UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ERIC KIMBLE,

Petitioner,

v.

RON DAVIS,[1] Warden of California State Prison at San Quentin,

Respondent.

CASE NO. CV 90-4826 SVW

DEATH PENALTY CASE

ORDER GRANTING IN PART PETITION FOR WRIT OF HABEAS CORPUS
[94]

Petitioner Eric Kimble was convicted in the Los Angeles County Superior Court of burglary, robbery, rape, and two counts of murder following a jury trial in 1980. Special circumstance allegations of multiple murder, murder in the course of a robbery, and murder in the course of a rape were also found true, making petitioner eligible for the death penalty. After a penalty trial, the jury returned a sentence of death on January 12, 1981.

Petitioner filed the instant Second Amended Petition for Writ of Habeas Corpus ("SAP") on June 18, 1993. The Court previously denied several claims in the petition and granted an evidentiary hearing on others. (Dkt. 141: Order on Pet'r Mot. Evid. Hr'g, Sept. 18, 2002.) For the reasons set forth below, the Second Amended Petition is GRANTED IN PART and DENIED IN PART.

[1] Ron Davis is substituted as Warden of California State Prison at San Quentin pursuant to Federal Rule of Civil Procedure 25(d)(1).

I. Background

On the afternoon of Saturday, August 12, in the summer of 1978, Harry and Avone Margulies were at their home in the Doheny Estates neighborhood of the Hollywood Hills, when someone entered the house, bound, gagged, and blindfolded them, and killed them with a .45 caliber handgun. An alarm was triggered and their bodies were soon discovered. Avone's body was nude and semen was detected in her vagina.

Police found a number of items in the residence that the Margulies' family members testified had not been there before the murders, including a black briefcase, a box of ammunition, and a bicycle cable and lock. The only item missing from the house was a set of keys to Mr. Margulies' stereo store, located a few miles south of the residence, on Beverly Boulevard.

At 8:05 p.m. that night, police were dispatched to Beverly Stereo to investigate the activation of the store's silent alarm. When the first officer arrived, he found nothing out of the ordinary and left. The store's burglar alarm was triggered and reset a number of times through the night and, finally, detectives investigating the Margulies' murders went to the store. Although there was no sign of a break-in, upon entering the store it was evident to the detectives that it had been ransacked. A subsequent inventory confirmed that stereo equipment had been removed after closing that evening.

On Monday, August 14, two days after the crimes, a couple reported having seen suspicious activity at the Beverly Stereo store between 11:15 and 11:30 p.m. on the night of the burglary. They stated they had seen a car driving slowly out of the alley behind the store, with a young black male walking alongside the car steadying several boxes that were resting on the hood. The passers-by noted the license plate number, and later gave it to police.

The police discovered that the car was registered to Ortez Winfrey and obtained a search warrant for his house. Upon executing the warrant on August 16,

1978, police found several thousand dollars worth of stereo equipment from the Beverly Stereo store and arrested Winfrey. While in custody, Winfrey gave a statement to the police, admitting his own involvement in the Beverly Stereo burglary and implicating his friend, Eric Kimble, in the Margulies murders. According to Winfrey, petitioner contacted him late Saturday afternoon, and asked for help removing stereo equipment from a store. Winfrey claimed Kimble showed him the keys to the store and explained that the owner had asked him to remove the stereo equipment. Winfrey said he agreed to help and a mutual acquaintance, William Grant, also helped remove the stereo equipment. Winfrey admitted that, as the evening progressed, he eventually realized they were stealing the equipment.

Based on the information provided by Winfrey, the police compared latent fingerprints from the Margulies' residence to police records of Kimble's fingerprints and found several matches. After obtaining search warrants, the police recovered additional stolen stereo equipment at Kimble's and Grant's residences. The keys to the stereo store were also found in petitioner's house. Kimble and Grant were both arrested.

Petitioner initially agreed to talk to police, and denied any involvement in the crimes. He disclaimed all knowledge of the Margulies' keys, emphatically denied having ever been in the Margulies' neighborhood, and reported having purchased the stereo equipment found in his home from a stranger on the street several months earlier. When the interrogating officers indicated they did not believe him, petitioner invoked his *Miranda* rights and asked to see an attorney.

Winfrey, Kimble, and Grant were charged with the burglary of the stereo store. Kimble was also charged with the burglary of the Margulies' residence, the robberies of Harry and Avone Margulies, the rape of Avone Margulies, and the murders of Harry and Avone Margulies. The state also alleged special circumstances with respect to both murders: (1) robbery felony-murder (as to Harry and Avone); (2) multiple murder (as to Harry and Avone); and (3) rape-

murder (as to Avone). (CT at 174-84.) The single burglary charge against Winfrey was dismissed in exchange for his testimony against petitioner. Grant was stabbed to death before trial began.

The evidence at trial is described in the Court's order granting petitioner's motion for an evidentiary hearing. (Dkt. 141 at 2-31.)

II. Procedural History

Petitioner filed his opening brief on direct appeal in 1984 (Case No. 21962). The California Supreme Court affirmed the judgment in its entirety on February 25, 1988, with Justices Mosk and Broussard dissenting as to the death sentence. *People v. Kimble*, 44 Cal. 3d 480 (1988). The United States Supreme Court denied certiorari. *Kimble v. California*, 488 U.S. 871 (1988) (mem).

In 1989, Kimble filed a petition for writ of habeas corpus and emergency request for stay of execution in the California Supreme Court (Case No. S008706). The state court denied the petition. Kimble filed a petition for certiorari in the United States Supreme Court, which was denied. *Kimble v. Vasquez*, 494 U.S. 1038 (1990) (mem).

In 1990, Kimble initiated federal habeas corpus proceedings in this Court by requesting appointment of counsel to assist him in preparing a federal habeas corpus petition. Counsel was appointed and in 1991 Kimble filed a petition for writ of habeas corpus. Because the petition contained claims not previously raised in state court, the federal proceedings were stayed pending exhaustion of the new claims.

Petitioner accordingly filed a second state habeas corpus petition in the California Supreme Court in 1992 (Case No. S025105). This petition included claims that were not in the federal petition. In 1993, petitioner filed a First Amended Petition in this Court which included the new claims. The California Supreme Court denied petitioner's exhaustion petition on May 26, 1993.

Shortly thereafter, on June 18, 1993, petitioner filed a Second Amended

Petition for Writ of Habeas Corpus (hereinafter "SAP"). This is the operative petition in this case. Respondent filed an Answer to Previously Unaddressed Claims in Second Amended Petition on October 14, 1993.[2] Petitioner filed an Amended Points and Authorities in Support of Petitioner's Traverse to Respondent's Answer on December 3, 1993.[3]

In 2002, this Court granted petitioner an evidentiary hearing on fifteen claims or subclaims: Claims 1-5, the aspect of Claim 6(B) relating to benefits conferred on Ortez Winfrey, Claim 6(C), Claim 7(C), Claim 10(B), the aspect of Claim 10(C) alleging deficient performance by counsel during voir dire, the aspect of Claim 10(D) alleging ineffective assistance of counsel in the handling of forensic evidence bearing on the rape charge and the participation of accomplices, Claim 10(E), the aspect of Claim 10(H) alleging deficient performance by counsel in objecting to certain proposed instructions, the aspect of Claim 10(I) alleging deficient performance by counsel in his penalty phase argument, and Claim 14(G). (Dkt. 141 at 102.)

The parties did not request an opportunity to present live testimony but agreed to conduct discovery, and then to present the direct testimony of their witnesses in written form. They conducted cross-examination by deposition and submitted transcripts to the Court.

III. Standard of Review

Kimble filed his first federal petition in 1991, so the Antiterrorism and Effective Death Penalty Act of 1996 does not apply to his claims. *Woodford v. Garceau*, 538 U.S. 202, 210 (2003). Under pre-AEDPA standards, the federal court must presume that state court determinations of historical fact are correct unless they are not fairly supported by the record. 28 U.S.C. § 2254(d) (1994);

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[2] Respondent had previously filed an Answer to the Petition on March 15, 1993.

[3] Petitioner had previously filed a Traverse to Respondent's [Original] Answer on May 20, 1993.

Clark v. Brown, 450 F.3d 898, 904 (9th Cir. 2006). If a habeas petitioner "'was afforded a full and fair hearing by the state court resulting in reliable findings' the district court 'ordinarily should . . . accept the facts as found' by the state-court judge." *Jefferson v. Upton*, 560 U.S. 284, 290 (2010) (quoting *Townsend v. Sain*, 372 U.S. 293, 312 (1963)). In contrast, no deference is owed to the state court's resolution of questions of law or mixed questions of law and fact. *Robinson v. Schriro*, 595 F.3d 1086, 1099 (9th Cir. 2010).

Before the 1996 amendments, 28 U.S.C. § 2254(d) provided:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . , evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit –
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> (1) that the merits of the factual dispute were not resolved in the State court hearing;
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> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
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> (3) that the material facts were not adequately developed at the State court hearing;
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> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
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> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
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> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.
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> And in an evidentiary hearing in the proceeding in the Federal court, . . . the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. § 2254(d) (1994). "[I]f any one of the eight enumerated exceptions applies then the state court's factfinding is not presumed correct." *Jefferson*, 560 U.S. at 291 (internal quotation marks and ellipsis omitted).

Here, because Kimble's state habeas petition was summarily dismissed, the factual bases for most of his claims were "never fully adjudicated and thus fall within the pre-AEDPA § 2254 exceptions to the deference rule." *Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002).

IV. Evidentiary Hearing Claims

A. Ineffective Assistance of Counsel at the Guilt Phase

1. Legal Standard

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To establish that counsel was

constitutionally ineffective, petitioner must prove both that his attorney's performance was deficient, and that this deficiency prejudiced the defense. *Id.* at 687.

An attorney is deficient if he "failed to exercise the skill, judgment, or diligence of a reasonably competent attorney." *United States v. Vaccaro*, 816 F.2d 443, 455 (9th Cir. 1987), *overruled on other grounds by Huddleston v. United States*, 485 U.S. 681 (1988). Petitioner must demonstrate "that counsel's representation fell below an objective standard of reasonableness," "considering all the circumstances," and was unreasonable "under prevailing professional norms." *Strickland*, 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." *Id.* at 689. The Court "must indulge a strong presumption that counsel's conduct falls within the wide range of professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (internal quotation omitted).

To demonstrate that counsel's deficient performance prejudiced the defense, petitioner must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. The resolution of an ineffective assistance of counsel claim thus depends on whether but for counsel's errors, it is reasonably probable that the jurors would have entertained a reasonable doubt about petitioner's guilt.

2. Claim 10(C): Ineffective Voir Dire

In Claim 10(C), petitioner alleges that his trial attorney, Richard Alan Walton, conducted an inadequate voir dire of the jurors and, as such, was unable to ensure that they were free of racial prejudice. Kimble also faults counsel for

failing to object to the prosecutor's use of five out of his eleven peremptory challenges to remove African-Americans from the jury. (*See* SAP at 44-45; Petr's Am. P. & A. in Supp. Traverse at 219-21.) Although the Court granted an evidentiary hearing on the performance prong of the *Strickland* test, neither party introduced any evidence bearing on this claim.

(a) Failure to Question Jurors about Racial Attitudes

The record contradicts petitioner's allegation that Walton failed to ask the jurors questions aimed at uncovering the existence of racial animosity toward African-Americans. He asked whether anyone thought young black males were more prone to commit crimes of violence than young white males. He asked several jurors about the racial composition of their neighborhoods, and whether they lived near black people. He asked whether jurors worked with any black people, and whether they supervised or were supervised by black people. He asked whether jurors were members of organizations that included or excluded black people. He asked jurors whether they felt free of racial bias, and whether they would object to racial considerations affecting the jury's deliberations. (*See, e.g.*, RT at 490-95, 515-21, 1235-36.) When a prospective juror mentioned that "statistics in the papers" showed higher crime rates in certain areas of the city, Walton questioned him about this, and asked him about his relationships with black people during his service in the military. He then exercised a peremptory challenge against the juror. (RT at 740-46.) Walton questioned another juror about his relationships with black people at work and in his neighborhood, and then peremptorily excused him. (RT at 798-808.)

(b) Failure to Make a *Wheeler* Motion[4]

On the seventh day of jury selection, in chambers just before the lunch break, the following transpired:

> Walton: I make just a quick observation for the record here? I'm not making my motion just yet, but I might.
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> The second peremptory exercised by the People was to excuse Vernella Thompson, who is black, the third peremptory used by the People was to excuse Gloria Wallick, who was black, the sixth —
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> The Court: I'm way ahead of you.
>
> Walton: The sixth peremptory was used to excuse Lucille Swindle, who is black, the eighth peremptory used by the People was used to excuse Artie Brown, who is black, and the ninth peremptory used by the People was used to excuse Isolyn Puplampu, who is black. Okay.
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> Mr. Poirier: Before we go, as long as we are mentioning that —
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> The Court: I'm keeping track, also, and if I feel there is a systematic exclusion of blacks, I'll excuse the whole panel.
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> Mr. Poirier: Your Honor, may I note that . . . there would be the same statistical inference that the defense is systematically excluding males; however, if the Court feels there is any problem, I would like to make a record of the reasons for the various jurors.
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> The Court: All right. If he makes a motion, then we'll make the record.

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[4] At the time of Kimble's trial, the United States Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), was five years in the future, but the California Supreme Court had largely anticipated its burden-shifting analysis in *People v. Wheeler*, 22 Cal. 3d 258 (1978). *See Wade v. Terhune*, 202 F.3d 1190, 1195-96 (9th Cir. 2000) (comparing *Wheeler* and *Batson*).

(RT at 857-58.)

Walton never made the motion. Later that afternoon, a black male was seated on the jury without objection. Two more days of jury selection ensued. With the exception of this one black male juror, who the parties identify as such only in connection with the claim of juror bias discussed later, the parties make no allegations about the racial characteristics of the jurors who were subsequently examined during these two days. Nor do they reveal the racial composition of the final jury or the four alternate jurors.

Although Kimble concedes that the prosecutor probably struck Artie Brown and Lucille Swindle because they expressed reservations about the death penalty, he claims nothing in the record provides a race-neutral explanation for striking the three other black women (Vernella Thompson, Gloria Wallick, and Isolyn Puplampu). He argues there could be no good reason to decline to make a *Wheeler* motion under these circumstances. To prevail on this claim, Kimble must show that Walton's failure to object to the prosecutor's challenges of these jurors "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688.

The record of the jury voir dire does not unambiguously demonstrate the existence of a prima facie case of racial discrimination in the prosecutor's exercise of peremptory challenges, and is insufficient evidence to overcome the strong presumption that Walton's decision not to bring a *Wheeler* motion fell "within the wide range of reasonable professional assistance" and was "under the circumstances, . . . sound trial strategy." *Strickland*, 466 U.S. at 689. "There is no magic number of challenged jurors which shifts the burden to the government to provide a neutral explanation for its actions. Rather, the combination of circumstances taken as a whole must be considered." *United States v. Chinchilla*, 874 F.2d 695, 698 (9th Cir. 1989). There is no minimum number of suspicious strikes required to trigger inquiry into the prosecutor's reasons because "the Constitution forbids striking even a single prospective juror for a discriminatory

purpose." *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994). "But just as 'one' is not a magic number which establishes the absence of discrimination, the fact that [a] juror was the one Black member of the venire does not, in itself, raise an inference of discrimination." *Id.*; *see also Chinchilla*, 874 F.2d at 698 ("[T]he challenge of two minority jurors does not, in and of itself, create a prima facie case of purposeful discrimination."); *Vasquez-Lopez*, 22 F.3d at 902 ("Using peremptory challenges to strike Blacks does not end the inquiry; it is not per se unconstitutional, without more, to strike one or more Blacks from the jury."); *see also United States v. Willis*, 88 F.3d 704, 715 (9th Cir.) ("[A] peremptory challenge to the only members of a similar racial group on the venire does not constitute a pattern of exclusion sufficient to establish a prima facie case.").

The record demonstrates that both Walton and the trial judge were attentive to the racial composition of the jury. On the first day of death qualification voir dire, a juror who indicated very strong opposition to the death penalty and was questioned extensively eventually announced, "I don't feel like I can continue." The court then excused her for cause over Walton's objection. After she left the courtroom, Walton stated, "I think the record should reflect that [she] was Black, and is the only Black who's been examined up to this point." (RT at 323.) Several days later, after five black women had been discharged by peremptory challenge, Walton evidently believed he had a basis, or might soon have a basis, to object under *Wheeler* and require the prosecutor to explain his reasons. The prosecutor indicated he was prepared to "make a record of the reasons for the various jurors." (RT at 857-58.) Thus, it appears that Walton considered bringing a *Wheeler* motion.

To prevail on his ineffective assistance of counsel claim, Kimble needs to show that no reasonable attorney under the circumstances of this trial would have decided *against* bringing the motion. This is inherently difficult to do on the basis

of the trial transcript alone, since it does not reveal "a host of factors impossible to capture fully in the record — among them, the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty." *Skilling v. United States*, 561 U.S. 358, 386 (2010) (citation omitted). In fact, the voir dire transcript indicates that at least four of the five black jurors challenged by the prosecutor gave answers indicating a possible reluctance to vote for a death sentence.

Petitioner concedes that the record indicates the prosecutor struck Artie Brown (the People's eighth peremptory challenge) and Lucille Swindle (the People's sixth peremptory challenge) because of their reservations about the death penalty. During her sequestered voir dire,[5] when asked how she felt about the death penalty, Mrs. Brown answered, "I really don't care for it. I can't say exactly why, but my own personal feelings and my religion I just don't care for it. [sic]" (RT at 811.) Nevertheless, she affirmed that she could follow the law and thought she could return a death verdict if the evidence were sufficiently aggravating, so she could not be excused for cause. (RT at 811-13.) Similarly, Mrs. Swindle said, "I don't like the death penalty," and although she could follow the judge's instructions to consider a death sentence, she would find it very difficult. She thought the death penalty might be warranted automatically for "mass murder," but not for the murdering two people. (RT at 604-607.)

Vernella Thompson, who was the subject of the prosecutor's second peremptory challenge, appeared either not to understand some of the questions asked of her, or to be reluctant to impose a death sentence. In response to Walton's

[5] Jurors whose views on the death penalty are so strong that they would either vote for death in all murder cases, or refuse to vote for death regardless of the evidence, cannot serve in a capital trial and must be excluded for cause. *Morgan v. Illinois*, 504 U.S. 719, 728-29 (1992). Pursuant to California law at the time of Kimble's trial, jurors were individually questioned about their attitude toward the death penalty outside the presence of the other jurors. *See Hovey v. Superior Court*, 28 Cal. 3d 1, 80-81 (1980).

question regarding whether she would consider the death penalty if the jury found petitioner guilty and was considering punishment, she stated, "I don't know." (RT at 327.) She answered another question the same way, and when again pressed as to whether she could consider the death penalty, she responded, "Whatever the law is, if I am chosen, I will have to abide by it. That's all I can say." (RT at 327-28.) Ms. Thompson initially did not respond to a question from the prosecutor about whether her feelings about the penalty decision would influence her decision on whether Kimble was guilty, and then said she did not understand the question. After the prosecutor provided a lengthy clarification, she affirmed that she would not let concerns about the sentence affect her verdict at the guilt phase. (RT at 329.) Throughout this colloquy, the prosecutor seemed to have some difficulty communicating with Ms. Thompson. (*See, e.g.*, RT at 328-30 (asking him to repeat or clarify his questions); *id.* at 330 ("I don't understand all of these terms, but I'm willing to abide by the law.")). Emphasizing that a death sentence is one of the possible penalties she might have to consider, the prosecutor asked Ms. Thompson if she "could handle that if you think the case justifies it." She replied, "I think so." (RT at 331.)

Later, during her general voir dire, Ms. Thompson said her purse had been snatched or her pocket picked five or six times. Walton suggested that she "must be getting sick and tired of it." Ms. Thompson replied, "Well, I forgave them. I forgave them." The perpetrators of these crimes were never caught. (RT at 482.) Walton could reasonably have understood that the prosecutor would prefer not to have someone on a capital jury with whom he had difficulty communicating, who seemed hesitant about imposing a death sentence, and who was willing to forgive those who had committed crimes against her.

The prosecutor used his third peremptory challenge to remove Gloria Wallick. During her death qualification voir dire, Walton asked, as he usually did, whether she had ever expressed an opinion about the death penalty. She replied,

"Not a positive one, just some discussions." (RT at 360.) He then asked her whether she meant she was unsure how she felt about it. She replied, "Not exactly unsure. I think that, you know, I could deal with a situation if it was in a situation where it had to be that I had to think of it in a positive way, but just speculation. I never really formed an opinion." (RT at 360). She then affirmed that she could consider the death penalty, and Walton passed for cause. The prosecutor's questioning was uneventful, and established that she could separate guilt from punishment, follow the law, and vote for either penalty "if the facts warranted it." (RT at 363.) In her general voir dire, Ms. Wallick said little. Walton's only question to her was whether she had prior jury service. She did not. (RT at 463.) The prosecutor asked about her job at the Los Angeles County Department of Social Services. She said she did clerical work and affirmed that she was not involved in helping clients. He asked about her children. She had a 19-year-old son and a 15-year-old son, and a 9-year-old daughter. She affirmed that petitioner's youth would not affect her judgment in this case. The prosecutor also asked whether there was "anyone where you work or anyone else that you feel might give you a rough time" if she told them she had voted one way or another in this case. Ms. Wallick said there was not. (RT at 548-49.)

Nothing in the record of Ms. Wallick's voir dire provides an obvious reason for the prosecutor's decision to exercise a peremptory challenge on her or why he wanted her off the jury. It is possible that he perceived her initial response to questions about the death penalty as indicating only tepid support. Of course, the record provides no information on Ms. Wallick's demeanor in the jury box. *Cf. Skilling*, 561 U.S. at 386 (many factors bearing on a juror's fitness for jury service may be apparent to those present in courtroom but are not captured in transcript).

Petitioner also cites Ms. Puplampu as one of the jurors who he suspects the prosecutor might have tried to remove because she is black. However, elsewhere in his pleadings, petitioner alleges as part of Claim 36 that the prosecutor

impermissibly used his peremptory challenges to exclude jurors based on their scruples about the death penalty. (Petr's Am. P & A in Supp. of Traverse, filed Dec. 3, 1993, at 221-23.)[6] In support of this claim, petitioner includes Ms. Puplampu in his list of ten jurors who had reservations about the death penalty. (*Id.* at 222 & n.33.) This is a reasonable conclusion based on her voir dire responses. When asked to identify the kind of case in which she "might be tempted to impose [a death sentence]," Ms. Puplampu replied, "Well, everything is different, but I guess if it was a case of a repeated offender [sic], in a really serious crime I mean." Walton then listed certain kinds of cases to see whether she would think the death penalty "should be imposed without fail." To the suggestions of "premeditated murder," "rape-murder," and "child murder," she responded "No, not necessarily." (RT at 625.)

The prosecutor engaged the fifth black juror struck, Ms. Puplampu, in a discussion of how difficult it might be to decide to impose a death sentence, and how serious a decision it would be. When he asked whether, given that it would not be easy, she could look at the defendant and affirm a death verdict as her own, she replied: "No, it wouldn't. I mean nothing is. I mean, no, I don't think it would be easy, but if that is the way I felt about it, well, I could do it." (RT at 628.)

Further, Ms. Puplampu was 22 years old, and the prosecutor asked her whether Kimble's similar youth would affect her penalty judgment. (RT at 623, 628.) Her answer was somewhat convoluted, but she said that "if it came to that point where the decision had to be made, . . . his age would already have been bypassed, I think." (RT at 628.) During her general voir dire, Ms. Puplampu also

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[6] This claim is meritless because a party may use peremptory challenges to remove jurors for any reason at all other than a group bias subject to heightened scrutiny under the Equal Protection Clause. *See United States v. Annigoni*, 96 F.3d 1132, 1138-39 n.8 (9th Cir. 1996) (en banc); *cf. Batson*, 476 U.S. 79, 89 (1986) (race); *J.E.B. v. Alabama*, 511 U.S. 127, 135 (1994) (gender).

gave answers to some questions that might have appeared inconsistent. She indicated she was born in Texas, and when asked how long she had lived in Los Angeles, she replied "off and on for about — it's hard to say. Most of my life." Walton then asked, "Did you go to school here, basically?" She replied, "Basically." (RT at 631.) Later, the prosecutor asked her if she went to school outside of California. Ms. Puplampu answered, "I went to school in Africa and Jamaica." In Africa, she studied "everything. Physical chemistry and biology and French and everything," and in Jamaica, she studied "the same thing. I went there much longer, but their schooling is based on the British system." She explained that her mother was from Jamaica and her father from Africa, "so I went there with them." (RT at 634.) Given her youth, it might have seemed inconsistent to say that she had lived in Los Angeles most of her life and attended school in Los Angeles "basically," while also spending so much time attending schools outside the country.

The prosecutor also asked Ms. Puplampu about whether, as a young person who had never sat through more than a day of a trial, she could be patient and keep her attention focused during a long trial that would "drag on a lot slower than you see in the movies or television." She said she understood and would be able to keep her attention focused on the trial. (RT at 635.) The prosecutor used his ninth peremptory challenge to remove Ms. Puplampu the next day, and shortly afterward, Walton made his statement about the race of five of the eleven jurors struck by the prosecutor. (RT at 845, 857.)

Most of the jurors who were not peremptorily challenged and who ended up serving on the jury expressed support for the death penalty far less ambiguously than Ms. Thompson, Ms. Wallick, and Ms. Puplampu. (*See* RT at 698-99 (wouldn't hesitate to impose it in recent case in the news of "senseless" killing of four people); RT at 503 (death penalty should be on the books); RT at 763 ("it's the right thing"); RT at 822 (extreme punishment but sometimes necessary); RT at

992 ("I am for the death penalty provided it is absolutely proven . . . that the person is actually guilty."); RT at 1113 ("I'm for it."); RT at 1267 (was against it while growing up in less violent part of nation, but after moving to Los Angeles, came to favor it and voted for it); RT at 1302 ("I'm for it.); RT at 1433 ("If it was definite that it was premeditated, that would make me lean toward [a death sentence].") Three jurors were less clearly supportive of the death penalty as a policy matter, although they unhesitatingly affirmed that they could vote for it in the right case. (*See* RT at 269-77, 835, 906-907.)

From the voir dire transcript, there were race neutral reasons for at least four out of the five peremptory challenges apparent on the record. Petitioner has proffered no additional evidence in support of this claim. This record is insufficient to overcome the strong presumption that defense counsel's decision not to challenge the prosecutor's peremptory challenges was the product of sound trial strategy. *See Strickland*, 466 U.S. at 689.

Claim 10(C) is DENIED.

3. Claims 10(B) & 10(D): Failure to Investigate and Present Available Guilt-Phase Evidence of the Involvement of Accomplices in Break-In of the Margulies' House

Petitioner presents several claims whose common theme is that if the prosecutor and trial counsel had performed their jobs adequately, then the jury would have heard evidence implicating others in the burglary of the Margulies' house and their murders. The failure to provide this evidence to the jury allegedly affected the verdicts on the special circumstance allegations or at the penalty phase.

Under the law in effect at the time of the crimes, even if Kimble was guilty of first degree murder under a felony murder theory, he was not eligible for the death penalty unless the jury also found beyond a reasonable doubt that he "was personally present during the commission of the act or acts causing death," and "with the intent to cause death, physically aided or committed the act or acts

causing death." (RT at 3222-23.) At trial, the prosecutor argued that Kimble acted alone when he entered the house and murdered Harry and Avone Margulies. (RT at 3035-36.) Defense counsel argued that other people were probably in the house with Kimble. (He suggested that Ortez Winfrey's inconsistent testimony showed he had something to hide.) He suggested that if the jurors felt reasonable doubt on this issue, they could not find the special circumstance allegations to be true because there was no way to know which person in the house actually participated in the killings. (RT at 3104.)

In Claims 10(B) and 10(D), Kimble contends that trial counsel's investigation of the crime was inadequate: he failed to interview witnesses and failed to investigate forensic evidence. Had he done so, petitioner alleges, he could have presented evidence implicating others in the crimes at the Margulies' house, thereby defeating the special circumstance allegations. (*See* SAP at 44-25 (Claim 10(B, D)).) Kimble subsequently withdrew this claim to the extent it alleges deficient handling of the forensic evidence, explaining that although counsel performed inadequately, he is unable to show prejudice. Thus, only the allegation that counsel could have presented witness testimony regarding third party participation in the home invasion requires resolution.

Because Walton is dead, it is difficult to evaluate the adequacy of his investigation into the possible involvement of accomplices. However, under *Strickland*, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Strickland*, 466 U.S. at 697. As explained below, Kimble has failed to identify evidence that would have been admissible at his 1980 trial and would have materially influenced the jurors' assessment of his role in the crimes.

a. Petitioner's Allegations

According to Kimble, competent defense counsel would have introduced evidence that petitioner and a group of friends in his neighborhood often spent time

together, sometimes while drinking alcohol or smoking marijuana. One of them, Ortez Winfrey, occasionally bought marijuana for the group from the victims' son, Bill Margulies, who sold it out of his car at Hamilton High School. Winfrey also occasionally went to the Margulies' house to buy marijuana from Bill Margulies. Petitioner contends that, from this contact with the victims' son, Winfrey and the others believed there were large quantities of marijuana hidden in the Margulies' residence and, about a week and a half before the crimes, four of the friends (Winfrey, Kimble, Grant, and Michael Brown) drove to the area to case the house.

Petitioner contends that the crime itself was committed by another friend, Kevin Goff, and that Winfrey, Kimble, and Grant were also present. He suggests it was Goff who actually shot the Margulies, while petitioner was off searching another part of the house. Moreover, petitioner argues, evidence could have been introduced to show that Grant was murdered in order to prevent him from testifying on Kimble's behalf at trial. Grant allegedly would have admitted being at the house with Kimble at the time of the murders, and would have testified that Kimble did not commit the murders.

To prove that all of this evidence could, and should, have been presented at his trial, Kimble offered testimony from the following seven witnesses:

i. Gordon Cheatham

Gordon Cheatham testified by declaration that he was petitioner's neighbor and good friend from childhood through high school. They and other friends "all used to get high," but Kimble started using drugs earlier than the others, and he used them heavily. In August of 1978, petitioner was smoking "sherms" (marijuana cigarettes laced with PCP) "non-stop up until the time he was arrested." (Ex. 75 ¶¶ 2-3.) Their group of friends sometimes bought marijuana from William Margulies, who sold it from his car near a high school. Ortez Winfrey had personally bought marijuana from William Margulies, and "said that he had made some large purchases from Margulies at his home in the Hollywood Hills." (Ex.

75 ¶ 4.)[1]

Mr. Cheatham also testified that in early August, he, Kimble, Winfrey, and three others (Kevin Goff, William Grant, and Michael Brown) "started planning a burglary of the Margulies' home" to take the "large quantities of high quality marijuana" that they believed were there. They were all smoking marijuana during these discussions, and Mr. Cheatham remembers Kimble "being wasted, just sitting there and nodding, and saying 'Yeah,' to what others said." Some of the men drove up into the Hollywood Hills to case the Margulies' house. (Ex. 75 ¶ 5.)

At his deposition, Mr. Cheatham recalled only himself, Kimble, Michael Brown, and Ortez Winfrey at these planning meetings, with William Grant participating "sometimes." He could not recall whether Kevin Goff participated in any of the burglary planning. (Ex. 216.0025.) Mr. Cheatham also claimed to have no recollection of anyone discussing how many people should participate in the burglary or what time of day it should take place. (Ex. 216.0055.) He denied casing the house himself, and admitted being aware of just one trip by others, about a week and a half before the burglary. He claimed he heard Winfrey, Kimble, Grant, and Michael Brown discussing what they had seen on that trip. (Ex. 216.0028-29.)

Mr. Cheatham also testified in his declaration that William Grant intended to testify and implicate Winfrey and others (including himself) in the burglary of the Margulies' house, and to say that Kimble had not committed the rape or the murders. (Ex. 75 ¶ 7.) On cross-examination, he admitted that Grant never told this to him personally; instead, his declaration testimony was based on "rumors in the neighborhood." (Ex. 216.0049.) This testimony is therefore hearsay.

During trial, defense counsel told the court that he spoke with Mr. Cheatham at petitioner's home and served him with a subpoena directing him to appear at

[1] On cross-examination, Mr. Cheatham clarified that he had heard these purchases were made either at the Margulies' house "or in that proximity." (Ex. 216.0030.)

trial. When he did not appear, the court and counsel discussed how to bring him in. The following week, defense counsel reported that Mr. Cheatham had arrived at court, after "one of the fugitive deputies contacted him by telephone and persuaded him to come in this morning." However, counsel said, after reinterviewing Mr. Cheatham, he decided not to call him as a witness. (RT at 2956-61, 2996.)

At his deposition, Mr. Cheatham claimed he had no recollection of speaking with any attorney or investigator working on petitioner's behalf. He denied receiving a subpoena, but said that "two detectives came and picked me up," and placed him in a room at the courthouse. He sat there all day, and nobody came to talk to him. (Ex. 216.0046-47.)

ii. Kenneth Kimble

Kenneth Kimble is petitioner's younger brother. He testified that Winfrey and petitioner were high on PCP on the weekend they brought home the stolen stereo equipment. He knew this because he could smell the PCP on them. (Ex. 45 ¶ 20.)

Kenneth Kimble also testified that Gordon Cheatham came to the Kimble house *after the trial* and "told me he had burglarized the Margulies home with Eric, Ortez Winfrey, Billy Grant, and Kevin Goff." Mr. Cheatham allegedly also said that petitioner did not tie up the couple and was unaware of the shooting until later. (Ex. 45 ¶ 25.) However, at his deposition, Mr. Cheatham denied making these statements. (Ex. 216.0035.)

Respondent objects on hearsay grounds to Kenneth Kimble's testimony about what Mr. Cheatham said. Kimble replies that Mr. Cheatham's statement implicating himself in a burglary and felony murder is admissible as a statement against interest. However, a statement that tends to expose the declarant to criminal liability is not admissible unless it is "supported by corroborating circumstances that clearly indicate its trustworthiness." Fed. R. Evid.

804(b)(3)(B).[2] There are no such corroborating circumstances here. To the extent that anything corroborates Mr. Cheatham's alleged admission, it is only testimony by others offered in this proceeding. As will be seen, however, this testimony cannot be said to clearly indicate the trustworthiness of Mr. Cheatham's alleged admission against interest. Kenneth Kimble's testimony about what Mr. Cheatham said is therefore inadmissible.

iii. Sammy Kimble

Sammy Kimble is also petitioner's younger brother. His only testimony relevant to the accomplice question consists of recounting a rumor that William Grant's death "had something to do with Eric's case, because Billy was supposed to go to Court to testify for Eric." (Ex. 47 ¶ 12.) On cross-examination, he admitted he did not recall where he heard this rumor. (Ex. 219.0032) He also testified that Eric Kimble told him that Kevin Goff committed the murders. (*Id.* at 44.) Respondent's hearsay objection to this testimony is sustained.

iv. Margaret Brown

Margaret Brown is the mother of Michael Brown, a neighbor and friend of Kimble's who testified for the defense at trial, and who was subsequently murdered in 1989.

At trial, Michael Brown testified that in 1978, he owned a car and frequently gave Kimble rides. Kimble did not own a car, and Brown had never even seen him drive a car. However, Ortez Winfrey had a white Camaro. Several days before Kimble's arrest, Brown saw Winfrey in his Camaro, with a black briefcase and a gun. (RT at 2963-66.) This testimony was elicited as part of the defense theme that Kimble did not act alone, and that Ortez Winfrey also participated in the burglary of the Margulies' house. Additionally, Brown testified that he went to

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[2] The corresponding state rule does not require corroborating circumstances. *See* Cal. Evid. Code § 1230. Since this statement was allegedly made after trial, however, it is only admissible in these proceedings for the truth of the matter. It is not admissible as evidence of what Kenneth Kimble could have testified to at trial.

San Francisco "prior to the incident." (RT at 2967.)

In her declaration, Margaret Brown testified that she used to own "a brown Volkswagen 'bug.'" (Ex. 88 ¶ 2.) Shortly after Kimble's arrest, her son Michael received a telephone call. After the call, he "was white as a ghost and exclaimed to me, expressing shock, that they had done it." (*Id.* ¶ 4.) (On cross-examination, Mrs. Brown explained that she understood this to mean that "they" had robbed the Margulies' stereo store. (Ex. 217.0032.)) Michael then told her that a week earlier, he, Ortez Winfrey, Henry Poindexter, and Billy Grant had talked about burglarizing the Margulies' store. (Ex. 88 ¶ 4.)

Mrs. Brown also stated that Michael told her "there was no way Eric went to the house by himself," and that "Billy Grant was killed because he was going to testify for Eric." (Ex. 88 ¶¶ 5, 7.) Her declaration does not indicate when her son made these assertions. (The timing of these statements matters because petitioner argues they are admissible as excited utterances prompted by the telephone call.) At her deposition, Mrs. Brown clarified that Michael told her "there was no way Eric went to the house by himself" in their conversation immediately following the telephone call. (Ex. 217.0034-35.) However, her son did not explain why he believed this. Obviously, the statement about Grant being killed occurred long after the telephone call, since Grant was killed nine months after Kimble's arrest.

At her deposition, Mrs. Brown also testified that a few weeks before Billy Grant was killed, he personally told her he planned to testify and "turn state evidence, I think." Grant did not tell her who was at the Margulies' house, but said he knew who was. Although Grant told her he planned to testify in Kimble's defense, he did not reveal what he planned to say. (Ex. 217.0049-50, 54-55.)

Finally, Mrs. Brown testified that she saw Kimble almost every day in 1978, and never saw him under the influence of drugs or alcohol. (Ex. 217.0012.) However, on the day of the crimes, she and her son Michael were in Sacramento at a family reunion. (Ex. 217.0023.) This is contrary to Michael's trial testimony

that he went to "Frisco" "prior to the incident." (RT at 2967.)[3] This discrepancy was not explored.

Respondent objects that Mrs. Brown's testimony about what her son told her is hearsay. Kimble replies that Michael's statement that "they had done it" immediately after receiving a phone call, and visibly still in shock, was an excited utterance. There is some confusion in Mrs. Brown's deposition testimony about how soon after the phone call Michael told her this.[4] Nevertheless, in evaluating this claim, the Court will admit this statement, as well as Michael's explanatory comment that a week earlier, he had talked about burglarizing the Margulies' store with three others, as statements "relating to a startling event," *i.e.*, the telephone call informing him of Kimble's arrest, "made while the declarant was under the stress of excitement that it caused." Fed. R. Evid. 803(2).

Respondent's hearsay objection is otherwise valid, and the Court will disregard Mrs. Brown's testimony concerning what she heard from her son and from Billy Grant about Grant's knowledge of who was at the house, Grant's plans to testify, and the claim that Grant was killed because he was going to testify for Eric Kimble. Although Michael Brown's statement that "there was no way Eric went to the house by himself," might have been part of the excited utterance following the telephone call, it must also be excluded because it is not based on personal knowledge. Mrs. Brown stated her son was not in town on the day of the crime.

v. Connie Kimble

Connie Kimble is petitioner's older sister. At the guilt phase, she testified that Eric spent most of the day the crimes occurred at home, until about 5:00 p.m.

