consent was not a disputed material fact under the defense to be presented. The superior court overruled the hearsay and undue-prejudice objections to Rita’s testimony about Viivi’s statement of her fear, indicating its view to the effect that the statement was relevant and was not, in itself, substantially more prejudicial than probative, and “ruling” that consent was a “definite, genuine issue in the lawsuit.” But it sustained the undue-prejudice objection to Rita’s expected testimony about Viivi’s statement of the basis of her fear as “repetitive and cumulative.” In response, the prosecutor indicated that he had nothing further to ask Rita.

Later, during their direct examination of Avo Piirisild, the People attempted to ask about statements that Viivi made on July 4, 1988, as Waidla and Sakarias arrived at the front door of the Piirisilds’ North Hollywood home. Waidla’s counsel interposed an objection that any answer would be inadmissible hearsay. The superior court sustained the objection.

At the prosecutor’s request, the superior court called the prosecutor and Waidla’s counsel to the bench. Outside of the presence of the jury, the prosecutor volunteered an offer of proof, representing that Avo would testify to various statements by Viivi declaring her fear of Waidla and Sakarias and/or indicating such fear circumstantially, as through the tone in which they were spoken. He argued that

the expected testimony would be admissible hearsay within the state-of-mind exception, apparently to the extent that it was hearsay at all, because any such statements would be offered to prove lack of consent in the burglary and robbery related to her murder. Waidla's counsel argued to the contrary. He added that any such statements would be irrelevant because lack of consent was not a disputed material fact under the defense to be presented. The superior court asked Waidla's counsel and the prosecutor whether Waidla and the People would each enter into a stipulation relating to lack of consent. For Waidla, his counsel answered in the affirmative. For the People, the prosecutor passed the question, expressing concern that a stipulation "may not bring the full flavor" of the evidence. The superior court stated that it had been considering whether or not to "force" the People to stipulate by "rul[ing] the evidence doesn't come in." It decided, instead, to hold the "issue . . . in abeyance."

Under the People's direct examination, now resumed before the jury, Avo continued to testify on other matters.

Soon, the superior court called the prosecutor and Waidla's counsel to the bench. Outside of the presence of the jury, it expressed its belief that "the issue of consent to take the property, the issue of consent to enter the home, is an issue in litigation," and obtained the agreement of both the prosecutor and Waidla's counsel on the point. "The issue," it went on, "is whether or not" to "allow that in by stipulation or by evidence" in the form of Avo's expected testimony about Viivi's statements declaring and/or circumstantially indicating her fear of Waidla and Sakarias. Because it determined that a stipulation would not be equivalent to evidence, it choose not to "force" the People to enter into one. It expressed its belief that "it really boils down to a[n] . . . issue" whether Avo's expected testimony

about the statements in question would be substantially more prejudicial than probative, and obtained the agreement of both the prosecutor and Waidla's counsel on this point as well. After stating that it had "weigh[ed]" probativeness and prejudice, it determined that Avo's expected testimony would not, in fact, be substantially more prejudicial than probative. As a result, it allowed its introduction. It informed Waidla's counsel that, "[i]f the evidence comes in" and he "ask[ed] for a limiting instruction," it would "gladly give . . . one." Waidla's counsel responded that he "would" indeed "ask," "since" he "obviously" could not "cross-examine" Viivi herself.

Under the People's direct examination, again resumed before the jury, Avo undertook to testify. Before he did so, the superior court gave the jury a limiting instruction that the "statements of [Viivi] Piirisild that you are about to hear are not being introduced for the truth asserted. They're not being introduced for their truth. They're being introduced to show [her] state of mind to explain her conduct"; "[n]ot for the truth asserted whatsoever, but only to [her] state of mind . . . , to explain her conduct then and later." In response to the superior court's query whether the admonition was "agreeable," Waidla's counsel stated, "Yes." Avo proceeded to testify to statements by Viivi, in some of which she arguably declared her fear of Waidla and Sakarias, and in others of which she unarguably indicated such fear circumstantially.

Later still, at the prosecutor's request, the superior court called the prosecutor and Waidla's counsel to the bench. Outside of the presence of the jury, the prosecutor volunteered an offer of proof prior to the direct examination of George Charon, the Federal Bureau of Investigation Special Agent with whom Viivi was acquainted. He represented that, in pertinent part, Charon would testify to

various statements by Viivi, a few days after July 4, 1988, in some of which she declared her fear of Waidla and Sakarias, and in others of which she indicated such fear circumstantially. He argued that Charon's expected testimony would be relevant and not substantially more prejudicial than probative. He also argued that it would be admissible hearsay within the state-of-mind exception, apparently to the extent that it was hearsay at all, because any such statements would be offered to prove lack of consent in the burglary and robbery related to her murder. Waidla's counsel effectively made irrelevance, undue-prejudice, and hearsay objections to Charon's expected testimony. As for the undue-prejudice objection, he argued that "there is no way" that he could "cross-examine" Viivi herself. The superior court overruled the objections to Charon's expected testimony. Against the undue-prejudice objection, it determined that the testimony would not be substantially more prejudicial than probative, stating that it had "weigh[ed]" probativeness and prejudice. As a result, it allowed the introduction of Charon's expected testimony. It offered to give a limiting instruction for purposes of hearsay, and Waidla's counsel accepted.

Under the People's direct examination, Special Agent Charon commenced his testimony. In its course, the superior court gave the jury a limiting instruction that the "statements of [Viivi] Piirisild are not being introduced for the truth asserted. They're only being introduced to show her state of mind to explain subsequent conduct. They're not being introduced for the truth asserted." In response to the superior court's query whether the admonition was "sufficient," Waidla's counsel stated, "Yes." Charon proceeded to testify to statements by Viivi, in some of which she declared her fear of Waidla and Sakarias, and in others of which she indicated such fear circumstantially.

Subsequently, in its charge to the jury, the superior court instructed: “Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted you were admonished that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider such evidence for any purpose except the limited purpose for which it was admitted.”

Waidla now contends, in effect, that the superior court erred under California statutory law in its rulings on the admissibility of the testimony of Rita, Avo, and Special Agent Charon about statements by Viivi declaring and/or circumstantially indicating her fear of him and Sakarias, on the ground that the underlying statements were irrelevant.

At the outset, we believe that Waidla has preserved the claim for review. He adequately satisfied the specific-and-timely-objection rule.

On the merits, however, we conclude that the claim fails.

As stated, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including, as noted, one that turns on the relevance of the evidence in question.

We find not unreasonable the superior court’s determinations of the relevance of the testimony in question by Rita, Avo, and Special Agent Charon, some express, others implied. Viivi’s underlying statements declaring and/or circumstantially indicating her fear of Waidla and Sakarias had at least some tendency in reason to prove the fact of lack of consent in the burglary and robbery related to her murder. Lack of consent was material to burglary because it was material to the element of entry (see, e.g., 2 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Crimes Against Property, § 662, p. 743), and was also material to

robbery because it was material to the element of taking by means of force or fear (see, e.g., *id.*, § 648(b), p. 729). Lack of consent was also disputed with regard thereto. As a fact going to an element of burglary and an element of robbery, it was put into dispute by Waidla's plea of not guilty, and remained in dispute until it was resolved (*People v. Rowland, supra*, 4 Cal.4th at p. 260), as it was only by the jury's adverse verdicts. That Waidla, by presenting the defense that he did, chose not to dispute it *actually* is without effect. As a fact going to an element of burglary and an element of robbery, it had to be proved by the People, and proved beyond a reasonable doubt. (See Pen. Code, § 1096.) That it might have been proved other than by the statements in question⁵ is also without effect. A fact's relevance does not depend on the means of its proof.

Waidla also contends that the superior court erred under California statutory law in its rulings on the admissibility of the testimony of Rita, Avo, and Special Agent Charon about statements by Viivi declaring and/or circumstantially indicating her fear of him and Sakarias, on the ground that the underlying statements were substantially more prejudicial than probative.

⁵ Including a stipulation like the one that the superior court had considered "forc[ing]" the People to enter into.

We have observed that the "general rule is that" the People "cannot be compelled to accept a stipulation if the effect would be to deprive" their "case of its persuasiveness and forcefulness." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1007 (lead opn. of Kaufman, J.); accord, *People v. Arias* (1996) 13 Cal.4th 92, 131.) The superior court effectively determined that such would have been the effect. As a decision relating to the admissibility of evidence, it should be subject to review on appeal for abuse of discretion. As a decision that was not unreasonable, it survives such scrutiny.

We again believe that Waidla has preserved the claim for review. He satisfied the specific-and-timely-objection rule not only adequately, but fully.

But again we conclude that the claim fails.

As stated, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the relative probativeness and prejudice of the evidence in question (e.g., *People v. Alvarez, supra*, 14 Cal.4th at pp. 214–215; *People v. Rowland, supra*, 4 Cal.4th at p. 264). Evidence is substantially more prejudicial than probative (see Evid. Code, § 352) if, broadly stated, it poses an intolerable “risk to the fairness of the proceedings or the reliability of the outcome” (*People v. Alvarez, supra*, 14 Cal.4th at p. 204, fn. 14).

We find not unreasonable the superior court’s determinations that the testimony in question by Rita, Avo, and Special Agent Charon was not substantially more prejudicial than probative. Viivi’s underlying statements declaring and/or circumstantially indicating her fear of Waidla and Sakarias, as explained, were relevant, having at least some tendency in reason to prove the fact of lack of consent in the burglary and robbery related to her murder. The superior court discerned no intolerable risk to the proceedings’ fairness or the outcome’s reliability. We cannot say that it exceeded the limits of reason in this regard. We are surely unable to agree with Waidla that the statements in question were inflammatory. We are even less able to agree that they were not worthy of belief. Waidla himself does not seem seriously to doubt that Viivi was actually afraid.⁶

⁶ We note in passing that, in *People v. Mickey* (1991) 54 Cal.3d 612, 656, we held that a trial court, in making a determination whether certain evidence is substantially more prejudicial than probative, “need not expressly weigh prejudice

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Waidla contends, in addition, that the superior court erred under California statutory law in its rulings on the admissibility of the testimony of Rita, Avo, and Special Agent Charon about statements by Viivi declaring and/or circumstantially indicating her fear of him and Sakarias, on the ground that the underlying statements constituted inadmissible hearsay outside of any exception, including that for state of mind.