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[3] Mrs. Brown testified that her son did not go to San Francisco, or anywhere else other than the family reunion in Sacramento, in August 1978.

[4] When asked whether she heard the phone ring, Mrs. Brown testified, "Well, I was out of town. My sister and brother-in-law was there. I'm not sure." (Ex. 217.0028.)

(RT 2906-17.) In his guilt phase summation, the prosecutor argued that "Connie is acting as a very reasonable sister, but that her testimony is unreasonable in accordance with all the evidence". (RT at 3197.) The jurors' verdict shows they agreed with this assessment of her testimony.

Connie Kimble's declaration mainly addressed Kimble family history and Eric Kimble's drug use. However, she also stated:

> A couple of days after Eric was arrested, Billy [Grant] told me he was going to testify on Eric's behalf. Billy said he could get Eric off. Billy stated that Eric didn't commit the murders. He knew this because Eric was with him at that time. Billy told me that the Ortez[] brothers had something to do with the murders.

(Ex. 49 ¶ 17.)

Respondent objects to this testimony as hearsay. Kimble argues it is a statement against interest, because in admitting he was with Kimble at the time of the murders, Grant placed himself at the scene of a multiple homicide. But the statement does not place Grant at the scene of any crime. Grant might well have told Connie Kimble that he and Eric were together at the time of the murders because he was claiming that they were both somewhere other than the Margulies' house. Thus, the alleged statement is at least as likely to have been exculpatory as inculpatory. Since it is not a statement against interest, it would not have been admissible at trial. *See People v. Elliot*, 37 Cal. 4th 453, 483-84 (2005) (statements that are more exculpatory than inculpatory are not sufficiently against the declarant's penal interest to warrant admission under Cal. Evid. Code § 1230).

vi. Bonnie Kimble

Bonnie Kimble is petitioner's mother. In her declaration, she testified that there was a "neighborhood rumor" that Billy Grant was murdered to keep him from testifying for petitioner. (Ex. 50 ¶ 48.) Respondent objects to this as hearsay.

Petitioner argues it is admissible to show Kimble's state of mind before trial, and to show that if trial counsel had conducted an adequate pretrial investigation, then he would have found information that would have led to a viable guilt phase defense. This testimony is admissible for the former purpose, and will be considered in evaluating Kimble's claim of incompetence to stand trial. As for the latter purpose, the existence of rumors, depending on their nature, might have inspired reasonable counsel to search more diligently for evidence implicating accomplices in the Margulies' murder. Bonnie Kimble's report of a rumor is thus admissible for this limited purpose. But to conclude that counsel's search would actually have led to admissible evidence that Billy Grant was killed as part of a cover-up by accomplices, it is necessary to assume the truth of the rumor. Hence this testimony is not admissible as evidence of what counsel could have found and presented at trial as part of an accomplice defense.

vii. Mildred Shane (via Michael Corwin)

Mildred Shane's house was across the street and slightly uphill from the intersection of Nightingale Drive and Doheny Drive. The next street down the hill is Robin Drive, about 176 yards from Mrs. Shane's driveway. (Ex. 99 ¶ 8.) Like Nightingale Drive, Robin Drive is a dead end road that juts off at a right angle from Doheny. The hillside south of Robin Drive at that corner is very steep. The hillside descends until it hits another section of Doheny, which completes a hairpin turn below Robin Drive before continuing down the hill. (RT at 1084-86.)

Mrs. Shane testified at trial that between 1:30 p.m. and 1:45 p.m. on the day of the murders, she saw a young black man running fast down Nightingale Drive. He came within about twenty feet of her. She thought he was in his early 20's and was about 5'6" or 5'7". He was wearing a navy blue suit and was carrying a black briefcase. He continued running down Doheny Drive, until he reached the corner of Robin Drive, where he turned right and jumped over a low railing along the edge of Robin Drive, and disappeared over the hillside. (RT at 2070-74.) Then a

little brown car with two black men in it drove down Doheny Drive. "It passed Nightingale Drive and stopped at the corner of the hillside for a moment or two, and then it continued on around the hillside where I heard some brakes screeching." (RT at 2075.)

Mrs. Shane's trial testimony supplemented testimony by the Margulies' next-door neighbor, Ted Dietlin. As he was leaving his house around 1:30 p.m., he saw someone in the bushes along the sidewalk between his house and the Margulies' house. The person then disappeared into the bushes and lay down. Mr. Dietlin asked him to come out. When he came back up to the street, Mr. Dietlin asked him what he was doing. The man, who was carrying a black briefcase, responded that he was hiding from a couple of people who were chasing him. However, Mr. Dietlin saw no one else around. The man asked Mr. Dietlin to give him a ride down the hill. Mr. Dietlin refused, and asked him what was in the briefcase. The man replied that it was none of Mr. Dietlin's business, and again asked for a ride down the hill. Mr. Dietlin refused again and told the man to get going. The man then started walking down the hill. At trial, Mr. Dietlin identified Kimble as the man he saw outside the Margulies' house, and a briefcase recovered from the crime scene as the one Kimble was carrying. (RT at 1780-87.)[5]

No one suggests that Kimble's 1:30 p.m. visit to the Margulies' house coincided with the murder. Other evidence indicated that the Margulies were still alive and at home later that afternoon, possibly as late as 4:00 p.m. Instead, the prosecutor argued that Kimble had intended to break into the Margulies' house when Mr. Dietlin interrupted him, and he returned later that day to finish the job.

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[5] Mr. Dietlin also admitted that he had not identified Kimble in a set of photographs the police showed him shortly after the crime, and that at a line-up, he had described Kimble as "similar" to the man he saw. (RT at 1789-90, 1804-10.) Mr. Dietlin had also described the man he saw to the police as being about six feet tall, weighing 170 pounds, and appearing to be about 25 years old. (RT at 1797.) This description closely matched Orthy Winfrey (Ortez Winfrey's brother). (RT at 2653-54.)

(RT at 3005-07.)

On cross-examination of Mrs. Shane, defense counsel asked her to describe the layout of the streets and clarify what she observed. She explained that at the bottom of the hillside where the man jumped over the fence, the hillside meets Doheny Drive again because "it's a very winding street." Asked whether, after the man jumped over the fence, he would have at "some point down the hill ... hit Doheny again," Mrs. Shane responded "Right." (RT at 2084-87.) No one objected to this testimony, although Mrs. Shane had testified earlier that she was unable to see the man after he jumped over the railing. (RT at 2073.) Her confirmation of defense counsel's theory that "[at] some point down the hill he hit Doheny again" was a reasonable inference given that the man disappeared over the hillside.

Because Mrs. Shane died in 1994, petitioner submitted the declaration of a private investigator, Michael Corwin, who interviewed her in 1990 in connection with the state habeas corpus petition. Mrs. Shane's description of what she observed that afternoon, as related by Mr. Corwin, is similar to her trial testimony, except for the following portion about the small brown car that drove down Doheny:

> Mrs. Shane told me that the car screeched to a halt and the young black man dressed in the blue suit who had run down the hill got into the car. The car then drove off down the hill. I asked Mrs. Shane if she was certain that the man in the blue suit coming down Nightingale got in the car. She told me that she was positive.

(Ex. 93 ¶ 6.) The declaration does not say where on the hill the car "screeched to a halt," or whether Mrs. Shane saw it happen or deduced it from what she heard. According to Mr. Corwin, after the man ran past Mrs. Shane, "[s]he watched as the man left the street and headed down a steep embankment." (*Id.* ¶ 5.)

According to Mr. Corwin, Mrs. Shane said she was interviewed by the

police on the evening of the murders, and she then heard nothing from the police, the prosecution, or the defense for almost two and a half years. Then, on the day she was scheduled to testify,

> An officer from the District Attorney's Office came to her home and drove her to court. On the way there, this officer told her that if the prosecution did not seek the death penalty, Kimble would be "out in seven years." This scared Mildred Shane. She was afraid that Kimble might be released from prison and then threaten her safety.

(*Id.* ¶ 7.)

Respondent does not object to Mr. Corwin's declaration. Nor did he cross-examine him. Instead, respondent counters with a declaration from Mrs. Shane's husband, which is discussed below. Mrs. Shane's description of what she saw, as allegedly related to Mr. Corwin, is not hearsay to the extent it is offered only as evidence of what Mrs. Shane would have testified to, had certain questions been asked, or if Mrs. Shane had more fully explained what she observed. As for the statement allegedly made by the officer in the car, it is not hearsay if it is admitted, not for the truth of the matter asserted, but only for its effect on Mrs. Shane. However, Mr. Corwin could only have concluded that she was frightened by this statement if she told him so. Therefore, his conclusion that she was frightened is hearsay. Nevertheless, in view of respondent's failure to object, the Court will overlook these evidentiary problems and assess the potential impact of Mrs. Shane's additional testimony on the trial.

b. Respondent's Rebuttal Evidence

Respondent presented the testimony of six witnesses:

i. Cyril Shane

Respondent submitted a declaration by Mrs. Shane's husband, Cyril Shane. (Ex. 209.) He testified that his wife "excitedly" reported to him that she had just

seen a young black man carrying a briefcase running down the hill. Mr. Shane's recitation of her description of what she observed is similar to her trial testimony and her statement as related by Mr. Corwin. (*Id.* ¶¶ 4-8.) However, Mr. Shane did not report his wife saying that the car stopped briefly at the corner of Robin Drive before continuing around the sharp curve. Rather, he stated:

> [S]he heard the car take the first turn past our house on screeching tires, and . . . heard the car come to a screeching halt. It seemed obvious to my wife that the small car stopped to pick up somebody. However, my wife did not tell me that she saw the man who had jumped over the embankment get in the car.

(*Id.* ¶ 6.) Mr. Shane also claimed he was present when his wife spoke to Mr. Corwin, and that she "did not tell Mr. Corwin that she saw the man who had been running down the hill get into the small car. She said that she presumed that he did." (*Id.* ¶ 13.)

Petitioner objects to Mr. Shane's testimony and labels it "self-impeaching in its evident bias and its factual inaccuracy." It is unnecessary to address this claim because Mr. Shane's report of his wife's statements adds nothing material. Mr. Corwin did not testify that Mrs. Shane said she saw the running man get in the car; he only related her conclusion that he did.

ii. William Margulies

The victims' son, William Margulies, testified:

> Mr. Cheatham's statements [about marijuana sales] are completely false and ridiculous. I have never sold marijuana to anyone. I tried marijuana once, about five years before my parents were murdered. I do not know Ortez Winfrey and have never met him. I do not know where Hamilton High is even located.

(Ex. 212 ¶ 3.)

iii. Kelly Faithful

Ms. Faithful was William Margulies' girlfriend in 1978. She testified that she was with him every day, and spent time at the Margulies' house. She stated: "To my knowledge, Bill never owned or drove a silver Porsche or any other silver car." (Ex. 217 ¶ 5.)[6] She also stated that to her knowledge, Bill Margulies never sold marijuana. (*Id.* ¶ 6.)

iv. Ortez Winfrey

Ortez Winfrey stated in his declaration that he "did not receive anything for testifying, other than the dropping of the burglary charge that was discussed in court." (Ex. 203 ¶ 3.) He also denied knowing William Margulies, and purchasing marijuana from him. (*Id.* ¶ 5.)

Winfrey admitted knowing Kevin Goff, Gordon Cheatham, Henry Poindexter, Michael Brown, and Eric Kimble, but stated he "never met with them to plan the burglary of the Margulies residence or Beverly stereo." (*Id.* ¶ 6.)

v. Investigating Officers Arce and Hodel

The investigating police officers stated that the search of the Margulies' house turned up no evidence of marijuana, and there was no evidence of the sale or use of marijuana by William Margulies. (Ex. 210 ¶ 4; Ex. 211 ¶ 4.) This means little, however, since on petitioner's theory the burglars were looking for marijuana and would have taken it. Moreover, the absence of evidence of marijuana sales means little if there was no investigation into that possibility.

[6] At his deposition, Mr. Cheatham testified that he saw Bill Margulies sell marijuana from his car in a high school parking lot, and that the car was a fairly new silver Porsche. (Ex. 216.0027-28.)

c. Analysis

To establish that Walton was constitutionally ineffective in failing to find these witnesses and present their testimony, petitioner must prove both that Walton's performance as an attorney was deficient, and that this deficiency prejudiced him. *Strickland*, 466 U.S. at 687. For the sake of analysis, the Court will assume that Walton should have investigated the accomplice issue more thoroughly than he did, and that had he done so, he would have been able to present the admissible portions of the testimony of petitioner's seven witnesses. Still, Walton's failure to investigate did not deprive petitioner of a fair trial unless there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The question therefore is whether the admissible portions of the testimony described above would have so altered the evidence presented at trial that it is reasonably probable that the jurors would have entertained a reasonable doubt about whether Kimble committed the murders on his own.

It was probably deficient for defense counsel to fail to interview Mildred Shane. But as discussed above, there is no evidence that if counsel had interviewed her, she would have said anything materially different from her trial testimony. She might have revealed to counsel her conclusion that the running man must have got into the car driven by the other black men. Under questioning, presumably she would have clarified whether she saw this happen, or deduced it from other observations. Given Mrs. Shane's consistent statements, both at trial and to Mr. Corwin, that at the corner of Robin Drive and Doheny Drive, the running man left the street and disappeared over the hillside, it is impossible to conclude that she probably would have told counsel that she saw the man get into the car at that corner.

Petitioner also argues that counsel could have presented a stronger case for the involvement of accomplices by pursuing the following three categories of

evidence:

(1) Evidence that Bill Margulies sold marijuana to Ortez Winfrey. (This would have explained why Winfrey and his friends knew where the Margulies lived, and provided an additional motive to burglarize their house.)

(2) Evidence that a group of young men (including some or all of Kevin Goff, William Grant, Michael Brown, Gordon Cheatham, Ortez Winfrey, and Eric Kimble) planned the burglary of the Margulies' house and drove by the house in the weeks before the crimes to examine the scene.

(3) Evidence that Kevin Goff was the killer.

Petitioner points to Goff's long history of committing assaults and murder. and attempts to link him to the neighborhood rumors that Grant was murdered to prevent him from testifying at petitioner's trial. This effort to pin the blame on Kevin Goff is based on character evidence, speculation, and two hearsay statements allegedly made by Gordon Cheatham. As explained above, Kenneth Kimble's claim that Mr. Cheatham said Goff committed the murders, and Sammy Kimble's claim that petitioner also claimed Goff did it, both relay hearsay that is not admissible under any exception. (And anyway, Mr. Cheatham allegedly made his statement after Kimble's trial.) In short, petitioner fails to identify any admissible evidence of Goff's involvement that defense counsel could have used at Kimble's trial.

As the preceding review of the testimony of the Kimble family members shows, even if Walton had questioned them about accomplices, they would have provided no admissible evidence supporting the involvement of accomplices.

The only other sources of potentially admissible evidence identified by petitioner are Margaret Brown and Gordon Cheatham. Margaret Brown owned a brown Volkswagen beetle, and would have so testified. (She would also have

testified that she and her son were out of town on the day of the crimes, however.[7]) The Court assumes for the sake of analysis that Mrs. Brown would have been permitted to testify that after Kimble's arrest, her son Michael received a telephone call, and then excitedly told her that about a week earlier, he, Ortez Winfrey, Henry Poindexter, and William Grant had talked about burglarizing the stereo store.[8] Although Kimble does not explain how the testimony would have come in, but presumably is suggesting that Michael Brown himself, who was alive at the time of trial, could have testified about the burglary planning discussions. (It seems doubtful, however, that Mr. Brown would have willingly admitted participating in planning the stereo store burglary.)

This leaves Gordon Cheatham as the source of most of the alleged accomplice evidence. Mr. Cheatham claimed that he saw Bill Margulies selling marijuana at Hamilton High School, and that Winfrey admitted buying marijuana from him in the vicinity of the Margulies' house.[9] Mr. Cheatham also testified that some of his friends planned a burglary of the Margulies home to steal marijuana which they thought was inside, and that some of them drove by the

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[7] There is conflicting testimony about Michael Brown's whereabouts on the day of the crimes. At trial, Ortez Winfrey testified that in the morning, he and Eric Kimble spent time with Michael Brown at his house. (RT at 2287-90.) But Michael Brown testified that he "went out of town prior to the incident . . . [to] Frisco." (RT at 2967.) In contrast, at her deposition in 2003, Mrs. Brown testified that she and her son were both in Sacramento on that day. (Ex. 217.0023-24.)

[8] Michael's out-of-court statement might have been admissible as a "spontaneous statement" that "[p]urports to . . . explain an act . . . perceived by the declarant," namely, the voice on the phone informing him that the store had been burglarized. *See* Cal. Evid. Code § 1240; *cf. People v. Morrison*, 34 Cal. 4th 698, 718-19 (2004) (discussing spontaneous statement identifying perpetrator of crime against declarant).

[9] Respondent does not object to Mr. Cheatham's testimony about what Winfrey said. It is not admissible as a statement against interest in either state or federal court because Winfrey is not "unavailable as a witness." Fed. R. Evid. 804(b)(3); Cal. Evid. Code § 1230. However, it might have been admissible at trial as an inconsistent statement, assuming Winfrey was given "an opportunity to explain or deny the statement." Cal. Evid. Code § 770; *see also* Cal. Evid. Code § 1235 (hearsay exception for inconsistent statements).

house to inspect the scene about a week and a half before the crime.

There are several problems with this evidence. At the time of the trial, Michael Brown was still alive and, as his testimony that he was in San Francisco on the day of the murders shows, apparently eager to disassociate himself from both the murders and the stereo store burglary. It is therefore doubtful that his mother would have told defense counsel, and been willing to testify, that her son admitted having discussed the stereo store burglary in advance. And, if the jury had heard Ms. Brown's claim that she and her son were in Sacramento on the day of the crime, and her son's claim that he was in San Francisco, they probably would have viewed their stories skeptically and discounted them both.

It is also doubtful that Gordon Cheatham, who does not appear to have been a suspect at the time of trial, would have come forward to testify that he participated in planning the burglary of the Margulies' house. At the time of petitioner's arrest and trial, Cheatham was aware of the events, but told no one what he knew. (Ex. 216.0053-54.) There is conflicting evidence over whether he disobeyed a subpoena to appear, but in his deposition he admitted to being brought to the courthouse by the police. (Ex. 216.0046-47.) Trial counsel claimed to have spoken with him on more than one occasion, but Mr. Cheatham has no recollection of this. Mr. Cheatham never stated that he would have been willing to tell counsel what he claims he knew, or that he would have testified.

Under cross-examination, Mr. Cheatham backed away from several statements in his declaration. He vacillated on who was present at the planning meetings. (Ex. 216.0024-25.) He downplayed his own knowledge and participation. (Ex. 216.0026.) No longer was he aware of "a couple of trips up into the Hollywood hills to case the Margulies' house." (Ex. 75 ¶ 5.) Rather, he knew of only one trip, and only because he heard others discussing it. (Ex. 216.0029.) His recollection of the alleged planning discussions is weak: he cannot remember anyone discussing what time of day the burglary should be committed,

or how many people should participate. (Ex. 216.0054-55.) He explained his failure to remember these details by claiming that since he was working at the time, he did not pay much attention to what the others were discussing. (Ex. 216.0059.) In short, Mr. Cheatham is not a credible witness.[10]

It is also unclear whether it would have helped the defense to call to the stand a single witness with a credibility problem to accuse the victims' son of selling marijuana to associates of the killer. Just as William Margulies and Ortez Winfrey deny that charge now, they would have denied it at trial. It is unclear who the jury would have believed.

Even if the defense could have overcome all of these problems, what evidence of accomplice involvement would the jurors have heard? If they believed Margaret Brown, then they would have concluded that Ortez Winfrey was lying when he denied knowing anything about the stereo store burglary beforehand. They would have concluded that five people, including Michael Brown and Henry Poindexter, were involved in the burglary of the stereo store, not just the three they already knew about. They would have known that Michael Brown drove a "little brown car," *i.e.*, his mother's Volkswagen. And if the jurors also believed Gordon Cheatham, they would have concluded that Kimble, Brown, Winfrey, and Grant all participated in the planning of the break-in at the Margulies' house.

Putting this evidence together with Mildred Shane's existing testimony, the jurors probably would have concluded that Kimble at least received assistance getting to and from the Margulies' house. They would have been more likely to disbelieve Ortez Winfrey's denial of ever having been in the vicinity of the Margulies' house, and more likely to conclude that he helped drive Kimble to and

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[10] Mr. Cheatham was convicted of felonies after Kimble's trial. (Ex. 216.0057.) However, respondent has presented no evidence of impeachment information available at the time of the 1982 trial. Although respondent submitted a rap sheet for Mr. Cheatham (Ex. 214), there is no declaration interpreting its entries, and no evidence of how its contents could have been used at trial.

from the house. Still, the fingerprint evidence would have implicated only Kimble. His fingerprints were inside the house. (RT at 2024-36.) He does not argue that any of the other unidentified fingerprints recovered from the house could be matched to any of the alleged co-conspirators.

Trial counsel's deficient investigation of the guilt phase evidence prejudiced petitioner only if it is reasonably probable that, had he investigated more thoroughly, he would have been able to present additional evidence that would have tipped the scales for the jurors in favor of finding reasonable doubt about whether Kimble entered the Margulies' house alone. To conclude that the jury might have been more skeptical of Winfrey's testimony than they already had reason to be requires accepting a chain of speculative inferences. Mrs. Brown (or her son), and Mr. Cheatham had to be willing to implicate themselves or their acquaintances in the planning of these crimes. The jurors would have had to believe their testimony despite these witnesses' credibility problems. And the jurors would have had to believe Mr. Cheatham's testimony about Bill Margulies selling marijuana to Winfrey, and disbelieve Winfrey's and Margulies' denials.

If all of these things had happened, then it is somewhat more likely that the jurors would have concluded that accomplices entered the house with Kimble, and therefore somewhat more likely that the special circumstances would have been rejected. Thus, a more thorough investigation by defense counsel might have produced a different result. But the probability of all this happening is not a "reasonable probability." It is a slight possibility. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. The omissions by counsel assumed here "conceivably could have influenced the outcome." *Id.* But they did not result in the omission from Kimble's trial of "favorable evidence [that] could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Therefore, Kimble

was not deprived of the effective assistance of counsel in presenting a defense based on the involvement of accomplices in the break-in at the Margulies' house.

Claims 10(B) and (D) are DENIED.

B. Prosecutorial Misconduct: Failure to Disclose Evidence

Kimble claims the prosecution violated its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), by (1) failing to disclose certain benefits conferred on Kimble's accomplice, Ortez Winfrey, in exchange for his testimony, and (2) failing to disclose that a prosecution witness, Mildred Shane, said she saw Kimble leave the crime scene by getting into a car driven by two other men. (SAP at 21-25.)

1. Legal Standard

"There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Green*, 527 U.S. 263, 281-82 (1999). The standard for judging prejudice from a *Brady* violation is the same as the standard for assessing the impact of an attorney's deficient performance under *Strickland*: whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433-34 (1995) (citation and internal quotation marks omitted); *see United States v. Spawr Optical Research*, 864 F.2d 1467, 1472 n.6 (9th Cir. 1988) ("The *Strickland* standard for prejudice has been considered to impose virtually the same burden on the defense as the standard for materiality in *Brady* claims").

2. Claim 6(B): Failure to Disclose Benefits Conferred on Ortez Winfrey

At trial, Winfrey testified that he had known Kimble for several years. On the evening of August 12, 1978, Kimble showed up at Winfrey's house, and

invited him to help remove stereo equipment from a store. Kimble said his boss gave him the keys to the store and gave him permission to take the equipment. Winfrey then drove Kimble to the store and helped him remove stereo equipment. After unloading the equipment at Winfrey's house and another house in the neighborhood, they invited a third acquaintance, William Grant, to join them. The three men then returned to the store and removed more stereo equipment. Winfrey claimed he only learned later that the owners of the stereo store had been killed, when the police searched his house and arrested him. (RT at 2162-2237.)

Winfrey also testified that he had seen Kimble with a gun about a week before the burglary, and that he had seen Kimble with a black briefcase similar to the one found in the Margulies' house. (RT at 2193-94, 2233.)

Kimble claims the jurors would have been more skeptical of Ortez Winfrey's testimony if they had known that between the time of the stereo store burglary and the trial, Winfrey committed two other crimes for which he was arrested but not prosecuted. The jurors already had reason to distrust Winfrey, because he admitted he was facing a burglary charge that was to be dismissed in exchange for his testimony against Kimble. (RT at 2237-38.) Kimble argues, however, that the jurors would have given Winfrey's testimony even less credence had they known about his other criminal conduct, and known that the prosecution was willing to overlook this conduct in order to obtain his testimony against Kimble.

The evidence of Winfrey's other offenses consists of two police reports and a probation officer's report. The probation officer's report was prepared in 1980 in connection with Winfrey's burglary charge arising out of the stereo store burglary. (Ex. 59.) It lists two offenses following the August 12, 1978 offense, apparently based on the probation officer's review of law enforcement records and Winfrey's own statements. On August 22, 1979, Winfrey was arrested and charged with reckless driving, for which he was placed on twelve months probation. Probation

was terminated three months later. (Ex. 59-6-7.) The police report for that offense indicates that officers saw Winfrey drive through a red light, then activated their lights and followed him. Winfrey failed to stop, and sped unsafely through residential streets running stop signs, even after the officers activated their siren. He eventually stopped when a tire blew out, then got out of the car and spontaneously told the officers, "'I panicked, because I had a burglary case and the judge told me not to get involved with the police for nothing and I don't have my ID.'" (Ex. 54-3.)

Second, Winfrey was arrested for felony grand theft auto on December 14, 1979. The probation officer reported "no further disposition available per court clerk," and Winfrey said he was released from custody without having to appear in court. (Ex. 59-7.) The police report indicates that Winfrey was a passenger in a car driven by someone else. The car was registered to a car rental company, which when contacted, reported the car stolen. (Ex. 54-7-9.) A police department "Disposition of Arrest and Court Action" form for this arrest includes a section entitled "Reason for Release," below which the designation "849B(1) PC" is checked. California Penal Code § 849(b)(1) allows the police to release an arrestee if the officer "is satisfied that there are insufficient grounds for making a criminal complaint against the person arrested." Beneath the reference to § 849(b)(1), the form bears a check mark beside the phrase "ADMISS. EVID. INSUFF." (Ex. 54-5.) No information on the disposition of the charge against the car's driver is provided.

Kimble claims the rap sheet provided to the defense by the prosecution did not include these 1979 arrests. He submits exhibits that are difficult to read but appear to be rap sheets for Ortez Winfrey. (Ex. 51-556, 51-660.) It is unclear when these rap sheets were generated. In any event, they do not include any 1979 arrests. For the sake of analysis, the Court assumes the prosecution did not reveal these two arrests to the defense.

Kimble also observes that, in seeking the dismissal of the burglary charges against Winfrey, the prosecutor told the trial court that Winfrey "has stayed out of trouble for two years." (Supp. RT at 3.) However, he said this on December 18, 1980, while Kimble's jury was deliberating over the guilt phase verdict, at a hearing that neither Kimble nor Walton attended. (*Id.*; CT at 256.) Therefore, prosecutor's statement could not have had an effect on Walton's questioning of Winfrey or the jurors' perception of Winfrey's character.

Kimble presents no evidence of any agreement between the police or the prosecution to treat Winfrey leniently for these two vehicle-related arrests. Winfrey admitted the prosecutor agreed to dismiss the burglary charge in exchange for his testimony. (RT at 2238.) But there is no evidence that any additional benefit was promised. Because there is no evidence of any undisclosed agreement that may have motivated Winfrey to testify, habeas relief is not warranted on this basis. *Williams v. Woodford*, 384 F.3d 567, 597 (9th Cir. 2004).

Even if there was no agreement between Winfrey and the prosecutor, the prosecution did have an obligation to turn over to the defense any material impeachment information in its possession. *United States v. Bagley*, 473 U.S. 667, 676 (1985). Kimble claims that Winfrey's conviction for reckless driving and his arrest for being found with the keys to a stolen car could have been used to impeach him. Kimble argues that if the jurors had learned the facts behind these arrests, and heard what Winfrey said about the events, they would have been significantly less inclined to accept Winfrey's testimony about his role in the crimes.

Under current California law, "[m]isdemeanor convictions themselves are not admissible for impeachment, although evidence of the underlying *conduct* may be admissible subject to the court's exercise of discretion." *People v. Chatman*, 38 Cal. 4th 344, 373 (2006) (emphasis in original). In contrast, at the time of Kimble's trial in 1980, evidence of the conduct underlying a misdemeanor

generally was inadmissible as impeachment evidence. *See People v. Wheeler*, 4 Cal. 4th at 290 ("Before 1982, it was clear that Evidence Code section 787, consistent with prior case law, precluded the use of misdemeanors for impeachment."). Moreover, the facts underlying Winfrey's reckless driving conviction, as conveyed in the police report, while demonstrating a reckless character and a desire to evade law enforcement, shed no light on Winfrey's character for honesty or veracity. Therefore, neither this conviction nor the facts underlying it would have been admissible impeachment evidence at Kimble's trial.

It is also extremely doubtful that the judge would have permitted the defense to impeach Winfrey with evidence that the police arrested him on suspicion of automobile theft, and then released him without pressing charges. *See Wheeler*, 4 Cal. 4th at 290-93 (discussing rules governing admission of impeachment evidence before 1982).

Even if the undisclosed impeachment evidence was admissible, however, it was not material. The government's failure to disclose evidence deprives a defendant of a fair trial only if there is a reasonable probability that the jurors would have reached a different verdict if they had heard the suppressed evidence. *Kyles*, 514 U.S. at 433-34. The jurors heard Winfrey's dubious trial testimony that he thought he had permission to take the stereo equipment, they knew he gave conflicting accounts of the events, they knew he had a powerful motive to lie to minimize his own involvement in the crimes, and they knew he stood to benefit from his testimony because he admitted he was "testifying to avoid going to prison." (RT at 2285) Thus, the jurors had ample reason to be skeptical of Winfrey's testimony. Evidence that Winfrey had driven recklessly in an apparent attempt to evade arrest for running a red light, and that he was briefly detained by the police (but then released) on suspicion of being in possession of a stolen car, would not have materially altered their assessment of Winfrey's credibility as a witness. *Cf. United States v. Cooper*, 173 F.3d 1192, 1203 (9th Cir.) (undisclosed

impeachment evidence not material where witness's credibility was damaged at trial by other means).

Claim 6(B) is DENIED.

3. Claim 6(C): Failure to Disclose Statements Made by Mildred Shane

The petition alleges that the prosecution failed to disclose evidence that the man seen near the Margulies' residence on the afternoon of the murders was not alone. Although it is not explicit, the petition implies that when the police interviewed Mrs. Shane, she told them that she saw the man she witnessed running down the hill near her house get in to a car driven by two other black men. (SAP at 23-24.)

This claim fails because there is no evidence that Mrs. Shane told the police anything different from what she testified to at trial. According to Mr. Corwin, Mrs. Shane said she "was positive" that the man got into the car. At trial, she testified that she could no longer see the man after he jumped over the low fence on the hillside at Robin Drive. This is consistent with Mr. Corwin's testimony that Mrs. Shane told him the running man "left the street and headed down a steep embankment." Based on Mrs. Shane's trial testimony about the topography (which is confirmed in part by the photographic exhibits attached to Exhibit 99), she could not have seen the man after he jumped over the fence, assuming the man descended the embankment. Consistent with this, Mr. Corwin does not report Mrs. Shane as saying she *saw* the man get in the car. She might have concluded he got in the car because the driver of the car appeared to be looking for the man (he stopped at the top of the embankment), and when the car was out of sight further down the road, there was the sound of squealing brakes, as though the car had stopped again. It was reasonable to surmise that the man descended the embankment south of Robin Drive and got into the car at the base of the embankment. In any event, Mr. Corwin does not claim Mrs. Shane said she told the police that she saw the man get

in the car, or even told the police that she "was positive" that he got in the car.[11]

Because there is no evidence that the police or prosecution suppressed any statement made by Mrs. Shane, this *Brady* claim fails. *United States v. Price*, 566 F.3d 900, 907 (9th Cir. 2009) (*Brady* violation only if evidence was suppressed by the state). Claim 6(C) is DENIED.

C. Prosecutorial Misconduct: Police Intimidation of Mildred Shane

Kimble also claims the police coerced Mrs. Shane not to reveal in her trial testimony that she saw Kimble with accomplices. (*See* SAP at 21-26 (Claims 6 & 7(C)).)

Substantial government interference with a defense witness's free and unhampered choice to testify constitutes a violation of due process. *Earp v. Ornoski*, 431 F.3d 1158, 1170–71 (9th Cir. 2005); *United States v. Vavages*, 151 F.3d 1185, 1189 (9th Cir. 1998). Improper governmental interference in a defense witness's decision to testify arises when the government intimidates or harasses the witness to discourage the witness from testifying, for example, by threatening the witness with prosecution for perjury or other offenses. *Williams v. Woodford*, 384 F.3d at 601–02 (internal citations omitted).

The petition alleges law enforcement officers intimidated or coerced Mildred Shane so that she would not provide testimony favorable to the defense, including "testimony that the man seen near by [the] Margulies residence on the afternoon of the murders was not alone." (SAP at 25-26.) Accepting Mr. Corwin's testimony about what Mrs. Shane told him, we know only that after the police spoke to her while driving her to court to testify, she became afraid that Kimble might eventually be released from prison and threaten her safety. (Ex. 93 ¶ 7.) There is no evidence that Mrs. Shane altered her testimony in any way because of this fear.

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[11] Although the parties do not address it, what appears to be the handwritten notes of police officer Addison Arce memorializing an interview of Mildred Shane on August 12, 1978, at 9:35 p.m., report Mrs. Shane describing what she saw in a way similar to her trial testimony. (Ex. 53 at 35-36.)

As discussed above, there is no evidence that Mrs. Shane gave the police one account of what she saw, but said something different at trial. Accepting Mr. Corwin's account, we know only that Mrs. Shane felt positive that the running man got into a car driven by two other black men. We do not know how she reached this conclusion. Although petitioner alleges that officer misconduct caused Mrs. Shane to alter her testimony, he identifies no evidence to support this assertion. Such unsupported allegations do not warrant habeas relief. *Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995). Claim 7(C) is DENIED.

D. Juror Bias

In Claim 14(G), petitioner alleges that a juror who concealed his son's robbery convictions during voir dire must be presumed to be biased.

1. Legal Standard

The Sixth Amendment requires that each juror who sits on a criminal jury be impartial, meaning free of any bias against the defendant. *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998) (en banc). In addition to those barred from the jury because of known or "actual" bias, courts recognize that "with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given." *Crawford v. United States*, 212 U.S. 183, 196 (1909). "The relationship may be remote; the person may never have seen the party; he may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice." *United States v. Burr*, 25 F. Cas. 49, 50 (C.C.D.Va. 1807) (Marshall, C.J.).

In *Smith v. Phillips*, 455 U.S. 209 (1982), the Supreme Court considered a defendant's claim that he had been denied due process because, during his trial for murder, one of the jurors in his case applied for a job as a major felony investigator in the District Attorney's Office. The attorneys prosecuting the defendant's case

learned about the application more than a week before the end of trial, but chose not to inform either the trial court or the defense. Two weeks after the jury returned its verdict, the District Attorney first learned of the juror's application. Five days later, he informed the trial court and defense counsel, and the latter moved to set aside the verdict. The trial court held an evidentiary hearing and found that while the job application was improper, the juror was not biased. *Id.* at 212-14. On federal habeas review, the district court found insufficient evidence to demonstrate that the juror was actually biased. Nevertheless, the court imputed bias to the juror on the theory that the average person in his position would believe that the jury's verdict would affect his job prospects with the prosecutor. *Phillips v. Smith*, 485 F. Supp. 1365 (S.D.N.Y.), *affirmed*, 632 F.2d 1019 (2d Cir. 1980). The Supreme Court rejected this conclusion, explaining that it "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. at 215. The state trial judge's finding that the juror was impartial, after just such a hearing, was presumptively correct and entitled to deference on federal habeas review. *Id.* at 218.

In a concurring opinion, Justice O'Connor expressed her view that "[b]ecause there may be circumstances in which a postconviction hearing will not be adequate to remedy a charge of juror bias, it is important for the Court to retain the doctrine of implied bias to preserve Sixth Amendment rights." *Id.* at 224 (O'Connor, J., concurring). She read the majority opinion not to "foreclose the use of 'implied bias' in appropriate circumstances.'" *Id.* at 221. There are "some extreme situations that would justify a finding of implied bias." *Id.* at 222. She gave as examples hypothetical jurors who were closely involved with the parties or the events at trial. *Id.*

The Supreme Court next addressed implied bias in *McDonough Power Equip. v. Greenwood*, 464 U.S. 548 (1984), a personal injury case. A juror failed

to reveal that his son had been injured in an accident, apparently because he misunderstood a voir dire question. The Court refused to "invalidate the result of a three-week trial because of a juror's mistaken, though honest response to a question." *Id.* at 555. It held that "to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556. Five justices joined concurring opinions expressing their view that the Court's opinion did not foreclose the possibility that "in exceptional circumstances, . . . the facts are such that bias is to be inferred." *Id.* at 556-57 (Blackmun, J., concurring, joined by Stevens and O'Connor, JJ.); *id.* at 558 (Brennan, J., concurring in the judgment, joined by Marshall, J.).

In *Dyer*, the Ninth Circuit considered a juror who deliberately lied about her background in order to serve on the jury in a capital case. The court concluded that her behavior gave rise to a presumption that she was biased. *Dyer*, 151 F.3d at 981-84. The juror was presumed to be biased, not because something in her past necessarily disqualified her, but because she lied in order to avoid being dismissed. *See Dyer*, 151 F.3d at 982-83; *Green v. White*, 232 F.3d 671, 676-78 & n.7 (9th Cir. 2000).

"Although the Supreme Court has not explicitly adopted (or rejected) the doctrine of implied bias, both concurring opinions in *McDonough* seem to embrace it . . . and [the Ninth Circuit] has inferred or presumed bias on rare occasions." *Fields v. Brown*, 503 F.3d 755, 768 (9th Cir. 2007) (en banc). In particular, the Ninth Circuit recognizes implied bias "in those extreme situations . . . where repeated lies in voir dire imply that the juror concealed material facts in order to secure a spot on the particular jury." *Id.* at 770.

2. Claim 14(G): Juror Failed to Disclose Son's Robbery Convictions

It is undisputed that at the time of juror Ernest Bray's voir dire, his son, Ernest Bray, Jr., was incarcerated in state prison, having been sentenced eight months earlier to three years for three counts of robbery arising out of two incidents. Petitioner's evidence shows that Ernest Bray, Jr. committed an armed robbery, involving two victims, in Los Angeles on August 26, 1979. Subsequently, on December 16, 1979, while out on bail awaiting trial, he committed another armed robbery in Hawthorne. He pled guilty in the first case on February 2, 1980, and in the second case on February 21, 1980. On March 20, 1980, Bray, Jr. was sentenced on all three robbery counts to a term of three years in state prison. He was sent to Chino State Prison, where he remained for the duration of Kimble's trial. (*See* Ex. 73 at 2-3, 9, 24.)