Here too, we believe that Waidla has preserved the claim for review. He satisfied the specific-and-timely-objection rule not only adequately, but fully.

But, here too, we conclude that the claim fails.

As stated, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the hearsay nature of the evidence in question (e.g., *People v. Alvarez*, *supra*, 14 Cal.4th at p. 203; *People v. Rowland*, *supra*, 4 Cal.4th at p. 264).

We find not unreasonable the superior court's determinations that the testimony in question by Rita, Avo, and Special Agent Charon was admissible hearsay within the state-of-mind exception. This exception embraces evidence of a

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against probative value . . . — or even expressly state that [it] has done so” But, in other earlier decisions, as enumerated by the Court of Appeal in *People v. Triplett* (1993) 16 Cal.App.4th 624, 626–629, we used language not entirely consistent with this holding. For example, in *People v. Farmer* (1989) 47 Cal.3d 888, 906, we stated that the “court must affirmatively articulate the fact that it has weighed probative value against prejudice,” and that it must make the “weighing . . . explicit in the record.” After review, the *Triplett* court concluded that it is *Mickey* that “accurately reflects the current rule” (*People v. Triplett*, *supra*, 16 Cal.App.4th at p. 628.) It was right to do so. Any language in any decisions of ours to the contrary is no longer vital.

statement of a declarant's state of mind offered to prove the declarant's conduct, unless such statement was made under circumstances indicating its lack of trustworthiness. (Evid. Code, § 1250, subd. (a)(2).) Viivi's underlying statements declaring her fear of Waidla and Sakarias were within this exception. They were offered to prove lack of consent on her part in the burglary and robbery related to her murder. Furthermore, they were apparently not untrustworthy. Waidla asserts that other statements by Viivi were unreliable. Even if true, her statements declaring her fear were not. As noted, Waidla himself does not seem seriously to doubt that she was actually afraid. In addition, statements by Viivi indicating her fear of Waidla and Sakarias circumstantially were not even hearsay at all, because they were not offered for their truth.

Notwithstanding his counsel's contemporaneous acceptance, Waidla complains of the limiting instructions that the superior court gave the jury as to the testimony in question by Avo and Special Agent Charon. Contrary to his implication, there is no basis to judge them ineffectual. The presumption is that limiting instructions are followed by the jury. (See, e.g., *People v. Anderson* (1987) 43 Cal.3d 1104, 1120.) That presumption is not rebutted here. Had Waidla believed then, as he apparently believes now, that the limiting instructions should have expressly admonished the jury against using Viivi's statements declaring and/or circumstantially indicating her fear of him and Sakarias in order to infer that they had planned, and then executed, the events resulting in her murder and the related burglary and robbery, he should have requested the superior court to make a modification. He did not. In addition, had he believed then, as he apparently believes now, that the prosecutor himself so used the statements in question in the course of

his summation,⁷ he should have asked the superior court to make an assignment of misconduct and to give an admonishment. Again, he did not.

In our view, it is the People who might have raised a complaint against the limiting instructions with more justification. Viivi's statements declaring her fear of Waidla and Sakarias were offered for their truth — that is to say, to prove fear in order to prove lack of consent. Properly so, because they were within the state-of-mind exception. The limiting instructions may have been *too* limiting, by unduly restricting their use by the jury. Any error in this respect, however, could have prejudiced only the People.⁸

⁷ A belief that we do not think it reasonably likely (see *People v. Clair, supra*, 2 Cal.4th at pp. 662–663) that the jury shared. In his summation, the prosecutor did indeed argue planning and execution. But he had other evidence to use for that purpose.

⁸ Waidla claims, in substance, that, in its rulings on the admissibility of the testimony of Rita, Avo, and Special Agent Charon about statements by Viivi declaring and/or circumstantially indicating her fear of him and Sakarias, the superior court erred under the United States Constitution as well as California statutory law — specifically, under the confrontation clause of the Sixth Amendment, as applied to the states through the due process clause of the Fourteenth Amendment. He has not preserved this point for review. He did not satisfy the general rule, which we find applicable here, requiring specific and timely objection. He cites his counsel's comments about his inability to "cross-examine" Viivi. In another cause, "bare reference to the 'confrontation rule' . . . was not enough." (*People v. Alvarez, supra*, 14 Cal.4th at p. 186.) In this one, bare reference to an inability to "cross-examine" is even more insufficient. All the same, "where . . . hearsay . . . come[s] within a firmly rooted exception . . . , the Confrontation Clause is satisfied." (*White v. Illinois* (1992) 502 U.S. 346, 356.) State of mind is one such exception. (See *People v. Majors* (1998) 18 Cal.4th 385, 405; *People v. Morales* (1989) 48 Cal.3d 527, 552.) To the extent that Waidla claims that the superior court erred under the confrontation clause of section 15 of article I of the California Constitution, he does so perfunctorily. We reject the point in the same fashion. (*People v. Ashmus, supra*, 54 Cal.3d at p. 1011, fn. 29.)

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5. Denial of Motion to Suppress Confession Under *Miranda*

Not long after the superior court called the cause to trial, Waidla made a motion to suppress certain statements that he made to the police, including his confession, on the ground that the police obtained the statements in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (hereafter sometimes *Miranda*) and its progeny, including *Edwards v. Arizona* (1981) 451 U.S. 477 (hereafter sometimes *Edwards*) and *Arizona v. Roberson* (1988) 486 U.S. 675 (hereafter sometimes *Roberson*), and thereby rendered them inadmissible.

In *Miranda*, the court laid down a rule of a “prophylactic” nature (*Michigan v. Tucker* (1974) 417 U.S. 433, 446) in order to protect the privilege against self-incrimination of the Fifth Amendment to the United States Constitution, as applied to the states through the due process clause of the Fourteenth Amendment: “[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant [by law enforcement officers] unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. . . . Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights,

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Waidla also claims, in substance, that, in the rulings identified above, the superior court erred under the United States and California Constitutions as well as California statutory law — specifically, the due process clause of the Fourteenth Amendment and the due process clauses of subdivision (a) of section 7 and section 15. This point, too, he has not preserved for review. He did not satisfy the general rule, which we find applicable here, requiring specific and timely objection.

provided the waiver is made voluntarily, knowingly and intelligently.” (*Miranda v. Arizona, supra*, 384 U.S. at p. 444.)

In *Edwards*, the court laid down another rule of a “prophylactic” nature (*Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044 (plur. opn. of Rehnquist, J.); accord, e.g., *Davis v. United States* (1994) 512 U.S. 452, 458), which it reaffirmed in *Roberson*, in order to protect the prophylactic rule of *Miranda* itself by preventing the “badgering” of a defendant by law enforcement officers in an effort to get him to waive his rights thereunder (*Michigan v. Harvey* (1990) 494 U.S. 344, 350; accord, e.g., *Davis v. United States, supra*, 512 U.S. at p. 458): “[A]n accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him” (*Edwards v. Arizona, supra*, 451 U.S. at pp. 484–485; *Arizona v. Roberson, supra*, 486 U.S. at p. 677), and indeed until counsel is actually present (*Minnick v. Mississippi* (1990) 498 U.S. 146, 153), “unless the accused himself initiates further communication, exchanges, or conversations with the police” (*Edwards v. Arizona, supra*, 451 U.S. at p. 485; accord, e.g., *Minnick v. Mississippi, supra*, 498 U.S. at p. 150; *Arizona v. Roberson, supra*, 486 U.S. at p. 677). “An accused ‘initiates’ ” further communication, exchanges, or conversations of the requisite nature “when he speaks words or engages in conduct that can be ‘fairly said to represent a desire’ on his part ‘to open up a more generalized discussion relating directly or indirectly to the investigation.’ ” (*People v. Mickey, supra*, 54 Cal.3d at p. 648, quoting *Oregon v. Bradshaw, supra*, 462 U.S. at p. 1045 (plur. opn. of Rehnquist, J.); accord, *Oregon v. Bradshaw, supra*, 462 U.S. at p. 1045 (plur. opn. of Rehnquist, J.); *id.* at p. 1055 (dis. opn. of Marshall, J.).) “In the event he does in fact ‘initiate’ ” such further communication,

exchanges, or conversations, “the police may commence interrogation if he validly waives his [*Miranda*] rights.” (*People v. Mickey, supra*, 54 Cal.3d at p. 649; accord, *Edwards v. Arizona, supra*, 451 U.S. at p. 486, fn. 9; *Oregon v. Bradshaw, supra*, 462 U.S. at p. 1046 (plur. opn. of Rehnquist, J.).)

Waidla’s motion was based on, among other things, an assertion that “[t]he People have not indicated through any information provided during discovery that counsel was made available to” him, or that he “initiated the conversation with” the police, and he “does not believe the People will contend at this time that either was the case.”

The superior court conducted an evidentiary hearing on Waidla’s motion, outside of the presence of the jury, in the midst of the People’s presentation of their case at trial.

Robert Tripi was called to the witness stand by the People. In pertinent part, he testified to this effect: On August 28, 1988, he was employed as a border patrol agent by the United States Immigration and Naturalization Service in charge of the Jackman Main Border Patrol Station near the United States-Canada border at Rouse’s Point in New York; early that day, near the border, he detained Waidla on suspicion of illegal entry into the country, having received a tip from the Quebec Provincial Police; he did so with awareness that Waidla was being sought under an arrest warrant issued in this cause; he gave him an advisement of his *Miranda* rights; Waidla refused to make a waiver, responding instead that “he did not want to make a statement,” “he wanted an attorney,” and “he wanted a cigarette”; he was not provided with counsel; Tripi asked him no further questions of substance; some time later, he transported him to a correctional facility in the area of St. Albans in Vermont.

Victor Pietrantonio was also called by the People. In pertinent part, he testified to this effect: On August 29, 1988, he and his partner, David Crews, were employed as detectives by the Los Angeles Police Department; that day, he and Crews arrived at the Rouse's Point station; his primary and immediate purpose was to interrogate Waidla; his secondary and more remote purpose was to take him back to California following an extradition hearing; apparently at Pietrantonio's request, Waidla had been brought back to the station, and was being kept in a holding cell in one of its rooms; he had not been provided with counsel; Pietrantonio was in the room with the holding cell; Crews was not, but was apparently elsewhere in the station, possibly going through property seized from Waidla on his detention; a border patrol agent conducted Waidla out of the holding cell; immediately, Waidla addressed Pietrantonio, asking, "You're the detective from Los Angeles?"; Pietrantonio believed that Waidla may have seen him and Crews in New York City about two weeks earlier as they entered the Estonian House, which was evidently a cultural center, in an attempt to track him down; Pietrantonio "told [Waidla] what [his] name was" and "where [he] was from"; as he was "in the process of telling" Waidla that he and Crews "had come from California," Waidla "interrupted" him and said, "What can I do for you," or "What do you want from me?"; Pietrantonio "asked [Waidla] not to speak," and said that he "would get a room where [they] could sit down and [he] would explain [his] reason for being there"; he did so, in part, because he "didn't want [Waidla] to get into a discussion at that time prior to . . . having advised him of his rights"; finding a room, Pietrantonio and Waidla each took a seat across a desk from one another; Pietrantonio "began to once again explain that [he] was there from California to investigate the murder of Viivi Piirisild," and he "may have told him [Crews's] name again, that [they] were police detectives from Los Angeles"; Waidla

volunteered that “he knew Viivi very well and that he had lived with the Piirisilds and that . . . Avo was his best friend”; Pietrantonio “once again cautioned him not to say anything,” and he “asked him to please just listen to what [he] had to say”; he told him the purposes for which he had come; he “advised him shortly thereafter that he was a suspect in the case”; Waidla again interrupted, asking, “What can I do to help you[?],” or “What can I do for you[?],” “something along those lines”; Pietrantonio “once again told him,” “Just listen to what I have to say . . .”; Pietrantonio advised him of his *Miranda* rights and Waidla waived such rights; at the beginning of the ensuing uncounseled interrogation by Pietrantonio, who was apparently joined by Crews, Waidla denied any participation in Viivi’s murder and the related burglary and robbery, asserting as an alibi that he had left the Los Angeles area three days earlier to hitchhike to New York alone without Sakarias; later, withdrawing the alibi, he admitted participation, albeit minimal, in the form of helping Sakarias move Viivi’s body after Sakarias had killed her by himself; the next day, August 30, 1988, now at the Clinton County Jail in New York, Pietrantonio again advised Waidla of his *Miranda* rights and Waidla again waived such rights; in the course of the ensuing uncounseled interrogation by Pietrantonio, who was joined by Crews, Waidla made his confession.

During his testimony, Detective Pietrantonio denied that he had been informed that Waidla had been advised of his *Miranda* rights by Agent Tripi, had refused to waive such rights, and had instead asserted his right to silence and his right to an attorney. In addition, he admitted that he did not possess evidence recording or memorializing his dealings with Waidla when first they met at the Rouse’s Point station. Later, Waidla’s counsel made plain that he had been surprised by Pietrantonio’s testimony about these dealings. Later still, the prosecutor represented

that he had learned of the substance of the testimony only shortly before it was given.

Taking the stand in his own behalf, Waidla, among other things, denied that he had said anything at all to Detective Pietrantonio when first they met at the Rouse's Point station.⁹

Following the evidentiary hearing, the superior court denied Waidla's motion. Among its determinations, it expressly found that Waidla "himself initiated the conversation with" Detective Pietrantonio, "and that as such, there is an exception to the *Edwards/Roberson* rule because of the fact that the defendant himself initiated the conversation." It impliedly concluded that Pietrantonio adequately advised Waidla of his *Miranda* rights on each of the two occasions in question, and that Waidla effectively waived such rights each time.

An appellate court applies the independent or de novo standard of review, which by its nature is nondeferential, to a trial court's granting or denial of a motion to suppress a statement under *Miranda* insofar as the trial court's underlying decision entails a measurement of the facts against the law. (See, e.g., *People v. Bradford* (1997) 14 Cal.4th 1005, 1033; *People v. Crittenden* (1994) 9 Cal.4th 83, 128.) As for each of the subordinate determinations, it employs the test appropriate thereto. That is to say, it examines independently the resolution of a pure question

⁹ In making his motion, Waidla stated that he would rely on, among other things, the "transcript of the preliminary hearing," which preceded the presentation of the information. It turned out, however, that he apparently did not do so, relying instead on what transpired at the evidentiary hearing. At that hearing, it may be noted, the People proposed to the superior court that they and Waidla "could agree to move testimony from the preliminary hearing" into evidence. The superior court declined, stating, "I think this is a lot more complete."

of law; it scrutinizes for substantial evidence the resolution of a pure question of fact; it examines independently the resolution of a mixed question of law and fact that is predominantly legal; and it scrutinizes for substantial evidence the resolution of a mixed question of law and fact that is predominantly factual. (See generally *People v. Louis* (1986) 42 Cal.3d 969, 985–987.)

After independent review, we believe that the superior court did not err in denying Waidla's motion.

The point that is dispositive to the superior court's ruling — on which Waidla focuses his attack — involves the express finding quoted above, which may be rephrased in words quoted from *Edwards* and subsequent decisions, as follows: Waidla "initiate[d] further communication, exchanges, or conversations" of the requisite nature with Detective Pietrantonio (*Edwards v. Arizona, supra*, 451 U.S. at p. 485) "when he [spoke] words [and] engage[d] in conduct that [could] be 'fairly said to represent a desire' on his part 'to open up a more generalized discussion relating directly or indirectly to the investigation . . .'" (*People v. Mickey, supra*, 54 Cal.3d at p. 648, quoting *Oregon v. Bradshaw, supra*, 462 U.S. at p. 1045 (plur. opn. of Rehnquist, J.)).

The finding of "initiation" in and of itself is "reviewed for substantial evidence" as the resolution of a "mixed question" of law and fact that is "predominantly factual." (*People v. Mickey, supra*, 54 Cal.3d at p. 649.) The finding of any underlying historical fact is itself reviewed for substantial evidence as the resolution of a pure question of fact. (See generally *People v. Louis, supra*, 42 Cal.3d at p. 985.)

There is substantial evidence for the finding of "initiation" in and of itself. Specifically, there is substantial evidence that Waidla's spontaneous asking of

questions to Detective Pietrantonio to the effect, “What can I do for you[?],” “What do you want from me?,” and “What can I do to help you[?],” “can be ‘fairly said to represent a desire’ on his part ‘to open up a more generalized discussion relating directly or indirectly to the investigation . . .’ ” (*People v. Mickey, supra*, 54 Cal.3d at p. 648, quoting *Oregon v. Bradshaw, supra*, 462 U.S. at p. 1045 (plur. opn. of Rehnquist, J.)). Judged, as they must be, under an objective standard (see *Oregon v. Bradshaw, supra*, 462 U.S. at pp. 1045–1046 (plur. opn. of Rehnquist, J.); *People v. Mickey, supra*, 54 Cal.3d at p. 648), Waidla’s words and conduct can fairly be said to represent such a desire with respect to Pietrantonio’s investigation into Viivi’s murder and the related burglary and robbery and the other offenses. In fact, their only apparent referent is that investigation, and nothing else.¹⁰ That they might perhaps be construed otherwise if construed subjectively — for example, as merely a manifestation of politeness — is of no consequence.

There is also substantial evidence for the finding of the facts underlying “initiation.” Specifically, there is substantial evidence that Waidla did indeed spontaneously ask Detective Pietrantonio questions to the effect indicated above. Such evidence consists of the not-implausible testimony of Pietrantonio himself. This is not to deny that a basis exists to doubt Pietrantonio’s testimony, as recently fabricated to defeat Waidla’s motion. But a basis also exists, one that is at least as firm, to doubt Waidla’s testimony to the contrary, as perjurally given to cause his motion to succeed. The ultimate question goes to credibility. The superior court

¹⁰ Compare *Oregon v. Bradshaw, supra*, 462 U.S. at pages 1045–1046 (plur. opn. of Rehnquist, J.) (concluding that, by asking, “Well, what is going to happen to me now?,” the defendant therein “evinced a willingness and a desire for a generalized discussion about the investigation”).

expressly recognized as much. Its resolution of this question, which is itself reviewed for substantial evidence (see, e.g., *People v. Bradford*, *supra*, 14 Cal.4th at p. 1033; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 128), was in favor of Pietrantoni and against Waidla. It passes scrutiny because Pietrantoni's testimony, as stated, is not implausible.

We do not ignore the fact that, in making his attack on the express finding going to "initiation," Waidla asserts that the exception to the *Edwards* rule requires that "the accused himself" must "initiate[]" not only "further communication, exchanges, or conversations with the police" (*Edwards v. Arizona*, *supra*, 451 U.S. at p. 485), but also the encounter at which he does so. We have previously rejected this very assertion. (*People v. Mickey*, *supra*, 54 Cal.3d at p. 652.) We reject it again. Waidla quotes language that, in isolation, seems to support his position. (See, e.g., *Minnick v. Mississippi*, *supra*, 498 U.S. at p. 156 (dis. opn. of Scalia, J.); *Edwards v. Arizona*, *supra*, 451 U.S. at pp. 485 & 486, fn. 9.) But he fails to cite any holding that, in context, actually does so.