There is clear evidence that Mr. Bray was aware of his son's legal problems. Prior to sentencing, his son told a probation officer that he was living with his parents and that when he was released from custody, he would return to their house. At sentencing, Bray, Jr.'s attorney reminded the judge that his father had been with him at all his court appearances. The attorney said he had spoken to Mr. Bray "at some length" and Mr. Bray expressed his view that his son had been associating with the wrong crowd, which influenced him in committing these crimes. (Ex. 73 at 20-21, 49.)

a. Voir Dire

Mr. Bray was questioned near the end of a three-week process of jury selection. To assess the honesty of his responses on voir dire, it is necessary to understand what he heard during the period of jury selection before his name was called.

When voir dire began on Wednesday, October 15, 1980, twelve jurors were selected from the venire of prospective jurors, and seated in the jury box. The trial judge explained that he would be addressing the jurors in the box, but that the other venire members in the audience should also pay attention. He read a long list of

the charges against petitioner, which included murder, burglary, robbery, rape, and use of a firearm. The prosecutor then read a list of the witnesses he expected to call. The judge asked the jurors seated in the jury box whether they knew any of these witnesses, and whether they or anyone close to them had "ever suffered a similar charge as to those in this case" or had "ever been a complaining witness or a victim in a case of this kind." The transcript of the proceedings indicates the prospective jurors answered these questions in the negative. (RT at 224-36.)

Next, the judge asked the prospective jurors about prior jury service. (RT at 237.) All the venire members not in the box, including Mr. Bray, were then excused from the courtroom for the rest of the day. (RT at 241, 296.) They spent most of the next day in the jury assembly room while the prospective jurors in the box were individually questioned about their attitudes toward the death penalty. At some point in the afternoon, the entire venire was called back into the courtroom so that five of the members could be drawn to replace those stricken for cause from the original panel. (RT at 303-90.) Everyone other than the twelve prospective jurors in the box was then excused for a week. (RT at 391, 416.)

When the venire members returned to the courtroom on October 23, 1980, they were all informed how voir dire and peremptory challenges work. The judge asked them whether an attorney's use of a peremptory challenge would affect their ability to be fair. He asked the prospective jurors to say whether they had served on civil or criminal cases in the past. He explained the reasonable doubt standard and asked each venire member in the jury box if they could accept it. He asked whether any of the prospective jurors had law enforcement training or experience. To anyone answering any of the questions in the affirmative, he asked several follow-up questions regarding whether his/her experience would affect his/her ability to be an impartial juror. He then asked whether any prospective juror had any legal training or experience, or any close friends or relatives in the legal profession. Finally, he asked the prospective jurors whether they would follow his

instructions even if they disagreed with them. In short, the judge asked questions on at least nine different subjects before turning the questioning over to the attorneys. (RT at 448-57.)

Over the course of the next four days of voir dire, Mr. Bray sat in the courtroom with all of the other venire members, observing jurors being questioned by the judge and attorneys. (CT at 227-30; RT at 457-904.) Whenever a prospective juror was excused, and a seat in the jury box vacated, another venire member's name was drawn. The new prospective juror was separately questioned, in camera in chambers, about his/her attitude toward the death penalty. If found qualified, general voir dire would then resume in front of the entire panel of prospective jurors. (*See, e.g.*, RT at 555-63.)

Mr. Bray's name was called on the afternoon of Wednesday, October 29, 1980. It had been two weeks since the judge read the list of charges against petitioner. Following the established procedure, Mr. Bray was first questioned in chambers about his views on the death penalty. He assured the attorneys that he could vote for a death sentence, but would need to hear all the evidence before making up his mind. (RT at 904-11.) Mr. Bray was then brought back into open court for general voir dire. (RT at 912.)

By this point in the selection process, the judge had developed a pattern of beginning each prospective juror's general voir dire with a question like, "If I were to ask you the same questions [as those I asked the other members of the panel], sir, would your answers be the same, similar, or would they differ?" (RT at 796.) The first four venire members called before Mr. Bray that day answered "same." (RT at 796, 814, 828, 840.) The next one answered "They'd be similar." (RT at 876.) No one followed up to explore this answer. The prospective juror questioned immediately before Mr. Bray, answered, "No, I have a couple of differences." Asked to explain, she said she had been the victim of two burglaries of her house, her brother was a victim of attempted murder, her brother worked as

a clerk in the courthouse, she had friends who were attorneys, and she knew some policemen. (RT at 894-95.) After answering questions about whether these relationships would prevent her from serving impartially, she was permitted to remain in the jury box. (RT at 904.)

When Mr. Bray was seated in the jury box, the judge asked him, "Mr. Bray, did you hear the questions I asked of the other members of the panel?" Mr. Bray responded, "Yes, I did." The judge asked, "If I asked you the same questions would your answers be the same, similar, or different?" Mr. Bray responded, "Similar." The judge then elicited the fact that Mr. Bray was a pre-school teacher who was married with four children and who had no prior jury experience, and turned the questioning over to counsel. (RT at 912.)

After questioning Mr. Bray about his career, defense counsel asked how old his children were. Mr. Bray responded that his oldest daughter was 23, and "I have one that is 21, a son that's 19, will be 20 December the 20th, and one 15."

Walton: The 15-year-old, I assume, is still in school?

Mr. Bray: Yes.

Walton: What about the others?

Mr. Bray: They're working.

Walton: What kind of work do they do?

Mr. Bray: My daughter works for Western Union. The other one is a telephone operator in the great land of development, Pine Bluff, Arkansas, and the other one he does menial type tasks.

Walton: That's the 19-year-old?

Mr. Bray: Yes.

Walton: But none of them around the house, I suppose?

Mr. Bray: No.

Walton: Now, based on what you do know about this case do you think you would be a fair and competent juror if you were selected?

Mr. Bray: Yes.

Walton: Is there any reason you can think of why you shouldn't be a juror on this case?

Mr. Bray: No.

(RT at 913-14.)

The prosecutor then asked, "Mr. Bray, obviously, your 19-year old son is approximately the same age as the defendant. Would you have difficulty keeping your son's youth and the defendant's separated and completely out of your consideration in the guilt phase of the trial?" Mr. Bray said he would not. (RT at 916.)

Petitioner claims Mr. Bray lied twice: first when he gave his answers to the judge's earlier questions of the entire panel would be "similar," and second when he said his son was working at menial tasks.

It is impossible to know precisely what Mr. Bray meant when he chose "similar" as his answer to the standard opening question. This is a normal way to indicate that one's answers are neither exactly the same as those given by prior prospective jurors nor dramatically different. It is not obvious that this answer was false. The judge's original question about whether anyone close to the prospective jurors had "ever suffered a similar charge as to those in this case," which he did not repeat during the subsequent days and weeks of voir dire, could well have been remembered by prospective jurors as asking whether anyone close had ever

"suffered similar charges to those in this case." The original version of the question is correctly interpreted as asking about each individual charge, while the latter formulation is more naturally understood to inquire about the group of charges considered together. The difference between these two formulations is semantically significant but depends on close attention to subtleties of expression. The venire members were listening to the judge talk, not carefully reading a transcript. *See McDonough*, 464 U.S. at 555 ("jurors are not necessarily experts in English usage"). And because no prospective juror admitted closely knowing anyone who had been charged with a crime, those watching the voir dire were never reminded of the broader focus in the judge's original question.

In addition to this ambiguity, the judge's reference to "the questions I asked the other members of the prospective panel" was vague and broad-ranging. For two weeks, the prospective jurors were asked questions on a wide variety of subjects, many of which focused on their relationships with lawyers and law enforcement, their prior trial experience, and their ability to follow instructions and be impartial. The answer "similar," which the judge offered as a choice somewhere between "same" and "different," was also vague. The prospective jurors questioned over the course of the preceding week had provided a variety of answers to the parties' questions. Mr. Bray's truthful answers to most of these questions were probably substantially similar to other panel members' answers. When Mr. Bray chose to respond with "similar," no one questioned him further to explore the areas in which his answers were not the same as those of other prospective jurors. (*Cf.* RT at 705 (defense counsel asked juror who answered "primarily the same" to this question to elaborate, and juror described being a victim of several crimes).) Jurors have no "duty to respond to questions not posed." *Hard v. Burlington Northern R.R.*, 870 F.2d 1454, 1460 (9th Cir. 1989) ("*Hard II*") (citation and internal quotation marks omitted).

In contrast, Mr. Bray's responses to the questions about his children were

misleading. He said his adult children were all working, and that his 19-year-old son "does menial type tasks." It is obvious from this latter answer that Mr. Bray did not want to reveal that his son was in prison. The parties have not addressed whether Mr. Bray's answer was technically true.[12] In any event, even if his son was working in prison, Mr. Bray's response to this question was phrased to avoid disclosing where and for whom his son was performing menial tasks. It was not an honest answer to the voir dire question.

b. Juror's Deposition

At his deposition, Mr. Bray remembered little of the voir dire process twenty-two years earlier. He recalled that people were questioned and that some were then selected for the jury while others were not, but he did not recall anything about the questions they were asked. Nor did Mr. Bray recall being questioned individually in the judge's chambers. (Ex. 221 at 16-27.) His only recollection of being asked about his job was early in the selection process, in connection with hardship excusals. (*Id.* at 28.) Asked general questions about his attitude toward jury service at the time, Mr. Bray affirmed that he took his obligation to serve as a juror seriously, made an honest and sincere effort to fulfill his duties, tried to answer voir dire questions truthfully, never intended to lie, be misleading, or hide relevant information, and intended to be fair to both sides. (*Id.* at 19-21.) He also testified that he never thought about whether he would not be selected for jury service if he revealed his son's robbery conviction, because "I am not raring to serve on any jury duty." (*Id.* at 38.)

Mr. Bray's primary recollection of the trial was that he disagreed with his fellow jurors about the extent of Kimble's involvement in the crimes in comparison to others such as Ortez Winfrey. It was not clear whether this disagreement arose

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[12] While no evidence was introduced on this subject, in California, prisoners are generally required to work while incarcerated. *See* Cal. Penal Code § 2700; *Burleson v. California*, 83 F.3d 311, 312-13 (9th Cir. 1996) (describing California's prison work requirement).

during the guilt phase deliberations or the penalty phase deliberations, but it appears likely that any disagreement was most acute during the penalty phase. (*See id.* at 9, 36, 43-47; RT at 3390-3401 (juror questions during penalty deliberations).) Mr. Bray claims to have disagreed with his fellow jurors about whether Kimble deserved the death penalty. (Ex. 221 at 37.) He recalled everyone on the jury, including the foreman, urging him to change his decision, saying, "We have been here over three months."[13] (*Id* at 9.) In his view, "Eric Kimble wasn't given a fair shake [because] [t]hey made a deal with some other individual that I consider to be even more guilty than Kimble." (*Id.* at 13.) Mr. Bray did not recall being asked to affirm the verdicts as his own in open court, as the transcript reflects, but he remembers telling his fellow jurors that he disagreed with them. (*Id.* at 47; *cf.* RT at 3257, 3407, 3408.)

The only testimony Mr. Bray provided about his son was to report his date of birth and say they were close. (Ex. 221 at 30.) In response to other questions about his son, he claimed a lack of memory, but it is plain from the deposition transcript that Mr. Bray strongly resented being asked questions about his son's criminal history. (*See id.* at 30-35.)

Respondent objects to Mr. Bray's testimony about his disagreements with his fellow jurors under Federal Rule of Evidence 606(b), which provides: "During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment." Fed. R. Evid.

[13] The penalty phase deliberations occurred almost three months after jury selection began. The guilt phase deliberations occurred about two months after jury selection began.

606(b)(1).[14] Exceptions exist for testimony about whether jurors considered extraneous information, were subject to outside influence, or made a mistake in filling out the verdict form. Even in these situations, however, jurors "may not be questioned about their deliberative process or the subjective effects of extraneous information." *United States v. Montes*, 628 F.3d 1183, 1188 (9th Cir. 2011). Mr. Bray's testimony that he disagreed with the other jurors during their deliberations, that he voted not to impose the death penalty, and that other jurors encouraged him to change his mind, plainly falls within the scope of this rule. *See generally Tanner v. United States*, 483 U.S. 107, 116-25 (1987) (discussing origin of rule); *Sassounian v. Roe*, 230 F.3d 1097, 1108-1109 (9th Cir. 2000) (applying rule on federal habeas).

Petitioner argues that Mr. Bray's testimony is admissible under an exception to the rule for jurors who obtain their position by fraud. For this proposition he cites *Dyer*'s reliance on portions of Justice Cardozo's opinion in *Clark v. United States*, 289 U.S. 1 (1933). *See Dyer*, 151 F.3d at 983 & n.20. *Clark* involved the prosecution of a sole hold-out juror for contempt following a mistrial due to the hung jury that she caused. The Court held that the juror, who lied about her employment because she wanted to serve on the jury, and then voted in sympathy with her former employer, was validly convicted of criminal contempt. Among the evidence against her were statements she made and behavior she engaged in during jury deliberations. The Supreme Court observed that her conviction on the basis of this evidence did not conflict with the rule that juror testimony is not admissible to impeach a verdict, because "there was no verdict, and hence none to be impeached." *Clark*, 289 U.S. at 18. It explained that any common law privilege that a juror may have not to testify about jury deliberations is distinct from the rule

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[14] The language of Rule 606 was recently modified as a part of a general restyling of the Federal Rules of Evidence to make them easier to understand. The notes to the 2011 Amendments state that these alterations do not reflect any substantive changes in the rules governing the admissibility of evidence.

against testimony that impeaches a verdict. *See id.* at 12-14. The Court concluded that this privilege did not bar the contempt prosecution for several reasons, including that the privilege does not attach to a juror who obtains her position by fraud. *Id.* at 14. *Dyer* cited this discussion in *Clark* to illustrate why "a juror who lies his way into the jury room is not really a juror at all." *Dyer*, 151 F.3d at 983. It declined "to follow *Clark* to the letter," however, which would have required it "to conclude that Dyer was not convicted by a jury of twelve, but by eleven jurors and one intermeddler." *Id.* Instead, the Court of Appeals said *Clark* was "instructive" because it showed why a juror who lied his way onto a jury should be presumed to be biased. *Id.* In *Dyer*, the evidence that the juror repeatedly lied during voir dire did not depend on testimony about the jury deliberations. Neither *Clark* nor *Dyer* supports an exception to Rule 606(b)'s prohibition on juror testimony about their deliberations.[15]

The Ninth Circuit has also said that "[s]tatements which tend to show deceit during voir dire are not barred by [Rule 606(b)]." *Hard v. Burlington No. R.R.*, 812 F.2d 482, 485 (9th Cir. 1987) ("*Hard I*"). The juror affidavits in *Hard* claimed that *another* juror introduced extraneous information into the jury's deliberations. *Id.* at 483. The affidavits also implied that the juror concealed his employment history during voir dire. *See id.* at 484*; Hard II*, 870 F.2d at 1462. In contrast, Mr. Bray's *own* testimony about the jury deliberations has no bearing on the question of his awareness of his son's robbery convictions or his failure to reveal those convictions. Mr. Bray's testimony about the deliberations, if true, simply shows a jury in the process of deliberating, with significant initial disagreement before

[15] In *Green v. White*, which is discussed in greater detail below, the court considered juror testimony about another juror's statements during deliberations as evidence that the juror was biased, without addressing the admissibility of the testimony. *See Green*, 232 F.3d at 673. It appears the evidence was admitted in the state court proceeding, which then formed part of the record on federal habeas review. *See id.* at 674-75. The opinion does not reveal whether the issue of admissibility under Rule 606(b) was raised in the federal habeas proceedings.

unanimous verdicts were eventually reached. His testimony shows no deceit and no misconduct by any juror.[16]

Petitioner also argues that Mr. Bray's testimony demonstrates bias because it shows that although he believed Kimble was not guilty, he voted for conviction, and although he believed Kimble did not deserve the death penalty, he voted to impose it. Testimony that is a complete disavowal of the verdict announced in open court is at the core of the common law rule against the admission of juror testimony to impeach a jury verdict, codified in Rule 606(b). *Tanner*, 483 U.S. at 117.

In *Hyde v. United States*, 225 U.S. 347 (1912), the Supreme Court held that a motion for a new trial could not be based on juror testimony that described a vote-exchanging agreement during the deliberations in a trial of four defendants. The jurors would have testified that even though some of the jurors thought none of the defendants were guilty, they voted to convict two defendants in exchange for the pro-conviction jurors voting to acquit the other two defendants. *Id.* at 382-83. The Supreme Court explained that "the testimony of jurors should not be received to show matters which essentially inhere in the verdict itself and necessarily depend upon the testimony of the jurors, and can receive no corroboration." *Id.* at 384. Mr. Bray's testimony that he thought Kimble was not guilty and did not deserve a death sentence is like the testimony proffered by the jurors in *Hyde*. Even if true, it does not establish that he lied during voir dire. It is therefore not admissible in this habeas proceeding.

c. Analysis: Implied Bias

Dishonest answers by a prospective juror during voir dire demonstrate bias if

[16] If Mr. Bray's description of the jury deliberations were admissible, it would be partially corroborated by statements in declarations executed by other jurors. (*See* Ex. 89 ¶ 4 (juror declaration that "our deliberations took a long time because one juror was not convinced that Kimble was guilty of the murders"); Ex. 90 ¶ 2 (same).)

"a correct response would have provided a valid basis for a challenge for cause," *McDonough*, 464 U.S. at 556, or if the answers showed that the juror "lie[d] in order to improve his chances of serving," *Dyer*, 151 F.3d at 982.

Kimble argues that Mr. Bray's relationship with his son precluded him from being an impartial juror. The test is "whether an average person in the position of the juror in controversy would be prejudiced." *United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir. 2000) (citation and internal quotation marks omitted). Prejudice will be presumed under circumstances in which "'the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances.'" *Id.* (quoting *Tinsley v. Borg*, 895 F.2d 520, 527 (9th Cir. 1990)).

In *United States v. Allsup*, 566 F.2d 68 (9th Cir. 1977), two prospective jurors in a bank robbery trial were employees of the bank that was robbed, although they did not work at the branch where the robbery occurred. The jurors revealed their employment during voir dire and said they would be impartial, but the Court of Appeals held it was error to deny a defense motion to dismiss them for cause. The court reasoned that people who work in banks have good reason to fear bank robbery because of the potential for violence, and concluded that "[t]he employment relationship coupled with a reasonable apprehension of violence by bank robbers leads us to believe that bias of those who work for the bank robbed should be presumed." *Id.* at 71-72.

In *United States v. Eubanks*, 591 F.2d 513 (9th Cir. 1979), a heroin trafficking case, a juror failed to disclose that two of his sons were serving long prison terms for murder and robbery, crimes they had committed because they were heroin addicts trying to obtain more heroin. The court concluded that "[r]egardless of the reason for [the juror's] nondisclosure, we conclude that his sons' tragic involvement with heroin bars the inference that [he] served as an

impartial juror." *Id.* at 517 (citing *Allsup*, 566 F.2d at 71-72).

In *Tinsley v. Borg*, the Court of Appeals considered a federal habeas challenge to a state court conviction for rape. *Tinsley*, 895 F.2d at 522. A seated juror failed to reveal that, as a psychiatric social worker, she had provided extensive counseling to a rape victim suffering from trauma, and had testified on the victim's behalf, opining as to her credibility, during the trial. *Id.* at 529. Although the victim's credibility was an issue at Tinsley's trial, the Court of Appeals concluded that the case did not "present a relationship in which 'the potential for substantial emotional involvement, adversely affecting impartiality,' [was] inherent," as it was in *Allsup* and *Eubanks*. *Id.* at 527 (quoting *Allsup*, 566 F.2d at 71). It explained that courts "should hesitate before formulating categories of relationships which bar jurors from serving in certain types of trials." *Id.* at 527. The court observed that bias had been presumed in cases where a juror was exposed to such prejudicial information about a defendant that it was highly unlikely he could be impartial even if he said he could, cases involving a close relationship between the juror and the defendant, and cases in which "a juror or his close relatives have been involved in a situation involving a similar fact pattern" as the defendant's. *Id.* at 528.

Petitioner argues that this case is like *Eubanks*. However, in *Eubanks* the juror's sons had been convicted of crimes at least as serious as the heroin distribution charges involved in the trial. Their lives had been ruined by their addiction to heroin, and the juror sat in judgment of men who were accused of conspiring to distribute heroin. Here, Mr. Bray's son was serving a three-year sentence for three counts of robbery. There is no evidence that any of the victims of these robberies was injured. While Kimble was charged with two counts of robbery, his charges stemmed from a home invasion that also resulted in charges of burglary, rape, use of a firearm, and most significantly, two counts of murder. Despite the presence of the robbery charges, Bray Jr.'s crimes and Kimble's crimes

do not "involv[e] a similar fact pattern." *Tinsley*, 895 F.2d at 528. Of course, if Mr. Bray had revealed his son's convictions, it is likely counsel would have questioned him. Depending on how he responded, he might have been challenged. But the robbery convictions of his son did not automatically disqualify him from serving on the jury. *See id.* at 527 ("Only in 'extreme' or 'extraordinary' cases should bias be presumed.") (quoting *Smith*, 455 U.S. at 222 (O'Connor, J., concurring)).

The remaining question is whether Mr. Bray wanted to serve on Kimble's jury so fervently that he decided to conceal his son's robbery convictions *in order to* avoid being dismissed. On its own, Mr. Bray's misleading response to the question about his son is not enough to give rise to the *Dyer* presumption of bias. *Dyer*, 151 F.3d at 981 (having established that juror lied on voir dire, court must next consider whether juror's dishonesty "reflects an '[in]ability to render an impartial verdict'"). "The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." *McDonough*, 464 U.S. at 850.

In *Dyer* the juror's behavior truly was "extraordinary." She clearly lied in response to two standard voir questions: whether she or any relatives or close friends had ever been the victim of a crime, or had ever been accused of any offense (other than traffic offenses). She answered "no" to both. In fact, she knew that her brother had been shot and killed six years earlier, and that the case was prosecuted as a murder. She deliberately concealed several other crimes of which she was a victim, including robberies and burglaries. She concealed the fact that her husband had been arrested on rape charges one month before trial, and that many of her relatives had been arrested for murder, armed robbery, and drug possession. When some of these facts came to light during the trial, she was questioned by the trial judge. She lied again and attempted to downplay the significance of her failure to answer the voir dire questions accurately. *See Dyer*,

151 F.3d at 979-81. At a subsequent deposition, she did not claim to have forgotten the events she failed to disclose, but instead expressed her view that it was "ridiculous" to expect her "to reveal everything," and stated "the little information [she knew] about other relatives" was irrelevant. *Id.* at 981.

The Court of Appeals was unable to say whether the juror "was actually biased — i.e., whether she was disposed to cast a vote against Dyer," but concluded it was unnecessary to resolve this issue because her implied bias was clear. *Id.* at 981. The circumstances taken as a whole demonstrated that this juror wanted to remain on the jury, and had decided that she alone would choose which information to reveal to the trial court. *Id.* at 981-82. As the last juror selected, she "sat through the questioning of 74 potential jurors over the course of five days and had time to consider how she would answer the same questions when her turn came." *Id.* at 980. She watched jurors who disclosed being the victims of burglaries being "picked off by peremptory challenge." *Id.* "After watching a number of potential jurors disclose relatively minor crimes and get dismissed, she chose to conceal a very major crime — the killing of her brother in a way that she knew was very similar to the way Dyer was accused of killing his victims." *Id.* at 982. "She also failed to disclose many other facts that would have jeopardized her chances of serving on Dyer's jury." *Id.* The Court concluded that the juror's behavior gave rise to an inference that she "lied in order to preserve her status as a juror and to secure the right to pass on Dyer's sentence." *Id.* The court emphasized the egregiousness of the juror's conduct. She told "major lies" and did so "materially and repeatedly." *Id.* at 983. The court concluded:

> Not all jurors may walk a perfectly straight line. A distracted juror might fail to mention a magazine he subscribes to. An embarrassed juror might exaggerate the importance of his job. Few voir dires are impeccable, and most irregularities can be shrugged off as immaterial to the fairness of the trial. But the magnitude of [the juror]'s lies and her remarkable display of insouciance — her expressed feeling that

> only she would decide what matters — fatally undermine our confidence in her ability to fairly decide Dyer's fate. The facts here add up to that rare case where we must presume juror bias.

Id. at 984.

In contrast to this pattern of deception, Mr. Bray concealed just one thing: his son's robbery convictions. He did not lie repeatedly. He said his answers to the standard voir dire questions were "similar" to those of the other jurors, which probably was true, and neither party chose to follow up on his answer. Mr. Bray may have lied in saying that his son was working at "menial type tasks" while the truth was he was serving time in state prison; in any event, this statement was certainly misleading. But this quite possibly may have been the behavior of the "embarrassed juror" described in *Dyer*. *Id.* at 984.

In *Dyer*, the Court of Appeals observed that the challenged juror, before her own voir dire, had watched "a number of potential jurors disclose relatively minor crimes and get dismissed." *Dyer*, 151 F.2d at 982. In contrast, at petitioner's trial, no juror questioned prior to Mr. Bray admitted to having any relative or friend who had been charged with a crime. (*See* RT at 448- 904.) Several jurors disclosed that they or a family member had been the victim of a crime, and the attorneys questioned them about these incidents. (*See, e.g.*, RT at 479-86, 513, 587-89, 705-707.) This may have made Mr. Bray even more reluctant, out of embarrassment, to identify himself before his fellow jurors as the only one with a criminal in the family. While the juror in *Dyer* clearly was strongly motivated by a desire to serve on the jury, that inference is less plausible here. It is equally likely that Mr. Bray was ashamed of his son's crimes and did not see them as relevant, or in the same league as the charges against petitioner.

The only other Ninth Circuit opinion in which the court found implied bias based on a juror's lies during voir dire is *Green v. White,* 232 F.3d 671. In *Green*, a juror with a felony conviction for passing bad checks stated on his pre-service

jury questionnaire that he had no felony convictions. *Green*, 232 F.3d at 672-73. Subsequently, during voir dire, when asked whether he or any family member or friend had been charged or arrested for any "shootings, murders, any kinds of assaults," the juror failed to reveal that, while serving in the Army, he had been convicted of assault and spent six months in the brig. *Id.* at 673. Questioned later about these lies, the juror did not claim to have forgotten these incidents, but instead compounded the lies with misleading and contradictory excuses. *Id.* at 676-78. He also made several statements to the other jurors during deliberations that demonstrated he had prejudged the case. *Id.* at 673.

Citing *Dyer*, the Court of Appeals concluded that the juror's "pattern of lies, inappropriate behavior, and attempts to cover up his behavior introduced 'destructive uncertainties' into the fact-finding process . . . ." *Id.* at 676. The court explained that *Dyer* "was decided not on the basis of the juror's past history, but on the pattern of lies the juror engaged in to secure her seat on the jury." *Id.* at 677. Similarly, Green's juror "lied twice to get a seat on the jury; when asked about these lies, he provided misleading, contradictory, and outright false answers." *Id.* at 677-78. The juror's lies were much more serious, and much more blatantly indicative of bias than Mr. Bray's isolated act of dissembling about his son's crimes. Moreover, the court's finding of implied bias did not rest solely on the fact that the juror lied. He had engaged in other behavior that brought his impartiality into question, which the court found to provide "strong circumstantial evidence of his motive for lying." *Id.* at 678.

The doctrine of implied bias exists as an exception to the general rule that allegations of juror partiality should be resolved by holding a hearing at which the petitioner has an opportunity to prove *actual* bias. *Smith*, 455 U.S. at 215; *accord id.* at 222 (O'Connor, J., concurring) ("in most instances a postconviction hearing will be adequate to determine whether a juror is biased"). This exception is reserved for "extraordinary situations," and "each case must turn on its own facts."

Id. at 222 & n.* (O'Connor, J., concurring); *Fields*, 503 F.3d at 772 (doctrine applies "only in 'extreme' or 'extraordinary' cases"). In both *Dyer* and *Green*, the jurors at issue exhibited extreme dishonesty and the evidence supported an inference that their duplicity was motivated by a strong desire to avoid being dismissed from the jury. Mr. Bray's misbehavior pales in comparison. While his son's robbery convictions and three-year sentence should have been disclosed, they were not comparable in seriousness or criminality to the charges and potential sentence faced by petitioner. Moreover, Mr. Bray's lie was minor, probably flowing from a desire to avoid revealing an embarrassing fact that he may have felt reflected poorly on him as a parent. This one act does not give rise to a significant suspicion of bias. *See Fields*, 503 F.3d at 770 (implied bias is recognized in extreme situations involving "repeated lies"). The facts here taken as a whole do not "add up to that rare case where we must presume juror bias." *Cf. Dyer*, 151 F.3d at 984.

Although Mr. Bray committed misconduct during voir dire, there is no evidence he was actually biased against petitioner. Petitioner has failed to carry his burden of proving that Mr. Bray's dishonesty during voir dire was motivated by a desire not to be discharged from petitioner's jury. Implied bias has therefore not been established. Claim 14(G) is DENIED.

E. Competence Claims

1. Scope of Hearing: Claims 1-5

The parties address five consolidated claims related to Kimble's competence. In Claim 1, petitioner argues that the statement he gave the police after his arrest should not have been admitted at trial because he was not competent to understand and waive his *Miranda* rights as a result of his mental impairments and substance abuse. In Claim 2, Kimble asserts that the combination of his mental deficits, his long term substance abuse, and the trauma he experienced awaiting trial, rendered him incapable of rationally understanding the proceedings

against him and assisting counsel in his defense. In Claim 3, petitioner contends that due to his neurological, emotional, and psychological impairments, he lacked the capacity to control his actions and was incapable of premeditation and deliberation, so he cannot be guilty of capital murder. In Claim 4, Kimble asserts that these impairments also rendered him incapable of knowingly consenting and stipulating to various actions taken during the pretrial proceedings and the trial itself. And finally, in Claim 5, he argues that as a result of these impairments, he was denied the right to be mentally as well as physically present throughout all critical stages of the prosecution.[17] (SAP at 9-21.)

2. Petitioner's Evidence

In support of his claim that he was incompetent at the time of trial, petitioner cites evidence that he suffers from mental disabilities, was a substance abuser who experienced withdrawal symptoms following his arrest, was overwhelmed by his first experience of the harsh conditions of Los Angeles County Jail, and was devastated by the loss of an attorney he trusted and the death of people close to him on whom he was relying on for his defense. Based on reported observations of petitioner at the time of trial, by fellow inmates and some of the jurors, as well as subsequent mental health evaluations, Kimble argues he lacked the capacity to understand the proceedings and to assist counsel in his own defense.

The Court will assume for the sake of analysis the truth of petitioner's allegations about his long-term substance abuse before his arrest, primarily of marijuana and PCP. Similarly, the Court will assume that Kimble was distraught about losing his first attorney, and was devastated by the murders of his co-defendant Billy Grant, his sister Marsha, and a family friend, while he was in jail awaiting trial. The Court also accepts petitioner's mother's testimony that she told

[17] Claims 4 and 5 are different ways of saying that Kimble was not mentally competent to stand trial, and so are subsumed within Claim 2. *See generally Drope v. Missouri*, 420 U.S. 162, 171 (1975).

Walton that her son needed psychiatric counseling because he was speaking irrationally. (*See* Ex. 218 at 33.)

In addition, in support of these five claims, petitioner presented the testimony of his fellow pretrial inmate, Eddie McDonald, who attested to the fact that conditions in the maximum security unit of the Los Angeles County Jail, where he and petitioner were housed, were extremely difficult. (Ex. 38.) Although McDonald did not testify that he was personally aware of any attacks on petitioner, he did state that prisoners were routinely brutally beaten by guards and by other prisoners. Additionally, Mr. McDonald supported petitioner's claim of substance abuse, testifying that he and Kimble both experienced the symptoms of withdrawal from cocaine, marijuana, heroin, and PCP in the jail. McDonald claimed that Kimble was unable to remain strong in the face of these pressures, "and I could tell that he was cracking up," and that he was "severely unstable." (*Id.* ¶¶ 11-12.) One day, McDonald "heard Eric cracking up inside his cell . . . in there alone, talking, crying, and screaming to himself. . . . He was yelling in fragments . . . [and] sound[ing] like a crazy person." (*Id.* ¶ 13.)

Ronald Smallwood, another inmate, offered similar testimony about the "barbaric, unbearable" conditions in the jail. (Ex. 39 ¶ 2.)[18] He also claimed that "Eric was not strong enough to handle it" and told unbelievable stories. (*Id.* ¶¶ 15-17.) "If anyone refused to believe his outrageous stories, he went crazy right in the middle of the story, [and] would throw a fit and start yelling, screaming, and cursing at whoever did not believe him." (*Id.* ¶ 18.) Further, when Kimble's sister was murdered, he was devastated and his behavior changed. He stayed in his cell, stopped eating, and stopped telling his stories. "Eric was just dragging himself around, and we could tell that he was broken." (*Id.* ¶ 20.)

A third fellow inmate, Robert Warren, echoed the others' testimony about

[18] Smallwood's testimony about hearing a rumor that Kimble was raped is inadmissible hearsay. (Ex. 39 ¶ 5.)

the harsh jail conditions, and said "Eric was one of those prisoners who was always picked on because of his age, his inexperience and his personality." (Ex. 40 ¶ 2.) In his opinion, petitioner was "both mentally and physically broken." (*Id.* ¶ 3.) He generally "had a blank expression and just stared." (*Id.*) According to Warren, an inmate attacked and beat petitioner for refusing to retaliate against an inmate who was thought to be Kimble's sister's murderer. This attacker "beat him so badly that it looked like he broke Eric's jaw." After this, "Eric was fair game for anyone." (*Id.* ¶ 4.)

Inmate Woodrow Warren provided similar testimony about jail conditions. (Ex. 41.) With respect to petitioner, specifically, Warren recalled he "got a lot of pressure from other inmates." (*Id.* ¶ 7.)

Kimble's brother Kenneth testified that he shared a cell with petitioner and four other inmates at the county jail for a few weeks. During that time he saw inmates being slammed against the wall by guards, and witnessed rapes, even in the cell he occupied with his brother. (Ex. 220 at 77-78.)

As contemporaneous evidence of petitioner's demeanor at trial, he offers the testimony of three jurors. Juror Number 9, Lois James, testified that Kimble "never showed any emotion during the trial. He sat with a blank look on his face every day and didn't seem to react to anything that was going on in the courtroom." (Ex. 77 ¶ 2.) In apparent contrast, Juror Number 2, Harvie Culpepper, testified that petitioner's courtroom demeanor "was inappropriate and harmful to his case," and recalled him "attempting to joke with the marshal about various things . . . ." (Ex. 89 ¶ 6.) Finally, in her declaration, Juror Number 7, Dana (Ramirez) Schraeder, testified that jurors "discussed Kimble's manner in the courtroom" and he "didn't look remorseful or ashamed [and] just sat there."[19] (Ex.

[19] Respondent objects to the jurors' testimony on the ground that it is inadmissible under Federal Rule of Evidence 606(b), but to the extent the jurors are reporting their observations of Kimble at trial, the testimony is not about their deliberations and is admissible percipient witness testimony.

91 at 2.) It is unclear from her handwritten declaration whether she was merely reporting the statements of her fellow jurors or relating her own independent recollection.

Petitioner's psychiatric expert, Dr. O'Neil S. Dillon, has worked in the California prison system diagnosing and treating mental illness in prisoners. In 1998 and 1999, he worked with the condemned population of San Quentin. Subsequently retained by petitioner's counsel, he reviewed records and interviewed Kimble in 2003. (Ex 84 at 1.) Dr. Dillon claimed that Kimble suffered from "marked, observable mood swings, including 'trance' states, beginning in early childhood." (*Id.* at 2.) Based upon the observations of Kimble's fellow inmates as related in their declarations, Dr. Dillon concluded that Kimble experienced "severe mental instability and . . . a period of complete mental disorganization" during his pretrial incarceration (*Id.* at 3; *see* Exs. 38-41.) Although he described Kimble as "both a reliable and an unreliable historian, depending on the issue," (Ex. 84 at 5), Dr. Dillon characterized petitioner's first-person memory of the trial as: "It was adults talking in the presence of a child. I was not there. I did not work with my attorney." (*Id.* at 7.)

The psychological assessment of Kimble made closest in time to his trial was a post-conviction evaluation performed on May 11, 1981, by San Quentin staff psychologist C. E. Steinke. (Ex. 4.) Prison staff diagnosed Kimble with "schizotypal personality disorder" and concluded that "[t]he possibility exists of a more active thought disorder which he attempts to mask . . . ." (Ex. 4-1; Ex. 84 at 4-5.) According to Dr. Dillon's analysis, the Minnesota Multiphasic Personality Inventory test (MMPI) administered during that evaluation did "indicate[] the probability that Mr. Kimble suffered from a schizoid or schizotypal personality disorder." (Ex. 84 at 3.) Dr. Dillon explained that this diagnosis is given to people "with poor ties to reality, who exhibit magical, wishful or fanciful thinking, odd perceptions, suspiciousness or paranoid ideation, odd thinking and speech."

(Ex. 84 at 4.) The "psychotic-like thinking and perception" in this disorder is not severe enough to constitute "an outright psychotic-level disorder." (*Id.*)

Dr. Dillon diagnosed Kimble as having suffered from multiple disorders at the time of the crime: Cyclothymic Disorder (chronic mood swings, not as severe as Bipolar), Attention Deficit Disorder with hyperactivity, and "Conduct Disorder, Socialized, Aggressive," in addition to various substance abuse diagnoses. (*Id.* at 8 (using DSM-III).) He also stated his belief that a diagnosis of Atypical Bipolar Disorder might have been possible. (*Id.* at 9.) Dr. Dillon added his diagnoses of petitioner's current disorders, including Bipolar II Disorder, Somatization Disorder, Attention Deficit-Hyperactivity Disorder, Polysubstance Abuse in sustained remission, and Cyclothymic Disorder. (*Id.* (using DSM-IV).) In his expert opinion, petitioner is currently "generally competent to work with counsel." (*Id.* at 13.)

Dr. Dillon also testified that if Kimble "was high [when he was arrested], his ability to be fully competent in his dealing with the legal process would potentially be compromised." How impaired he was depends on the level of intoxication. (*Id.* at 10.) Petitioner cites as evidence of Kimble's intoxication at the time of his arrest a declaration from his brother Larry stating that he "could tell from his eyes and general behavior that he was high" when he was arrested, and that Kimble "smoked PCP consistently up until the time he was arrested." (Ex. 74 ¶¶ 19-20, at 5.)

Under a heading in his declaration entitled "Ability to work with counsel at the time of the crime," Dr. Dillon did not offer an opinion that Kimble was incompetent to face trial. (*See id.* at 11-12.) Instead, he stated only that "Mr. Kimble's capacity to work with his counsel in a reasonable and truly rational manner would be seriously impaired by his various disorders." (*Id.* at 11) Under cross-examination, Dr. Dillon admitted that the letters Kimble wrote his attorney after his arrest "seemed to make sense [in] what he was recommending to his

attorney." (Ex. 235 at 26.) Kimble seemed to make a "rational recommendation" regarding witnesses who should be contacted, but "[i]t was a one-way communication." Dr. Dillon "would have some concern" about Kimble's ability to think independently in an interaction with his attorney. (*Id.* at 27.)

Dr. Dillon also testified that Kimble's bipolar disorder causes him to experience severe mood swings, so that "there are times when he's not able to function very well, but there are other times when . . . he can function pretty well." (*Id.* at 36.) Thus, Kimble is currently competent to work with habeas counsel, and he understands and makes effective use of the inmate grievance process at San Quentin. (*Id.* at 45-46, 34-37.) In contrast, during his pretrial incarceration, Kimble was probably suffering from major psychotic depression. (*Id.* at 29.) Kimble's level of functioning was highly variable, and his conditions were "bound to affect his relationship with his attorney, . . . [which] could be problematic . . . ." (*Id.* at 37-40.)

Petitioner's neuropsychologist, Dr. Nell Riley does not offer an opinion on Kimble's competence at trial. (Ex. 87.)

3. Respondent's Evidence

In rebuttal, Respondent references the following evidence:

a. Investigating Officers Arce and Hodel

The police officers who interviewed petitioner following his arrest stated that petitioner did not appear to be under the influence of drugs or alcohol during the post-arrest interview, nor was their any indication that petitioner had any mental deficiency or had any trouble understanding his rights or the questions he was asked. (Ex. 210 ¶5; Ex. 211 ¶5.)

b. Dr. Lipian

Dr. Mark S. Lipian, a forensic psychiatrist and witness for Respondent, reviewed the transcript of petitioner's post-arrest interview and stated his opinion that petitioner "gave an internally consistent, clever, cohesive, imaginative

interview to police," provided answers which clearly demonstrated that he understood the difference between right and wrong, and was driven by a goal of exonerating himself. (Ex. 206 at 21.) Dr. Lipian also stated that, if petitioner were under the influence of drugs or alcohol during his police interview, his consistent story and answers demonstrated his ability to "function intellectually, and behaviorally, with or without drugs. . ." (Ex. 206 at 18.) Further, Dr. Lipian reviewed correspondence between petitioner and Walton, and opined that the letters demonstrate that petitioner was involved and able to assist in his defense, and show petitioner's ability to understand the charges against him.

4. Legal Standard

A defendant may not be tried unless he is competent. *Godinez v. Moran*, 509 U.S. 389, 396 (1993); *Drope*, 420 U.S. at 171; *Pate v. Robinson*, 383 U.S. 375, 378 (1966). The standard for competency to stand trial is whether, at trial, the defendant had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding- and whether he has a rational as well as factual understanding of the proceedings against him." *Boag v. Raines*, 769 F.2d 1341, 1343 (9th Cir. 1985) (citing *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam)); *United States v. Hernandez*, 203 F.3d 614, 620 n.8 (9th Cir. 2000) (Competence to stand trial requires "nothing more than that a defendant have some minimal understanding of the proceedings against him."), *overruled on other grounds by Indiana v. Edwards*, 554 U.S. 164 (2008). In evaluating a competence claim, the Court may consider facts and evidence that were not available to the state trial court. *Williams v. Woodford*, 384 F.3d at 608. Nevertheless, because retrospective determinations of incompetence are disfavored, considerable weight must be given "to the lack of contemporaneous evidence of a petitioner's incompetence to stand trial." *Id.*

A defendant's cognitive impairments or delusional ideas do not necessarily render him incompetent to be tried. *See United States v. Timbana*, 222 F.3d 688,

700-701 (9th Cir. 2000); *Hernandez v. Ylst*, 930 F.2d 714 (9th Cir. 1991). "Although the *Dusky* standard refers to 'ability to consult with [a] lawyer,' the crucial component of the inquiry is the defendant's possession of 'a reasonable degree of rational understanding.'" *Godinez v. Moran*, 509 U.S. at 403-404 (Kennedy, J., concurring in part and concurring in the judgment). "In other words, the focus of the *Dusky* formulation is on a particular level of mental functioning, which the ability to consult counsel helps identify. The possibility that consultation will occur is not required for the standard to serve its purpose." *Id.* at 404.

Thus, to establish that he was incompetent, Kimble must prove that at the time of trial, he lacked the "ability to consult with his lawyer with a reasonable degree of rational understanding," or lacked "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (internal quotation marks omitted); *Williams v. Woodford*, 384 F.3d at 608.

5. Analysis

Petitioner's evidence does not establish that Kimble was incompetent. No expert has testified he was incompetent. After his retrospective analysis of the evidence regarding Kimble's emotional and cognitive functioning at the time of trial, Dr. Dillon concluded that Kimble's ability to work with counsel "would be seriously impaired by his various disorders." (Ex. 84 at 11.) However, Dr. Dillon's testimony "do[es] not describe how [Kimble]'s probable mental impairment interfered with his understanding of the proceedings against him or with his ability to assist counsel in presenting a defense." *Williams v. Woodford*, 384 F.3d at 609. Kimble may well have had difficulty functioning as a result of the stress of the jail environment, the emotional toll of the deaths of people close to him, and his mental disorders. This difficulty does not equate to incompetence. Although some inmates observed Kimble "cracking up" in jail, there is no

evidence that any participant or observer at trial doubted Kimble's competence.[20] (*See* Dkt. 141: Order on Petr's Mot. Evid. Hr'g at 43-45); *Boyde v. Brown*, 404 F.3d 1159, 1167 (9th Cir. 2005) ("[P]erhaps the most telling evidence that [the petitioner] was competent at trial is that neither defense counsel . . . nor the trial court even hinted that [the petitioner] was incompetent."). One juror thought Kimble sat through trial with a blank look on his face, while another thought he joked inappropriately with the bailiff. These observations are not enough to support a finding of incompetence, even in combination with Dr. Dillon's concerns that Kimble "would be seriously impaired" by his mental problems. "[N]either low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial." *Medina v. Singletary*, 59 F.3d 1095, 1107 (11th Cir. 1995).

Petitioner's evidence also fails to establish that he was not mentally competent when he waived his *Miranda* rights and spoke with the police. A finding of "coercive police activity is a necessary predicate to the finding that a confession [was] not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). "The test is whether, considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne." *United States v. Leon Guerrero*, 847 F.2d 1363, 1366 (9th Cir.1988) (citing *Haynes v. Washington*, 373 U.S. 503, 513-14 (1963)).

The tape-recording of the interrogation shows Kimble initially answered the officers' questions. (RT at 2599-2617.) There is no evidence the police coerced

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[20] Petitioner points to the fact that his original attorney, Barry Grumman, wanted to hire a psychiatrist. (Ex. 51-592-93.) Mr. Grumman's pre-trial funding request said only that he "intends to hire a psychiatrist to evaluate the defendant and prepare a report regarding his mental condition." (*Id.* ¶ 14.) It is impossible to conclude from this cursory statement that Mr. Grumman doubted Kimble's competence to stand trial.

his responses. *Derrick v. Peterson*, 924 F.2d 813, 818 (9th Cir. 1990) ("[A] confession is only involuntary under the fourteenth amendment if the police use coercive activity to undermine the suspect's ability to exercise his free will."); *Colorado v. Connelly*, 479 U.S. at 167. As soon as Kimble asked to speak to a lawyer, the officers stopped questioning him. (RT at 2617.) Kimble's request for an attorney shows he understood his *Miranda* rights and eventually chose to exercise them. Dr. Dillon's speculative testimony that Kimble's competence when he was arrested "would potentially be compromised" — depending on whether he was actually under the influence of drugs and if so, the degree of intoxication — taken together with Kimble's actual behavior during the interview, is insufficient to demonstrate that Kimble's initial waiver of his *Miranda* rights was invalid. *See Clabourne v. Lewis*, 64 F.3d 1373, 1379 (9th Cir. 1995) (mere fact that criminal defendant was under influence of drugs or medication during interrogation does not establish involuntariness); *see also Colorado v. Connelly*, 479 U.S. at 164-65 (while relevant, mental state that renders defendant susceptible to police coercion is not dispositive evidence that defendant's statements were involuntary).

Finally, petitioner's evidence falls far short of being a "truly persuasive demonstration" that Kimble is actually innocent of first degree murder on the ground that, on August 12, 1978, he lacked the mental capacity to control his actions, or intentionally kill. *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (threshold showing for claim of actual innocence is extraordinarily high); *cf. Boyde*, 404 F.3d at 1169 ("[T]he mere presentation of new psychological evaluations . . . does not constitute a colorable showing of actual innocence.") (citation and internal quotation marks omitted).

Claims 1-5 are DENIED.

F. Ineffective Assistance of Counsel at Penalty Phase

In Claim 10(E), petitioner contends defense counsel was ineffective at the penalty phase because he failed to present evidence of Kimble's difficult childhood

and mental disabilities, leaving the jury with the false impression that Kimble led an untroubled life until one day at the age of 18 he suddenly and inexplicably became a murderer. (SAP at 50-55.)

1. The Penalty Trial

After the jury returned its guilt verdicts on December 22, 1980, the trial was adjourned for two weeks over the holidays. When trial resumed, the prosecutor announced he would present no further evidence in aggravation. Defense counsel then moved to bar the state from seeking the death penalty on the ground that the jury instructions on choosing between life and death were unconstitutional. (RT at 3260-61, 3266-80.) Walton argued that the instructions created a risk the jurors would interpret the absence of evidence on statutory mitigating factors as effectively aggravating:

> [L]et's take [Former Cal. Penal Code § 190.3(c)] which says, whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. Here we have no evidence one way or the other. Obviously, if there had been evidence that I thought might have mitigated, I would have introduced it, but in the absence of any evidence tending to show that he was under the influence of extreme mental or emotional disturbance does that ipso facto become an aggravating circumstance?

(RT at 3271.)

Walton objected to the fact that, under his reading of the penalty phase instructions, "of the approximately ten circumstances that are enumerated in the code, most of them can be tossed onto the scale against the defendant primarily because there is no evidence one way or the other." (RT at 3272.) He then gave his view of the available mitigating evidence:

> Consider my own personal dilemma . . . . I have tried a

> number of cases, I have read many beyond that, I have attended seminars, I know that in the usual death penalty case a defendant's attorney would be tempted to introduce as extenuation of his conduct evidence of abused or a deprived childhood, the father beat the child regularly in drunken rages, whatever it might be, you might then address yourself to the jury and say, "Well, what juror among you couldn't have taken this baby and made a better human under other more stable, loving, and caring circumstances?" Valid. I don't have that in this case.
>
> I'm going to produce his parents this afternoon to testify that they are fine people, the family is a fine family, the boys go to college, the girls are good kids, everybody goes to church or Sunday school, they all have to go to school, they work regularly, they are united in their marriage after 25 or 30 years, I'm introducing that how, in evidence of mitigation?
>
> I hope the jury views it that way, but I can see a prosecutor getting up and saying . . . he's got no excuses at all. He comes from a good background. So my feeble efforts to introduce evidence in mitigation somehow becomes perverted and distorted into an argument by the prosecutor in favor of aggravation of the defendant's conduct, and that's what's wrong with the law. . . .

(RT at 3278-80.) The motion to strike the death penalty was denied.

Walton's subsequent presentation of mitigating evidence appears to have consumed less than two hours. He introduced two photographs of petitioner as a young boy, and called his parents, three neighbors, and his sister, Constance, to testify. They attested to the fact that Kimble was well liked in the neighborhood, was kind to children and the elderly, and opined that he was incapable of killing two people. (RT at 3289-3333.)

As Constance stepped down from the witness stand, Walton announced he had "nothing further . . . with one possible exception," and requested a recess to "explore that possibility." (RT at 3333.) Outside the presence of the jury, he then noted the "agonizing equivocations" he had experienced over the last few days over whether to put Kimble on the stand. Observing that the district attorney had an investigator in court, Walton asked the prosecutor to reveal whether he intended to introduce rebuttal evidence if Kimble testified. The prosecutor responded that his investigator was prepared "to carry out any further investigation or leads that might be developed by the defendant's testimony" and "to investigate some possible witnesses as to acts of force and violence" that he had just been made aware of that afternoon. Upon hearing this, the defense immediately rested. (RT at 3334-35.)

In his closing argument, the prosecutor conceded the defense had shown that Kimble "was a pretty nice boy around the home." However, he argued, "in a family setting," even dangerous wild animals appear "downright friendly, [and] at peace with the world." He urged the jurors to see petitioner as a tiger, hungry and on the hunt, and to judge him based on what he had done to the Margulies. The prosecutor asked the jury to look at the murders and determine whether they were the type that "warrants the death penalty." (RT at 3339-45.) As he concluded his argument with a discussion of the statutory factors the jury was instructed to consider, the district attorney argued that "as you consider aggravation and mitigation the stark thing before you is there is no mitigation." (RT at 3352.) The prosecutor asserted that none of the statutorily prescribed mitigating factors favored life imprisonment over the death penalty, and petitioner had not "demonstrated conclusively and convincingly" any "justification for him to go on living." (RT at 3348-52.)

Walton urged the jurors to spare Kimble's life for his parents' sake, and delivered a generic attack on the death penalty. (RT at 3355-63.) He accused the

prosecutor of asking the jurors "to demean and degrade and dehumanize [themselves] by killing Eric Kimble." (RT at 3355.)

The jury's penalty deliberations consumed far more time than counsel's presentations. The jurors deliberated for more than eleven hours over three court days separated by a weekend. On the first day, following nearly five hours of deliberations, they sent out a note asking, "If the jury feels the possibility at this time that we will not be able to find a unanimous decision, what will then be the court's decision?" (CT at 356, 376; RT at 3390.) Through the bailiff, the judge simply instructed the jurors to continue deliberating. (CT at 356.) They did so for another half hour before recessing. (CT at 356; RT at 3388-C.) They resumed the next morning, and after another hour and a half, sent out a second note:

> According to our printed instructions, special circumstances found to be true in Counts I and II of the information fix the penalty as either life imprisonment without the possibility of parole or death. Is there any further criteria that can be used to determine one penalty as opposed to the other or is it simply the matter of our personal choice?

(CT at 357, 375, RT at 3390-94.) The judge then released the jurors for lunch, telling them that he would answer their questions. (CT at 357; RT at 3389.)

After consulting with counsel, the trial court responded to the jurors' notes. Addressing their first question about what would happen if they were unable to reach a verdict, the judge simply said, "That is not within your province." (RT at 3393.) In response to their second question, the judge explained:

> It is not a matter of your personal choice. At the time that you were sworn you were sworn to follow the law as I read it to you. This takes it out of the province of it being your personal choice.
>
> You are to follow the law, regardless of what your personal choice may be.
>
> I again will emphasize that there is no further criteria other than

> the instructions that have previously been given you, and I will read the instructions again to you.

(RT at 3394.) The judge then reread the entire penalty phase instructions exactly as he had initially. (RT at 3395-99; *cf.* RT at 3383-87.) He concluded by emphasizing that these instructions provided the sole criteria for reaching a penalty decision: "There is no further criteria that I can give you, and you are not to simply make it a matter of your personal choice. . . . Your duty is not to follow your personal choice, but you are to follow what the law states that you must do . . . ." (RT at 3400-3401.) The jurors then resumed deliberating for another two hours before breaking for the weekend. (CT at 357; RT 3404.) The following Monday, the jurors deliberated for two more hours, and then announced that they had reached a verdict. (CT at 377; RT at 3405-3409.)

2. Petitioner's Evidence

Petitioner claims that if Walton had conducted a reasonable investigation into Kimble's background, he would have been able to present the jury with the following mitigating evidence:

a. Learning Disabilities

Kimble's elementary school records show that he was consistently a poor student who had trouble maintaining self-control in the classroom. He required constant teacher supervision. In high school, his IQ was tested at 83. After being placed in the educationally handicapped program, he continued to perform poorly. At age 17, he told a teacher he regularly smoked marijuana. Although he was in the eleventh grade, he functioned at a fourth grade level in math and a fifth grade level in reading. In 1977, he was suspended for selling marijuana and PCP at school, and never returned to school.

b. Childhood Neglect and Abuse

Kimble's parents failed to obtain medical and dental care for Kimble. They ignored requests to have his vision checked, failed to obtain psychological counseling recommended by school personnel, and failed to address his dental needs, so that he had significant tooth decay by the time he was a teenager.

Kimble's brothers, Kenneth and Larry, report that their parents were strict disciplinarians. Kenneth testified that his father "liked things quiet . . . [so] if you got on his nerves he'd get the switch and 'get' you." (Ex. 45 ¶ 5.) Larry testified that his father was "the main disciplinarian in our family." He whipped the children with a belt or a razor strap. Their mother used switches picked from trees. (Ex. 74 ¶ 25.)

A neighbor testified that she once went to Kimble's home to tell his parents that she caught Eric (then 11 or 12 years old) trying to take fish from the fish pond in her yard. She recounts:

> It was about 2:00 on a Sunday afternoon, and it appeared that Mr. Kimble had been drinking. When we told him the details of the incident, he began a wretched torrent of verbal abuse aimed at Eric. His language was foul, awful, vulgar and completely offensive. This took place in front of my husband and me and one or more of Eric's siblings. Eric's mother came into the room and stood silently during Mr. Kimble's tirade.

(Ex. 42 ¶ 4.)

c. Siblings' Criminal History

Petitioner contends that his siblings' violent and troubled lives reflect their dysfunctional home environment. (Petr's Opening Br. at 37.) He cites events both before and after the date of his trial, but post-trial incidents obviously were not available as mitigating evidence. Nevertheless, the following incidents occurred before 1981: Petitioner's older sister Marsha, who was shot and killed in 1980,

was charged with various misdemeanors five times in the 1970s; and his older brother Larry pleaded guilty to receiving stolen property around 1975. In addition, petitioner's youngest brother Kenneth was arrested eleven times between 1971 and 1985 and was incarcerated in the California Youth Authority from 1980 through 1984; some of this evidence would have been available for the penalty trial. Petitioner also claims that his younger brother Sammy served time in prison between 1985 and 1990, and has been the subject of five felony and two misdemeanor filings, but does not reveal the dates of these offenses. (Petr's Opening Br. at 37; *see also* Ex. 219.) It is impossible to conclude from these assertions that defense counsel could have introduced evidence of Sammy Kimble's legal problems at the penalty trial in January 1981.

d. Substance Abuse

Kimble's father drank heavily and for much of Kimble's childhood, and stayed out every night. Later on, he stayed home and drank. He had numerous arrests for gambling and drunk driving. All of Kimble's siblings used drugs, including cocaine, PCP, and marijuana.

All four of Kimble's living siblings testified that he began using alcohol, marijuana, and PCP as a teenager. (Ex. 45 at 5; Ex. 47 at 3; Ex. 49 at 2-3; Ex. 74 at 4-5; Ex. 220 at 16.) A neighborhood friend concurred and explained that drugs were a regular part of Kimble's life from at least age 16. (Ex. 79 at 1.) His drug use increased to the point that during the summer of 1978, "he was smoking sherms — marijuana cigarettes dipped in PCP or angel dust — every day." (*Id.*) His brother Larry testified that smoking PCP made Kimble more passive, and that he was smoking it regularly until the day he was arrested. (Ex. 74 at 5.) His brother Kenneth claimed that Kimble and Ortez Winfrey were both high on PCP when they arrived home late at night and started piling stolen stereo equipment in the den. (Ex. 45 at 5.)

Kimble's criminal history shows arrests for selling marijuana and PCP in

1977, and for possession of a controlled substance (apparently PCP) in 1978. (Ex. 86 at 16; Ex. 206 at 13-14.)

e. Cognitive Disabilities and Mental Illness

Shortly after arriving at San Quentin State Prison, Kimble was given a psychological evaluation. Staff psychologist C. E. Steinke, Ph.D. wrote that although Kimble was "pleasant and cooperative" during the interview, "his account of his personal life became very improbable, and it raises the question of how much of this distortion of facts is deliberate, and if an active thought disorder exists." (Ex. 4 at 1 ¶ 1.) Dr. Steinke reported that Kimble was "well oriented in all areas," and had normal reasoning ability, but that "the MMPI test results indicate the probability of a schizoid or schizotypal personality disorder." He recognized the possibility of "a more active thought disorder which [Kimble] attempts to mask," but noted the prison had no records of prior mental illness. Dr. Steinke concluded that "[t]he most appropriate diagnosis appears to be schizotypal personality disorder." (*Id.* ¶¶ 1-2.)

Nell Riley, Ph.D., a clinical neuropsychologist, examined Kimble in 1992, 1993, and 2003. In her opinion, if a competent neuropsychologist had examined Kimble before trial, she would have concluded that Kimble "suffered from significant learning disabilities as well as a severe form of Attention Deficit Hyperactivity Disorder." (Ex. 87 at 21.) Standard neuropsychological testing would have revealed that Kimble suffered from additional cognitive impairments. He had "severe deficits in visuospatial processing" and his "capacity for concept formation and cognitive flexibility was severely restricted." (*Id.* at 5.)

The combination of all these impairments merits a diagnosis of Atypical or Mixed Organic Brain Syndrome. Kimble's abnormal brain function "affected his capacity for reasoning, problem-solving, impulse control, attentional control and behavioral regulation." Together with his immaturity at the time of the crime, this is likely to have "significantly impaired his ability to appreciate the criminality of his conduct

and to conform his conduct to the requirements of the law." (*Id.* at 21) Kimble's ability to control his behavior would have been further impaired if he was abusing PCP prior to the crime, as reported by his siblings. (*Id.*)

Petitioner's psychiatric expert, Dr. Dillon, has experience treating mental illness in prisoners. On the basis of his review of the records and an interview with Kimble in 2003, he diagnosed Kimble as suffering from Cyclothymic Disorder and Attention Deficit Disorder with Hyperactivity at the time of the crime.[21] In view of the evidence of Kimble's regular abuse of alcohol, PCP, and marijuana for years before the crime, Dr. Dillon opined Kimble was likely intoxicated on the day of the crime as well. (Ex. 84 at 8-9.)

Dr. Dillon testified that if Kimble had been examined immediately after arriving at San Quentin State Prison, and if the examiner had been aware that Kimble experienced a mental breakdown in the Los Angeles County Jail, then Kimble would also have been diagnosed with Atypical Bipolar Disorder. (*Id.* at 9.) The evidence of Kimble's mental breakdown in jail is based on the observations of his fellow inmates, as previously described in connection with Kimble's competence claims. (Exs 38, 39, 40.)

According to Dr. Dillon, the inmates' declarations together with the testimony of family members and others "document classic 'textbook' descriptions of chronic, and pre-existing, hypomanic and depressed states, which would be worsened with drug abuse." Cyclothymic Disorder is a mood disorder that Kimble continues to experience. The fact that symptoms persisted long after Kimble was sentenced and stopped abusing drugs indicates that the mood disorder at the time of the crime was not caused solely by drugs. Similarly, Kimble's Attention Deficit Hyperactivity Disorder (ADHD) has existed since childhood and is independent of drug use and intoxication. (Ex. 84 at 10.)

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[21] Dr. Dillon used categories from the DSM-III to diagnose Kimble at the time of the crime, since that was the version of the manual then in effect.

3. Respondent's Evidence

The Attorney General argues that if trial counsel had presented evidence of Kimble's mental disorders as mitigating evidence at the penalty phase, the prosecution would have rebutted it with evidence that Kimble had Antisocial Personality Disorder (ASPD). This rebuttal evidence, which is based largely on evidence of other bad acts committed by Kimble since he was a child, allegedly would have been prejudicial to Kimble's mitigation case. For this reason, respondent argues, trial counsel could reasonably have decided not to present any evidence of mental disorders. Moreover, whether or not trial counsel actually made an informed strategic choice, Kimble was not prejudiced by counsel's omissions because, when the potential mitigating evidence is considered together with this rebuttal evidence, it is not reasonably likely that the jury would have rejected the death penalty.

a. Dr. Lipian

Dr. Mark S. Lipian is a forensic psychiatrist. He has a background in child psychology and psychiatry, and has also clinically treated adults. He examined many of the same documents and witness declarations that Kimble's experts relied upon. (Ex. 206 at 2, 5-5.) In his opinion, at the time Kimble committed his crimes, he was not under the influence of any extreme mental or emotional disturbance, and no psychiatric or psychological circumstances existed that might extenuate the gravity of his crimes. As a forensic psychiatrist, Dr. Lipian would have advised defense counsel not to introduce mental health testimony in mitigation because it would have opened the door to potentially devastating rebuttal evidence. (Ex. 206 ¶ 11.) Surveying Kimble's school records and juvenile arrest and probation records for the period of 1971 through 1978, Dr. Lipian concluded that they "reveal a pattern of belligerent, rebellious, violent and unsocialized conduct" that is typical of a person with ASPD. (Id. ¶ 14.)

Dr. Lipian reached his conclusions primarily on the basis of his review of

evidence provided by petitioner, and his opinion is independent of the findings reported by respondent's psychologist, Dr. John Dunn. (Ex. 96 at 26.) Nevertheless, after reading Dr. Dunn's report (Ex. 228) and listening to the audiotapes of Dr. Dunn's examination of Kimble, Dr. Lipian concluded that this additional material confirmed his original conclusions. (Ex. 229; Ex. 96 at 26.)

Unlike petitioner's mental health experts, Dr. Lipian did not interview petitioner. An interview was scheduled, but was cancelled when Dr. Lipian became ill. (Ex. 96 at 85.) Dr. Lipian testified that he then spoke with one of respondent's attorneys about whether it was necessary to interview Kimble. Respondent's attorneys advised him that he did not need to make a diagnosis of Kimble, but instead could analyze the records of his behavior and the opinions of the other experts; Dr. Lipian then concluded it was unnecessary to meet with petitioner. (Ex. 96 at 122.)

Petitioner cross-examined Dr. Lipian about whether his failure to examine Kimble in person undermined the validity of his conclusions. Dr. Lipian responded by distinguishing between "a thorough clinical evaluation," which he conducted, and a "personal psychiatric examination," which he did not. (Ex. 96 at 20.) He testified that, to answer the questions he addressed in his testimony, "a full and thorough and complete psychiatric evaluation does not require a face-to-face examination of Mr. Kimble." (*Id.* at 23.) In contrast, under the rules of the American Psychiatric Association, to diagnose petitioner with a mental disorder, Dr. Lipian would have to examine Kimble in person. (*Id.* at 24.) Petitioner retorts that respondent earlier admitted that it was Dr. Lipian's professional opinion "that he should conduct a psychiatric examination of Petitioner personally in the interest of reaching a complete and valid evaluation . . . ." (Resp't Ex Parte 2d Applic. for

Additional Time, Sept. 15, 2003, at 2.)[22]

b. Dr. Dunn

Dr. Dunn is a clinical psychologist retained by respondent to administer psychological tests to petitioner and interview him for the purpose of challenging the conclusions reached by petitioner's experts, Dr. Dillon and Dr. Riley. (Ex. 228 at 3-6.) In his testimony, Dr. Dunn disputed petitioner's experts' opinions that Kimble had ADHD as a child, and reported his test results are instead consistent with an ASPD diagnosis. (*Id.* at 15-24, 41-42.) Dr. Dunn also claimed his results refuted Dr. Riley's opinion that Kimble may have been incapable of appreciating the criminality of his conduct and conforming his conduct to the requirements of the law. (*Id.* at 7-15.)

Dr. Dunn testified that the neuropsychological test data from both his and Dr. Riley's testing indicate that petitioner's performance is mostly within normal limits, although they reveal impairment in certain areas. (*Id.* at 25-29.) Dr. Dunn considered it likely that Kimble has "very mild deficits" in visual perception and abstract reasoning. (*Id.* at 27, 29.) These are the same areas in which Dr. Riley found "severe deficits." (Ex. 87 at 5.) In Dr. Dunn's opinion, petitioner's mental deficits would not affect his ability to appreciate the criminality of his actions or conform his conduct to the requirements of the law. (Ex. 228 at 27, 29.)

4. Analysis

To meet his burden of demonstrating that he was deprived of the effective assistance of counsel at the penalty phase, petitioner must demonstrate both that Walton's performance was deficient and that he was prejudiced by the deficiency. *Strickland*, 466 U.S. at 687.

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[22] This assertion was made by a deputy attorney general in a declaration supporting a request for more time to arrange the examination. Counsel stated he "had been informed . . . that Dr. Lipian has expressed his professional opinion that he should personally conduct a psychiatric examination of Petitioner in order to render a proper evaluation of Petitioner." (Resp't Ex Parte 2d Applic. for Additional Time, Sept. 15, 2003, at 2.)

a. Deficient Performance

"*Strickland* establishes that, although counsel enjoys wide latitude ... in making tactical decisions, counsel also has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Detrick v. Ryan*, 677 F.3d 958, 974 (9th Cir. 2012) (internal quotation marks omitted). "The Supreme Court has since made clear that this duty includes an obligation to "conduct a thorough investigation of the defendant's background." *Id.* (citing *Williams v. Taylor*, 529 U.S. 362, 396 (2000)).

"Preparing for the penalty phase of a capital trial is the equivalent of preparing for an entirely new trial, and trial counsel must treat it as such." *Turner v. Calderon*, 281 F.3d 851, 891 (9th Cir. 2002). "'It is imperative that all relevant mitigation information be unearthed for consideration.'" *Douglas v. Woodford*, 316 F.3d 1079, 1088 (9th Cir.) (quoting *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir.1999)). Walton therefore had a duty to conduct a thorough investigation into petitioner's background to prepare for the penalty phase. *Terry Williams*, 529 U.S. at 396; *Ainsworth v. Woodford*, 268 F.3d 868, 876-77 (9th Cir. 2001) (counsel's duty to "adequately investigate, develop, and present mitigating evidence to the jury" was "as crucial in 1980 as it is today"). "To that end, trial counsel must inquire into a defendant's 'social background, . . . family abuse, mental impairment, physical health history, and substance abuse history." *Hamilton v. Ayers*, 583 F.3d 1100, 1113 (9th Cir. 2009) (citing *Correll v. Ryan*, 539 F.3d 938, 943 (9th Cir. 2008). "That investigation should include examination of mental and physical health records, school records, and criminal records." *Correll*, 539 F.3d at 943. The evidence introduced here demonstrates that Walton fell far below the prevailing professional norms of capital defense counsel in 1981.

First, Walton did not conduct even a rudimentary investigation of petitioner's background. *Cf. Hamilton*, 583 F.3d at 1130 (in 1982, it was "undisputed that counsel was required to obtain the type of available information

that a social history report would contain, such as family and social background and mental health"). Instead, he presented cursory and banal comments from petitioner's parents, neighbors, and sister attesting that petitioner came from a "fine family" with no evidence of a deprived childhood. (RT at 3278.) Had he investigated, Walton would have discovered that Kimble's father was a drunk who was repeatedly arrested during Kimble's childhood, was verbally abusive, and whipped his children with belts and razor straps. Basic investigation would also have found that petitioner's parents failed to provide medical and dental care for their son. There was also evidence that all petitioner's siblings abused drugs, including cocaine, PCP, and marijuana, and most of them had been incarcerated prior to 1978. Had Walton questioned petitioners' siblings, he would have discovered that petitioner began using alcohol and drugs from at least age 16. Kimble's brothers would have attested that he smoked PCP every day during the summer of 1978, including on the day of the crimes.

Second, Walton also failed to investigate readily available school records. Although it was not introduced at trial, when petitioner was still a juvenile, he was arrested and charged with a rape about a year before the murders. He was represented by the Los Angeles County Public Defender, who gathered his school records and probation reports. In these records, petitioner was described by various observers as being "a considerably disturbed 17-year-old young man" who bragged about using marijuana and other drugs, was in "the educationally handicapped program" at school, and needed psychiatric help. (Ex. 37 at 1-3.) Walton did not contact petitioner's attorney in the rape case. (Id. ¶ 5) Nor did he pursue his own investigation of petitioner's performance in school. (*See* Ex. 78 (petitioner's high school principal recalls Kimble as a special education student but was not contacted by counsel).)

Petitioner's school and arrest records would have corroborated the testimony of family and friends that petitioner regularly used drugs for several years before

the crime. Walton entirely failed to investigate petitioner's history of drug and alcohol abuse, even though such information constitutes "classic mitigation evidence." *Correll*, 539 F.3d at 944; *see also James v. Ryan*, 679 F.3d 780, 809 (9th Cir. 2012) ("This component of a competent mitigation investigation is well-established.") (citing *Rompilla v. Beard*, 545 U.S. 374 (2005) (deficient performance where counsel "did not look for evidence of a history of dependence on alcohol that might have extenuating significance")).

Third, Walton did not investigate petitioner's mental health. Petitioner's original defense attorney, Barry Grumman, had filed a request for funds to hire a psychiatrist, which was granted in part. (Ex. 52 at 13-21.) However, there is no evidence a psychiatrist or any other mental health professional was ever retained by Grumman or Walton. Additionally, although Walton's file contains some evidence that he considered hiring a fingerprint expert and an investigator to help serve subpoenas, (Ex. 51 at 320-41; *cf.* Ex. 52 (Superior Court records of funding requests)), the file contains no evidence that he sought to retain experts for the penalty phase. It is well established that by 1981, capital defense counsel had a duty to investigate mitigating evidence of the defendant's mental impairment. *See, e.g.*, *Evans v. Lewis*, 855 F.2d 631, 636-37 (9th Cir. 1988) (holding that defense counsel had duty to investigate and present evidence of mental health in 1979 capital sentencing proceeding). "This includes examination of mental health records," *Summerlin v. Schriro*, 427 F.3d 623, 630 (9th Cir. 2005) (citation omitted), and "an affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health." *Caro v. Woodford*, 280 F.3d 1247, 1254 (9th Cir. 2002) (citation omitted).

Respondent argues that Walton could reasonably have decided, as a tactical matter, that it would be a mistake to present mitigating evidence based on petitioner's school records because it would open the door to rebuttal evidence that petitioner has ASPD. To be sure, *if* Walton had conducted an adequate

investigation and concluded that presenting evidence of petitioner's substance abuse and poor performance in school would backfire, then this might have been a reasonable tactical decision. *See Edwards v. Ayers*, 542 F.3d 759, 772 (9th Cir. 2008) ("[W]hen counsel's investigation discovers little that is helpful and much that is harmful, counsel may reasonably decide to forego presenting evidence of the defendant's background."). But there is no evidence that Walton was even aware of this evidence. His own words at trial indicate he was not. (RT at 3278 ("I don't have that in this case.").) "A decision not to present mitigating evidence to the jury can be considered tactical only if counsel is aware of that information and how it could fit into a penalty phase defense." *Hamilton*, 583 F.3d at 1122. Where, as here, defense counsel has "failed to make a reasonable investigation into potential mitigating evidence . . . , his decision not to put on a mitigation case cannot be considered to be the product of a strategic choice." *Correll*, 539 F.3d at 949. "An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all." *Id.* The evidence introduced in this habeas proceeding is sufficient to rebut the "strong presumption that counsel's conduct . . . might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (citation and internal quotation marks omitted). Walton's failure to investigate Kimble's background and mental condition was plainly deficient.

b. Prejudice

Defense counsel's deficient performance at the penalty phase does not by itself warrant habeas corpus relief. Petitioner must also establish prejudice by showing "that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "[I]t is not necessary for the habeas petitioner to demonstrate that the newly presented mitigation evidence would necessarily overcome the aggravating circumstances." *Correll*, 539 F.3d at 951–52. Rather, "the question is whether there is a *reasonable probability* that, absent the errors,

[the jury] . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695 (emphasis added). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the penalty proceedings. *Id.*

The task before the Court is to "compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently, and evaluate whether the difference between what was presented and what could have been presented is sufficient to undermine confidence in the outcome of the proceedings." *Hamilton*, 583 F.3d at 1131 (citations and internal quotation marks omitted). This calls for an evaluation of "the totality of the available mitigation evidence — both that adduced at trial, and the evidence adduced in the habeas proceeding," including any additional evidence that the prosecution would have introduced in rebuttal. *Id*; *Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (per curiam). The Court must reweigh this missing evidence against the evidence in aggravation. *Hamilton*, 583 F.3d at 1131. In reweighing the evidence, it is not the Court's place to substitute its own conclusions on the credibility of competing witnesses for the conclusions of a properly informed state court jury. *See Correll*, 539 F.3d at 952 n.6. Instead, the Court must assess the likely impact of the evidence on the jurors at Kimble's trial. *Id.*; *see also Kotteakos v. United States*, 328 U.S. 750, 764 ("The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting."). "Prejudice is established if there is a reasonable probability that at least one juror would have struck a different balance between life and death." *Hamilton*, 583 F.3d at 1131 (citation and internal quotation marks omitted).

I. Mitigation Evidence

Substantial mitigating evidence could have been presented to the jury at the penalty trial. Petitioner had a troubled childhood. His IQ was low and from an early age he performed poorly in school. His parents failed to obtain necessary

medical and dental care for him, and they ignored requests from school personnel to obtain psychological counseling that might have helped him. He was eventually placed in classes for the educationally handicapped, and he dropped out of school when he was 17 years old. At home, petitioner experienced neglect interspersed with verbal and physical abuse. His father was largely absent, and was frequently arrested for gambling or drunk driving. When he was home, he was drunk and abusive, beating Kimble and his siblings with belts and straps for little more than "getting on his nerves." His mother imposed discipline with a switch. The failure to present similar evidence in mitigation at a death penalty trial has been widely recognized as prejudicial. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 390–93 (2005) (failure to discover and present evidence that defendant was raised in a slum; was beaten by his parents; witnessed his father's frequent abuse of his mother; quit school at sixteen; had no indoor plumbing; and may have had schizophrenia or another mental disorder); *Terry Williams*, 529 U.S. at 369, 370 (failure to investigate and present evidence that defendant had been abused and neglected during his childhood, and that he was " 'borderline mentally retarded,' had suffered repeated head injuries, and might have mental impairments organic in origin"); *Karis v. Calderon*, 283 F.3d 1117, 1139 (9th Cir. 2002) (failure to present any evidence of the substantial abuse suffered by defendant; available records showed that defendant's father and stepfather "viciously beat" him and his mother on a regular basis).

Substance abuse was rampant in the Kimble home. In addition to the father's heavy drinking, each of the Kimble children abused drugs, including cocaine, PCP, and marijuana. Most of petitioner's siblings had been incarcerated one or more times by the time of the penalty trial. *Cf. Correll*, 539 F.3d at 952 ("It is notable that each of the six Correll children reported that they had or have had substance abuse problems beginning in childhood or adolescence. Further, at least five of the six children spent time in juvenile correctional facilities, and all four of

the boys in the family have spent time in adult correctional facilities."). Petitioner was no exception; he began using alcohol, marijuana, and PCP as a teenager. By the summer of 1978, petitioner was using PCP on a daily basis. And according to Kenneth Kimble, both petitioner and Winfrey were noticeably high on PCP on the date of the crimes.