Neither do we ignore the fact that Detective Pietrantoni himself would evidently have "initiate[d] further communication, exchanges, or conversations" with Waidla (*Edwards v. Arizona*, *supra*, 451 U.S. at p. 485) outside of the exception to the *Edwards* rule, had not Waidla initiated them with him instead. It is nevertheless true that there is substantial evidence that it was Waidla who initiated and not Pietrantoni. Waidla may have saved Pietrantoni from himself. But save him he did.¹¹

¹¹ Waidla claims that he was "deprived of due process, his privilege against self-incrimination, and his right to counsel . . ." In doing so, he merely restates his point that the superior court erred by denying his motion, and did so reversibly. But,

(footnote continued on next page)

6. Failure to Instruct Sua Sponte on Trespass and Assault as Lesser Included Offenses of Burglary and Robbery

The superior court instructed the jury on burglary and robbery as charged against Waidla, specifically, the burglary of the Piirisilds' North Hollywood home based on larceny and the robbery of Viivi Piirisild therein, as independent felonies, as bases for first degree murder on theories of felony murder-burglary and felony murder-robbery, and as components of the felony-murder-burglary and felony-murder-robbery special circumstances. It did not instruct on trespass or assault, which were not charged. Waidla's counsel did not request any such instructions.

Waidla contends that the superior court erred under California decisional law by failing to instruct the jury sua sponte on trespass and assault as offenses that were lesser than, and included in, the charged burglary and robbery, respectively.

An appellate court applies the independent or de novo standard of review to the failure by a trial court to instruct on an uncharged offense that was assertedly lesser than, and included, in a charged offense. Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that, we believe, is however predominantly legal. As such, it should be examined without deference.

A trial court must instruct the jury sua sponte on an uncharged offense that is lesser than, and included in, a greater offense with which the defendant is charged "only if [citation] 'there is evidence' " (*People v. Memro* (1995) 11 Cal.4th 786, 871), specifically, "*substantial evidence*" (*People v. Berryman* (1993) 6 Cal.4th 1048, 1081, italics added, overruled on a point not pertinent to this cause, *People v.*

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as explained in the text, the superior court did not err at all.

Hill (1998) 17 Cal.4th 800, 823, fn. 1), “ ‘which, if accepted . . . , would absolve [the] defendant from guilt of the greater offense’ [citation] *but not the lesser*” (*People v. Memro, supra*, 11 Cal.4th at p. 871, italics in original). (Accord, *People v. Lopez* (1998) 19 Cal.4th 282, 287–288; see, e.g., *People v. Breverman* (1998) 19 Cal.4th 142, 154.)

For purposes of discussion only, we will accept this assertion made by Waidla: Under the “ ‘accusatory pleading’ test” (*People v. Breverman, supra*, 19 Cal.4th at p. 182 (dis. opn. of Mosk, J.)) if not the “ ‘legal elements’ test” (*ibid.*) — according to Waidla — trespass should here be deemed a lesser included offense of the charged burglary, on the ground that the burglary here, which is based on larceny, comprises elements embracing intent to steal (e.g., *People v. Thompson* (1980) 27 Cal.3d 303, 313 & fn. 5), whereas trespass comprises supposedly the same elements with the pertinent exception of such intent (see, e.g., Pen. Code, §§ 602, subd. (1), 602.5). Similarly, under the “accusatory pleading” test if not the “legal elements” test — again according to Waidla — assault should here be deemed a lesser included offense of the charged robbery, on the ground that robbery comprises elements embracing intent to steal (e.g., *People v. Thompson, supra*, 27 Cal.3d at p. 313), whereas assault comprises supposedly the same elements with the pertinent exception of such intent (see Pen. Code, § 240 et seq.).

For no purpose, however, will we accept this further assertion made by Waidla — which, we observe, did *not* figure in the defense that he presented at trial: There was supposedly substantial evidence that, when he committed the charged burglary and robbery, he did not intend to steal any item of the Piirisilds’ personal property because — as he claims — he intended *only* to take items as to which, to quote *People v. Butler* (1967) 65 Cal.2d 569, 573, he had a “right or claim” under a

“bona fide belief,” namely, Avo’s Triumph or its worth in cash, a state of mind that would have “negate[d]” any intent to steal.¹²

What is crucial was the mental state with which Waidla committed the charged burglary and robbery. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1145; *People v. Romo* (1990) 220 Cal.App.3d 514, 519.) More precisely, what mattered for the burglary was his state of mind when he entered the Piirisilds’ home, because burglary based on larceny requires intent to steal on entry (see, e.g., *People v. Holt* (1997) 15 Cal.4th 619, 669; *People v. Collins* (1878) 53 Cal. 185, 186–187 (*per curiam*)). And what mattered for the robbery was his state of mind when he effected a taking from Viivi by means of force or fear, because robbery requires an intent to steal accompanying the use of such means (e.g., *People v. Green* (1980) 27 Cal.3d 1, 52–54).

On our independent review, there was substantial evidence that, when he committed the charged burglary and robbery, which were close to contemporaneous, Waidla was angry with Avo and especially Viivi, was desperate for money, and was scheming to resolve matters in his favor, and had been for some appreciable period of time. Prior to the commission of the burglary and robbery, he may have had a “bona fide belief” that he had a “right or claim” (*People v. Butler, supra*, 65 Cal.2d at p. 573) to Avo’s Triumph or its worth in cash, based on the construction and

¹² In *People v. Tufunga* (1999) 21 Cal.4th 935, 938–939, we overruled *Butler* to the extent that it covers, among others, a perpetrator who attempts to collect on a debt, limiting it instead to the perpetrator who merely seeks to effect what he believes in good faith to be the recovery of specific items of his own personal property. The overruling and limiting of *Butler* is of no import here.

related work that he completed on their behalf. But, prior thereto, he had failed in all his efforts to obtain either the vehicle or its value.

There was also substantial evidence that, because of his anger, desperation, and scheming, Waidla, in committing the charged burglary and robbery, intended to take whatever items of the Piirisilds' personal property he could get his hands on, without discriminating, carefully or at all, between items concerning which he had a "bona fide belief" of a "right or claim" (*People v. Butler, supra*, 65 Cal.2d at p. 573), such as perhaps Avo's Triumph or its worth in cash, and items concerning which he had no such belief. In confirmation, there was substantial evidence that he actually took whatever items of the Piirisilds' personal property he happened to get his hands on, and did so indiscriminately, without relation to the vehicle or its value¹³ — including Viivi's purse, wallet, green jade earrings, black star sapphire pendant, and credit and telephone charge cards.¹⁴

¹³ Compare *People v. Barnett, supra*, 17 Cal.4th at page 1145 (noting that the perpetrator therein "simply seized whatever items of value" were available "without any regard to whether such items came from" the person "who supposedly owed him a debt, or from one of" certain "others" there present, "who indisputably did not"); *People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1022 (noting that the perpetrators therein "conducted a general ransacking" of certain premises, "indiscriminately taking items of value never specifically related to any claim of right").

¹⁴ We observe that, in his summation, the prosecutor commented that Waidla acted with a "motive": "The motive consists of the fact that . . . Waidla had no money at that time, he had come a long way for property he believed was his," that is, Avo's Triumph or its worth in cash, "and he believed that he was not going to get the property." Through this remark, the prosecutor apparently conceded that, at least prior to the charged burglary and robbery, Waidla may have had a "bona fide belief" of a "right or claim" (*People v. Butler, supra*, 65 Cal.2d at p. 573) to the vehicle or its value. But he surely did *not* concede that, in committing the burglary and robbery, Waidla acted on any such belief in taking what he actually took.

But there was simply no evidence, substantial or otherwise, that Waidla intended to take *only* items of the Piirisilds' personal property concerning which he had a "bona fide belief" of a "right or claim" (*People v. Butler, supra*, 65 Cal.2d at p. 573). One might, of course, speculate that he harbored such a particularized intent. "But speculation is not evidence, less still substantial evidence." (*People v. Berryman, supra*, 6 Cal.4th at p. 1081; see *People v. Wilson* (1992) 3 Cal.4th 926, 942.)

Waidla complains that his counsel provided ineffective assistance under the Sixth Amendment's counsel clause by failing to request instructions on trespass and assault as assertedly lesser included offenses of the charged burglary and robbery, respectively. Even if he can demonstrate deficient performance, a point on which we do not pass, he cannot demonstrate prejudice. As explained, there was not substantial evidence that would absolve him of burglary and robbery but not trespass and assault. Indeed, the People's evidence was in sum that he was guilty as charged, whereas his evidence was in sum that he was not guilty at all. It is not reasonably probable that his counsel's failure to request instructions on trespass and assault, even if professionally unreasonable, adversely affected the outcome. That is because it is not reasonably probable that any such request

would have resulted in the giving of such instructions by the superior court and in the returning of verdicts in accordance therewith by the jury.¹⁵

¹⁵ Waidla broadly claims that, by failing to instruct the jury sua sponte on trespass and assault as assertedly lesser included offenses of the charged burglary and robbery, respectively, the superior court erred under the impartial jury trial clause of the Sixth Amendment to the United States Constitution, as applied to the states through the due process clause of the Fourteenth Amendment, and under the due process clause of the Fourteenth Amendment itself, and also under the analogous provisions of subdivision (a) of section 7, section 15, and section 16 of article I of the California Constitution. The point rests on the asserted existence of error under California decisional law. But, in light of the analysis in the text, it rests on nothing.