But for Walton's deficient performance, the jurors would also have heard expert testimony about petitioner's mental health. *See Caro*, 280 F.3d at 1258 ("More than any other singular factor, mental defects have been respected as a reason for leniency in our criminal justice system."). The experts would have explained that at the time of the murders, petitioner suffered from significant learning disabilities, severe ADHD, a mood disorder (cyclothymia), and organic brain damage (Atypical or Mixed Organic Brain Syndrome) that impaired his capacity for reasoning, impulse control, and behavioral regulation. The experts would have concluded that these factors were likely to have "significantly impaired [petitioner's] ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law." (Ex. 87 at 21). These disabilities existed independently from petitioner's substance abuse, but their effect on his mental state and behavior would have been exacerbated by his use of PCP on the date of the crime, as reported by petitioner's brother. Courts have repeatedly found the failure to present evidence of such mental disabilities in mitigation to be prejudicial. *See, e.g.*, *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (brain abnormality and cognitive defects); *Summerlin*, 427 F.3d at 641-42 ("lack of impulse and emotional control and organic brain dysfunction could have provided significant mitigating evidence"); *but see Brown v. Ornoski*, 503 F.3d 1006, 1016 (9th Cir. 2007) ("Dyslexia and [ADHD] . . . are somewhat common disorders; although they add quantity to the mitigation case, they add little in terms of quality.").

In analyzing prejudice, the Court must presume that if defense counsel had presented mental health testimony at the penalty trial, the defense experts would

have been cross-examined much as they were in this proceeding, and their testimony would have opened the door to rebuttal testimony by prosecution experts. *See Belmontes*, 558 U.S. at 20-26; *Cf. Andrews v. Davis*, 798 F.3d 759, 777-82 (9th Cir. 2015) (under AEDPA's deferential standard, assessing reasonableness of state court's analysis of likely effect of prosecution rebuttal evidence).

ii. Cross-Examination

Having carefully reviewed respondent's cross-examination of Dr. Riley about the basis for her conclusions about petitioner's impaired functioning, the Court finds nothing that would be likely to cause reasonable jurors to doubt her testimony on that subject.[23] (*See* Ex. 234 at 12-88.) However, respondent did elicit Dr. Riley's admission that by the age of 15, based on various records including his numerous arrests as a juvenile, petitioner probably met the DSM-III's diagnostic criteria for "conduct disorder," which is a requirement for a subsequent diagnosis of ASPD as an adult. Asked whether petitioner met the criteria for ASPD itself, Dr. Riley said she "would defer to somebody who is more knowledgeable about that." The diagnoses that Dr. Riley offered, of ADHD and mixed organic brain syndrome, are compatible with petitioner also having ASPD. (*Id*. at 89-91.) And someone suffering from these cognitive impairments would still be capable of committing the crimes in this case. (*Id.* at 95-97.) While conceding that petitioner probably knew right from wrong despite his cognitive deficits, Dr. Riley reiterated her view that his ability to fully appreciate the significance and consequences of

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[23] Respondent attempted to impeach Dr. Riley on the basis of her having calculated Kimble's scores on the Halston-Reitan Battery Norms Program twice, first on the basis of Kimble's actual educational level of 10 years of education, and second on the basis of a hypothetical 12 years of education. (Ex. 235 at 58-64; Ex. 236 ¶¶ 130-133.) Dr. Riley never deceived anyone about Kimble's education level or the significance of these test results, and her explanation of her reasons for running the test twice with different values for Kimble's educational level is credible. (Ex. 105 ¶¶ 50-57.) Dr. Riley ultimately concluded that the change in educational level "did not significantly affect any of the major test scores," (*Id.* ¶ 56), which respondent does not dispute.

his behavior probably was impaired. (*Id.* at 116-19.)

Respondent also cross-examined Dr. Riley about whether she adequately ruled out malingering by petitioner during his psychological tests. (*See* Ex. 234 at 22-24; *see also* Ex. 96 at 105-12 (Dr. Lipian's opinion on whether Dr. Riley adequately addressed malingering).) It is difficult to assess the likely response of a psychologist in 1981 to this questioning based on testing performed by Dr. Riley ten and twenty years later, since her own response when these doubts were raised was, in part, to refer to the consistency across time of petitioner's test results. (Ex. 104 ¶ 70.) However, Dr. Riley also reported the results of a test administered in 1992 which indicated that petitioner was not malingering. (Ex. 87 at 4; Ex. 104 ¶ 66.) Notably, respondent's experts did not claim that petitioner was in fact malingering, just that Dr. Riley did not take sufficient measures to eliminate the possibility. (Ex. 95 at 52; Ex. 96 at 105-112.) Having reviewed the competing expert testimony on this subject, the Court concludes that respondent's challenges to the sufficiency of Dr. Riley's precautions against malingering were adequately albeit not conclusively rebutted by Dr. Riley herself. (*See* Ex. 104 ¶¶ 65-75.) This is not the end of the analysis, however. As previously noted, it is not the Court's job in this habeas proceeding to determine which expert is more credible to the Court, but instead to assess the likely effect of their dueling testimony on a reasonable penalty phase jury. *See Jones v. Ryan*, 583 F.3d 626, 641 (9th Cir. 2009) ("a district court should not independently evaluate which expert was most believable") (citing *Correll*, 539 F.3d at 952 n.6), *vacated on other grounds*, 563 U.S. 932 (2011). While these determinations are obviously related, they are conceptually distinct. The Court concludes that although some initial doubt about the validity of a defense psychologist's conclusions about petitioner's cognitive deficits might have been cast through cross-examination about potential malingering, a competent psychologist in 1981 would have been able to respond, as Dr. Riley has here, in a manner that reassured jurors that the probability of

malingering did not significant undermine the validity of the test results.

Respondent questioned Dr. Dillon about his additional diagnosis of petitioner as having "conduct disorder, socialized, aggressive at the time of the crimes," which is a precursor to ASPD. (Ex. 235 at 21-22.) Dr. Dillon admitted that petitioner would have qualified at the time of trial under the DSM-III for the diagnosis of ASPD unless "there were other issues going on." (*Id.* at 22-23.) Dr. Dillon personally ruled ASPD out, however, because he concluded petitioner had engaged in behavior that "indicates presence of conscience not held by people with true anti-social personality." (Ex. 84 at 10-11.) The evidence of this behavior is based on the reports of jail inmates Robert Warren and Woodrow Warren,[24] who testified that while petitioner was in jail awaiting trial, his sister was murdered and the accused killer was placed in the same module of the jail as petitioner. Although other inmates pressured Kimble to attack and kill this man, he refused to do anything. (Ex. 40 ¶ 24; Ex. 41 ¶ 7.) Dr. Dillon believes this behavior shows that petitioner has a conscience and therefore does not have ASPD. (Ex. 84 at 11.) He opined that petitioner's anti-social behavior before incarceration can "be better accounted for by group and environmental socialization experiences."[25] (*Id.*)

iii. Rebuttal Testimony

Respondent's rebuttal witnesses demonstrate the likelihood that if mental health experts had testified on petitioner's behalf at the penalty trial, the prosecution could have introduced equally qualified mental health experts who would have offered different opinions about petitioner's cognition and psychology. In analyzing prejudice, the Court will therefore assume that a forensic psychiatrist

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[24] The Warrens' testimony was previously discussed in connection with Claims 1-5 (competence).

[25] Dr. Dillon also based his conclusion that Kimble does not have ASPD on his opinion that after many years on death row, Kimble experienced "a complete personality transformation." (Ex. 84 at 11.) This evidence would not have been available at the time of trial, however.

would have testified, as Dr. Lipian did here, that when petitioner committed the murders, he "was not under the influence of any extreme mental or emotional disturbance." (Ex. 206 ¶ 11.) The psychiatrist would have offered his opinion that although Kimble might suffer from ADHD, might have abused drugs, and might have some organic brain damage, these factors did not explain Kimble's criminal history as effectively as ASPD. (Id. ¶ 14.) He would have explained that Kimble's school and criminal history records reflect "a common pattern in ASPD." (*Id.* at 10.)

In their testimony, both petitioner's experts and respondent's experts occasionally refer to school and law enforcement records listing various bad acts committed by Kimble from the age of 12 to 17. (*See, e.g.*, Ex. 86-16; Ex. 206.0012.) School records report, for example, that around age 13, Kimble hit a girl and caused a "class disturbance," was "defiant," "disrespectful," and engaged in "continued willful disobedience." Other events are described with greater specificity, such as "threw egg and hit a teacher." The mental health experts also rely on Kimble's juvenile arrest and probation records, but their testimony does not distinguish between charges and convictions. These records also include events that were alleged but did not result in adjudications (*e.g.*, at age 13, "Theft (exonerated).").

Respondent has not shown that evidence about the character of these prior bad acts as a juvenile would have been introduced in rebuttal at the penalty phase. Because the experts for both sides rely on the same list of acts, it is likely that they would have mentioned some of these acts in their penalty phase testimony. In this habeas proceeding, however, the Court can only assume that the expert testimony at trial would have been roughly as it was presented here. Thus, while the jury would have learned from the mental health experts that the young Kimble was considered disruptive in school, and like many children, occasionally engaged in fights, they would not have heard testimony describing the specific acts he

allegedly committed. The same applies to the arrest records. The jury might have learned that Kimble was charged with throwing rocks at a moving car at age 12, that he later engaged in acts of shoplifting and attempted burglary, that at age 16 he was twice arrested for stealing a car, and that he was arrested for selling marijuana and PCP to an undercover police officer. This combination of misbehavior, charged conduct, and adjudicated juvenile offenses would have influenced the sentencing jury obliquely, reaching them only through the lens of the mental health experts' testimony. The charge that had the greatest potential for prejudice at the penalty phase was a 1977 arrest for rape, which stands out from the long list of school misbehavior and property and drug crimes both in its seriousness and its prima facie similarity to the rape of Avone Margulies one year later. But because this charge was resolved with a plea to statutory rape, its prejudicial effect is considerably diminished, as discussed below. In any event, as mentioned, respondent has not argued that testimony describing the details of Kimble's prior bad acts as a juvenile would have been directly admitted at the penalty phase as evidence in aggravation.[26]

Dr. Lipian also disputes Dr. Dillon's contention that Kimble's refusal to attack and kill his sister's killer when he had an opportunity to do so in jail indicates the presence of a conscience that is incompatible with ASPD. (Ex. 206 at 23.) It is therefore likely that at trial, a competent mental health expert would have been able to offer a similar alternative explanation for Kimble's behavior that was

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[26] By the time of Kimble's trial, Penal Code § 190.3 had been amended to "expressly exclude[] evidence of criminal activity, except for felony convictions, which activity 'did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence.'" *People v. Boyd*, 38 Cal. 3d 762, 776 (1985) (footnote omitted). In a 1981 opinion addressing the earlier version of this statute under which Kimble was tried, which lacked this explicit restriction, the California Supreme Court recognized "the constitutional problems which might arise if it appeared that a verdict of death rested, not on an implicit determination that aggravating factors outweighed mitigating factors, but on evidence of defendant's background, history, or character irrelevant to any of the listed factors." *People v. Murtishaw*, 29 Cal. 3d 733, 773 n.37 (1981).

consistent with the prosecution's theory that Kimble has ASPD.

Because Dr. Lipian did not examine Kimble and therefore did not diagnose him, the Court will assume that a prosecution psychiatrist retained in 1980 would also have been unable to offer a diagnosis. He would therefore have been subject to cross-examination about whether his theory that Kimble probably has ASPD was adequately supported. (*See* Ex. 96 at 20-49.) Nevertheless, Dr. Lipian's contention that "a perfectly valid diagnosis [of ASPD] . . . could be made simply upon the data provided" without a face-to-face examination of Kimble, even though the rules of his profession prohibit him from doing so (*id.* at 25), appears plausible enough that it could have convinced jurors that his opinions about Kimble's personality were as reliable as those of the defendant's experts.

Cross-examination of a psychiatrist like Dr. Lipian would also have elicited testimony that children "with parents who neglect them often turn into antisocial personality-disordered individuals." (*Id.* at 50.) This would tend to reinforce the defense theme that Kimble's character and behavioral problems were rooted in his parents' neglect of his basic needs as a child.

The testimony of respondent's psychologist, Dr. Dunn, that the neuropsychological data he gathered is consistent with ASPD was not contradicted by Dr. Riley, and did not add to the testimony offered by Dr. Lipian on this subject. Dr. Dunn disputes petitioner's experts' view that petitioner *currently* has ADHD, but he was unable to conclude that petitioner did not have ADHD while in school or at the time of the crime. (Ex. 95 at 38.) The experts agreed that ADHD symptoms typically diminish with age. (*Id.* at 37.) Thus, it is impossible to conclude on the basis of the evidence developed here that at the time of trial, if the defense had introduced expert testimony that petitioner suffered from ADHD, the

prosecution would have been able to rebut this with a credible contrary opinion.[27]

The remaining portions of Dr. Dunn's testimony focused predominantly on his disagreement with Dr. Riley over the magnitude of petitioner's cognitive impairments. Dr. Dunn generally agreed with Dr. Riley that petitioner has some deficits in visual perception and abstract reasoning, but disagreed about the degree of impairment. (*See* Ex. 228 at 25-30.) Petitioner attempted to impeach Dr. Dunn's views on this subject with evidence that he made scoring errors on four out of the seven neuropsychological tests that he reported, and that in all four of these cases, his errors tended to improve the reported results of petitioner's test performance. (Ex. 104 ¶¶ 26-33.) While the case against Dr. Dunn is not as strong as Dr. Riley represents, a review of their arguments over these four tests reveals that Dr. Dunn apparently did make some scoring errors that likely would have caused jurors to question the accuracy of his opinions on petitioner's neuropsychological test results.

The Rey Complex Figure Test measures visual perception or visuospatial organization. (Ex. 228 at 27; Ex. 236 ¶ 77; Ex. 104 ¶ 31; Ex. 105 ¶ 64.) Dr. Riley claims that Dr. Dunn made five scoring errors on this test, which significantly inflated petitioner's raw score. (Ex. 104 ¶ 32 & n.11 & pp. 75-87.) Dr. Dunn rejects this criticism, but does not explain his reasoning behind the scores he assigned for the five disputed elements. (Ex. 236 ¶ 78.)[28] For her part, Dr. Riley fails to respond to Dr. Dunn's defense of his scores, despite identifying this test in her surrebuttal declaration and despite addressing Dr. Dunn's defense of his scoring results on the *other* tests. (*See* Ex. 105 ¶¶ 20-35.) In the end, this dispute

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[27] For this reason, it is unnecessary to resolve the parties' disagreement over the validity of Dr. Dunn's MMPI-2 test results, since these results were offered in support of Dr. Dunn's conclusion that Kimble does not have ADHD but does have ASPD. (*See* Ex. 228 at 15-16, 20-24; Ex. 104 ¶¶ 7-12; Ex. 236 ¶¶ 47-64.)

[28] To the untrained eye, there appears to be room for legitimate disagreement over the correct scores for elements 1, 2, 15, 17, and 18 of the figure. (*See* Ex. 104 at 78 & 80.)

over the correct raw score appears to amount to little, as both psychologists agree that petitioner performed very poorly. (Ex. 87 at 5; Ex. 228 at 27.)

The Ruff 2 & 7 Selective Attention Test measures attention and concentration, and is relevant to the psychologists' opinions about the presence of ADHD. (Ex. 104 ¶¶ 36-39; Ex. 228 at 15-16.) Dr. Riley identified the alleged errors and supplied an exhibit showing Dr. Dunn's mistakes. (Ex. 104 ¶¶ 29-30 & pp. 70-74.) In his rebuttal declaration, despite addressing two of Dr. Riley's other allegations of scoring errors, Dr. Dunn did not discuss the Ruff 2 & 7 test. Based on the specificity of Dr. Riley's allegations and the lack of rebuttal, a jury would likely accept Dr. Riley's criticism of Dr. Dunn's conclusion. (*See* Ex. 105 ¶¶ 21-25.)

The Hooper Visual Organization Test (HVOT) also tests the ability to process visual information. The subject must identify objects from thirty pictures that depict the objects broken up into several pieces that are scattered and rotated in seemingly random ways. (*See* Ex. 105 at 88-91.) Dr. Riley accuses Dr. Dunn of giving petitioner too high a score because he failed to recognize two errors that petitioner allegedly made. The psychologists engage in a lively debate over this question despite Dr. Riley's concession that Dr. Dunn's scoring error "does not change the overall interpretation of the HVOT results." (Ex. 104 ¶ 33; *see* Ex. 236 ¶¶ 71-76; Ex. 105 ¶¶ 26-32.) Reasonable jurors would likely conclude that this dispute was unimportant since petitioner ultimately demonstrated an ability to recognize the scrambled objects, even if he did not use the psychologists' preferred names for the objects.

Finally, Dr. Riley contends that Dr. Dunn made multiple scoring errors on the Symbol Search subtest of the WAIS-III, which had the effect of inflating petitioner's reported performance from the 16th percentile to the 37th percentile. (Ex. 104 ¶¶ 27-28.) Dr. Dunn fails to respond to this claim in his rebuttal declaration, even though he addresses two of Dr. Riley's other allegations of

scoring errors. The Court therefore concludes that Dr. Riley's criticism on this point is accurate. (*See* Ex. 105 ¶¶ 33.)

In sum, if jurors heard the competing testimony of two psychologists like Dr. Riley and Dr. Dunn, they probably would conclude that the prosecution expert made some mistakes that caused him to slightly underestimate the extent of petitioner's deficits, but that these errors were not so egregious as to undermine the validity of his entire opinion. The jurors would have been left with the overall impression that petitioner did suffer from cognitive deficits that contributed to his poor school record, and that the extent of these deficits was debatable.

iv. Summary

If Walton had performed as a competent capital defense attorney, Kimble's penalty trial would have been dramatically different. Respondent barely disputes this; instead, respondent contends that all the additional evidence that would have emerged about Kimble's childhood and character would have reinforced the impression the jurors formed of Kimble during the guilt phase: that he was a violent young man whose depravity transformed a commercial burglary of stereo equipment into a terrifying home invasion, rape, and double murder. Yet even when they were given nothing in mitigation, the jurors at petitioner's penalty trial struggled to reach a verdict. At first, they thought they might be deadlocked. Later, recognizing that they had been given no evidence bearing on any of the statutory factors listed in former California Penal Code § 190.3 (aside from the circumstances of the crime itself), the jurors asked the trial court for additional guidance on how to make the choice between life and death. "The difficult time the jury had reaching a unanimous verdict on death" is an "indicator of prejudice." *Stankewitz v. Wong*, 698 F.3d 1163, 1175 (9th Cir. 2012); *Murtishaw*, 255 F.3d at 974 (jury deliberated for two days before returning death verdict); *Bean v. Calderon*, 163 F.3d 1073, 1081 (9th Cir. 1998) ("[W]e 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 . . . .”); *Hamilton v. Vasquez*, 17 F.3d 1149, 1163 (9th Cir. 1994) (“The jury spent three days deliberating in the penalty phase, suggesting that the California jury saw this as a close case.”).

At petitioner’s trial, the jurors “heard almost nothing that would humanize [him] or allow them to accurately gauge his moral culpability.” *Porter*, 558 U.S. at 41. If defense counsel had conducted an adequate investigation, the jurors would have been provided with significantly more information about the background of the young man who they had just convicted of murder. They would have learned that he began exhibiting signs of mental disability at an early age, was neglected and beaten by his parents, and was raised in a family with a history of substance abuse. Not surprisingly, petitioner himself turned to drugs by the time he was sixteen, quit school, and was using PCP on a daily basis by the time of the crimes. Thus, “[t]his is not a case in which the new evidence would barely have altered the sentencing profile presented to the sentencing [jury].” *Porter*, 558 U.S. at 41 (citation and internal quotation marks omitted).

In making their penalty determination, the jurors were instructed to consider “[w]hether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or the effects of intoxication.” (RT at 3386 (quoting former Cal. Penal Code § 190.3(g).) But they were provided no evidence relating to Kimble’s mental health or substance abuse — except for the misleading testimony elicited by counsel that portrayed Kimble as a happy and normal child. If counsel had performed competently, the jurors would have heard expert testimony that petitioner was cognitively and emotionally

impaired.[29] Although prosecution experts would have disputed this, a competent defense psychologist could have testified that Kimble's abnormal brain function together with his immaturity was likely to have "significantly impaired his ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law." (Ex. 87 at 21.) And the psychologist could have further explained that Kimble's ability to control his behavior would have been exacerbated by PCP use.

Despite the disagreements between the opposing sides' experts, there was no dispute over the fact that petitioner had a below-average IQ, impairment in visual processing and poor abstract reasoning, and petitioner's ADHD diagnosis was not refuted. Their most significant disagreement was over whether petitioner's behavior was best explained by mood disorder and organic brain damage or by antisocial personality disorder (ASPD). Some jurors might have accepted one explanation, while others might have accepted the competing one. They were not required to agree on a diagnosis to reach a verdict. Respondent's rebuttal evidence that petitioner had ASPD is not without flaws; Dr. Lipian admitted he never personally examined petitioner, but rather based his conclusions on the observations of others. Even if all the jurors accepted Dr. Lipian's view that ASPD was the most important factor in Kimble's criminal behavior, rather than his other deficits, it does not follow that they would automatically have voted for death. Courts have recognized that evidence of a defendant's antisocial personality disorder is not dispositive of the prejudice analysis. *See, e.g., Stankewitz v. Wong*, 698 F.3d 1163, 1173-74 (9th Cir. 2012); *Lambright v. Schriro*, 490 F.3d 1103, 1122, 1125 (9th Cir. 2007) (ASPD is a mitigating factor under Arizona law);

[29] Even if the jurors doubted whether petitioner's impairments constituted a "mental disease," they could still have found them mitigating under § 190.3(j)'s catch-all provision: "Any other circumstances which extenuate the gravity of the crime even though it [sic] is not a legal excuse for the crime." (RT at 3387); *See People v. Rich*, 45 Cal. 3d 1036, 1121 (1988).

Morton v. Secretary, Florida Dept. of Corrections, 684 F.3d 1157, 1168 (11th Cir. 2012) (evidence of ASPD is not ideal mitigation and can be a double-edged sword but it also can be "a valid mitigating circumstance for trial courts to consider and weigh") (citation and internal quotation marks omitted).

The Ninth Circuit's decision in *Stankewitz* is instructive. There, capital defense counsel similarly failed to present any mitigation evidence about the defendant's traumatic childhood. And the court was similarly confronted with the likelihood that, had counsel opened the door to mental health mitigation evidence, the prosecution would have presented rebuttal evidence of the defendant's antisocial behavior, including several emotional and violent outbursts throughout his life. *Stankewitz*, 698 F.3d at 1173-74. That risk notwithstanding, the court reasoned that "any adverse impact of the additional mitigation evidence would have been merely cumulative because the prosecution had already painted a grim picture of [defendant's] violent, antisocial tendencies. Instead, it is the *mitigating* effect of the proffered evidence that would have been novel because the jury had heard next to nothing about [defendant's] traumatic childhood." *Id.* at 1174.

Likewise here, the harmful effect of the prosecution's ASPD evidence would have been cumulative to the ample existing evidence that petitioner had antisocial tendencies, found in the abhorrent circumstances of the murders themselves. In the prejudice analysis, "cumulative evidence is given less weight because it is not as likely to have affected the outcome of the sentencing." *Leavitt v. Arave*, 646 F.3d 605, 615 (9th Cir. 2011) (citation omitted). Even if the jurors were provided with the catalog of mostly minor misdeeds committed by Kimble as a juvenile, the aggravating effect of hearing this abstract list — with the possible exception of the rape charge — would have been negligible in relation to the facts of the crimes committed against the Margulies. As for the rape charge, respondent has not shown that evidence pertaining to it could have been admitted at the penalty phase. If merely the fact of the conviction were admitted (statutory rape) the defense

would undoubtedly have been permitted to establish that at the time of the crime, Kimble was 17 years old and the victim was 16 years old. Such a conviction, provided without any other factual background, is unlikely to have been considered significantly prejudicial by the penalty jury.

At the original penalty trial, the prosecutor attempted to cross-examine Kimble's mother about whether Kimble had been "nice" to the 16-year-old rape victim. (RT at 3305.) The prosecutor contended the evidence was admissible to rebut Mrs. Kimble's character testimony to the effect that her son was a popular babysitter in their neighborhood and was friendly to younger children. Despite Kimble's conviction only for statutory rape, the prosecutor argued that "the facts of the case could be brought up by the alleged victim." (*Id.*) The trial judge responded that "If it's statutory rape as opposed to forcible rape, that negates forcible rape under the same set of facts." The parties then debated whether the effect of Kimble's plea was similar to an acquittal on the forcible rape charge. (RT at 3307.) The judge ultimately barred the rape evidence, reasoning that although the plea did not constitute an acquittal, the prejudicial effect of the proposed evidence outweighed its probative value. *Cf. Murtishaw*, 29 Cal. 3d at 773-75 & n.38 (although 1977 death penalty law does not limit penalty phase evidence to matters relevant to statutory aggravating or mitigating factors, courts still must weigh probative value of the evidence against its prejudicial effect). The trial court might well have reached the same conclusion about the juvenile rape evidence even if the penalty phase were augmented with the mental health and family background evidence identified in this habeas proceeding.

Finally, even if the prosecution had called the statutory rape victim to describe her account of the crime as aggravating evidence at the penalty phase, it must be assumed that she would have been subject to cross-examination and rebuttal testimony much as she was at the March 1978 trial. Respondent has submitted a 309-page "partial transcript" from that trial, which encompasses the

prosecution's case-in-chief and three witnesses for the defense (including Eric Kimble). (Ex. 207.) The transcript then abruptly ends. We know only that the charge was eventually resolved by Kimble's plea to statutory rape.[30] It is impossible to conclude from the partial rape trial transcript alone that if the penalty phase jurors had heard similar testimony (even if it were only the prosecution's case-in-chief), then they would have accepted without doubt the victim's description of the rape as a forcible encounter, rather than finding a reasonable possibility that it was a repeat occurrence of consensual sex between two underage high school students.[31]

For all of these reasons, this case is unlike those in which the prosecution's rebuttal evidence would have dramatically damaged the defendant in the eyes of the sentencing jury. *Cf. Belmontes*, 558 U.S. at 28 (rebuttal evidence that defendant had previously committed another murder); *Andrews*, 798 F.3d at 777-78 (rebuttal evidence of violent criminal history as an adult including prior escapes from prison); *Mickey v. Ayers*, 606 F.3d 1223, 1244-45 (9th Cir. 2010) (rebuttal evidence of "a pattern of sexual misbehavior that had recently escalated into sexual abuse of his own step-daughter.").

In this case, because defense counsel abdicated his role preparing for the penalty phase, an already closely balanced jury remained ignorant of significant mitigation evidence comprising petitioner's family history, oppressive childhood, serious drug issues, and possible organic brain damage and mood disorder. On

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[30] Elsewhere, petitioner claims that he presented evidence of consensual sexual conduct at the trial, the jury hung, and he then pleaded guilty to statutory rape. (SAP at 73-74.)

[31] Before they could consider the forcible rape charge as an aggravating factor, the jurors would have to find it proved beyond a reasonable doubt. *People v. Robertson*, 33 Cal. 3d 21, 53-54 (1982). The required instruction on this standard of proof was absent from Kimble's actual penalty phase (RT at 3385-86), but in analyzing the prejudicial effect of counsel's deficient performance in this habeas proceeding, the Court must "presume . . . that the judge or jury acted according to law," and accordingly that the jurors would have been properly instructed. *Strickland*, 466 U.S. at 694.

balance, the mitigating effect of such evidence on the jury figures much more prominently in the prejudice calculus than the possibility of cumulative aggravating evidence from the ASPD testimony.

Courts have frequently concluded that the failure to present evidence of such classic mitigating evidence of an abusive childhood, heavy drug abuse, and mental disability is prejudicial. *See Porter*, 558 U.S. at 41 (physical abuse in childhood, brain abnormality, difficulty reading and writing, and military service); *Rompilla*, 545 U.S. at 391-92 (organic brain damage caused by fetal alcohol syndrome, IQ in the mentally retarded range, absent and alcoholic mother, abusive father); *James v. Ryan*, 679 F.3d 780, 810 (9th Cir. 2012) (troubled childhood, mental illness, and "downward spiral of depression and drug abuse in the year before [the] murder"); *vacated on other grounds and subsequently reaffirmed*, 733 F.3d 911, 916 (9th Cir. 2013); *Correll*, 539 F.3d at 952 (neglected and abused as child, likely brain injury as child, began using alcohol and drugs at 10, abandoned by parents at 14, heavy methamphetamine user by 16, and under influence of meth on night of crimes); *Bean*, 163 F.3d at 1079-81 (placed in class for "educable mentally retarded," traumatic childhood including beatings, habitual use of PCP); *Jackson v. Calderon*, 211 F.3d 1148, 1162-64 (9th Cir. 2000) (signs of mental illness in childhood, repeated beatings in childhood, medical evidence that PCP intoxication rendered petitioner unable to think consciously when he shot police officer).

Petitioner's crimes in this case were horrifying and inexplicable. Yet "[t]he gruesome nature of the killing did not necessarily mean the death penalty was unavoidable." *Douglas*, 316 F.3d at 1091 (9th Cir. 2003); *Hendricks v. Calderon*, 70 F.3d 1032, 1044 (9th Cir. 1995). Faced with aggravating circumstances that are comparable or worse, courts have found defendants prejudiced by capital counsel's failure to investigate mitigating evidence. *See, e.g.*, *Porter*, 558 U.S. at 41 (failure to investigate mental impairment, family history, or military service was prejudicial even though defendant shot and killed two people in cold blood);

Lambright, 490 F.3d at 1106–07, 1127–28 (failure to investigate abusive childhood, mental health problems, and drug abuse was prejudicial even though the defendant watched as his codefendant repeatedly raped the victim, and then defendant killed the victim by stabbing her multiple times and smashing her head with a rock); *Douglas*, 316 F.3d at 1082–83, 1091 (failure to investigate defendant's social history and mental health was prejudicial even though defendant raped, tortured, and killed two teenage girls and buried them in the desert); *Jackson*, 211 F.3d at 1162-64 (failure to investigate social history, mental illness, drug addiction, and drug intoxication at time of crimes was prejudicial even though defendant shot and killed police officer while intoxicated with PCP); *Smith v. Stewart*, 189 F.3d 1004, 1006, 1013–14 (9th Cir. 1999) (failure to investigate family background and mental illness was prejudicial even though defendant raped two women; both victims were stabbed repeatedly, punctured with needles, bound with rope, suffocated by stuffing their mouths with dirt and taping them shut, and left naked in the desert to die).

The Court recognizes that the mitigating evidence adduced in this habeas corpus proceeding is not the most powerful compared to all that is to be found in the woeful compendium of capital sentencing caselaw. Petitioner's childhood was not the worst of all childhoods, and he did not suffer from a mental disease as disabling as schizophrenia. Nevertheless, the probable effect on the jury of petitioner's mitigating evidence must be assessed both in relation to the aggravating evidence in his case, which was far less egregious than many other murder cases, and also in relation to the mitigating evidence that his jury heard at trial, which was essentially nothing. *See Doe v. Ayers*, 782 F.3d 425, 461 (9th Cir. 2015) ("The determination whether a petitioner was prejudiced by his lawyer's failure to discover and present mitigating evidence is an inherently fact-intensive inquiry, and requires close consideration of individual records, rather than oversimplified, ordinal comparisons between summaries of the suffering

experienced by capital defendants."); *Stankewitz*, 698 F.3d at 1174. The testimony that Walton did present painted a false portrait of a rosy childhood in a warm and supportive family. Such trite mitigation evidence may have been worse than no mitigation evidence at all, as Walton himself recognized. (RT at 3230.) And the witnesses who expressed their opinion that Kimble was incapable of murder were undoubtedly discounted by the jurors, who knew otherwise. In his closing argument, Walton attacked the death penalty itself and suggested that by voting to execute Kimble, the jurors would "demean and degrade and dehumanize yourselves." (RT at 3355.) Yet every juror had sworn during voir dire that they *could* vote to impose the death penalty. Counsel's argument was not reasonably calculated to appeal to these jurors and it did nothing to help petitioner.

It must also be noted that this case was tried under California's 1977 death penalty statute, not the subsequently enacted 1978 version that governs most of the California capital trials that have been analyzed in Ninth Circuit opinions. The jury instructions on selecting a penalty therefore provided Kimble's jury with greater flexibility to determine the appropriate penalty than in most cases discussed in the caselaw. *See Murtishaw*, 255 F.3d at 962 ("[T]he 1978 version is much less favorable [to a capital defendant] than the 1977 provision . . . because the [1978 law] . . . deprived defendant of the opportunity to have the jury exercise the discretion that the 1977 statute provided when aggravation outweighs mitigation.") (citation and internal quotation marks omitted). Under the 1978 law, jurors are told, "If you conclude that the aggravating circumstances outweigh the mitigating circumstances you *shall impose* a sentence of death." *Id.* (emphasis added). In contrast, petitioner's jury was simply told: "After having considered all the evidence in this case and having taken into account all of the applicable factors upon which you have been instructed you shall determine whether the penalty to be imposed on the defendant shall be death or confinement in the state prison for life without possibility of parole." (RT at 3387; *see also* RT at 3385); *cf. Murtishaw*,

255 F.3d at 962. Given this instruction, the jurors deliberated for nearly five hours before concluding they might be deadlocked. They then asked for more guidance from the trial court on how to make their choice. Clearly, this was not a jury that found the circumstances of Kimble's crimes to be so aggravating that death was a foregone conclusion.

Because of defense counsel's deficient performance, the jury had no occasion to consider the petitioner's disturbed childhood, history of mental disability, and persistent drug use including likely intoxication with PCP on the day of the crimes. In view of how closely balanced this jury was even without the mitigating evidence it should have heard, the Court concludes that if petitioner had received an adequate defense at his penalty trial, "there is a reasonable probability that at least one juror would have struck a different balance" in favor of life imprisonment. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003). The probability of a different result is significant enough in this case to undermine confidence in the jury's penalty verdict and to conclude that petitioner was deprived of the effective assistance of counsel guaranteed by the Sixth Amendment.

Claim 10(E) is GRANTED.

V. Remaining Record-Based Claims

A. Claim 32: Unconstitutionality of 1977 Death Penalty Law

Petitioner claims that the 1977 death penalty law is unconstitutional because it fails to provide sentencing juries with adequate guidance, lacks intercase proportionality review, and permits too much prosecutorial discretion. (SAP at 109.) This claim substantially overlaps with petitioner's as-applied challenge to the statute in Claim 31, which the Court previously rejected. (*See* Dkt. 141: Order on Petr's Mot. Evid. Hr'g at 99-102.) It fails for the reasons discussed there, as well as those discussed in *Tuilaepa v. California*, 512 U.S. 967, 975-80 (1994); *Pulley v. Harris*, 465 U.S. 37, 51-53 (1984); and *[Keith] Williams v. Calderon*, 52 F.3d 1465, 1484 (9th Cir. 1995). Claim 32 is DENIED.

B. Claim 33: Newly Discovered Evidence

Petitioner argues that his conviction and sentence violate the Constitution because newly discovered evidence, as described in more detail in Claims 6, 7, and 10, would probably produce an acquittal. (SAP at 110-11.) Petitioner was provided an opportunity to make specific allegations showing the need for an evidentiary hearing on these claims, he did so, and the Court granted a hearing on portions of the three claims. (*See* Dkt. 141 at 102.) Following an extensive opportunity for discovery, petitioner presented his new evidence, as described above in the discussion of Claims 6, 7, and 10. For the reasons discussed there, petitioner's new evidence fails to establish that the guilt phase of the trial was unfair. That evidence certainly also fails to meet the "extraordinarily high" burden of proof necessary to establish a freestanding claim of actual innocence. *Cf. Boyde*, 404 F.3d at 1168 (petitioner "must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent") (citation and internal quotation marks omitted). Claim 33 is DENIED.

C. Claim 34: Admission of Irrelevant and Prejudicial Evidence

Petitioner contends that the trial court should not have admitted a photograph of the Margulies taken while they were on vacation, and evidence of ammunition found in Kimble's father's bedroom, since they were irrelevant to any issue at the guilt phase and potentially inflammatory. (SAP at 111-12.) The issue on federal habeas review is not whether the trial court erred under state law in admitting the evidence, but only whether it rendered petitioner's trial fundamentally unfair in violation of due process. *Estelle v. McGuire*, 502 U.S. at 67-68; *Boyde*, 404 F.3d at 1172 ("A habeas petitioner bears a heavy burden in showing a due process violation based on an evidentiary decision."). "Admission of evidence violates due process only if there are *no* permissible inferences the jury may draw from it." *Boyde*, 404 F.3d at 1172 (citation and internal quotation marks omitted).

The ammunition recovered from the Kimble home was .45 caliber ammunition, which was the same caliber ammunition that was used to kill the Margulies, and the same caliber as ammunition that was found in the black briefcase abandoned in the kitchen. The prosecution's own ballistics expert, however, testified that the bullets used to kill the Margulies had been manufactured for military use (although they were widely available in surplus stores (RT at 2409)) and were unlike the bullets found in Kimble's house. The ammunition from the Kimble home therefore had little probative value. But it was not completely irrelevant since it supported an inference that Kimble had access to a .45 caliber handgun at home. In his closing argument, the prosecutor acknowledged that the ammunition from the Kimble home was different from that found at the crime scene. He argued only that the fact that the Kimbles had several boxes of different kinds of .45 caliber bullets showed that "they were not loyal to any particular type," and that "a .45 was available to Mr. Kimble." (RT at 3179-80.) Because the jury could draw a permissible inference from this evidence, its admission did not violate due process. *Boyde*, 404 F.3d at 1173.

The photograph of the Margulies while alive was irrelevant, but in view of the strength of the evidence against petitioner, it could not have influenced the jury's guilt phase verdict. The Court concurs in the conclusion of the California Supreme Court that this error was not prejudicial. *See People v. Kimble*, 44 Cal. 3d at 499 (under state law, "such photographs probably should be excluded").

Claim 34 is DENIED.

D. Claim 36: Jury Selection Errors

Petitioner claims he was deprived of his right to a fairly selected jury by three different kinds of errors during jury voir dire. First, he argues that the trial court erred in selecting jurors whose views on the death penalty permitted them to serve on a capital case. Second, he contends some jurors were biased. Third, he claims the prosecutor used peremptory challenges to remove African-Americans

from the jury.

1. Death Qualification Voir Dire

Petitioner claims that several jurors were improperly excused for cause because of their opposition to the death penalty, and several other jurors should have been excused for cause because they would automatically vote for death, but they were not. (SAP at 113-15.)

a. Legal Standard

Jurors whose opposition to the death penalty would prevent them from being impartial may be excluded from capital sentencing juries. *Morgan v. Illinois*, 504 U.S. at 728-29; *Wainwright v. Witt*, 469 U.S. 412, 424 (1985); *Witherspoon v. Illinois*, 391 U.S. 510 (1968). More generally, at a capital trial, both the defendant and the government have the right to exclude jurors whose views on the death penalty would prevent them from being able to follow the trial judge's instructions and impartially consider the evidence of aggravating and mitigating circumstances before selecting the appropriate penalty. *Morgan*, 504 U.S. at 728-29. "[A] juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause." *Id.* at 728. Conversely, "[a] juror who will automatically vote for the death penalty in every case" is not impartial and must be excluded for cause. *Id.* at 729.