Waidla claims more narrowly that, by failing to instruct the jury sua sponte on trespass and assault as assertedly lesser included offenses of the charged burglary and robbery, respectively, the superior court erred under the cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution, as applied to the states through the due process clause of the Fourteenth Amendment, and under the due process clause of the Fourteenth Amendment itself, as both are construed in *Beck v. Alabama* (1980) 447 U.S. 625. In *Beck*, the court, as it stated in *Hopkins v. Reeves* (1998) 524 U.S. 88, 90, “held unconstitutional a state statute that prohibited lesser included offense instructions in capital cases, when lesser included offenses to the charged crime existed under state law and such instructions were generally given in noncapital cases.” “The goal of the *Beck* rule,” as the court said in *Spaziano v. Florida* (1984) 468 U.S. 447, 455, and as it said again in *Schad v. Arizona* (1991) 501 U.S. 624, 646–647, “is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence” — “capital murder” meaning murder that legally “require[s]” the jury “to impose the death penalty” (*Beck v. Alabama*, *supra*, 447 U.S. at p. 629). *Beck* is distinguishable on its facts. Here, there was no California statute or law of any kind that prohibited instructions on lesser included offenses in capital cases but not in noncapital ones: To quote *Hopkins*, California has not “erected an ‘artificial barrier’ that restrict[s] its juries to a choice between conviction for a capital offense and acquittal.” (*Hopkins v. Reeves*, *supra*, 524 U.S. at p. 96.) Moreover, the *Beck* rule is not implicated in its purpose. Here, Waidla’s jury was not forced into an all-or-nothing choice between a conviction of murder that would legally compel it to fix the penalty at death, on the one side, and innocence, on the other: Even if it found him guilty of first degree murder on

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7. Failure to Instruct Sua Sponte on Theft as a Lesser Included Offense of Robbery

As stated, the superior court instructed the jury on the robbery of Viivi Piirisild as charged against Waidla as an independent felony, as a basis for first degree murder on a theory of felony murder-robbery, and as a component of the felony-murder-robbery special circumstance. It did not instruct on theft, which was not charged. Waidla's counsel did not request any such instructions.

Waidla contends that the superior court erred under California decisional law by failing to instruct the jury sua sponte on theft as an offense that was lesser than, and included in, the charged robbery.

Again, a trial court must instruct the jury sua sponte on an uncharged offense that is lesser than, and included in, a greater offense with which the defendant is

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theories of both felony murder-burglary and felony murder-robbery under both the felony-murder-burglary and felony-murder-robbery special circumstances, it was not legally compelled to fix the penalty at death, but could fix it instead at a term of imprisonment for life without possibility of parole. Furthermore, it could have found him guilty of first degree murder on a theory of willful, premeditated, and deliberate murder under no special circumstances — a result that would have precluded any exposure to the death penalty whatsoever.

To the extent that Waidla claims that the superior court erred under any law by failing to instruct the jury sua sponte on, apparently, brandishing a deadly weapon and being an accessory to a felony as assertedly lesser related offenses of the charged burglary and/or robbery, he does so perfunctorily, and we reject the point in the same fashion.

Similarly, to the extent that Waidla claims that the superior court erred under any law by failing to “identify” and “describe” the “target” offenses for which he might be liable as an aider and abettor under the “‘natural and probable consequences’ doctrine” (*People v. Prettyman* (1996) 14 Cal.4th 248, 254), he does so perfunctorily, and we reject the point in the same fashion.

charged only if there is substantial evidence that, if accepted, would absolve the defendant from guilt of the greater offense but not the lesser.

On independent review, we agree with Waidla that theft is indeed a lesser included offense of the charged robbery. That is true, specifically in this cause, under the “accusatory pleading” test. It is also true, here and elsewhere, under the “legal elements” test. “Theft,” as we have often held, “is a lesser included offense of robbery” (*People v. Melton* (1988) 44 Cal.3d 713, 746; accord, e.g., *People v. Bradford, supra*, 14 Cal.4th at p. 1055.) Robbery comprises elements embracing the use of force or fear to effect a taking from the victim (see, e.g., *People v. Bradford, supra*, 14 Cal.4th at pp. 1055–1056) and also an intent to steal (e.g., *People v. Thompson, supra*, 27 Cal.3d at p. 313) accompanying the use of such means (e.g., *People v. Green, supra*, 27 Cal.3d at pp. 52–54). Theft comprises the same elements, including intent to steal, with the pertinent exception of the use of force or fear. (See, e.g., *People v. Bradford, supra*, 14 Cal.4th at pp. 1055–1056.)

We do not agree with Waidla, however, that there was substantial evidence that he did not intend to steal any item of the Piirisilds’ personal property when he used force or fear to effect the taking from Viivi in the charged robbery, but came to do so only afterward, with the result that the existence of such an intent accompanying the use of such means, which is necessary for robbery, would be absent (*People v. Green, supra*, 27 Cal.3d at p. 54). Rather, as stated, there was substantial evidence that, for some appreciable period of time prior to the robbery, Waidla had been angry with Avo and especially Viivi, had been desperate for money, and had been scheming to resolve matters in his favor. But there was no evidence, substantial or otherwise, that he did *not* form *any* intent to steal *any* item until *after* he used force or fear to effect the taking. Ignoring the substantial evidence of his

anger and especially his desperation and scheming, one might perhaps speculate that he formed the intent to steal entirely as an afterthought without any connection whatsoever to his use of force or fear to effect the taking. Speculation, however, is not enough. (See *People v. Berryman*, *supra*, 6 Cal.4th at p. 1081; *People v. Wilson*, *supra*, 3 Cal.4th at p. 942.)

Waidla complains that his counsel provided ineffective assistance under the Sixth Amendment's counsel clause by failing to request instructions on theft as a lesser included offense of the charged robbery. Even if he can demonstrate deficient performance, a point on which we do not pass, he cannot demonstrate prejudice. As explained, there was not substantial evidence that would absolve him of robbery but not theft. Again, the People's evidence was in sum that he was guilty as charged, whereas his evidence was in sum that he was not guilty at all. It is not reasonably probable that his counsel's failure to request instructions on theft, even if professionally unreasonable, adversely affected the outcome. That is because it is not reasonably probable that any such request would have resulted in the giving of such instructions by the superior court and in the returning of a verdict in accordance therewith by the jury.¹⁶

¹⁶ The claims of instructional error under, inter alia, the United States and California Constitutions that Waidla raises with respect to trespass and assault as assertedly lesser included offenses of the charged burglary and robbery, respectively (see *ante*, at pp. 51–52, fn. 15), also extend to theft as a lesser included offense of the charged robbery. They are rejected for the reasons stated (see *ibid.*), which are applicable here as well as there.

8. Failure to Instruct Sua Sponte on Second Degree Murder, Voluntary Manslaughter, Involuntary Manslaughter, Assault, and Battery as Lesser Included Offenses of First Degree Murder

As stated, the superior court instructed the jury on the murder of Viivi Piirisild as charged against Waidla, including first degree murder both on a theory of willful, premeditated, and deliberate murder and also on theories of felony murder-burglary and felony murder-robbery. It did not instruct on second degree murder, voluntary manslaughter, involuntary manslaughter, assault, or battery, which were not charged. Waidla's counsel expressly declined to request instructions on second degree murder, and impliedly declined to request instructions on voluntary manslaughter, involuntary manslaughter, assault, or battery.

Waidla contends that the superior court erred under California decisional law by failing to instruct the jury sua sponte on second degree murder, voluntary manslaughter, involuntary manslaughter, assault, and battery as offenses that were lesser than, and included in, the charged murder insofar as it was of the first degree.

Yet again, a trial court must instruct the jury sua sponte on an uncharged offense that is lesser than, and included in, a greater offense with which the defendant is charged only if there is substantial evidence that, if accepted, would absolve the defendant from guilt of the greater offense but not the lesser.

On independent review, we shall assume for present purposes that, under the "accusatory pleading" test if not the "legal elements" test, second degree murder, voluntary manslaughter, involuntary manslaughter, assault, and battery should here each be deemed a lesser included offense of the charged murder insofar as it was of the first degree.

But, even so assuming, we cannot conclude that there was substantial evidence that Waidla was not guilty of the charged murder insofar as it was of the

first degree, but was guilty instead only of second degree murder, voluntary manslaughter, involuntary manslaughter, assault, or battery.

Apart from his confession, there was substantial, albeit circumstantial, evidence that Waidla was guilty of first degree murder on a theory of willful, premeditated, and deliberate murder. Simply recall that, for some appreciable period of time prior to the burglary of the Piirisilds' North Hollywood home and the robbery of Viivi therein, Waidla had been angry with Avo and especially Viivi, had been desperate for money, and had been scheming to resolve matters in his favor. Also recall what attended the burglary and robbery, namely, the killing of Viivi, more precisely, the killing of Viivi under a sudden and devastating attack. All this amounts to evidence of the kind of motive, planning, and manner indicative of first degree murder on a theory of willful, premeditated, and deliberate murder. (Cf. *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 [dealing with the question of the sufficiency of the evidence, apparently under California statutory law, to support a conviction of first degree murder on a theory of willful, premeditated, and deliberate murder].)

And, apart from his confession, there was similarly substantial, albeit circumstantial, evidence that Waidla was guilty of first degree murder on theories of felony murder-burglary and felony murder-robbery. Recall again his anger, desperation, and scheming, which extended back for some appreciable period of time prior to the burglary and robbery.

Pointing to his confession itself, however, Waidla argues that there was substantial evidence that he was not guilty of the charged murder insofar as it was of the first degree, but was guilty instead only of second degree murder, voluntary manslaughter, involuntary manslaughter, assault, or battery. In isolation, his confession might constitute substantial evidence against first degree murder *on a*

*theory of willful, premeditated, and deliberate murder.*¹⁷ Not so against first degree murder *on theories of felony murder-burglary and felony murder-robbery*. That is because his confession effectively admits conduct that amounts to first degree murder at least on a theory of felony murder-burglary, that is to say, the killing of Viivi in the perpetration of a burglary of the Piirisilds' North Hollywood home, predicated on what Waidla said was an entry to steal, or more neutrally "get," food (see generally *People v. Dillon* (1983) 34 Cal.3d 441, 475 (plur. opn. of Mosk, J.); *id.* at p. 490 (conc. opn. of Kaus, J.)).