Nevertheless, jurors may not be excluded for cause simply because they have strong views for or against the death penalty. *Witherspoon*, 391 U.S. at 519-21. The government "infringes a capital defendant's right under the Sixth and Fourteenth Amendments to trial by an impartial jury when it excuses for cause all those members of the venire who express conscientious objections to capital punishment." *Witt*, 469 U.S. at 416. Instead, "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions

and his oath.'" *Id.* at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). The question is whether a juror can, regardless of his views on the death penalty, consider in good faith "the evidence of aggravating and mitigating circumstances as the instructions require him to do." *Morgan*, 504 U.S. at 729.

Under the *Adams* standard, "where an adversary wishes to exclude a juror because of bias, then it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality," and the trial judge must then "determine whether the challenge is proper." *Witt*, 469 U.S. at 423. The trial court must give the defendant an adequate opportunity to question prospective jurors' about their views on capital punishment so that he may identify unqualified jurors. *Morgan*, 504 U.S. at 735-36.

"Courts reviewing claims of *Witherspoon–Witt* error, . . . especially federal courts considering habeas petitions, owe deference to the trial court, which is in a superior position to determine the demeanor and qualifications of a potential juror." *Uttecht v. Brown*, 551 U.S. 1, 22 (2007). "[T]he trial judge who sees and hears the juror" respond to questions during voir dire about his views on the death penalty — and about his ability to separate his personal views from his duty as a juror to follow the judge's instructions — is in the best position to assess whether a juror can be impartial. *Witt*, 469 U.S. at 425-30. "[S]uch a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." *Id.* at 428. Thus, "[a] finding by the trial judge of juror bias concerning the death penalty is a factual finding entitled to the presumption of correctness under 28 U.S.C. § 2254(d)." *Hendricks v. Vasquez*, 974 F.2d 1099, 1103 (9th Cir. 1992) (citing *Witt*, 469 U.S. at 429).

In *Uttecht*, the Supreme Court held that the trial court did not deprive the defendant of a fairly selected jury when it excused a juror who equivocated about his ability to impose the death penalty and at times seemed confused about the law. *See Uttecht.* 551 U.S. at 13-15. While acknowledging that deference to the trial

court "does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment," the Court held that when "there is lengthy questioning of a prospective juror and the trial court has supervised a diligent and thoughtful *voir dire*, the trial court has broad discretion." *Uttecht.* 551 U.S. at 20.

b. Analysis

The petition identifies five prospective jurors who it alleges were improperly excused for cause because of their views on capital punishment. (SAP at 113-14.) In his traverse to respondent's answer, however, petitioner apparently concedes the validity of respondent's arguments for three of these jurors, and instead claims only that the record was "devoid of any evidence of unwillingness to follow the law by either [prospective juror Simpson or McLurkin]." (Petr's P. & A. in Supp. Traverse at 101.) Under the *Adams* standard, however, the question is not whether the prospective jurors demonstrated an "unwillingness to follow the law," but rather, whether their voir dire responses revealed that their views on capital punishment "would prevent or substantially impair" the performance of their duties as impartial jurors. *Witt*, 469 U.S. at 420 (quoting *Adams*, 448 U.S. at 45).

From the outset of his voir dire, prospective juror Simpson indicated opposition to the death penalty, stating that he did not "think there should be any circumstances which people . . . through whatever means, legal or whatever, should have the right to determine life or death of an individual," and "on moral grounds . . . the death penalty is a terrible thing, unconscionable thing to be faced." (RT at 1097.) While these statements alone did not foreclose the possibility that Mr. Simpson could perform the duties required of a capital juror, his subsequent statements strongly suggest he would have great difficulty being impartial. Defense counsel asked, "Is it your position that you would never, ever in any case, no matter what the crime, nor how aggravated the circumstances surrounding it, vote to impose the death penalty?" Mr. Simpson responded, "That's correct." (RT

at 1099.) When asked if he would be unable to follow his oath as a juror, he replied that he "would have a great deal of trouble . . . taking the oath" if it involved "setting aside . . .[his] own strong personal beliefs." (RT at 1100.) After additional questioning, he said, "I have very strong feelings, and I can't see myself being instrumental in the death of any person. In a way, I will feel almost as guilty as if I myself were committing a murder . . . although I realize it would be my obligation to act in the course of law, but I still feel it's my personal decision that would cause the death of a person, and I just see that as unconscionable." (RT at 1104.) He explained, "It's the penalty itself. It has nothing to do with anything that would come up in the case. . . . I just feel that the penalty itself is something that I just can't, I just — well, I would not want to deal with it, and I don't — I just can't see myself returning the death penalty verdict . . . ." (RT at 1109.)

These voir dire responses strongly suggest that the trial judge acted well within his discretion in finding, based on seeing and hearing Mr. Simpson explain his views on the death penalty and his role as a juror, that his performance of his duties as a juror at petitioner's trial would be substantially impaired by his views. The presumption of correctness of the trial court's finding stands.

Similarly, prospective alternate juror McLurkin's voir dire answers revealed that he did not believe in the death penalty, and did not want "to sit on a trial where a death penalty would be involved." (RT at 1376-78.) Despite trial counsel's attempt to get him to admit that some murders were so egregious that they warranted a death sentence, he repeatedly affirmed that he could not think of a case in which he could vote for death. When the prosecution challenged him, defense counsel did not argue the point. (RT at 1379.)

As in *Uttecht*, the trial judge here supervised a diligent and thoughtful voir dire of these two prospective jurors, after which he concluded that they held beliefs which disqualified them from serving as jurors at petitioner's trial. The trial court's findings are "entitled to deference." *Uttecht*, 551 U.S. at 17.

Petitioner's argument that several prospective jurors should have been excused for cause because of their predisposition to vote for the death penalty is equally unavailing. Of the fifteen venire members identified in the petition, only three sat as jurors.[32] (*Compare* SAP at 114-15 *with* CT at 232, 234.) Petitioner fails to allege sufficient facts showing that they should have been excluded. The Court's independent review of the transcript reveals that the defense had an adequate opportunity to question these jurors about their views on the death penalty and there is nothing to suggest that the trial court should have excused any of them for cause. (*See* RT at 819-827; 1111-1122; 1300-1306.)

2. Juror Bias

Petitioner claims three other jurors should have been excused for cause, based upon their disclosures of personal experiences or circumstances indicating they could not be fair and impartial factfinders. (SAP at 114-15.) One of those named in the petition was not seated on the jury, and another served only as an alternate juror. The alternate juror did not end up participating in the deliberations (or even being present during them). (*See* CT at 234; RT at 1421-22, 3286, 3388-B.) Because there is no evidence the alternate had any influence on the other jurors, her alleged bias is irrelevant. *Cf. United States v. Olano*, 507 U.S. 725, 739 (1993) (mere presence of alternate juror in jury room during deliberations was not plain error where there was "no specific showing that the alternate jurors in this case either participated in the jury's deliberations or 'chilled' deliberation by the regular jurors.); *Linden v. Dickson*, 287 F.2d 55 (9th Cir. 1961) (rejecting habeas corpus relief where petitioner alleged bias of alternate juror who did not participate in deliberations). This leaves juror Dana Ramirez. Petitioner claims she should

[32] It is unnecessary to address the other twelve prospective jurors because they did not serve on petitioner's jury. *Ross v. Oklahoma*, 487 U.S. 81, 85-86 (1988) (trial court's failure to remove prospective juror for cause under *Witherspoon* and *Witt* does not abridge petitioner's right to impartial jury if prospective juror did not sit on jury).

have been excused after she told the trial court that she would be unable to concentrate because she was upset that her ex-husband had recently been charged with child molestation. (SAP at 114.)

As discussed above in connection with claim 14(G), in order to guarantee a fair trial, the Sixth Amendment requires that jurors be impartial. *Fields v. Woodford*, 309 F.3d 1095, 1103 (9th Cir. 2002). Whether a juror was *actually biased* is a question of fact. *Id.* (remanding for evidentiary hearing on juror bias). In contrast, implied bias may be found in "the potential for substantial emotional involvement, adversely affecting impartiality, inherent in certain relationships." *Tinsley*, 895 F.2d at 527 (citation and internal quotation marks omitted). Implied bias may be presumed "[o]nly in 'extreme' or 'extraordinary' cases," such as "where a juror or his close relatives have been personally involved in a situation involving a similar fact pattern." *Tinsley*, 895 F.2d at 528. "Some examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." *Smith v. Phillips*, 455 U.S. at 222.

Following in camera death qualification voir dire and subsequent general voir dire in open court, Ms. Ramirez was seated on the jury. After a weekend break, on a Monday morning, she met with the trial judge in camera outside the presence of the parties, and told him that over the weekend, her ex-husband was charged with child molestation. (*See* RT at 1087-88 (judge describing ex parte conversation for counsel).) The conversation was not reported and, upon counsel's inquiry, the judge at first simply stated that Ms. Ramirez had "a personal problem that emotionally upset her, but it had no bearing on the case." When defense counsel asked for more information, the judge explained that Ms. Ramirez's "ex-husband had been arrested over the weekend, and even though she had been separated from him for eight years, it kind of upset her." He said it was a Penal

Code § 288 charge (lewd conduct with child under 14). When counsel asked for more details, the judge replied, "I don't know. I don't know. I know no more about the facts than what I have put on the record." He added that "she did say she wanted to be excused, but upon composing herself she said she could serve, and it would not affect her, just the initial shock over the weekend." Defense counsel asked to question Ms. Ramirez about whether this "might truly affect her ability to at least be attentive." (RT at 1089.) The prosecutor expressed concern that "further conversation on it might be extremely painful to her." The trial court agreed and stated that while it was undoubtedly a shock, "I don't think it's such a shock that would render any inability for her to serve on the jury." (RT at 1089.)

After examining a few more jurors, counsel offered a stipulation that Ms. Ramirez be excused. The prosecutor argued that her personal contacts with the criminal justice system "could prejudice one side or another," and counsel and the court debated the matter for a few minutes. (RT at 1123-25.) The trial court refused to excuse Ms. Ramirez, stating "We're going to run out of jurors pretty quick. . . . If you want to excuse peremptorily it's okay with me." (RT at 1125.) No one did, however, so Ms. Ramirez served on the jury. (CT at 232.)

Petitioner argues that "the trial court's limitation on questioning of Ms. Ramirez demonstrates that 'the material facts were not adequately developed at the State court hearing,'" "any findings of fact regarding Ms. Ramirez's bias are 'not fairly supported by the record,'" and therefore "no presumption of correctness can attach" to the trial court's factual determination. (Petr's Am. P. & A. in Supp. Traverse at 218.) However, petitioner did not request an evidentiary hearing on this claim, in contrast to Claim 14(G).

Ms. Ramirez's general voir dire was unremarkable, and provided no indication she might not be impartial. (RT at 512-15.) As noted above, her subsequent ex parte conversation with the trial court was not transcribed. But petitioner has not sought to introduce evidence of actual bias. While the parties

stipulated to her removal for cause, with the prosecutor arguing that "she's undergoing, obviously, a strong emotional reaction to her husband being accused of something," the trial court found no reason to excuse her. (RT at 1122-23.) The trial court concluded that her situation was no different from anyone who had "any form of justice contact." (RT at 1123.) Under these circumstances, petitioner has failed to demonstrate actual bias. Ordinarily, the trial judge's finding that Ms. Ramirez remained impartial despite her concern over her ex-husband's travails would be entitled to deference under 28 U.S.C. § 2254(d). *Tinsley*, 895 F.2d at 525-26 (trial court's finding on juror bias entitled to presumption of correctness where "[t]he relevant record consisted of the transcript of the examination of the juror and the judge's ruling."). Even if the lack of a transcript of the ex parte discussion between Ms. Ramirez and the judge (or the trial court's refusal to permit additional voir dire) vitiates this presumption of correctness, the fact remains that there is no evidence from which this Court can conclude that she was actually biased. S*ee* 28 U.S.C. § 2254(d) (1994); *cf. Jefferson v. Upton*, 560 U.S. 284 (2010) (per curiam) (remanding for hearing on "whether any of the exceptions enumerated in §§ 2254(d)(1)-(8) apply in this case").

Nor does this case present "extreme" or "extraordinary" circumstances in which bias must be presumed. *Tinsley*, 895 F.2d at 528. As discussed above in connection with Claim 14(G), in *Tinsley*, the defendant in a rape trial argued that the court should have excluded a social worker who had extensively counseled a rape victim and even testified at the trial that the victim was credible. The Court of Appeals acknowledged the "strong argument that this case presents an extreme situation where implied bias may justifiably be found." *Id.* at 529. Nevertheless, the court concluded that "these circumstances do not warrant a presumption of bias" because neither the juror nor a close relative had been a rape victim or rapist, and the juror lacked any connection to the defendant, the victim, or other witnesses. *Id.* Similarly here, neither Ms. Ramirez nor her ex-husband were

"personally involved in a situation involving a similar fact pattern" as petitioner's case. *Id.* at 528; *Smith v. Phillips*, 455 U.S. at 222 (O'Connor, J., concurring). Nor did Ms. Ramirez try to conceal information in order to remain on the jury. *Cf. Dyer*, 151 F.3d at 981-84. To the contrary, she asked to speak to the trial judge to volunteer information she considered potentially relevant to the court's jury selection process. (RT at 1087-88.) These circumstances do not give rise to a presumption of bias. *See United States v. Gonzalez*, 214 F.3d at 1112 (test for implied bias is "whether an average person in the position of the juror in controversy would be prejudiced").

3. *Batson/Wheeler*

Petitioner claims the prosecutor exercised peremptory challenges in a racially discriminatory manner in violation of the principle of *People v. Wheeler* and *Batson v. Kentucky*. (SAP at 115; Petr's Am. P. & A. in Supp. Traverse at 219-21.)

As discussed above for Claim 10(C), after seven days of jury selection, defense counsel observed for the record that the prosecutor had used about half of his peremptory challenges to date to remove African-Americans from the jury. He implied that he was considering making a *Wheeler* motion, but said he was not doing so yet. The trial court commented, "I'm way ahead of you," and added, "If [defense counsel] makes a motion, then we'll make the record." (RT at 857-58.) After reviewing the entire voir dire transcript, this Court has concluded that there is insufficient evidence to overcome the presumption under *Strickland* that defense counsel's ultimate decision not to bring a *Wheeler* motion was a sound strategic decision. (See Claim 10(C), *supra*.)

The Ninth Circuit has held that "a timely objection to the prosecutor's use of peremptory challenges is a prerequisite to a *Batson* challenge." *Haney v. Adams*, 641 F.3d 1168, 1173 (9th Cir. 2011). The lack of an objection at trial is therefore fatal to this claim.

Claim 36 is DENIED.

E. Claim 7: Prosecutorial Misconduct: Prejudicial Closing Arguments

In Claim 7, petitioner alleges the prosecutor committed prejudicial misconduct in his closing statements at both the guilt and penalty phases of petitioner's capital trial, by misrepresenting the evidence, misleading the jury about Ortez Winfrey's credibility, invoking unconstitutional considerations such as race, asking the jury to return duplicative special circumstance findings and other sentencing enhancements, and generally misleading the jury about its role in determining petitioner's sentence.

1. Legal Standard

When a habeas court is reviewing an allegation of prosecutorial misconduct, including a claim of improper statements in summation, "[t]he relevant question is whether the prosecutors' [misconduct] 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 180 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643(1974)); *Thompson v. Borg*, 74 F.3d 1571, 1576 (9th Cir. 1996). "To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial." *Greer v. Miller*, 483 U.S. 756, 765 (1987) (internal quotation marks omitted). Thus, the first issue is whether the prosecutor's actions were improper; if so, the next question is whether the conduct infected the trial with unfairness so that there was a due process violation. *Tan v. Runnels*, 413 F.3d 1101, 1112 (9th Cir.2005). As with all non-structural trial errors, federal habeas relief is available only if the prosecutor's misconduct had a "substantial and injurious effect or influence in determining the jury's verdict," or there is at least "grave doubt" about whether it affected the jury. *Wood v. Ryan*, 693 F.3d 1104, 1113 (9th Cir. 2012) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993)); *Sechrest v. Ignacio*, 549 F.3d 789,

808 (9th Cir. 2008) (quoting *O'Neal v. McAninch*, 513 U.S. 432, 438 (1995)).

Alleged prosecutorial misconduct during closing argument is evaluated in context. *United States v. Young*, 470 U.S. 1, 12 (1985); *Donnelly*, 416 U.S. at 647. It is well settled that "[c]ounsel are given latitude in the presentation of their closing arguments, and courts must allow the prosecution to strike hard blows based on the evidence presented and all reasonable inferences therefrom." *Ceja v. Stewart*, 97 F.3d 1246, 1253-54 (9th Cir. 1996) (citation and internal quotation marks omitted); *Young*, 470 U.S. at 7. "Improper argument does not, per se, violate a defendant's constitutional rights. It is not enough that the prosecutor's remarks were undesirable or even universally condemned. Rather, the relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Runningeagle v. Ryan*, 686 F.3d 758, 781 (2012) (citations and internal quotation marks omitted).

2. Claim 7(E): Penalty Phase Closing Argument

In Claim 7(E), petitioner cites eleven instances in which the prosecutor allegedly committed misconduct in his closing argument at the penalty phase. Defense counsel did not object to any of the statements. For the reasons discussed below, none of the prosecutor's comments, considered separately or together, had substantial and injurious effect or influence in determining the jury's penalty verdict.

a. Subclaim 1: Personal Characteristics of the Victims

Petitioner claims the prosecutor improperly urged the jury to sentence petitioner to death "based on the personal characteristics of the victims." (SAP at 26.) Petitioner does not specify which of the prosecutor's remarks were objectionable, but broadly states "[t]he prosecutor repeatedly alluded to the honorable qualities of the victims, appealing to the jury's sympathy." (Petr's Am. P & A in Supp. of Traverse at 47.) This appears to be a reference to the prosecutor's description of the Margulies as having lived "good lives, fairly

successful lives," including Harry Margulies' education, military service, and electronics career that allowed him to begin to "enjoy the fruits of his life's efforts" when their lives ended in 45 minutes of terror. (RT at 3345.)

These statements about the victims were not unduly inflammatory. Even if the statements were evidence, which they were not, the Eighth Amendment would not bar the jury from considering them. "[I]f the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); *Gretzler v. Stewart*, 112 F.3d 992, 1009 (9th Cir. 1997) ("Evidence about a victim's characteristics and the impact of the murder on the victim's family is relevant and admissible at a death penalty sentencing proceeding."); *United States v. Mitchell*, 502 F.3d 931, 989 (9th Cir. 2007) (same). "Admission of such evidence will only be deemed unconstitutional if it is so unduly prejudicial that it renders the sentence fundamentally unfair." *Gretzler*, 112 F.3d at 1009. These comments about the Margulies did not cross that line.

b. Subclaim 2: Likened Petitioner to a Vicious Animal

The prosecutor began his closing argument referencing tragic stories "where a young child. . . go[es] up to a cage [at the zoo] where [a] peaceful tiger is sleeping . . . and [the child is] horribly mauled." (RT at 3339-40.) He went on to make the analogy between petitioner and the sleeping tiger, suggesting that though petitioner looked harmless in court, and was undoubtedly a wonderful boy around his family home, he was also a dangerous criminal. Petitioner contends that the prosecutor's closing argument, likening petitioner to a vicious animal, was a thinly veiled racial argument having no purpose but to inflame the passions of the jury

and, thereby constituted prejudicial misconduct. (SAP at 26.)[33]

The prosecutor clearly invoked this analogy in an attempt to undercut the defense mitigation presentation, which focused on petitioner's behavior at home and in his community and suggested he was incapable of murder. The prosecutor was trying to get the jury to shift its focus back to the man they had just convicted of a vicious double murder, rather than the seemingly benign and docile individual now sitting before them. There was no impropriety in these statements.

These statements are also far less inflammatory than those considered by the Supreme Court in *Darden v. Wainwright*. There, the prosecutor in his summation referred to the defendant as an "animal" who should not be allowed out of his cell except on a leash, and said he wished he could see the defendant "sitting here with no face, blown away by a shotgun." *Darden*, 477 U.S. at 180 & nn. 11-12. The Supreme Court held that, while improper, these statements did not deprive the defendant of a fair trial, in part because of the substantial evidence against him, but also because the trial court instructed the jury that the arguments made by counsel were not evidence. *Id*. at 181-83; *see also Donnelly*, 416 U.S. at 645 (finding an improper statement by a prosecutor during closing argument did not amount to a due process violation in part because the judge instructed the jury that the remark was not evidence); *Allen v. Woodford*, 395 F.3d 979, 998 (9th Cir. 2005) (finding prosecutorial misconduct in argument did not amount to a due process violation where the trial court gave an instruction that the attorneys' statements were not evidence and where the state presented substantial evidence of the defendant's guilt).

As in *Darden*, even if the prosecutor's analogy was improper, when

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[33] Petitioner also contends that the prosecutor's argument improperly contrasted him with a national hero, Audie Murphy. However, the prosecutor's reference to Audie Murphy was an extension of his argument that a killer does not "look" a particular way: (*See* RT at 3343 ("Can you think of a more peaceful, inoffensive-looking many than young Audie Murphy, a great soldier, but to be a great soldier, he was a great killer, but he sure didn't look the part.")

considered in the context of the entire proceedings, it did not substantially influence the jury's penalty verdict. The jury was instructed that arguments made by counsel were not evidence. (CT at 262.) And the guilt phase evidence against Kimble, which comprised all the aggravating evidence at the penalty phase, was substantial, while against this the jury was given almost nothing to consider in mitigation. Under these circumstances, the Court finds no due process violation.

c. Subclaim 3: Improperly Shifted the Burden of Proof

Petitioner contends that during closing argument, the prosecutor erroneously suggested to the jury that it was petitioner's burden to proffer mitigation that would justify life imprisonment. (SAP at 26; *see* RT at 3344, 3352.) He suggests that petitioner's right to due process was violated by this argument because it was the state's burden to prove beyond a reasonable doubt that the aggravating circumstances to support a death sentence outweighed the factors in mitigation.

Consistent with California law, the jury instructions on selecting the penalty imposed no burden of proof requirement. (RT at 3387.) Counsel for each side was accordingly entitled to argue that his opponent had not sufficiently justified the penalty he advocated. Moreover, it would not violate the Eighth Amendment to place the burden on a capital defendant of proving that the mitigating circumstances outweigh the aggravating circumstances, once the state had proved that the defendant was eligible to receive the death penalty. *Kansas v. Marsh*, 548 U.S. 163, 173 (2006); *Walton v. Arizona*, 497 U.S. 639, 649-51 (1990), *overruled on other grounds, Ring v. Arizona*, 536 U.S. 584 (2002). "So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." *Walton*, 497 U.S. at 650; *Marsh*, 548 U.S. at 170-71. There was therefore no impropriety in the prosecutor's suggestion that

petitioner did not present sufficient mitigation to justify a life sentence.

d. Subclaim 4: Improperly Urged Jury to "Double Count" the Circumstances of the Crime Under Factors (a) & (b)

The prosecution presented no evidence at the penalty phase, choosing instead to rely upon the circumstances of the crime, as presented during the guilt phase, as sufficiently aggravating to warrant a death sentence. (RT 3264-65.) After setting the stage for his closing argument with statements encouraging the jury to envision petitioner not as he appeared before them in court, but rather as the perpetrator of the violent crimes for which they found him guilty, the prosecutor argued for imposition of the death sentence, referencing the capital sentencing factors delineated in the statute and jury instructions. (RT at 3345-51.)

Petitioner contends the prosecutor misled the jury by arguing that the jury could find both statutory aggravating factors (a) and (b) from the circumstances of the crime itself. The prosecutor argued:

> The things you can consider, as the Court will instruct you are the circumstances of the crime with which you have convicted defendant, and from all of the evidence that you have, you know that it is pretty hard to visualize a more brutal, cruel way for a couple's life to be ended.
>
> . . .
>
> The entire circumstances of the crime are before you, and it's been a long trial, and I'm sure you're just about as familiar with them as I am.
>
> The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence. All that we have before you is the killing of Harry and Avone Margulies. What more violent use of force to you ever expect to see? That 45

> minutes, ladies and gentlemen, is the true identity of Eric Kimble.

(RT at 3343-3346.) Petitioner claims this argument led the jury to double-count the circumstances of the crime in aggravation, thereby impeding the statute's "necessary function of guiding and narrowing sentencing discretion," and rendering petitioner's sentence unconstitutional. (Petr's P & A in Supp. of Traverse at 117.)

The California Supreme Court held that this argument was indeed an incorrect interpretation of the role of the statutory aggravating and mitigating factors. *People v. Kimble*, 44 Cal. 3d at 505. Nevertheless, the state court found it "inconceivable that the jury would have reached a different verdict in the absence of the improper argument; accordingly, there was no prejudice." *Id.* at 506. This Court agrees. The prosecutor did not lead the jury to believe that there were other crimes in aggravation besides the one petitioner was convicted of, and he did not ask them to consider any evidence that was inadmissible. He simply pointed out the obvious: that petitioner's crimes were crimes of violence. The jury would still have understood that its role was to weigh the circumstances of those crimes against any mitigating evidence proffered by petitioner. Erroneously labeling the circumstances of the crime as also coming under factor (b)'s "criminal activity by the defendant which involved the use or attempted use of force or violence" would not have had a substantial influence on their assessment of the penalty phase evidence. *Cf. Brown v. Sanders*, 546 U.S. 212, 220 (2006) (jury's consideration of invalid sentencing factor does not undermine its sentencing determination if "one of the other sentencing factors enables the [jury] to give aggravating weight to the same facts and circumstances").

e. Subclaim 5: Improperly Urged Jury to Consider Petitioner's Courtroom Demeanor

Without citation to the record, petitioner argues that "[t]he prosecutor improperly asked the jury to consider Petitioner's courtroom demeanor in reaching its [penalty] verdict." (SAP at 27; Petr's Am. P & A in Supp. of Traverse at 52.) Petitioner suggests that the prosecutor's comments constituted improper character evidence. (Petr's Am. P & A in Supp. of Traverse at 52-53); *see generally United States v. Schuler*, 813 F.2d 978, 979 (9th Cir. 1986).

To the extent that this is a complaint about the prosecutor's comment that Kimble appeared harmless sitting in the courtroom (RT at 3341), it fails for the reasons discussed above in connection with subclaim 2. Aside from this, petitioner fails to identify any statement about his demeanor that could have materially affected the fairness of the penalty trial. Such conclusory allegations do not warrant habeas relief. *Jones v. Gomez*, 66 F.3d at 205.

f. Subclaims 6 and 7: Improperly Urged Jury to Consider Lack of Mitigation and Implied Absence of Mitigating Evidence Counted as Aggravation

Former California Penal Code § 190.3 (1977) listed ten statutory factors that the jury should consider "if relevant" in reaching its sentencing decision. In his closing argument, the prosecutor discussed each of these sentencing factors in turn, arguing that none of the mitigating factors existed, and concluding, "there is no mitigation." (RT at 3343-3352.) Petitioner claims this argument improperly implied that the absence of mitigating factors counted as aggravation, in violation of constitutional protections against arbitrary decisionmaking in capital sentencing.

Addressing the 1978 death penalty law, the California Supreme Court held that it is improper for a prosecutor to argue that the absence of mitigation amounts to aggravation. *People v. Davenport*, 41 Cal. 3d 247, 289-90 (1985). Whether or not this state law error also constitutes an Eighth Amendment violation, it is not

what the prosecutor did here. A "prosecutor properly [may argue] that there was no evidence of mental impairment or intoxication and the jury [may] consider this lack of evidence," but a "prosecutor [may] not argue . . . that under California law this lack of evidence constitute[s] a positive aggravating factor." *McDowell v. Calderon*, 107 F.3d 1351, 1364-65 (9th Cir.), *amended*, 116 F.3d 364 (9th Cir.), *vacated in part on other grounds*, 130 F.3d 833 (9th Cir. 1997) (en banc).

The prosecutor stayed within the parameters of proper argument. He repeatedly argued that there was no evidence supporting the statutory mitigating factors, and never suggested that this lack of evidence could itself be considered aggravating. (*See e.g.*, RT at 3347-3348 ("there's no suggestion to you whatever that [defendant] was under the influence of any mental or emotional disturbance.[¶] . . . There's no evidence whatsoever to suggest [the victims were participants in the defendant's homicidal conduct.] [¶] . . . I don't think the wildest imagination can suggest to you any justification or extenuation, moral or otherwise [for defendant's conduct]. [¶]. . . I think all of the evidence before you from both sides indicates that the defendant was a dominant figure, a person who could act and did act on his own, and he was surely not the type of person who you would expect to be under the domination of another person. [¶] . . . No evidence. . . that [at the time of the offense the defendant's capacity was impaired or as a result of mental disease, et cetera]. I think that does not apply.")) Contrary to petitioner's argument, the prosecutor did not contend that the absence of these mitigating factors supported a conclusion that petitioner was more deserving of a death sentence.

g. Subclaim 8: Misled Jury into Believing its Decision Should be Based on the Crime Instead of the Defendant

Petitioner claims the prosecutor misled the jury into believing that its role was to compare the facts of the murders committed by Kimble to the facts of other murders, rather than focusing on Kimble himself and asking whether death was the

appropriate punishment for him. (SAP at 27.) Petitioner points to the prosecutor's statement that "the decision you have to make about the murder, is this the type of murder that warrants the death penalty, or is this a lesser type of murder?" (RT at 3343.) And in concluding his summation, the prosecutor argued:

> You heard all of the testimony, ladies and gentlemen. . . . [I]sn't it a fair statement that as you consider aggravation and mitigation the stark thing before you is there is no mitigation? And if your decision is whether this is the type of crime for the death penalty, ladies and gentlemen, then I ask you what type would be?

(RT at 3352.)

These statements must be evaluated in context. The prosecutor introduced no additional aggravating evidence at the penalty trial, so his entire case in aggravation necessarily consisted of the facts of the crimes themselves. He led the jury through the list of statutory sentencing factors, claiming the facts of Kimble's crimes were aggravating and that none of the evidence proffered in mitigation established that any of the statutory mitigating factors applied. His focus on the aggravating nature of the circumstances of the crime was not improper argument. "The relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181 (internal quotation omitted). It is unlikely that his comments about the "type of murder" misled the jury about their duty to consider the mitigating evidence. The jury was instructed to make its decision based on "all of the evidence which has been received during any part of the trial of this case." (RT at 3385.) When the defense argued that the death penalty did not deter, and was cruel, and that Kimble was only 18 years old and had redeeming qualities as testified to by his friends and family, the prosecutor did not respond by urging the jury to pay no attention to such considerations, or by claiming the defense

arguments had nothing to do with the statutory sentencing factors. Instead, the prosecutor responded to each of these points by disputing them or contending they did not support giving Kimble a life sentence. (RT at 3369-74.) His argument did not mislead the jury about their responsibility in reaching a sentencing decision.

h. Subclaim 9: Undermined Jurors' Sense of Responsibility for Penalty Decision

Petitioner contends the prosecutor's penalty phase closing argument undermined and reduced the individual jurors' sense of responsibility for the penalty phase verdict, violating the principle laid out *Caldwell v. Mississippi*, 472 U.S. 320 (1985). (SAP at 28; Petr's Am. P & A in Supp. of Traverse at 54.)

Caldwell precludes a prosecutor from improperly diminishing capital jurors' sense of responsibility for imposing a death sentence, including inaccurately describing the jury's role under state law. *Caldwell*, 472 U.S. at 323, 328-29, 341 ("it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the defendant's death rests elsewhere"); *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). In *Caldwell*, the defense attorney's penalty phase argument acknowledged the juror's "awesome responsibility" in deciding the defendant's fate. *Caldwell*, 472 U.S. at 324. "In response, the prosecutor sought to minimize the jury's sense of the importance of its role . . . forcefully argu[ing] that the defense had done something wholly illegitimate in trying to force the jury to feel a sense of responsibility for its decision." *Id*. at 325. The prosecutor protested:

> I'm in complete disagreement with the approach the defense has taken. I don't think it's fair. . . . Now, they would have you believe that you're going to kill this man and . . . they know that your decision is *not the final decision*. My God, how unfair can you be? *Your job is reviewable.* They know it.

Id. at 325 (emphasis added).

The Supreme Court concluded that this argument suggested to the sentencing jury that it could shift its sense of responsibility to an appellate court, thereby potentially leading to the execution of a defendant "although no sentencer had ever made a determination that death was the appropriate sentence." *Id.* at 331-32. "[T]he prosecutor's argument sought to give the jury a view of its role in the capital sentencing procedure that was fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Id*. at 340 (citations omitted).

Here, in contrast, the prosecutor's allegedly misleading statement was this: "Let's show that you are in fact responsible, just jurors, and that you are doing your part within the system." (RT at 3373.) Nothing in this statement minimized the jurors' sense of personal responsibility for imposing a death sentence or misled the jurors as to their role in the sentencing process. Instead, it emphasized the importance of the jurors "doing your part within the system" by adhering to their oaths and following their instructions on choosing a penalty. The prosecutor immediately followed this plea by stating, "I don't ask you to do anything in anger or vengeance, but neither could I understand you having any sympathy or empathy for Mr. Kimble." (*Id.*) This argument recognized the jurors' power to spare Kimble's life out of sympathy, and urged them against taking that course. The argument focused on the jury's power; it did not reduce their sense of responsibility.

i. Subclaim 10: Impermissibly Argued Life Without Parole was a Harsher Penalty than Death

In his closing argument, the prosecutor asked the jury to apply the sentencing factors listed in section 190.3, and find that the mitigating factors did not justify a sentence of life without parole. In conclusion, he argued there was no mitigation that would support a sentence less than death and implored the jury "to

bring back a reasonable and just verdict of death." (RT at 3352.) Subsequently during his rebuttal, the prosecutor told the jury that "death may well not be nearly as much punishment as spending a lifetime in a cage." (RT at 3370.) He went on further to argue that, for petitioner's parents, his execution might be better than "having a son in prison for the rest of [their] natural li[ves]." (RT at 3373-74.) Petitioner argues that these comments "impermissibly argued that life without possibility of parole was a harsher punishment for petitioner and his family than death." (SAP at 28.)

In *Simmons v. Bowersox*, the Eighth Circuit addressed a claim that a prosecutor's argument that the jury should impose the death penalty for the benefit of the defendant's family violated the Eighth Amendment and the Due Process Clause. *Simmons v. Bowersox*, 235 F.3d 1124, 1135-36 (8th Cir. 2001). The Eighth Amendment claim was based on a theory that the prosecutor's comments diminished the jury's sense of responsibility in imposing the death penalty, in violation of *Caldwell*. The court rejected the suggestion that the prosecutor's argument about which sentence would most benefit the defendant's family "dilute[d] the gravity of a death sentence or place[d] the responsibility of imposing a capital sentence in hands other than those of the jurors." *Id.* at 1136.

With respect to the due process element of the claim, however, the Eighth Circuit condemned the prosecutor's argument: "There is no legal or ethical justification for imposing the death penalty on this basis and it is not a proper factor to be considered by the jury, for it does not reflect the properly considered circumstances of the crime or the character of the individual." *Id.* at 1137 (citations and internal quotation marks omitted). While the idea that a death sentence is preferable to life in prison might appeal to some, as a statement about the legal status of the two alternative punishments it runs contrary to federal and state caselaw. For example, the Supreme Court has squarely rejected the argument that the individualized sentencing determination required for imposition of the

death penalty should be extended to prisoners serving life without parole. *Harmelin v. Michigan*, 501 U.S. 957, 994–96 (1991); *see also Coleman v. McCormick*, 874 F.2d 1280, 1288 (9th Cir. 1989) ("The finality and severity of a death sentence makes it qualitatively different from all other forms of punishment."). The entire edifice of capital sentencing law is built on the assumption that a death sentence is society's most severe punishment.

Nevertheless, in the context of this penalty phase, the prosecutor's comments did not so mislead the jurors as to render petitioner's trial fundamentally unfair. "It was an isolated moment[]" in a proceeding "in which the jury was clearly instructed that the statements made by attorneys during closing argument were not evidence to be considered in deciding the facts." *Duckett v. Godinez*, 67 F.3d 734, 743 (9th Cir. 1995). There was never any suggestion that Kimble preferred death over life in prison, and there was no ambiguity about which side sought which penalty. The prosecutor made his first questionable comment after noting that "there is nothing pleasant about death in the California gas chamber," and then observing that "depending on the nature of your religious convictions, . . . death may well not be nearly as much punishment as spending a lifetime in a cage." (RT at 3370.) This suggestion, which acknowledged that others might view the matter differently, led directly to his next point: "I don't ask you to bring back the just verdict of death to punish Eric Kimble, but to remove him from ever harming another citizen," since "even behind bars he has to live with people." (RT at 3371.) Even if this argument and the prosecutor's speculation that a life sentence would be "far less kind" to Kimble's parents improperly focused on matters that had nothing to do with the statutory sentencing factors, they did not have a substantial and injurious effect on the jury's penalty deliberations. The jurors would hardly have believed that Kimble's parents testified on his behalf at the penalty phase about his redeeming qualities while secretly harboring a desire to put the matter behind them by seeing their son executed. Considering the entirety

of defense counsel's and the prosecutor's arguments, the jurors surely understood that the defense was asking them to spare Kimble's life, not to punish him more severely by allowing him to live.

j. Subclaim 11: Improperly Urged Jury to Impose Death Based on Impermissible Standard

In his closing argument, the prosecutor stated: "Mr. Walton will probably ask you for mercy when he gets up. I suggest to you that you measure mercy by the mercy that the defendant himself exhibited and demonstrated." (RT at 3345.) Petitioner argues that this was improper because it "urged the jury to impose death based on impermissible standards." (SAP at 28.) On the contrary, it was entirely legitimate for the prosecutor to urge the jurors to focus on the circumstances of the crimes and not be swayed by defense appeals to mercy. "Both prosecuting attorneys and defense attorneys are allowed reasonably wide latitude in closing arguments and may strike hard blows based on the evidence . . . ." *United States v. Vaccaro*, 816 F.2d 443, 451 (9th Cir. 1987), *abrogated on other grounds by Huddleston v. United States*, 485 U.S. 681 (1988).

3. Claim 7(F): Guilt Phase Closing Argument

Claim 7(F) alleges that the prosecutor frequently misrepresented the evidence against petitioner and urged the jury to find him guilty based on constitutionally prohibited factors.

a. Subclaims 1 and 3(a): Injected Racial Animus and Hypothesized Petitioner was Motivated by Revenge

Petitioner objects to the prosecutor's "suggest[ion] to the jury that Petitioner had been slighted at the victims' stereo store and had thereupon concocted a scheme of cruel and sadistic revenge upon the Margulies." (SAP at 28-29.) He argues that this theory was unsupported by any evidence in the record and was "clearly intended to inject racial animus into the jury's deliberations." (SAP at 28.)