Waidla complains that his counsel provided ineffective assistance under the Sixth Amendment's counsel clause by failing to request instructions on second degree murder, voluntary manslaughter, involuntary manslaughter, assault, and battery as assertedly lesser included offenses of the charged murder insofar as it was of the first degree. Even if he can demonstrate deficient performance, a point on which we do not pass, he cannot demonstrate prejudice. As explained, there was not substantial evidence that would absolve him of first degree murder but not second degree murder, voluntary manslaughter, involuntary manslaughter, assault, and battery. Yet again, the People's evidence was in sum that he was guilty as charged, whereas his evidence was in sum that he was not guilty at all. It is not reasonably

¹⁷ Contrary to Waidla's assertion, his confession could *not* constitute substantial evidence *in favor of voluntary manslaughter*. He invites our attention to the fact that voluntary manslaughter is committed "upon a sudden quarrel or heat of passion" (Pen. Code, § 192, subd. (a)). We invite his to the fact that "sudden quarrel or heat of passion" requires provocation that is adequate to arouse a reasonable person (e.g., *People v. Valentine* (1946) 28 Cal.2d 121, 136–144). There was no evidence whatsoever that Viivi so provoked Waidla as adequately to arouse a reasonable person to make the kind of sudden and devastating attack that he participated in making.

probable that his counsel's failure to request instructions on second degree murder, voluntary manslaughter, involuntary manslaughter, assault, and battery, even if professionally unreasonable, adversely affected the outcome. That is because it is not reasonably probable that any such request would have resulted in the giving of such instructions by the superior court and in the returning of verdicts in accordance therewith by the jury.¹⁸

9. Exclusion of Waidla in Violation of His Right of Personal Presence

A criminal defendant, broadly stated, has a right to be personally present at trial under various provisions of law, including the confrontation clause of the Sixth Amendment to the United States Constitution, as applied to the states through the due process clause of the Fourteenth Amendment; the due process clause of the Fourteenth Amendment itself; section 15 of article I of the California Constitution; and sections 977 and 1043 of the Penal Code.

Waidla contends that, in violation of his right of personal presence under the cited provisions, the superior court erred by assertedly excluding him from 17 "proceedings" during the course of the trial. The "proceedings" in question involved 16 conferences at bench, outside of the presence of the jury, that related essentially to procedural, evidentiary, and housekeeping and other matters. They

¹⁸ The claims of instructional error under, inter alia, the United States and California Constitutions that Waidla raises with respect to trespass and assault as assertedly lesser included offenses of the charged burglary and robbery, respectively (see *ante*, at pp. 51–52, fn. 15), also extend to second degree murder, voluntary manslaughter, involuntary manslaughter, assault, and battery as assertedly lesser included offenses of the charged murder insofar as it was of the first degree. They are rejected for the reasons stated (see *ibid.*), which are applicable here as well as there.

also involved a single conference in chambers, outside of the presence of the jury, that related to instructions.

An appellate court applies the independent or de novo standard of review to a trial court's exclusion of a criminal defendant from trial, either in whole or in part, insofar as the trial court's decision entails a measurement of the facts against the law. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1355–1358 [*semble*].)

After independent review, we find no error on the superior court's part in any exclusion of Waidla from any of the 17 "proceedings" in question because we find no right on his part to be personally present.

Under the Sixth Amendment's confrontation clause, a criminal defendant does not have a right to be personally present at a particular proceeding unless his appearance is necessary to prevent "interference with [his] opportunity for effective cross-examination." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 744–745, fn. 17; accord, *id.* at p. 740.)

Similarly, under the Fourteenth Amendment's due process clause, a criminal defendant does not have a right to be personally present at a particular proceeding unless he finds himself at a "stage . . . that is critical to [the] outcome" and "his presence would contribute to the fairness of the procedure." (*Kentucky v. Stincer*, *supra*, 482 U.S. at p. 745.)

Under section 15 of article I of the California Constitution, a criminal defendant does not have a right to be personally present "either in chambers or at bench discussions that occur outside of the jury's presence on questions of law or other matters as to which [his] presence does not bear a ' " 'reasonably substantial relation to the fullness of his opportunity to defend against the charge.' " ' "

(*People v. Bradford, supra*, 15 Cal.4th at p. 1357; accord, e.g., *People v. Jackson* (1980) 28 Cal.3d 264, 308–309 (plur. opn. of Richardson, J.).)

Lastly, under sections 977 and 1043 of the Penal Code, a criminal defendant does not have a right to be personally present where he does not have such a right under section 15 of article I of the California Constitution. (*People v. Bradford, supra*, 15 Cal.4th at p. 1357; accord, e.g., *People v. Jackson, supra*, 28 Cal.3d at pp. 308–309 (plur. opn. of Richardson, J.).)

Having examined each of the 17 “proceedings” in question, whose general nature we have identified above, we cannot conclude with respect to any one of them that Waidla’s personal presence *either was necessary* for an “opportunity for effective cross-examination,” for purposes of the Sixth Amendment’s confrontation clause (*Kentucky v. Stincer, supra*, 482 U.S. at pp. 744–745, fn. 17); *or* would have “contribute[d]” to the trial’s “fairness” *in any marginal way*, for purposes of the Fourteenth Amendment’s due process clause (*id.* at p. 745); *or* bore a “ ‘ ‘ ‘reasonably *substantial* relation to the fullness of his opportunity to defend,’ ” ’ ’ ’ for purposes of section 15 of article I of the California Constitution and also sections 977 and 1043 of the Penal Code (*People v. Bradford, supra*, 15 Cal.4th at p. 1357, italics added). The only possible basis for a conclusion favorable to Waidla in this regard would be speculation. Such a basis, however, is inadequate. (See *People v. Horton* (1995) 11 Cal.4th 1068, 1121.)

In arguing the claim, Waidla says that the 17 “proceedings” in question were “critical,” “individually” as well as “cumulatively.” To utter the words simply does not create the reality. As perhaps clearest illustration of the weakness of the point, let us comment solely on what he himself selects as “[p]erhaps the clearest illustration” of its strength. He asserts that, had he been personally present at the

conference on instructions in chambers, he could have “nudged” his counsel, in reliance on certain statements in his confession, to request instructions on second degree murder as an offense that was lesser than, and included in, the charged murder insofar as it was of the first degree. His assertion cannot be accepted. The defense that he himself presented on the witness stand was one of alibi, nothing more and nothing less, in an effort to avoid a conviction of murder in any degree: Evidently, he desired to escape second degree murder as well as first degree murder, and was unwilling to evade the latter by falling into the former. In his testimony in support, he recanted his confession as coerced and false. To have “nudged” his counsel to request instructions on second degree murder based on his confession would have been altogether inconsistent with his own defense and his own supporting testimony. That he would actually have done so can hardly be imagined.¹⁹

10. Prosecutorial Misconduct in Offering Factual Scenarios

Waidla contends that the prosecutor committed misconduct under the Fourteenth Amendment’s due process clause by assertedly “manipulating” evidence and “skewing” argument in order to offer “ ‘mutually exclusive’ ” factual “scenarios,” one to the jury at his trial, specifically its guilt phase, and another to the jury at Sakarias’s subsequent trial: For example, at his trial, the prosecutor put forth the position that he had wielded the hatchet against Viivi Piirisild, and hence that he had inflicted the chopping blows; at Sakarias’s later trial, by contrast, the same prosecutor assertedly put forth the position that Sakarias too had wielded the

¹⁹ Waidla claims that he was “deprived of due process, a fair trial, and his right of presence” In doing so, he merely restates his point that the superior court erred by assertedly excluding him from the 17 “proceedings” in question, and did so reversibly. But, as explained in the text, the superior court did not err at all.

hatchet, that Sakarias too had inflicted chopping blows, and that Sakarias's chopping blows ended Viivi's life.²⁰

We reject the claim at the threshold. In this cause, it is our appellate jurisdiction that we exercise. Because we do so, we cannot consider the point. "Appellate jurisdiction is limited to the four corners of the record on appeal" (*In re Carpenter, supra*, 9 Cal.4th at p. 646.) The record on appeal embraces only Waidla's trial. It does not extend to Sakarias's as well. Even if it did, it would be lacking in evidence and argument bearing on the assertedly " 'mutually exclusive' " factual "scenarios," and on any justification or explanation therefor. It would be lacking in such evidence and argument because the underlying issue was not been litigated below. (See *People v. Hardy* (1992) 2 Cal.4th 86, 134; *People v. Zamora* (1980) 28 Cal.3d 88, 96 (plur. opn. of Tobriner, J.).) As a result, it would not furnish us with a basis on which we could arrive at a resolution that we could be confident would be fair and reliable. (See *People v. Hardy, supra*, 2 Cal.4th at p. 134.)

We therefore conclude that the claim must be raised, if at all, "by petition for writ of habeas corpus" (*People v. Sanchez, supra*, 12 Cal.4th at p. 59), which is not limited to the record on appeal's four corners (see, e.g., *People v. Pope, supra*, 23 Cal.3d at pp. 426–427, fn. 17), "rather than [on] appeal" itself (*People v. Sanchez, supra*, 12 Cal.4th at p. 59).

²⁰ Although, in label, Waidla's claim impliedly refers to the due process clauses of subdivision (a) of section 7 and section 15 of article I of the California Constitution as well as the due process clause of the Fourteenth Amendment to the United States Constitution, in substance it expressly rests only on the latter.

B. Issues Relating to the Penalty of Death

Waidla raises a number of claims against the imposition of the penalty of death. As will appear, none is meritorious.

1. Ineffective Assistance of Counsel

Waidla contends that his counsel provided ineffective assistance under the Sixth Amendment's counsel clause by failing to attempt to introduce, for mitigation, evidence of a portion of a confession that Sakarias assertedly made to the police, which was assertedly admitted at Sakarias's later trial.