It is improper for a prosecutor to argue facts not in evidence. *Berger v.*

United States, 295 U.S. 78 (1935); *Donnelly*, 416 U.S. at 645. In evaluating such a claim, the court must determine whether the argument was based on a permissible inference from evidence at trial or was instead a reference to extra-record facts. *United States v. Nash*, 115 F.3d 1431, 1439 (9th Cir. 1997); *Duckett*, 67 F.3d at 742. The court must "consider the probable effect the prosecutor's [statement] would have on the jury's ability to judge the evidence fairly." *Young*, 470 U.S. at 12.

Petitioner objects to the following portion of the prosecutor's argument:

> I think that we have to say for whatever reason he had it in for Mr. and Mrs. Margulies, and how could he get more complete, more sadistic revenge upon anyone than by what he did?
>
> . . . I would suggest it was revenge. I suggest that the revenge was connected not only to those two persons, but also to the stereo shop. In some manner he wanted to hurt both. Maybe somebody hurt his feelings while he was shopping in the stereo store. Maybe any number of things, but I don't believe you can find sufficient motive in the few stereo items, albeit they were expensive items, to do what he did.
>
> How did he know about the stereo store and the Margulies home? Well, if whatever set him off was generated at the stereo store, it wouldn't be difficult. If his feelings were hurt while he was shopping or playing with the equipment or whatever by any person in the store he could very easily identify the owners. I guess when you see a big Lincoln driving off you can figure that's who owns it. It would be easy enough to follow him up to his house and get the connection.
>
> . . .
>
> The only reason he came back that day is because inside him he had a burning hatred of the Margulies

> family and probably their stereo store, to run that risk of going back to the same place and doing what you know he did.

(RT 3004-07; *see also* RT 3035 ("What more cruel, sadistic revenge, for whatever motive, could be inflicted on a man . . . .").)

There was no evidence that petitioner had ever been to the Margulies' stereo store before these crimes, had ever been slighted or insulted by Harold or Avone Margulies, or had even met them. In his rebuttal, defense counsel labeled the prosecutor's theory "outrageous speculation" and reminded the jurors that there was no evidence to support it. (RT at 3076-78.)

The prosecutor's theory was speculative, as he essentially admitted when he said "maybe any number of things." Nevertheless, it was reasonable to infer from the evidence that Kimble knew about the stereo store and knew where the Margulies lived. Otherwise, he would have no reason to go to the Margulies' house in the first place. And if he knew about the store and where its owner lived, then it is reasonable to infer that he had previously visited the store. Kimble was interested in stereo equipment, so it would have been natural to enter the store if he visited it while it was open. The theory about following Harry Margulies home from the store also had no direct evidence, but it was a reasonable explanation of how Kimble could have learned where the Margulies lived. As the prosecutor observed, if all Kimble wanted was some stereo equipment, "he surely could have done it a lot easier, a lot faster, than committing the most aggravated crime that he did in the Margulies home." (RT at 3004.)

The manner in which the crimes were committed also suggested some motive beyond purely obtaining the stereo store keys. If the keys were the sole object of the burglary, then Kimble could have immediately shot and killed the Margulies and made off with the keys. Instead, he blindfolded and gagged them and bound their hands behind their backs. Scrapes and bruises on Harry

Margulies' wrists indicated that he had struggled to free himself from the handcuffs, or that his hands had been pulled forcibly from behind. (RT at 1470-78, 1853-55.) Thus, it was reasonable to infer that for some reason, Kimble kept both of the Margulies alive for a time before killing them.

The prosecutor went beyond reasonable inference to rank speculation when he suggested that "maybe somebody hurt [Kimble's] feelings while he was shopping in the stereo store," but this theory was not so outrageous as to have a substantial and injurious effect on the guilt phase verdict. The jury was told that the prosecutor's statements were not evidence, the prosecutor said "maybe" twice in presenting this idea, and defense counsel reminded the jury that the prosecutor's theory had no basis in the evidence and that many unanswered questions surrounded the crimes. The evidence that Kimble entered the Margulies' house and committed the murders was strong: his fingerprints were in the house and a neighbor saw him hiding in the bushes next to the house with a black briefcase a few hours before the break-in. While the defense theory of the case relied on reasonable doubt, its principle focus (probably in view of the fingerprint evidence) was a theory that even if Kimble did enter the Margulies house, he had confederates who participated in the crimes. Under all of these circumstances, the prosecutor's statements about "sadistic revenge" did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 180.

b. Subclaim 2: Improperly Claimed Forensic Evidence Implicated Petitioner and Conclusively Established Manner in which Killings Occurred

In subclaim 2, petitioner alleges:

> The prosecution claimed that the chemical evidence presented at trial conclusively implicated Petitioner and that . . . forensic evidence presented by the prosecution conclusively established the manner in which the killings

> occurred. In fact the evidence was meaningless and/or false and provided no basis for the conclusions drawn by the prosecution. Indeed the prosecution was obligated to disclose to the defense the invalidity of that evidence and its failure to do so as well as the utilization of that evidence in argument was improper and prejudicial.

(SAP at 29.) This is petitioner's entire presentation of this claim. He did not seek to develop it further in his motion for evidentiary hearing. To the extent that it refers to the forensic evidence discussed in connection with Claim 10(D), that claim has been withdrawn. This conclusory allegation does not warrant habeas relief.

c. Subclaims 3(b)-(q): Improperly Argued Matters Not in Evidence[34]

i. Asked Jury to Recall the Weather on Date of Crimes

A neighbor of the Margulies, Ted Dietlin, testified that on August 12, 1978, at about 1:30 p.m., he saw petitioner wearing a blue jogging suit with the hood over his head carrying a black briefcase. Referencing this testimony as part of his summary of the evidence placing Kimble at the scene of the murders, the prosecutor contended that it was "unusual, bizarre" that Kimble was wearing such a suit in August, since "as most of you who survived the summer of '78 will recall [it was] not a particularly cold day . . . ." (RT at 3005.) Although defense counsel did not object, petitioner claims this comment rendered his trial unfair because no evidence was introduced regarding the temperature on that date. (SAP at 29.)

"Counsel are entitled to reasonable latitude in closing argument, including references . . . to matters within the common knowledge of all reasonable people."

[34] Subclaims (d), (e) and (i) relate to the rape charge and are discussed later in connection with Claim 13(C), which challenges the sufficiency of the evidence of rape.

United States v. Candelaria, 704 F.2d 1129, 1132 (9th Cir. 1983). It probably was warm in the Hollywood Hills in the middle of the day in August. In any event, what mattered most was simply that Kimble was seen at the Margulies' house. That itself was suspicious since he did not live in the area and he told the police he had never been there. The prosecutor's reference to the fact that it was probably a warm day, and the resulting implication that it was suspicious that Kimble seemed to be hiding his face, did not add significantly to the evidence implicating Kimble in the crimes. It did not render the trial unfair.

ii. Claimed Petitioner's Hairstyle Change After Arrest Showed Consciousness of Guilt

In his summation, the prosecutor argued that petitioner changed his appearance after his arrest and before the lineup because he did not want to be identified by witnesses. Using photographs that were introduced into evidence, the prosecutor pointed out that petitioner's hairstyle had changed significantly between his arrest on August 16, 1978, and the lineup on September 11, 1978. He argued:

> The defendant while facing charges of double murder while being held in custody, knowing that he was facing . . . [a] probable death penalty, elected to change his hairdo to a style which Mr. Winfrey has testified he had never seen him use before, . . . a medium Afro parted in the middle.
>
> I think you may decide from the change that Mr. Kimble had some interest in not being identified by witnesses. I think you will attach to that a consciousness of guilt. If Mr. Kimble had not been seen by Ted Dietlin, Mrs. Shane, and the other folks as he ran down the hill, if he knew there were no witnesses that could identify him, why change anything? I think as you examine these photographs, you will find some significance to that.

(RT 3009-10.)

Petitioner claims this argument was unfair because the man seen in the

vicinity of the Margulies' house on the afternoon of the killings was wearing a sweatshirt with the hood covering his head, so a change in hairstyle could not have affected the identification. (SAP at 29-30.) This assumes, however, that Kimble was sure no one saw his hair on the date of the crimes. It was reasonable to infer from the change in hairstyle that Kimble was uncertain how visible he was to witnesses and wanted to reduce the chance of identification. *See United States v. Perkins*, 937 F.2d 1397, 1403 (9th Cir. 1991) ("[W]hen a defendant is known shortly after the commission of a crime to have cut his hair, shaved off facial hair, or changed his hair color, the jury can consider this as evidence of consciousness of guilt and consider it in light of the other evidence in deciding whether the defendant is guilty."); *United States v. McKinley*, 485 F.2d 1059, 1061 (D.C. Cir. 1973) ("Another inference available from a change in appearance by someone who has been called to appear in a line-up is, simply, that the change reflects an awareness of guilt and fear of identification."). The prosecutor's argument was not improper.

iii. Claimed Briefcase Found in Victims' House Belonged to Petitioner

The prosecutor referred to the briefcase found in the kitchen of the Margulies' as "the defendant's briefcase." (*See, e.g.*, RT at 3016 (bullet casings retrieved from crime scene were "in fact .45 cartridges made to fit the same weapon as the large box of cartridges found in the defendant's briefcase in the kitchen").) Petitioner contends this description was improper because ownership of the briefcase was disputed at trial. But a prosecutor is entitled to argue reasonable inferences from the evidence. *Menendez v. Terhune*, 422 F.3d 1012, 1037 (9th Cir. 2005). Witnesses Ted Dietlin and Mildred Shane saw Kimble with a similar black briefcase on the day of the crimes, and Ortez Winfrey testified that he frequently saw Kimble carrying a similar briefcase. For its part, the defense introduced evidence implying that the briefcase belonged to Winfrey. Under these

circumstances, it was not improper for the prosecutor to argue that the briefcase was Kimble's.

iv. Claimed Petitioner Tethered Harry Margulies to a Rod in the Closet

William Margulies testified that his mother kept shipping boxes in the closet of the master bedroom. (RT at 1570.) About a week after the murders, he noticed that the boxes were crushed and appeared to be covered with blood. (RT at 1571-72.) No other evidence was introduced about these boxes. The police detective who described the homicide scene never mentioned them, even though he described in great detail blood stains found elsewhere in the house.

Petitioner argues that the prosecutor "improperly claimed that, for cruel and sadistic revenge, Petitioner had tethered Mr. Margulies to a rod in the closet while he sexually assaulted Mrs. Margulies within Mr. Margulies' hearing, to explain the crushed and bloody boxes in the closet." (SAP at 30 (citing RT at 3035).) Petitioner claims this was error because it was contradicted by the medical examiner's testimony that the injuries to Mr. Margulies's wrists from the handcuffs were bruises, without any external bleeding. (Petr's Am. P & A in Supp. of Traverse at 62-63; *see* RT at 1471-73.)

Contrary to petitioner's claim, the record reflects that the prosecutor never argued that Harry Margulies bled onto the boxes in the closet. The prosecutor never even referred to the boxes in his argument. He did argue that Kimble handcuffed Mr. Margulies and used the bicycle chain and lock to immobilize him by tethering the handcuffs either to "part of his bed, over the hanger ring in the closet, or any number of other things you can find in the house." The prosecutor theorized that Kimble did this to inflict "sadistic revenge" on Mr. Margulies, who was "put in his own bedroom closet, or his own bedroom, unable to see, but able to

hear while his wife of 20 years is being raped." (RT at 3034-35.)[35] As discussed above in connection with Claim 7(F)(1), the prosecutor's "sadistic revenge" theory was a reasonable inference from the evidence. The prosecutor did not misrepresent the medical evidence in presenting this theory to the jury.

v. Misleading Argument about Ortez Winfrey's Testimony

Ortez Winfrey gave a written statement to the police. The statement was not introduced into evidence, but defense counsel used it on cross-examination to impeach Winfrey and demonstrate inconsistencies in his testimony. (RT at 2286-2300.) Defending Winfrey's veracity, the prosecutor told the jurors they would be instructed that if they found a witness to be false in a material matter, they "may disregard the rest of his testimony unless [they had] a reason to believe other parts of his testimony [were] true." (RT at 3043.) The jury should find Winfrey credible, he continued, because his testimony was substantially similar to the contemporaneous statements he gave to the police, and also consistent with other evidence in the case. (RT at 3043, 3059.) The fact that he lied about graduating from high school was not material to any issue at trial, and there are "certain areas when many people tend to obscure the truth," and "one is education." (RT at 3061-62.)

Petitioner contends that the prosecutor's argument falsely characterized the evidence because Winfrey's trial testimony was inconsistent with his statement to police and with the evidence presented at trial. (SAP at 31-32.) On cross-examination, defense counsel successfully pointed to some inconsistencies between Winfrey's trial testimony and his prior statement to the police, such as

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[35] At another point in the trial, at a hearing outside the presence of the jury on a defense motion for acquittal, the prosecutor argued to the judge that the bicycle chain "was clearly used to hook Harry Margulies up in the Master bedroom while Mrs. Margulies was being raped," and mentioned the crushed boxes in the closet and the fact that the bicycle chain had blood on it. (RT at 2824.) The jury never heard this argument, however.

when Kimble first appeared at Winfrey's house with the keys, how many times the two men visited the stereo store, whether Winfrey went into the store with Kimble on the first visit, and when Winfrey first realized that he was stealing the stereo equipment. (RT at 2291-2300, 2330-34.) Nevertheless, the prosecutor was entitled to argue, as he did, that the evidence generally corroborated Winfrey's testimony. This was a reasonable interpretation of the evidence.

Petitioner also claims the prosecutor misrepresented the jury instruction regarding witnesses found to be false in a portion of their testimony. He asserts that "the correct version of the applicable instruction, CALJIC 2.21, indicates that the jury *must* reject the witness's entire testimony unless the jury shall believe the probability of truth favors the witness's testimony in other particulars." (SAP at 31-32.) This is incorrect. The trial court properly instructed the jury that "you *may* reject the whole testimony of a witness who willfully has testified falsely as to a material point . . . ." (RT at 3207-3208 (emphasis added)); *People v. Beardslee,* 53 Cal. 3d 68, 95 (1991) ("The instruction at no point requires the jury to reject any testimony; it simply states circumstances under which it may do so.").

The prosecutor committed no misconduct discussing Winfrey's testimony.

vi. Argued Evidence Outside the Record Supported Winfrey

In rebuttal, the prosecutor responded to defense counsel's contention that Ortez Winfrey should have been investigated for the murders. (RT at 3155-58.) He discussed the timeline of the police investigation, and Detective Hodel's decision to change his focus from the Winfrey brothers to petitioner:

> If Mr. Walton had chose to make his career as a police officer investigator, he might well have investigated the case in a different manner from Detective Hodel. . . . [¶] Why not ask Ortez about the murders? Detective Hodel indicated from his notes that the suspect denies homicides and for various reasons involved in his

> investigation he was satisfied with that. . . . [¶] Hodel believed both Ortez and Orthy to be murderers at the time of the execution of the search warrant, no question that he believed that, and properly so. . . . [¶] But after talking to Ortez and talking to Orthy, after talking to William Grant III, after talking to Eric Kimble, they changed their minds, and I suggest to you that it would be grossly improper for you to speculate why they changed their minds, because after all, Ortez, Orthy, William Grant are surely not on trial today.

(RT at 3155-58.) Petitioner contends that this argument improperly implied that "there was evidence outside the record that supported the prosecution witness Ortez Winfrey, and improperly argued the personal belief of law enforcement officers in Ortez Winfrey's innocence." (SAP at 33.)

At trial, the defense put the investigation of the Winfrey brothers at issue. The prosecutor responded, as he was entitled to do, by suggesting Detective Hodel had "various reasons" for his actions that the jurors should not speculate about, and arguing that the Winfrey brothers were not on trial so the jury should focus on the evidence of Kimble's guilt. (RT at 3157-58.) This argument was not a comment on Winfrey's truthfulness but rather was offered to explain Hodel's actions in eliminating Winfrey as a potential suspect. The prosecutor did not argue, and Detective Hodel did not testify, that he believed Winfrey was a truthful witness, but simply stated that in the course of the investigation, he was eliminated as a suspect in the murders. For this reason and those discussed in connection with Claim 7(H) below, the prosecutor's closing argument was not improper.

vii. Argued Alarm was Set Off Within 20 Minutes of Avone Margulies' Shooting

The prosecutor argued that Avone Margulies set off the alarm after being shot, and that "the fact that the alarm was set off within 20 minutes of Avone being shot . . . will have considerable significance to you as you consider some of the

circumstantial evidence that was found in the house." (RT at 3022.) Petitioner complains there was no evidence about when she was shot in relation to the alarm being triggered. (SAP at 33-34.) But the medical examiner testified that because of the way the bullet passed through Avone Margulies' body, she could have survived for 20 or 30 minutes, bleeding and continuing to move around the house. (RT at 1495.) The prosecutor's argument was supported by the evidence.

viii. Discussed Tests About Reliability of Memory Which Were Not Introduced at Trial

Petitioner suggests that the prosecutor committed prejudicial misconduct in discussing "tests about the reliability of memory (RT 3147-48) which were not introduced at trial." (SAP at 34; Petr's Am. P & A in Support of Traverse at 67 ("The prosecutor improperly argued matters of expert opinion not in evidence.").) Rather than citing scientific tests or expert opinions, however, the prosecutor merely recounted an anecdote about the unreliability of memory, a matter of common experience, to explain the standard jury instruction on discrepancies among witnesses' observations. The prosecutor stated:

> Witnesses, as the Court will instruct you, seeing the same thing, often relate it differently. I'm sure you have all heard of various little tricks that are used in some schools. I remember back at Tulane, the law students had one in the cafeteria where everyone is sitting down eating lunch, one guy comes running through shouting, another fellow comes through firing blanks at him, the guy falls down and has some red stuff that falls all over him. Then they scoop him all up, get rid of him, and pass out questionnaires to all the folks sitting eating, and have a big ha-ha about how much the observations differ.

(RT at 3147-48.) These comments were similar to defense counsel's comments on the same subject:

> I know that you have all heard about two people, no two people seeing the same thing in the same way, and this is some evidence of that.
>
> Is there any doubt in your mind that if some startling event occurred right in front of your eyes right now and you were then asked to write what happened, you would probably get 14 different versions?

(RT at 3129.) In view of this agreement, even if the prosecutor's reference to the "little trick . . . at Tulane," was improper, it could not have affected the jury's verdict.

ix. Described How Absent Witness Would Testify

Petitioner complains that although the police did not interview Berta Rosales (the Margulies' live-in housekeeper), and she was not produced at trial, the prosecutor improperly described how she would testify. (SAP at 34.)

The prosecutor's comments must be evaluated in context. In his closing argument, defense counsel attacked the adequacy of the police investigation, listing twelve questions he said were raised by the evidence but left unanswered. (RT at 3079-3086.) The common thread of these questions was that the police focused too quickly on the assumption that Kimble acted alone and failed to investigate evidence that others (such as the Winfrey brothers) committed the crimes. One of the questions was "Why in the world would the police not interview [the Margulies' live-in housekeeper] Berta Rosales, never seek her out?" (RT at 3082.)

In rebuttal, the prosecutor responded, "We could surely go into next Christmas if we tried to answer all the questions that [defense counsel] raised. He's asked you to second guess the homicide investigation." (RT at 3152.) He continued:

> Why not interview Berta Rosalez? Why not bring her to court? Well, the testimony was that Berta worked for [the Margulies' daughter] Pat for about six months after

> this. There was testimony, I believe, that one of the officers interviewed her on the telephone.
>
> Should we bring her bring her back from El Salvador or wherever it is she is right now, to state, gee, I don't know nothing, fellows, but thanks for the trip? I don't think you'd appreciate the expenditure of your tax money that way. That's rank speculation.
>
> I think you can have confidence in the police that if Berta had something to tell us she'd tell us. She was not a fugitive. She stayed working for Pat for several months after the killing. Focus. Focus on the material things in this case.

(RT at 3152.) Officer Hodel, the primary investigating officer at trial, testified that he did not interview Berta Rosales. (RT at 2705). The prosecutor's reference to a possible telephone interview of the witness appears to have been erroneous.

The prosecutor's comments constitute a description of Rosales' testimony only in the sense that he implied that she had nothing to add to the evidence from other sources. This was a reasonable interpretation of the trial evidence, since there was testimony that Rosales was not present at the Margulies' house on the afternoon of the murders. And even if Rosales could have testified about her observations of possible prowlers at the house on other occasions, the prosecutor reasonably argued that the jury should instead focus on what happened on August 12, 1978, and not "waste your time speculating on . . . who the trespassers were on prior occasions." (RT at 3152.) Moreover, Pat Margulies had testified that Rosales, while reporting that she saw someone walking around outside the house a couple of nights during the week preceding the murders, said she could not see the person's face. (RT at 1753.) This supported the prosecutor's contention that Rosales would not have been able to offer probative testimony. Thus, these portions of the prosecutor's argument were not improper. *Menendez*, 422 F.3d at

1037 (prosecutor may argue reasonable inferences from evidence).

Assuming that the prosecutor's comments that the jurors should have "confidence in the police" and appreciate that the government was not wasting their tax dollars by tracking down Berta Rosales exceeded the bounds of permissible argument, the effect of these statements on the jury must be evaluated within their context as an "invited reply" to defense counsel's attack on the quality of the police investigation. *See Young*, 470 U.S. at 14-20; *United States v. Sayetsitty*, 107 F.3d 1405, 1409 (9th Cir. 1997); *United States v. McChristian*, 47 F.3d 1499, 1508 (9th Cir. 1995). The jury knew that counsel's arguments were not evidence. For the reasons previously discussed in connection with Claim 10(D), even if the jury believed that Kimble received assistance getting to and from the Margulies' house, all the evidence pointed to him alone as the intruder. No reasonable juror evaluating the evidence at trial would have concluded that Berta Rosales was the key to resolving the dozen unanswered questions posed by the defense. The prosecutor's argument therefore did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 638.

x. Argued Failure to Produce Charles Strauss was Justified Because he had Nothing to Add

Defense counsel's ninth question in his argument challenging the validity of the investigation of the Margulies' murders was, "where was [eyewitness] Charles Strauss?" He argued that police reports indicated that an officer had interviewed Strauss in the neighborhood, and that Strauss stated "he saw a black fellow walking down the street at about 1:30 that afternoon." Nevertheless, Detective Hodel never spoke to Strauss to determine what he saw and whether it was consistent with the testimony of trial witnesses Ted Dietlin and Mildred Shane. Defense counsel suggested that the prosecution should have called Strauss to testify. (RT at 3084-85.) The prosecutor responded:

> Why don't we bring in Charles Strauss? Why should we bring in Charles Strauss. I'm sure he's a very nice gentleman. What does [defense counsel] feel Mr. Strauss could give to you? Any person who can be identified is available to the defense. They can write subpoenas just like we can. If Mr. Strauss had something to say that would help you in your decision of the case and particularly if it would help the defendant, he could be brought in as other witnesses were brought in by the defendant. If I felt Mr. Strauss had something that would help you I'd bring him in, but either side can bring witnesses in. The fact that neither side did should satisfy you that Mr. Strauss' testimony, whatever that may be, is not necessary nor helpful to your deliberations by either the defense evaluation or the prosecution's.

(RT at 3155.)

Petitioner challenges the prosecutor's contention that Strauss had nothing to add to the case. (SAP at 34.) But his argument was a fair response to defense's counsel's question. "It is not improper for a prosecutor to note that the defendant has the same subpoena powers as the government, particularly when done in response to a defendant's argument about the prosecutor's failure to call a specific witness." *United States v. Hernandez*, 145 F.3d 1433, 1439 (11th Cir. 1998) (citation and internal quotation marks omitted); *accord United States v. Williams*, 990 F.2d 507, 510 (9th Cir. 1993).

xi. Discussed His Own Military Training

Defense counsel noted that although Harry Margulies was 61 years old, he lived a youthful lifestyle and was "passing himself off as 51." (RT at 3113-14.) He was a strong man with a temper who still sometimes got into physical fights with his 20 year-old son. Thus, counsel argued, it was unlikely that "one teen-age black boy [was] going to walk into that house and subdue Mr. and Mrs. Margulies .

. . without any apparent fight from Mr. Margulies." (RT at 3115.) Rather, counsel contended, there must have been multiple armed assailants. (RT at 3116.)

The prosecutor responded:

> Mr. Margulies was about four years older than I am, about two inches shorter, about 55 pounds lighter, and I've had the advantage of considerable unarmed offense training, almost three years of military reserve and active, but if I were to take on this defendant — [objection[36]] — without any weapons and you bet on me you would be throwing your money away. I guarantee you . . . if he comes to my front door and puts this [gun] into my face . . . I wouldn't be that kind of foolish, particularly with your wife around . . . No. You're going to go along with the program and hope for a break. Whatever advantage this tiger, Harry Margulies, may have had, one of these will change it. One of these will do it. . . . It would be surprising to me, and what I would consider very foolish, if Harry Margulies decided to fight it out with that .45 and that spindly 18-year old kid.

(RT at 3182-83.)

Petitioner claims that the prosecutor improperly referred to evidence outside the record by mentioning his military training and claiming that despite this advantage, neither he nor Mr. Margulies could have successfully resisted petitioner. (SAP at 35.) This was legitimate argument based on "matters within the common knowledge of all reasonable people" — that strength and fighting ability are no match for a loaded gun — and as such it was permissible in the prosecutor's summation. *Candelaria*, 704 F.2d at 1132. The prosecutor's brief reference to his own military background was accompanied by the trial judge's simultaneous reminder to the jury that it was just argument, a point later reinforced

[36] Defense counsel objected to "these personal injections," but the trial court responded, "It is argument."

by the standard instructions that statements made by the attorneys during the trial are not evidence, and that the jury must decide all questions of fact "from the evidence received in the trial and not from any other source." (RT at 3200-01.) This argument did not deprive petitioner of a fair trial.

xii. Told Jury Why he Had to Obtain a New Exemplar of Petitioner's Fingerprints

Defense counsel argued during his summation:

> Robert Sexton was one of those who was at the scene lifting prints, and at that time did not [have] sufficient experience to qualify as an examiner. At some point in the two-year interim he has . . . been promoted so now he is permitted to examine and compare and come to court . . . But Robert Sexton testified that he made his first comparisons in this case on November 12th of 1980, which is 27 months to the day after the Margulies couple was killed. 27 months to the day on a case of this magnitude a fingerprint man is finally gearing up.
>
> And when he testified he said he was working from a Kimble exemplar which he had taken that very day in the courtroom, and that very day happened to be November 20th, almost a month ago, and both Garcia and Sexton sit up here and with the unaided naked eye hold an exemplar here, an exemplar there, and look at them for a few moments and say, "In my opinion, those exemplars were made by the same person."
>
> You've got to wonder what in the name of God is going on when experts do that kind of horseback evaluation, when 2-1/2 years almost after the crime the prosecution is trying to get his fingerprint evidence together. . . .

(RT at 3134-35.)

In rebuttal, the prosecutor countered,

> When we take an exemplar of a person and use it for testimony in court, you have to have a foundation, you have to bring an officer in who says, "Yes, I did that."
>
> Now, I'm sure that when Mr. Kimble was arrested, that he was fingerprinted; in fact I think there was testimony to that effect, but for whatever reason we can't find the officer that fingerprinted him, or the officer can't say, "Gee whiz, that's 2-1/2 years ago now. I really can't remember. It might have been him. It's got his name on it, but I can't testify under oath," then obviously we have got to scurry around and get a new exemplar.
>
> . . . Counsel says it's inexcusable for Sexton to compare the prints after 27 months. It may be inexcusable after 27 months when we get to this trial, but there's very good reasons for that happening and I'm sure you will not consider that.

(RT at 3193-95.)

Petitioner objects to the prosecutor explaining his reason for obtaining a new fingerprint exemplar from petitioner. (SAP at 35.) The Court finds that the prosecutor's comments were a fair response to defense's counsel's argument. In any event, the remarks to which petitioner objects were not of sufficient significance to render petitioner's trial fundamentally unfair. The prosecutor did not address any material issues that were not already within the jury's knowledge. Although the prosecutor provided a first-hand account of the reason he obtained a new exemplar from petitioner, this information was not relevant to petitioner's guilt or innocence. The prosecutor's explanation had no effect on the verdict.

. xiii. Argued Petitioner Destroyed Evidence

A major defense theme throughout trial was that Ortez Winfrey was the mastermind behind the crimes. Among other things, at the time of his arrest, Winfrey had most of the stolen stereo equipment in his house, as well as a light blue hooded sweatshirt fitting the description of the clothing worn by the young man that Mrs. Shane and Mr. Dietlin saw on the day of the crimes.

In his argument, the prosecutor acknowledged that Winfrey had possession of "the lion's share" of the stolen stereo merchandise, had used it, and had not attempted to hide it. (RT at 3044, 3166.) However, the prosecutor suggested that, rather than implicating Winfrey in the murders, these facts showed he "was in it for the stereo equipment." (RT at 3166.) "That was his motive for the caper. He was not concerned about using his car in the stereo burglary with his license registered to him. He was not concerned about having that stereo equipment dropped off at a friend's house until it cooled. He brought it right in his house, put it right in his bedroom, played with it." (RT at 3166-67.) In contrast, the prosecutor noted, Kimble stored his portion of the stolen stereo equipment at a neighbor's before bringing it to his own house. (RT at 3046.) Moreover, "Mr. Winfrey had a number of sweatshirts with hoods on them, including one blue and one black one," while Kimble's home did not. (RT at 3046.)

Petitioner claims this argument misrepresented the record by implying that petitioner destroyed evidence, showing consciousness of guilt. (SAP at 35-36.) But the argument as a whole was a legitimate hypothesis about why more incriminating evidence was recovered from Winfrey's house than Kimble's house. Petitioner identifies only one misstatement. The prosecutor claimed "the Kimble home did not have a blue sweatshirt with a hood, although Mr. Winfrey has told us that when they play basketball he had seen Mr. Kimble in such an outfit a number of times." (RT at 3046.) If "such an outfit" referred simply to hooded sweatshirts in general, then this was a correct summary of Winfrey's testimony. But if "such

an outfit" meant *blue* sweatshirts, then it misstated Winfrey's testimony. Winfrey had testified as follows:

> Q Incidentally, those 15 sweat jackets [of many different colors] that you had, was that in conjunction with your basketball?
>
> A Yes.
>
> Q And did you ever see Mr. Kimble in such a jacket?
>
> A Of that type?
>
> Q Yes.
>
> A Yes.

(RT at 2383.)

The jury probably understood the prosecutor to be arguing that Winfrey had testified that Kimble had a blue sweatshirt, not just a sweatshirt of any color, since this would have been more incriminating. Nevertheless, the jury was instructed not to consider counsel's arguments as evidence. Even if the prosecutor's recollection of Winfrey's testimony led the jury to mistakenly conclude there was evidence that Kimble destroyed his blue sweatshirt in an effort to avoid detection, this would not have added significantly to the strong independent evidence placing Kimble inside the Margulies house on the day of the murders. Therefore this mistake did not have a substantial and injurious effect on the jury's verdict.

d. Subclaim 4: Improper Appeal to Emotions

Although prosecutors are afforded wide latitude in closing argument, they should avoid appeals to the passions and prejudice of the jury that are irrelevant to the issues at trial. *Dee Viereck v. United States*, 318 U.S. 236, 247 (1943); *United States v. Leon-Reyes*, 177 F.3d 816, 823 (9th Cir. 1999). Arguments urging a jury to enter a verdict on the basis of emotion rather than fact create a risk "that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence." *United States v. Weatherspoon*, 410 F.3d 1142, 1150 (9th Cir. 2005); *see also Berger*, 295 U.S. at 85 ("A prejudicial argument by the prosecutor poses a

serious threat to a fair trial. Not only does it undermine the jury's impartiality, but it also disregards the prosecutor's responsibility as a public officer."). In this habeas proceeding, however, the Court's role is not to judge the prosecutor but to determine whether petitioner received a fair trial. The standard of review applicable to petitioner's claims is therefore "the narrow one of due process, and not the broad exercise of supervisory power." *Donnelly*, 416 U.S. at 642. Only if the prosecutor's appeals to emotion "so infected the trial with unfairness as to make the resulting conviction a denial of due process" is habeas relief warranted. *Id.* at 643; *see also Thomas v. Hubbard*, 273 F.3d 1164, 1181 (9th Cir. 2001) ("Because a *Donnelly* violation always has 'a substantial and injurious effect' on the proceedings, a *Donnelly* violation necessarily meets the requirements of *Brecht*.").

Petitioner cites four instances at the guilt phase of the trial in which the prosecutor allegedly exceeded the bounds of appropriate argument by appealing to jurors' passions: (1) urging them to imagine the crimes from the victims' perspective; (2) encouraging them to experiment by considering their own ability to navigate their homes while blindfolded; (3) appealing to prejudice by claiming Kimble had no difficulty eating a meal shortly after committing murder; and (4) asking the jurors to imagine trying to explain to the Margulies' children that there was no confrontation between their parents and Kimble. (SAP at 36-37.) The first two instances were not improper argument, but the third and fourth were.

In discussing his theory of a revenge motive for the killings, the prosecutor said, "Think of the terror, the horror to those people not being able to see, not being able to shout out or talk or reason or complain, and of Mr. Margulies while his wife was being violated to have to be there completely disabled." (RT at 3004.) During rebuttal, he stated: "What happened to the Margulies is just about as horrible as anything that could happen to any person during a 45-minute interval. It boggles the mind to speculate who suffered more, Avone or Harry, but

suffer they did . . . ." (RT at 3149.) For the reasons previously discussed in connection with Claim 7(F)(1), these statements were part of the prosecutor's argument that Kimble was motivated by revenge against the Margulies, which explained why he did not simply burglarize the stereo store. While speculative, this was nonetheless a reasonable inference from the evidence.

The prosecutor presented a theory about how the alarm was activated, based in part on the bloodstain evidence. He contended that Avone Margulies was shot in the den and began bleeding heavily onto the couch. She eventually got to her feet and made her way to the front hall, where she activated the alarm system and collapsed. (RT at 3018-22.) Anticipating the defense response, the prosecutor suggested that the fact that Avone was blindfolded would not have prevented her from navigating her own house. He said, "Remember Bill's testimony, that they had lived in that house about 12 years, and I suggest to you that after 12 years a person, I know I played the game, close your eyes and see how well you can maneuver in the house, and if it's areas that you have frequently traversed, it is not too difficult, you can do it." (RT at 3019.) Discussion of facts beyond the record is generally improper, but this does not bar references to matters of common knowledge or that are based on ordinary human experience. *Candelaria*, 704 F.2d at 1132. The prosecutor did not urge the jurors to conduct their own experiment. Anyone who has moved around in the dark in their own house knows what is possible. The argument was not improper.

In contrast, the prosecutor's comments on how unusual it is for someone to be able to eat soon after killing were irrelevant to any issue at the guilt phase of the trial and had no purpose other than to paint Kimble as a monster. In discussing the burglary of the stereo store, the prosecutor described Winfrey's testimony that Kimble had the keys to the store and showed him they could enter. After this demonstration:

> They go, and this is the part that would probably be

> difficult for anybody to believe, they then go, I believe, to the Taco Bell to have supper.
>
> It's not hard to believe that Ortez Winfrey had supper, he didn't know anything about the killing, but it is hard to believe that Eric Kimble, so soon after this horrible killing, after what he'd seen that day, that he could hold anything on his stomach. It takes an unusual person to really be able to kill and then have food.
>
> Now, some of you may have had an opportunity to see a killing in wartime. Now, it is true, there are some folks that tend to enjoy it, but they are extremely rare. Most people, even when they have to kill legitimately, have a great deal of difficulty eating in the immediate vicinity.

(RT at 3038-39.)

Also improper was the prosecutor's comment that "I wonder if any of you would care to go to Bill or Pat Margulies and tell them there has never been a confrontation between the defendant and their parents? No confrontation? If that is not a confrontation, I don't know what Mr. Kimble would call it." (RT at 3148.) This was not a fair response to defense counsel's argument that "We haven't heard any evidence of confrontations or disputes or dissatisfaction or insults or anything of that sort that might constitute some motive to gravely dislike the Margulies people." (RT at 3077.) Defense counsel was responding to the prosecutor's revenge theory, arguing that it was sheer speculation to suggest that Kimble had some prior contact with the Margulies at the stereo store that caused him to dislike them. It was improper to ask the jurors when reaching their guilt verdict to imagine having to explain their decision to the victims' children.

Nevertheless, these emotional appeals were isolated moments in the course of a lengthy closing argument in which the prosecutor primarily focused on the significant amount of circumstantial evidence available from diverse sources:

ballistics, bloodstains, fingerprints, and eyewitness accounts. The two improper comments are unlikely to have led the jury to disregard their instructions to assess the defendant's guilt based only on the evidence received in the trial, and not on the arguments of counsel. The evidence that Kimble murdered the Margulies was substantial. Considering the statements in the context of the entire trial, therefore, the Court concludes that these appeals to the jury's passions did not have a substantial and injurious effect on the guilt phase verdicts.

4. Claim 7(G): Improper Appeal to Sympathy for Victims

Petitioner claims the prosecutor also committed misconduct by improperly appealing to the jury's sympathy for Harry Margulies. In his rebuttal argument, the prosecutor stated that Mr. Margulies had worked all his life and had finally reached "the point where he could start enjoying the fruits of his labor," but it took just "one night to destroy a lifetime of honest productive effort." (SAP at 37; RT at 3184.) The prosecutor returned to this theme later at the penalty phase, as previously discussed in connection with Claim 7(F)(1). It was not improper as part of an argument about the appropriate *penalty*. But it was improper at the guilt phase, since it had no bearing on the evidence of Kimble's involvement in the crimes, and merely reminded the jurors that murder is a tragedy for the victim and his family.

Respondent argues that the prosecutor's statement was made in response to defense counsel's suggestion that Mr. Margulies would not have been intimidated by a lone intruder of petitioner's youth and build. While the prosecutor's comments were made *after* his legitimate response to that argument, they went beyond what was necessary. The prosecutor legitimately observed that Harry Margulies had the good sense not to resist an intruder with a gun because "he was no dummy," citing his success in his long business career. (RT at 3184.) It was the statement immediately after this, designed to evoke sympathy for the victim, that was irrelevant. The prosecutor "inappropriately obscured the fact that his role

is to vindicate the public's interest in punishing crime, not to exact revenge on behalf of an individual victim," and "risked improperly inflaming the passions of the jury by [appealing] to its sympathies for the victim who . . . did nothing to deserve his dismal fate." *Drayden v. White*, 232 F.3d 704, 712-13 (9th Cir. 2000). Nevertheless, this passing reference to Harry Margulies' life and the tragedy of his death was far less prejudicial than the prosecutor's soliloquy in *Drayden*, and as in that case, the Court is satisfied that the jury instructions here together with the strength of the substantive evidence of Kimble's guilt nullified any possible prejudice. *Cf. id.* at 713-14.