We reject the claim at the threshold. The record on appeal does not include any confession by Sakarias. Therefore, we conclude that the point must be raised, if at all, by petition for writ of habeas corpus rather than on appeal.

2. Prosecutorial Misconduct in Offering Factual Scenarios

Waidla contends that the prosecutor committed misconduct under the Fourteenth Amendment's due process clause by assertedly "manipulating" evidence and "skewing" argument in order to offer " 'mutually exclusive' " factual "scenarios," one to the jury at his trial, specifically its penalty phase, and another to the jury at Sakarias's subsequent trial: For example, at his trial, the prosecutor put forth the position that he dominated Sakarias, that he wielded the hatchet against Viivi Piirisild, and hence that he inflicted the chopping blows; at Sakarias's later trial, by contrast, the same prosecutor assertedly put forth the position that he did not dominate Sakarias, that Sakarias too had wielded the hatchet, that Sakarias too had inflicted chopping blows, and that Sakarias's chopping blows ended Viivi's life.²¹

²¹ Although, in label, this claim too impliedly refers to the due process clauses

(footnote continued on next page)

As we did with regard to its counterpart, we reject this claim too at the threshold, and conclude that it must be raised, if at all, by petition for writ of habeas corpus rather than on appeal. (See *ante*, at pp. 62–63.)

3. Response to Jury Request for Instructions Regarding Inability to Reach a Verdict

The jury deliberated on the question of penalty over nine court days. On the third day, it sent a note to the superior court requesting “instructions regarding a jury who cannot come to a unanimous decision in the penalty phase”; the superior court directed its bailiff, to whose role as messenger the People and Waidla stipulated, to inform the jury on its behalf that “there are no instructions regarding a jury who cannot come to a unanimous decision in the penalty phase”; the bailiff, presumably, informed the jury as the superior court had directed him to. On the fifth day, the jury sent a note to the superior court stating that it was deadlocked and was unable to reach a unanimous verdict; summoning the jury into open court, the superior court polled each juror as to whether he believed that there was a reasonable probability that the jury would reach a unanimous verdict if it continued to deliberate, received one “yes,” ten “noes,” and one “not sure,” and then asked the jury to resume its deliberations, commenting that the “issue which you are to decide is a very difficult issue because it involves intense moral reflection.” On the ninth day, the jury returned the verdict of death.

(footnote continued from previous page)

of subdivision (a) of section 7 and section 15 of article I of the California Constitution as well as the due process clause of the Fourteenth Amendment to the United States Constitution, in substance it expressly rests only on the latter. (See *ante*, at p. 62, fn. 20.)

Waidla contends that the superior court erred by effectively refusing to instruct the jury as it deliberated in response to its request that, under California statutory law, if a jury “has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole” (Pen. Code, § 190.4, subd. (b)).

An appellate court applies the abuse of discretion standard of review to any decision by a trial court to instruct, or not to instruct, in its exercise of its supervision over a deliberating jury. (Cf. 2 Childress & Davis, *Federal Standards of Review*, *supra*, Trial Judge: Supervision and Discretion, § 11.33, pp. 11-127 to 11-129 [stating that abuse of discretion is the federal standard of review for a decision whether or not to give a so-called “*Allen*” charge (*Allen v. United States* (1896) 164 U.S. 492) to a deadlocked jury].)

Employing that test, we find no error. It was not at all unreasonable for the superior court effectively to refuse to instruct the jury as it deliberated in response to its request, which went to the consequences of a jury’s inability to reach a unanimous verdict as to penalty. As the superior court itself commented, the choice between death and life imprisonment without possibility of parole that is demanded of a jury after the penalty phase as its fundamental and ultimate act is “very difficult . . . because it involves intense moral reflection.” An instruction of the sort refused, if given, might disturb the task and invite its avoidance, having as it does a “potential for unduly confusing and misguiding the jury in their proper role and function in the penalty determination process” (*People v. Belmontes* (1988) 45 Cal.3d 744, 814;

accord, e.g., *People v. Hines* (1997) 15 Cal.4th 997, 1075; cf. *Jones v. United States* (1999) 527 U.S. 373, ____ [119 S.Ct. 2090, 2099] [implying as much for a jury at the so-called “selection phase” of a federal capital trial, which is similar to the penalty phase here].) The proper focus of the jury’s deliberations is which penalty to choose, and not whether to make the choice in the first place. We recognize that, under California statutory law, a trial court is required to instruct a deliberating jury on its request “on any point of law arising in the case.” (Pen. Code, § 1138.) But it is not required so to instruct on any “point of law” merely associated therewith. The consequences of a jury’s inability to reach a unanimous verdict as to penalty is a point of the latter kind and not the former. (Cf. *Jones v. United States*, *supra*, 527 U.S. at p. ____ [119 S.Ct. at p. 2099] [implying as much for a jury at the selection phase of a federal capital trial: the consequences of a jury’s inability to reach a unanimous verdict as to penalty “has no bearing on [its] role in the sentencing process”].) To repeat: The proper focus of a jury’s deliberations as to penalty is which penalty to choose, and not whether to make the choice in the first place.

Waidla argues against our conclusion. We agree that, as a general matter, the superior court *may* instruct a deliberating jury in response to a request going to the consequences of its inability to reach a unanimous verdict as to penalty. (See *People v. Belmontes*, *supra*, 45 Cal.3d at p. 814 [*semble*].) But we cannot agree that, in this cause, the superior court *had* to do so, whether under the compulsion of the cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution, as applied to the states through the due process

clause of the Fourteenth Amendment;²² the due process clause of the Fifth Amendment, as applied to the states through the due process clause of the Fourteenth Amendment; the due process clause of the Fourteenth Amendment itself; or otherwise. Waidla asserts that the superior court was required to act in order to dispel a concern by the jury that its inability to reach a unanimous verdict as to penalty might undermine its verdicts and findings as to guilt or, at least, result in a sentence of some term of imprisonment that might in fact allow parole. Any such concern, however, is solely a matter of speculation, and is altogether without basis in the record on appeal. The superior court was not obligated to act in the premises. Waidla says that its effective refusal to instruct “derail[ed]” the jury as it deliberated. Quite the opposite. It kept it on track.

4. Denial of Automatic Application for Modification of the Verdict of Death

California statutory law provides for an automatic application to the superior court for modification of any verdict of death returned by a jury. (Pen. Code, § 190.4, subd. (e).) As a matter of substance, it requires the superior court, in making its ruling, to “review the evidence” (*ibid.*) — meaning *all* the evidence (see *People v. Edwards* (1991) 54 Cal.3d 787, 847), and *only* the evidence (*People v. Jennings* (1988) 46 Cal.3d 963, 995), *presented to the jury* (*People v. Williams* (1988) 45 Cal.3d 1268, 1329); to “consider, take into account, and be guided by”

²² Compare *Jones v. United States*, *supra*, 527 U.S. at page ____ [119 S.Ct. at p. 2099] (rejecting a claim of error based on a trial court’s refusal to instruct the jury in its charge at the selection phase of a federal capital trial on the consequences of a jury’s inability to reach a unanimous verdict as to penalty: the “Eighth Amendment [does not] require[] a jury be instructed as to the consequences of a breakdown in the deliberative process”)).

specified “aggravating and mitigating circumstances” referred to therein (Pen. Code, § 190.4, subd. (e)); and, thereupon, to “make a determination as to whether” the verdict in question is “contrary” to the “law” or the “evidence” (*ibid.*). As a matter of form, it requires the superior court, in issuing its ruling, to “set forth” its “reasons” therefor and “direct that they be entered on the Clerk’s minutes” (*ibid.*); and also to “state on the record the reasons for” any “findings” that it may make (*ibid.*).

After a hearing, the superior court denied Waidla’s automatic application for modification of the verdict of death.

Waidla contends that the superior court erred thereby.

In part, Waidla’s claim is that, in denying his verdict-modification application, the superior court erred under California statutory law.

In this part, we reject the claim on the merits. An appellate court applies the independent or de novo standard of review to a trial court’s granting or denial of a verdict-modification application. (E.g., *People v. Alvarez*, *supra*, 14 Cal.4th at p. 244.) Employing that test, we find the superior court’s denial of Waidla’s application sound. By all indications, it did what it was required to do. That is to say, it effectively reviewed all the evidence, and only the evidence, presented to the jury — notwithstanding Waidla’s assertions and suggestions to the contrary; it considered, took into account, and was guided by the aggravating and mitigating circumstances; it made a determination that the verdict in question was not contrary to the law or the evidence; it set forth its reasons for its consequent denial of the application, and directed their entry in the clerk’s minutes; and it stated on the record the reasons for various findings that it made.

In other part, Waidla's claim is that, in denying his verdict-modification application, the superior court erred under the United States Constitution, including the Eighth Amendment's cruel and unusual punishments clause and the Fourteenth Amendment's due process clause.²³ Its gist is that, in denying his application and in subsequently denying Sakarias's (*People v. Sakarias, supra*, ___ Cal.4th at p. ___ [p. 1]), the superior court assertedly made "mutually exclusive" findings: For example, in denying his application, the superior court found that he actually killed, and intended to kill, Viivi Piirisild, that he wielded the hatchet, and hence that he inflicted the chopping blows; in denying Sakarias's later application, by contrast, the superior court, through the same judge, assertedly found that Sakarias actually killed, and intended to kill, Viivi, that Sakarias too wielded the hatchet, and that Sakarias in fact inflicted the two evidently peri- or postmortem chopping blows.

In this part, we reject the claim at the threshold. We have proceeded thus as to the claims of prosecutorial misconduct. (See *ante*, at pp. 62–63 & 63–64.) We shall do the same as to this part of the present claim, which is effectively based thereon.²⁴ Apart from the asserted "manipulat[ion]" of evidence and "skewing" of argument by the prosecutor in order to offer " 'mutually exclusive' " factual "scenarios" at Waidla's trial and at Sakarias's subsequent one, the superior court's assertedly "mutually exclusive" findings would not be problematic in and of

²³ Even though this part of Waidla's claim makes passing mention of the California Constitution, specifically, the due process clauses of subdivision (a) of section 7 and section 15 of article I and the cruel or unusual punishment clause of section 17 of article I, it does not rest thereon.

²⁴ Contrary to Waidla's charges, we cannot discover in the record on appeal any expression or implication by the superior court of any bias, either in fact or in appearance.

themselves. As stated, in making its ruling on a verdict-modification application, the superior court must review only the evidence presented to the jury at the trial in question. The evidence that was presented to the jury at Waidla's trial might prove different from the evidence that would subsequently be presented to the jury at Sakarias's later trial. Therefore, the findings that the superior court made in denying Waidla's application might be different from the findings that it would subsequently make in denying Sakarias's later application. We conclude that this part of the claim must be raised, if at all, by petition for writ of habeas corpus rather than on appeal. (See *ante*, at pp. 62–63 & 63–64.)²⁵

²⁵ In denying Waidla's verdict-modification application, the superior court, as stated in the text, found that he actually killed, and intended to kill, Viivi Piirisild. It did so beyond a reasonable doubt. Whether or not such a degree of certitude is necessary (see *Hopkinson v. Shillinger* (10th Cir. 1989) 866 F.2d 1185, 1214 [assuming to the affirmative]), it is obviously sufficient, since none higher is demanded by the law. Having reviewed the record on appeal, we conclude that the superior court's findings on actual killing and intent to kill are supported by substantial evidence, and must therefore be sustained. (See, e.g., *People v. Alvarez*, *supra*, 14 Cal.4th at p. 247, fn. 45.) Accordingly, we further conclude that the superior court's imposition of the sentence of death on Waidla does not violate the cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution, on the separate and independent grounds, each of which is adequate in and of itself, that he actually killed and also intended to kill. (*Cabana v. Bullock* (1986) 474 U.S. 376, 386.)

IV. Disposition

Having found no reason to do otherwise, we conclude that we must affirm the judgment.

It is so ordered.

MOSK, J.

WE CONCUR: GEORGE, C. J.
KENNARD, J.
BAXTER, J.
WERDEGAR, J.
CHIN, J.
BROWN, J.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1328

September Term, 2017

EPA-80FR42870

Filed On: January 26, 2018

Mexichem Fluor, Inc.,

Petitioner

v.

Environmental Protection Agency,

Respondent

Chemours Company FC, LLC, et al.,
Intervenors

Consolidated with 15-1329

BEFORE: Brown*, Kavanaugh, and Wilkins, Circuit Judges

ORDER

Upon consideration of the petitions of Natural Resources Defense Council and the Industry Intervenor-Respondents for panel rehearing and the joint response thereto; the motion of rehearing petitioners for leave to file a joint reply and the lodged joint reply; the motions for invitation to file brief of Administrative Law Professors and the States as amici curiae in support of the petitions for panel rehearing and the lodged briefs; the vote of Circuit Judge Kavanaugh to deny the petitions; and the vote of Circuit Judge Wilkins to grant the petitions, it is

ORDERED that the motion for leave and the motions for invitation to file be granted. The Clerk is directed to file the lodged documents. It is

FURTHER ORDERED that the petitions be denied as the current panel is equally divided.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk

*Circuit Judge Brown was a member of the panel but retired prior to the filing of the petitions.

FILED: April 22, 2011

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1021 (L)
(8:06-cv-02266-AW)

SHANE FELDMAN; BRIAN KELLY; PAUL SINGLETON

Plaintiffs - Appellees

v.

PRO FOOTBALL, INCORPORATED; WFI STADIUM, INCORPORATED

Defendants - Appellants

No. 09-1023
(8:06-cv-02266-AW)

SHANE FELDMAN; BRIAN KELLY; PAUL SINGLETON

Plaintiffs - Appellants

v.

PRO FOOTBALL, INCORPORATED; WFI STADIUM, INCORPORATED

Defendants - Appellees

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Davis and Chief District Judge Beaty. Judge Michael participated in the decision of this case, but passed away before consideration of the petition for rehearing and petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

October 19, 2020

Before

MICHAEL S. KANNE, *Circuit Judge*

ILANA D. ROVNER, *Circuit Judge**

No. 20-1041

CHRISTEL VAN DYKE,
Plaintiff-Appellant,

v.

VILLAGE OF ALSIP, et al.,
Defendants-Appellees.

Appeal from the United States District
Court for the Northern District of Illinois,
Eastern Division.

No. 18 C 6112

Virginia M. Kendall,
Judge.

ORDER

On consideration of the petition for rehearing *en banc* filed on September 16, 2020, no judge in active service has requested a vote on the petition for rehearing *en banc* and all members of the original panel have voted to deny rehearing.

Accordingly, IT IS ORDERED that the petition for rehearing is DENIED.

* Circuit Judge Barrett was a member of the panel when this case was decided on September 2, 2020; however, she did not participate in the consideration of the petition for rehearing. The petition is resolved by a quorum of the panel pursuant to 28 U.S.C. §46(d).

28 U.S.C. § 46

(a) Circuit judges shall sit on the court and its panels in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs. The United States Court of Appeals for the Federal Circuit shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and, notwithstanding the first sentence of this subsection, may determine by rule the number of judges, not less than three, who constitute a panel.

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is

ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633) [28 USCS § 41 note], except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title [28 USCS § 294(c)] and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.

(d) A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

28 U.S.C. § 2254 (a), (d)

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

(d) 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.

Federal Rules of Appellate Procedure, Rule 40

(a) A Party's Options. A party may seek rehearing of a decision through a petition for panel rehearing, a petition for rehearing en banc, or both. Unless a local rule provides otherwise, a party seeking both forms of rehearing must file the petitions as a single document. Panel rehearing is the ordinary means of reconsidering a panel decision; rehearing en banc is not favored.

(b) Content of a Petition.

(1) Petition for Panel Rehearing. A petition for panel rehearing must:

(A) state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended; and

(B) argue in support of the petition.

(2) Petition for Rehearing En Banc. A petition for rehearing en banc must begin with a statement that:

(A) the panel decision conflicts with a decision of the court to which the petition is addressed (with citation to the conflicting case or cases) and the full court's consideration is therefore necessary to secure or maintain uniformity of the court's decisions;

(B) the panel decision conflicts with a decision of the United States Supreme Court (with citation to the conflicting case or cases);

(C) the panel decision conflicts with an authoritative decision of another United States court of appeals (with citation to the conflicting case or cases); or

(D) the proceeding involves one or more questions of exceptional importance, each concisely stated.

(c) When Rehearing En Banc May Be Ordered. On their own or in response to a party's petition, a majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be reheard en banc. Unless a judge calls for a vote, a vote need not be taken to determine whether the case will be so reheard.

Rehearing en banc is not favored and ordinarily will be allowed only if one of the criteria in Rule 40(b)(2)(A)-(D) is met.

(d) Time to File; Form; Length; Response; Oral Argument.

(1) Time. Unless the time is shortened or extended by order or local rule, any petition for panel rehearing or rehearing en banc must be filed within 14 days after judgment is entered—or, if the panel later amends its decision (on rehearing or otherwise), within 14 days after the amended decision is entered. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after entry of judgment or of an amended decision if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the court of appeals' judgment is entered or files that person's petition.

(2) Form of the Petition. The petition must comply in form with Rule 32. Copies must be filed and served as Rule 31 prescribes, except that the number of filed copies may be prescribed by local rule or altered by order in a particular case.

(3) Length. Unless the court or a local rule allows otherwise, the petition (or a single document containing a petition for panel rehearing and a petition for rehearing en banc) must not exceed:

(A) 3,900 words if produced using a computer; or

(B) 15 pages if handwritten or typewritten.

(4) Response. Unless the court so requests, no response to the petition is permitted. Ordinarily, the petition will not be granted without such a request. If a response is requested, the requirements of Rule 40(d)(2)-(3) apply to the response.

(5) Oral Argument. Oral argument on whether to grant the petition is not permitted.

(e) If a Petition Is Granted. If a petition for panel rehearing or rehearing en banc is granted, the court may:

(1) dispose of the case without further briefing or argument;

(2) order additional briefing or argument; or

(3) issue any other appropriate order.

(f) Panel's Authority After a Petition for Rehearing En Banc. The filing of a petition for rehearing en banc does not limit the panel's authority to take action described in Rule 40(e).

(g) Initial Hearing En Banc. On its own or in response to a party's petition, a court may hear an appeal or other proceeding initially en banc. A party's petition must be filed no later than the date when its principal brief is due. The provisions of Rule 40(b)(2), (c), and (d)(2)-(5) apply to an initial hearing en banc. But initial hearing en banc is not favored and ordinarily will not be ordered.

Ninth Circuit General Order 3.2(h) - Unavailability

Each member of the Court shall inform the Clerk of Court as far in advance as possible of his or her unavailability for assignment to a calendar. Each member of the Court has the option to exchange days of sitting with another member of the Court upon mutual agreement and with the approval of the Chief Judge. Exchanges of assignments shall normally be accomplished at least 60 days in advance of the hearing week. Although the Clerk's Office may be consulted and must be notified of any exchanges, arrangements for exchanges shall be made by direct contact among the members of the Court.

If, after a matter is under submission to a three-judge panel, a judge becomes unavailable by reason of death, disability, recusal, or retirement from the Court, the remaining two judges may – if in agreement – decide the

matter as a quorum pursuant to 28 U.S.C. § 46(d), or shall request the Clerk to draw a replacement judge. If the two judges are not in agreement, the Clerk shall draw a replacement judge. If a replacement judge is requested, the Clerk shall draw a replacement judge from among active judges (and senior judges willing to serve), drawn by lot. Once a replacement judge is designated, the Clerk will advise the parties.