5. Claim 7(H): Vouching

In Claim 7(H), petitioner argues that the prosecutor used his summation and direct examinations of law enforcement officers to improperly introduce prejudicial opinion evidence on Ortez Winfrey's credibility and innocence, and on petitioner's guilt.

a. Vouching for Ortez Winfrey

Petitioner contends that the prosecutor improperly solicited Ortez Winfrey's testimony on direct examination that, under a cooperation agreement, the state agreed to dismiss the burglary charge against him if he testified truthfully. (SAP at 37.) Petitioner also argues that in his closing argument, the prosecutor emphasized the fact that Winfrey's credibility was central to the prosecution's case, improperly vouched for his veracity by stating the jury would find that Winfrey "was giving . . . useful and correct information," and suggested that Winfrey had an incentive to "tell his truth to the best of his ability." (RT at 3059-3063).

"As a general rule, a prosecutor may not express his opinion of the defendant's guilt or his belief in the credibility of government witnesses." *United States v. Molina*, 934 F.2d at 1444; *Young*, 470 U.S. at 18-19. Thus, it is improper for a prosecutor to offer personal assurances of the veracity of government witnesses or to suggest that their testimony is supported by evidence not

introduced at trial. *Molina*, 934 F.2d at 1445*; United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980) ("Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony."). The Ninth Circuit has explained:

> Vouching is especially problematic in cases where the credibility of witnesses is crucial, and in several cases applying the more lenient harmless error standard of review, [courts] have held that such prosecutorial vouching requires reversal. At the same time, we have recognized that prosecutors must have reasonable latitude to fashion closing arguments, and thus can argue reasonable inferences based on the evidence, including that one of the two sides is lying.

United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993) (citations omitted).

References to the "truthful testimony" provisions of a witness's agreement with the government are not improper if "made in response to an attack on the witness's credibility because of his plea bargain." *United States v. Monroe*, 943 F.2d 1007, 1013 (9th Cir. 1991), *United States v. Shaw*, 829 F.2d 714, 716 (9th Cir. 1987). As with other forms of prosecutorial misconduct, to warrant habeas relief, a petitioner must demonstrate that any vouching "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181; *Davis v. Woodford*, 384 F.3d 628, 643-44 (9th Cir. 2004)

Here, at the conclusion of his direct testimony, Winfrey affirmed that he was initially charged with burglary of the stereo store, but that "in consideration for your testimony and cooperation in this case . . . the District Attorney's Office agreed to dismiss the second degree burglary charge if you testified truthfully in this case." (RT at 2238.) This was not vouching. *Necoechea*, 986 F.2d at 1278. "The prosecutor's question does not imply a guaranty of [the witness's]

truthfulness, refer to extra-record facts, or reflect a personal opinion." *Id.* at 1278-79.

On cross-examination, defense counsel questioned Winfrey at length about his arrest, his subsequent decision to cooperate with the police and the prosecution, and his motive to testify against petitioner, which Winfrey admitted he was doing "in order to avoid going to prison." (RT at 2263-70, 2283-85.) The defense also highlighted other inconsistencies in Winfrey's testimony. (RT at 2291-2300, 2330-34.)

During closing argument, the prosecutor responded to the attacks on Winfrey's credibility. He admitted that Winfrey might have lied about a few minor immaterial matters, but argued that the bulk of his testimony about the stereo store burglary was corroborated by other evidence in the case. (RT at 3059-63.) This was not vouching, but a legitimate argument based on "an inference from evidence in the record." *Necoechea,* 986 F.2d at 1279. The prosecutor continued:

> I suggest to you that, "he had an incentive to testify."[37] That incentive was provided by the offer of my office to dismiss the burglary charge if he told the truth. I suggest to you that the incentive he had was to tell the truth to the best of his ability. You understand when you promise a person to dismiss if he tells the truth, then it doesn't matter whether the case is won, lost, or a draw. His case will be dismissed.

(RT at 3063.) This was a legitimate response to defense counsel's cross-examination of Winfrey about his motive to testify against Kimble under the cooperation agreement. "References to requirements of truthfulness in plea bargains do not constitute vouching when the references are responses to attacks on the witness' credibility because of his plea bargain." *United States v. Shaw*, 829

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[37] The written transcript contains these quotation marks. Assuming it is accurate, the prosecutor apparently said "quote" and "unquote" around this sentence. Defense counsel had not yet delivered his closing argument, but the prosecutor apparently was referring to the defense's questioning of Winfrey about testifying in order to avoid prison.

F.2d 714, 716 (9th Cir. 1987). The prosecutor's arguments therefore did not constitute vouching.

b. Advising Jury that the Deal with Winfrey was in the Public Interest

In his rebuttal, the prosecutor responded to the defense attacks on Ortez Winfrey, noting that the state must take its witnesses as it finds them. (RT at 3164.) He mentioned the state's "arrangement with Ortez," under which the burglary charge would be dismissed in exchange for his testimony. (*Id.*) The prosecutor then added, "It was my judgment that that was a good exchange, and in the public interest." (RT at 3165.) Defense counsel objected. A colloquy then clarified that defense counsel considered the prosecutor's discussion of the plea deal to be "fair comment," but not his expression of judgment about what served the public interest. The trial court agreed and instructed the jury to disregard that comment. Resuming his argument, the prosecutor stated, "In any case, I make no apologies for having done that." (*Id.*) Defense counsel did not renew the objection. Petitioner argues that, in this moment, "the prosecutor became an unsworn and uncross-examined witness against Petitioner, in violation of the Sixth Amendment." (SAP at 38.)

The prosecutor's comment that he would not apologize for making the deal with Ortez Winfrey is less explicit than his prior objectionable statement, but it could still be understood to reiterate his contention that the deal was in the public interest. Nevertheless, this comment did not imply a guarantee of Winfrey's truthfulness, reflect a personal opinion about Winfrey's honesty, or refer to extra-record facts. The judge had just sustained defense counsel's objection that the prosecutor's reference to his own judgment about what was in the public interest "is certainly inappropriate argument," and instructed the jury to disregard the argument. (RT at 3165.) The jury is presumed to "listen to and follow curative instructions from judges." *Trillo v. Biter*, 769 F.3d 995, 1000 (9th Cir. 2014). The

jury understood that Winfrey had a motive for testifying and that the prosecutor had reached a deal with Winfrey that allowed Winfrey to escape prosecution for the commercial burglary that he admitted participating in. The prosecutor's comment that he did not apologize for making the deal "did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent." *Darden*, 477 U.S. at 182. In this context, the comment was not so egregious that it "infected the trial with unfairness." *Donnelly*, 416 U.S. at 643.

c. Law Enforcement Testimony Regarding Ortez Winfrey

Petitioner claims the prosecutor improperly elicited testimony from law enforcement officers "regarding their opinions of Winfrey's innocence and Petitioner's culpability." (SAP at 38.) He cites Officer Hodel's testimony that, after interviewing Ortez, he "never felt he was a suspect." (RT at 2662.) However, Officer Hodel made this comment in response to a question from defense counsel, not the prosecutor. Defense counsel was questioning Hodel about two sweatshirts, one blue and one black, that he found at Winfrey's houses. He asked why Hodel never showed the blue sweatshirt to the eyewitnesses Dietlin and Shane, prompting Hodel to explain: "Subsequent to my interview with Ortez, I never felt he was a suspect and subsequent to some additional things that I did." (RT at 2662.) Defense counsel continued questioning Hodel about alleged inadequacies in the police investigation, which formed a basis for his closing argument: "Why in the world was Ted Dietlin not shown the blue sweatshirt recovered from Ortez Winfrey's bedroom? Is there any conceivable justification for that?" (RT at 2085.) There was no impropriety in Officer Hodel's answer to defense counsel's question about the course of his investigation. Hodel did not provide an opinion on petitioner's guilt. *See United States v. Lockett*, 919 F.2d 585, 590 (9th Cir. 1990) ("A witness is not permitted to give a direct opinion about the defendant's

guilt or innocence.")

6. Claim 7(J): Argued Excessive and Duplicative Allegations and Special Circumstances

Petitioner complains that the prosecutor "improperly asked the jury to make findings on excessive and duplicative allegations and special circumstances." (SAP at 39.) To the extent that this conclusory allegation is based on the allegations of Claim 12 (errors in special circumstance instructions), it fails for the reasons discussed there.

Claim 7 is DENIED.

F. Claim 8: Prosecution's Failure to Provide Adequate Notice of the Charges

In Claim 8, petitioner argues that the prosecution failed to provide adequate notice of the charges against him. The original felony complaint filed on October 25, 1978 alleged that petitioner "did willfully, unlawfully and with malice aforethought murder. . . a human being," and also that he "personally committed" the murders of Harry and Avone Margulies during the commission and attempted commission of robbery and rape. (CT at 156-164A.) A substantially similar information was filed on November 8, 1978. (CT at 189-90.) Two years later on November 4, 1980, after the jury was empaneled and during alternate selection, an amended information was filed alleging that the murders were "personally committed *or physically aided* by the defendant." (CT at 185-88 (emphasis added).)

Petitioner claims he spent two years preparing to defend against the claim that he personally committed the murders, and was not given sufficient notice that he was being charged with "physically aiding" the murders. He also argues that the amended information allowed the jury to find him guilty even if it doubted that he acted alone or had no idea what actually transpired in the Margulies' house.

The Sixth Amendment guarantees a criminal defendant the right to be

clearly informed of the charges against him in order to permit adequate preparation of a defense. *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *Lincoln v. Sunn*, 807 F.2d 805, 812 (9th Cir. 1987). While the Constitution does not require perfection in the charging document, it still must inform the defendant of the alleged crime in sufficient detail to enable him to prepare a defense. *See James v. Borg*, 24 F.3d at 24. "Such definiteness and certainty are required as will enable a presumptively innocent man to prepare for trial." *Koontz v. Glossa*, 731 F.2d 365 (6th Cir. 1984). A critical consideration "is whether the introduction of a new theory changes the offense originally charged . . . or so alters the case that the defendant has not had a fair opportunity to defend." *Lincoln*, 807 F.2d at 813.

"When determining whether a defendant has received fair notice of the charges against him, [a court must] begin by analyzing the content of the information." *Gautt v. Lewis*, 489 F.3d 993, 1003 (9th Cir. 2007). The critical issue in deciding whether notice was constitutionally adequate is whether the defendant had sufficient notice to present a defense, ensure adversarial testing, and produce an acceptable record. Actual notice may be found in the record of pre-trial proceedings, opening statements, testimony or jury instructions. *See, e.g.*, *Morrison v. Estelle*, 981 F.2d 425 (9th Cir. 1992) (testimony and jury instructions gave defendant sufficient notice of robbery and felony-murder charges).

The November 1978 information notified petitioner that he was being charged with the murders of Harry and Avone Margulies, the burglary of their house, the robbery of the stereo store, and the rape of Avone. While disclosing the prosecution's theory that petitioner personally committed the crimes, the information also included a felony murder theory. The subsequent amendment of the information to add the words "or physically aided" did not alter the charges against petitioner. Therefore, the amendment of the information during jury selection did not deprive petitioner of notice and a fair opportunity to defend against the charges. *See Murtishaw v. Woodford*, 255 F.3d 926, 953-54 (9th Cir.

2001) (prosecutor's opening statement, evidence presented at trial, and jury instructions conference gave defendant adequate notice of felony-murder theory); *Calderon v. Prunty*, 59 F.3d 1005, 1009-10 (9th Cir. 1995) (prosecutor's opening statement and subsequent argument at defense motion for acquittal gave defendant notice that prosecution was proceeding under lying-in-wait theory of murder); *Morrison v. Estelle*, 981 F.2d at 428-29 (defendant received constitutionally adequate notice of felony murder charges from jury instructions the prosecutor submitted two days before closing arguments and from the evidence presented at trial).

Claim 8 is DENIED.

G. Remaining Ineffective Assistance of Counsel Claims

Petitioner also assigns error to defense counsel's handling of the jury instructions, his closing argument, and his failure to prepare petitioner for his interview with the probation officer. (SAP at 56-60: Claim 10(H, I, J).) Counsel's closing argument at the penalty phase was deficient and stemmed from his failure to investigate the mitigating evidence, as previously discussed. The error contributed to the penalty phase verdict and together with Claim 10(E) warrants habeas relief. (See Claim 10(K) below, alleging cumulative ineffective assistance of counsel.)

It is unnecessary to address the allegations of Claim 10(J), which fails for the reasons discussed below in connection with Claim 15, alleging error in the trial court's consideration of the probation report. While defense counsel should have objected to consideration of the report, which was improper under state law, it is not reasonably likely that the trial court would have granted the motion to reduce petitioner's sentence to life imprisonment in the absence of the report.

This leaves Claim 10(H), which cites twelve instances where counsel allegedly mishandled the jury instructions.

1. Failure to Request Instruction on Lesser Included Offense

Petitioner complains that trial counsel failed to request an instruction at the guilt phase on a non-capital lesser included offense. He does not say what the lesser included offense would be, nor the evidence that would support it. Such a conclusory allegation does not warrant habeas relief.

2. Failure to Request Instruction Pursuant to *People v. Green* Narrowing Felony Murder Special Circumstances

Petitioner argues that counsel should have requested an instruction pursuant to *People v. Green*, 27 Cal. 3d 1 (1980) that would have narrowed the scope of the rape and robbery felony murder special circumstances and potentially resulted in an acquittal on these two allegations. *Green* was decided in May 1980, before Kimble's trial. The California Supreme Court held that for felony murder special circumstances to adequately narrow the class of murders eligible for the death penalty, the defendant must have killed in order to advance a felonious purpose independent of the homicides themselves. *Id.* at 61; *see generally Pensinger v. Chappell*, 787 F.3d 1014, 1025-29 (9th Cir. 2015) (discussing *Green* rule in context of kidnap murder special circumstance). Not every murder committed in the course of a robbery qualifies; instead, the murder must have been "'committed in order to carry out or advance the commission of the crime'" of robbery, "'or to facilitate the escape therefrom or to avoid detection'" of the robbery. *Clark v. Brown*, 450 F.3d at 903 (quoting standard California jury instruction required by *Green*). In other words, if the jury concluded that Kimble committed the murders in the course of the rape of Avone Margulies or in the course of the robbery of Harry Margulies, the special circumstances applied. But if the jury instead concluded that Kimble invaded the house in order to kill Harry and Avone Margulies, and in the course of the murders also committed rape and robbery, then the special circumstances would not apply. *See Green*, 27 Cal. 3d at 60 ("[T]he jury perceptively sensed the truth of this case that it was not in fact a murder in the

commission of a robbery but the exact opposite, a robbery in the commission of a murder.")

On direct appeal, petitioner argued that the trial court should have given an instruction pursuant to *Green* sua sponte.[38] The California Supreme Court rejected this argument on the ground that "[s]ua sponte instructions are required only on the general principles of law relevant to the issues *raised by the evidence*." *People v. Kimble*, 44 Cal. 3d at 503 (citations and internal quotation marks omitted, emphasis in original). While acknowledging that the prosecutor "relied on a theory that the murders were committed for revenge" — which if accepted might have led the jurors to conclude that the rape and the robbery were only incidental to the murders, and hence did not support the special circumstances — the state court reasoned that there was no "direct evidence" to support the prosecutor's theory. *Id.* Instead, the California Supreme Court found, apparently based on its own view of the evidence, that "*the evidence* clearly showed a concurrent intent to rape Avone and steal the stereo store keys." *Id.* (emphasis in original). The state court concluded that under these circumstances, the trial court had no duty to give the *Green* instruction sua sponte. *Id.*

Here petitioner raises a different claim: that counsel was ineffective for failing to request the *Green* instruction. There could be no tactical reason to prefer that the jury not be instructed in the narrower terms required by *Green*, since by limiting the scope of the special circumstances this would increase the chance that the jury would reject the felony murder special circumstance allegations. *Cf. Pensinger*, 787 F.3d at 1031 (counsel was not deficient for failing to request *Green* instruction where it did not comport with defense theory of case). In this case, the defense attempted to cast doubt on every aspect of the crimes, but the primary strategy — in view of the fingerprint evidence placing Kimble inside the house —

[38] The federal petition presents a similar argument in Claim 19, discussed below.

was to raise a reasonable doubt about whether he acted alone and whether a rape was even committed. An instruction pursuant to *Green* would not have conflicted with this strategy.

The California Supreme Court's reasoning rejecting petitioner's direct appeal applies only to sua sponte instructions. In analyzing this ineffective assistance of counsel claim, therefore, it must be presumed that the trial court would have given the requested instruction. *See People v. Kimble*, 44 Cal. 3d at 501 n.16 ("CALJIC No. 8.81.17, paragraph 3, incorporates the *Green* holding. Presumably trial courts have given this instruction as a matter of course in post-*Green* trials. Nothing in our opinion today is intended to discourage such a practice."); *Strickland*, 466 U.S. at 694 (in analyzing ineffective assistance claim, court must presume trial judge would act "according to law").

If counsel had requested the instruction, the jury would have been instructed substantially as follows:

> To find that the special circumstance referred to in these instructions as murder in the commission of [robbery/rape] is true, it must be proved . . . [that] [t]he murder was committed in order to carry out or advance the commission of the crime of [robbery/rape] or to facilitate the escape therefore or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the [robbery/rape] was merely incidental to the commission of the murder.

See CALJIC 8.81.17. Instead, the jury was merely instructed that to find the special circumstances true, it must find "that the murder was committed during the commission of a [robbery/rape]." (RT at 3222.)

There was sufficient evidence to support a jury determination that Kimble broke into the Margulies' house intent on retrieving the keys to the stereo store, that he robbed Harry Margulies of the keys, raped his wife, and then killed them both so that they would not call the police, giving Kimble time to escape and

burglarize the stereo store. If the jury accepted this view of the evidence, then the absence of the *Green* instruction would have made no difference to their verdict. But if the jury instead accepted the prosecutor's "revenge" theory for the murders, the instruction could have made a difference. If the jury concluded that Kimble invaded the Margulies' home in order to kill them both, and that part of his plan to exact revenge involved raping Avone Margulies while Harry was still alive to hear it, then it could have concluded that the rape was "merely incidental to the commission of the murder," *i.e.* that it "was not in fact a murder in the commission of a [rape] but the exact opposite, a [rape] in the commission of a murder." *Green*, 27 Cal. 3d at 60.

Considering all the evidence, it is far more likely that the jury would have concluded that the rape was "merely incidental to the commission of the murder" than that it would have concluded that the robbery was incidental. The rape appears to have been a senseless (or perhaps as the prosecutor contended, sadistic) addition to the home invasion. The prosecutor's revenge theory included the suggestion that Kimble's motive "was connected not only to those two persons, but also to the stereo shop. In some manner he wanted to hurt both." (RT at 3004.) If the jury accepted the theory that Kimble was motivated more by a desire for revenge than by a desire to acquire stereo equipment, it is still likely to have concluded that the way Kimble chose to exact revenge was by committing murder "in order to carry out or advance the commission of the crime of robbery." The robbery was not an incidental addition to the murders; it was part of Kimble's plan from the beginning, even under the prosecutor's revenge theory. In contrast, the relationship of the rape to Kimble's other crimes is more peripheral, or "incidental."

Nothing in the verdicts themselves supports an inference that the jury rejected the prosecutor's revenge theory. It is simply impossible to know what the jury thought about the theory. The Court concludes that if counsel had requested

that the jury be instructed in accordance with *Green*, the trial court would have done so, and this additional instruction would have made it reasonably probable that the jury would reject the rape special circumstance allegation. The same is not true for the robbery special circumstance, however. It is not reasonably probable that the *Green* instruction would have caused the jurors to doubt that the murders were committed in order to advance the commission of the robbery of the stereo store keys.

In Claim 19, petitioner argues that the trial court's failure to include the independent felonious purpose requirement in the jury instructions on the rape and robbery murder special circumstances was federal constitutional error. (SAP at 83-86.) This claim is based on the trial court's sua sponte obligation to adequately guide the jury's penalty decision making process as required by the Eighth Amendment. The California Supreme Court's rejection of this claim on direct appeal does not dispose of the issue for the purposes of federal habeas corpus review. *See Pensinger*, 787 F.3d at 1027-28 (California's "current interpretation" of the *Green* rule conflicts with Ninth Circuit precedent establishing that it is a "constitutional necessity"). Ninth Circuit authority clearly establishes that in trials where the *Green* instruction could have made a difference to the jury's analysis of a special circumstance allegation, it is federal constitutional error to omit the instruction. *Pensinger*, 787 F.3d at 1027-28; *Clark*, 450 F.3d at 908-16; *Williams v. Calderon*, 52 F.3d at 1476. The analysis of prejudice for this claim is exactly the same as it is for the related ineffective assistance of counsel claim. *See Clark*, 450 F.3d at 916 ("If the jury had been properly instructed under *Green*, there is a reasonable probability that it would have concluded that the arson was 'incidental' and that the felony-murder special circumstance therefore was not true."); *Belmontes v. Brown*, 414 F.3d 1094, 1139 (9th Cir. 2005) (*Brecht* requires a "reasonable probability" that the jury would have reached a different verdict), *reversed on other grounds*, 549 U.S. 7 (2006).

These twin errors — defense counsel's failure to request, and the trial court's failure to give, the *Green* instruction — invalidate petitioner's rape murder special circumstance and require that it be vacated. *Pensinger*, 787 F.3d at 1032. However, this result has no effect on petitioner's ultimate eligibility for a sentence of death or life imprisonment without the possibility of parole, since the multiple murder special circumstance finding and the robbery murder special circumstance finding each independently require one of those two alternative penalties. Cal. Penal Code § 190.2. Moreover, this one invalid special circumstance finding did not permit the jury to consider, in its penalty deliberations, any additional facts about the crimes beyond those already before it based on the evidence at the guilt phase. Hence, as previously discussed in connection with Claim 7(E)(4), the invalid special circumstance finding did not affect the jury's ultimate sentencing decision. *Cf. Brown v. Sanders*, 546 U.S. at 220 (jury's consideration of an invalid sentencing factor does not undermine its sentencing determination if other sentencing factors permitted the jury to give aggravating weight to the same facts); *Pensinger*, 787 F.3d at 1032 (where absence of *Green* instruction invalidates the only special circumstance supporting death sentence, error was not harmless). The jury's sentencing decision is invalid because of defense counsel's failure to marshal the mitigating evidence, not because of this instructional error.

Claim 10(H)(2) and Claim 19 are GRANTED.

3. Failure to Request Instruction that Special Circumstance Allegations Required Finding Petitioner Acted with Deliberation and Premeditation and Intent to Cause Death

Petitioner argues that trial counsel should have requested a jury instruction advising the jury that, to find the felony murder special circumstances true, it must first find petitioner acted with deliberation, premeditation, and intent to cause death. This claim fails for the same reasons as Claim 11, *infra*.

4. Failure to Request Penalty Phase Instruction Countermanding Guilt Phase Anti-Sympathy Instruction

At the guilt phase, the jury was instructed that in reaching a verdict they "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." (RT at 3201.) Petitioner argues that counsel should have requested an instruction at the penalty phase clarifying that this "anti-sympathy instruction" did not apply to the jury's sentencing decision. This claim is foreclosed by the United States Supreme Court's decision in *California v. Brown*, 479 U.S. 538 (1987). In *Brown*, the petitioner claimed that his rights were violated when the jury was instructed *at the penalty phase* "that they 'must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling." *Id*. at 539. The Supreme Court held that "a reasonable juror would interpret the instruction to avoid deciding the case on 'mere sympathy' as a directive to ignore only the sort of sympathy which would be totally divorced from evidence presented at the penalty phase." *[Stanley] Williams v. Calderon*, 48 F. Supp. 2d 979, 1022 (C.D. Cal. 1998) (citing *Brown*, 479 U.S. at 543). In short, "the giving of a no sympathy instruction during the guilt phase did not result in the jury being misinformed about its responsibility to consider all mitigating evidence" at the penalty phase. *Williams v. Calderon*, 52 F.3d at 1481. Thus counsel was not deficient for failing to request clarification, and in any event the failure was not prejudicial.

5. Failure to Request Penalty Phase Instruction that Jury Could Consider Mercy, Sympathy, and Pity

Petitioner argues that trial counsel provided constitutionally deficient representation by failing to request affirmative instructions that the jury could consider petitioner's character and background, as well as mercy, sympathy, and pity, in reaching a penalty phase verdict. (SAP at 57.) It is impossible to know whether such a request would have been granted, as the California Supreme Court

has not required trial courts to grant requests for such instructions, and in some cases has concluded that it was not error to refuse such requests. *See, e.g.*, *People v. Clark*, 63 Cal. 4th 522, 640-41 (2016); *People v. Smith*, 35 Cal. 4th 334, 371 (2005). Nevertheless some trial judges have granted similar requests, explicitly confirming, for example, that the jury may consider "any sympathetic, compassionate, merciful, or other aspect of Defendant's background, character, [etc.] . . . ." *Smith*, 35 Cal. 4th at 371 (quoting defendant's special instruction given by trial court). In view of the fact that such an instruction could only have helped petitioner at the penalty phase, not harmed him, and that there is no bar to trial judges granting such requests, the Court concludes that it was deficient for trial counsel to fail to request an instruction clarifying the broad authority of the jury to base its sentencing decision on considerations such as mercy. *See People v. Easley*, 34 Cal. 3d 858, 884 (1983) ("If it had been properly instructed under the 1977 law, . . . the jury would have understood that even if aggravation outweighed mitigation, it was not required to impose a death sentence but *could exercise mercy* and return a verdict of life without possibility of parole.") (emphasis added).

An instruction to consider mercy or pity might have made a difference to this jury. In the middle of their penalty deliberations, they asked the judge for guidance on whether were "any further criteria that can be used to determine one penalty as opposed to the other." (RT at 3390-91.) It was not obvious to the jurors from the instructions they were given that they could simply choose to "exercise mercy" despite the aggravating circumstances of the crimes. Nevertheless, considering this one alleged deficiency in isolation, it is unlikely that it was prejudicial. Defense counsel did appeal to the jurors' "sense of dignity, and decency and charity, and compassion," and asked them to "spare Eric Kimble's life" for his parents' sake. (RT at 3356.) But this was just the argument of counsel, quickly rebutted by the prosecutor. By failing to present available mitigating evidence, counsel gave the jurors no reason to be sympathetic to Kimble

based on his difficult childhood and cognitive deficits. In view of the dearth of mitigating evidence provided to the jurors that could have given rise to feelings of sympathy, mercy, or pity, the absence of this additional instruction was not prejudicial. Nevertheless, when considering this deficiency along with the other failings of defense counsel, it contributed to the cumulative prejudicial effect of counsel's anemic penalty phase case. (*See* Claim 10(K), *infra*.)

6. Failure to Request Penalty Phase Instruction that Jury Could Consider Lingering Doubt

Petitioner claims counsel should have requested an instruction at the penalty phase telling the jurors they could consider any lingering doubts they had about the guilt phase crimes when making their penalty decision. (SAP at 57.)

Although neither the state nor the federal Constitution *entitles* a capital defendant to a lingering doubt instruction at the penalty phase, it has long been recognized as a valid mitigating factor under California law. *See Franklin v. Lynaugh*, 487 U.S. 164, 172-76 (1988); *People v. Souza*, 54 Cal. 4th 90, 132-33 (2012); *People v. Terry*, 61 Cal. 2d 137, 145-47 (1964). If counsel had requested it, the trial court might have clarified that the jurors could consider any lingering doubts they had about Kimble's role in the crimes. *See, e.g., People v. Hamilton*, 45 Cal. 4th 863, 948 (2009).[39] This could have helped influence them to reject a death sentence. Although the evidence that Kimble received assistance from confederates in burglarizing the Margulies' house was insufficient to inspire *reasonable doubt* about Kimble's guilt of the crimes committed there, the jurors might still have entertained some lingering doubt, "however slight," about

[39] In *Hamilton*, the jury was instructed: "Any lingering doubt you may entertain on the question of guilt may be considered by you in determining the appropriate penalty, which, of course, is the sole issue before you, choice of penalty. A lingering doubt is defined as any doubt, however slight, which is not sufficient to create in the minds of a juror reasonable doubt . . . . If there is such a lingering doubt, of course, you may consider that in determining the appropriate penalty and helping you make your choice of penalty." *Id.* at 948.

Kimble's role in the crimes, in view of the difficulty of reaching the Margulies' house, the testimony about the car that might have picked Kimble up, and defense counsel's arguments casting doubt on Kimble's ability to subdue the Margulies by himself. The prejudice analysis for this claim mirrors the preceding analysis of the mercy instruction claim: on its own, counsel's failure to request the instruction does not warrant habeas relief, but the error still marginally contributes to the evaluation of cumulative prejudice in Claim 10(K).

7. Failure to Request Penalty Phase Instruction Directing the Jury to Consider Absence of Prior Felony Convictions as Mitigating Factor

Just one day before petitioner's arraignment on November 8, 1978, California voters passed Proposition 7, approving modifications to the state's death penalty law. Among other changes, the special circumstances were expanded and the mitigating and aggravating factors revised. Although petitioner was tried under the 1977 law in effect at the time of his crimes, he argues that defense counsel was deficient in failing to request that the penalty phase instructions include the new death penalty law's section 190.3 factor (c): "The presence or absence of any prior felony conviction." (SAP at 57.) Petitioner contends that because he had no prior felony convictions, counsel's failure deprived him of a statutory factor in mitigation. He is correct.

Under California law, the general rule is that "a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise." *Tapia v. Superior Court*, 53 Cal. 3d 282, 287 (1991). Nevertheless, the California Supreme Court has held that the provisions of a new law should be applied to prosecutions of crimes committed before its effective date where such provisions "address[] the conduct of trials" or "chang[e] the law to the benefit of defendants." *Id*. at 286. Thus, the provisions of the 1978 death penalty law which inured to petitioner's

benefit could have been applied to his case. *Id.* at 300-301.

Defense counsel's duty of zealous representation includes an obligation to know the law and seek its application to the client's benefit. Where, as here, the law changes in the course of a case, it is counsel's duty to seek application of any changes that could benefit the client. Accordingly, defense counsel was deficient for not requesting that the jury be instructed to take into account the fact that Kimble had no prior felony convictions. As with the two prior claims, counsel's mistake is unlikely to have significantly affected the jury's assessment of the mitigating and aggravating factors, but in combination with the more serious failure to mount an effective case in mitigation, it contributed to the jury's penalty verdict.

8. Failure to Request Anti-Inflationary and Anti-Double-Counting Instructions

Petitioner argues that trial counsel was also deficient for failing to request affirmative "anti-inflationary" and "anti-double-counting" instructions at the penalty phase "to minimize the effect of the prosecutor's overreaching and misconduct." (SAP at 58.) In light of the Court's conclusion that the prosecutorial conduct to which petitioner objects did not prejudice the defense, any failure by trial counsel in this regard does not undermine confidence in the penalty verdict. (*See* Claim 7(E)(4), *supra*, and Claim 12(D), *infra*.)

9. Failure to Object to Trial Court's Instructions that Juror's Should Rely on their Notes and Not Request Readback

On its own motion, the trial court asked the jury to refrain from "perfunctorily" requesting that testimony to be read back to them. The judge explained that to comply with such a request, he would have to take a break from the next case he would be hearing and reconvene petitioner's case in open court. The judge also stated that he would, "of course, if there is any real disagreement among you as to the testimony, . . . comply with your request." (CT at 335; RT at

3240.)

Petitioner claims trial counsel provided ineffective assistance by failing to object to the court's instruction, arguing that it effectively told the jurors to "rely on their notes and not request a rereading of testimony." (SAP at 58.) This misrepresents the instruction. The judge merely reminded the jurors that during the course of the trial, "you all have been very attentive and most, if not all of you, have taken notes which you will have with you in the jury room, and what I want to caution about is perfunctorily making this type of request when it is not really necessary in your deliberations." (RT at 3240.) It was not deficient to elect not to challenge this instruction, which made clear that if the jurors had "any real disagreement" over a witness's testimony, they could request a readback and it would be provided. The judge's cautionary instruction merely prompted jurors to think twice before asking that testimony be read back.[40]

10. Objection to Reinstructing Jury on Duty to Deliberate

As mentioned previously, after several hours of penalty phase deliberations, the jury sent out notes indicating they were having difficulty reaching agreement and requesting additional guidance. Defense counsel urged the court to declare the jury deadlocked, which would have resulted in a life sentence. The trial judge declined and reread the penalty phase instructions to the jury. (RT at 3389-99.) He then asked counsel whether they also wanted him to "read the instructions as to the duty of the jurors to talk to each other and form their own opinions." Defense counsel objected, and the instruction was not given. (RT at 3400.)

Petitioner argues that defense counsel should not have objected to the standard instruction on the jurors' duty to deliberate because "as a result, the court

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[40] In Claim 17, petitioner argues that the trial court erred in cautioning the jurors because "by encouraging the jurors to rely on their notes rather than seek rereading of the record, the court insinuated that the juror's notes would prevail over the transcript." (SAP at 82.) Petitioner identifies no federal constitutional basis for barring such an instruction, and the Court concludes for the reasons just given that the cautionary instruction did not deprive petitioner of a fair trial.

emphatically instructed the jury that the decision was not to be based on personal choice . . . [and] implied that the jurors should reach a consensus rather than tally their individual opinions." (SAP at 58.) The instruction to which counsel objected was a version of CALJIC 17.40. which had previously been read at the guilt phase:

> Both the people and the defendant are entitled to the individual opinion of each juror. It is the duty of each of you to consider the evidence for the purpose of arriving at a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after a discussion of the evidence and instructions with the other jurors.
>
> You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision.

(RT at 3237-38.) The record contradicts petitioner's claim that by objecting to this instruction, defense counsel caused the trial judge to instruct the jurors not to base their decision on their own personal choice. The trial judge had already indicated his firm intention to "reinstruct them and tell them it's not a matter of their personal choice." (RT at 3393.) Nor did the trial judge say anything implying that "the jurors should reach a consensus rather than tally their individual opinions." (SAP at 58.) Defense counsel's objection kept out only this additional instruction on the duty to deliberate. Faced with a potentially deadlocked jury, counsel could reasonably have decided that the less said to the jurors at this point in their deliberations, the better. Petitioner fails to overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is . . . that, under the circumstances, [counsel's objection] might be considered sound trial strategy." *Strickland*, 466 U.S. at 689.

11. Objection to Reinstructing Jury Not to Consider Kimble's Failure to Testify at Penalty Phase

Petitioner also argues that counsel should not have objected to instructions proposed by the prosecutor explaining that the jury should draw no inferences from the fact that Kimble did not testify at the penalty phase. (SAP at 58; *see* RT at 3380.) The prosecutor proposed repeating CALJIC 2.60 and 2.61, which were given at the guilt phase:

> It is a constitutional right of a defendant in a criminal trial that he may not to be compelled to testify. You must not draw any inference from the fact that he does not testify. Further you must neither discuss this matter nor permit it to enter into your deliberations in any way.
>
> In deciding whether or not to testify, the defendant may choose to [rely] on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him, and no lack of testimony on defendant's part will supply a failure of proof by the People so as to support a finding against him on any such essential element.

(RT at 3209-10.) The second instruction could have confused the jury by discussing the "elements" of "charges," which had no obvious application to the factors the jury was asked to consider at the penalty phase. Counsel therefore could reasonably have declined the instruction. The question of whether the jury should have been reminded to disregard the fact that Kimble did not testify at the penalty phase is closer. Even if counsel's objection to the repetition of this instruction fell outside the wide range of reasonable professional assistance, however, it is impossible to conclude that it was prejudicial here. No attention was drawn, directly or indirectly, either by any penalty phase witness or by counsel's closing arguments to suggest that Kimble's silence should be held against him. *Cf.*

Lincoln, 807 F.2d at 809 (prosecutor improperly commented on defendant's failure to testify).

12. Failure to Request Instruction that Deterrence Should Not Be Considered

During his penalty phase closing argument, the prosecutor told the jury that "the experts disagree as to whether executing a person for a horrible crime has a deterrent effect, but one thing everyone can agree on, justice to Eric Kimble and his execution will prevent him from any further transgressions on his fellow human beings." (RT at 3369-70.) Defense counsel responded:

> It's kind of interesting, we talk about deterrent effect. I didn't get into this. I want to make a comment about it, because it wasn't mentioned in the district attorney's opening argument, he just mentioned it a moment ago, that that is addressing ourselves to the question does the death penalty deter?
>
> This is certainly the most common argument advanced by proponents of it, that it deters others from committing similar crimes.
>
> I have over there at the table available to me study after study comparing states of similar demographics and populations, one of which would have the death penalty and another of which would not, demonstrating, I would say very convincingly, that it does not deter, but I think those studies are suspect, because the studies which I have, for reasons which I can't fathom, will show that in the states without the death penalty the murder rate per hundred thousand of population is less than it is in the states which have it.
>
> Now, that doesn't make a lot of sense to me, but at least it suggests that it doesn't really deter.
>
> Now, let's consider our own personal experience here in

> Los Angeles. No part of our penological system in the past ten years has received more public attention, more public debate, more attention from the legislature, more attention from the Supreme Court than the death penalty.
>
> It's been on the ballot twice, it has been editorialized about by the millions of words.
>
> Is there any evidence that the death penalty deters? Haven't we been reading day after day in recent weeks, in recent months about the increased homicide rate in the County of Los Angeles or in the City of Los Angeles?
>
> Who is being deterred? And if the only argument which the district attorney can advance in favor of the death penalty, and he pretends this is his compelling argument, is that killing Eric Kimble would deter him, but I think that is a specious and sophomoric argument.
>
> Lock him up in prison for life without parole would deter him just as effectively.

(RT at 3374-76.)

Counsel made a reasonable tactical decision to respond to the prosecutor's argument about deterrence. While the prosecutor conceded that experts disagree over the question of general deterrence, defense counsel went further and provided jurors with additional reasons to reject this as a reason to execute Kimble. He then turned to the point of the prosecutor's argument — that regardless of what one thinks of general deterrence, executing Kimble would specifically deter him — and provided the jurors with a reason to reject that argument as well, on the ground that life in prison would incapacitate Kimble equally effectively. In view of this reasonable tactical response to the prosecutor's argument, it would have been counterproductive to instruct the jurors to pay no attention to counsels' arguments about deterrence.

13. Cumulative Ineffective Assistance of Counsel

Claim 10(K) alleges cumulative error from all of counsel's omissions and strategic blunders. (SAP at 60); *see, e.g., Harris v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995) (In analyzing ineffective assistance of counsel claim, "prejudice may result from the cumulative impact of multiple deficiencies.") (citation and internal quotation marks omitted). Counsel's penalty phase closing argument was deficient and independently prejudicial for the reasons previously given in connection with Claim 10(E). And as just discussed, counsel was also deficient in failing to request certain instructions that could have benefitted petitioner at the penalty phase. Accordingly, based on the combined prejudicial effect of Claims 10(E), 10(H)(5,6,7), and 10(I), Claim 10(K) is GRANTED.

H. Claim 11: Petitioner Was Deprived of Right to Unanimous Jury Determination on Premeditation and Deliberation

Petitioner argues that the two felony murder special circumstance findings are invalid because the jury could have found them true without finding beyond a reasonable doubt that he premeditated and deliberated the killings. He contends that imposing the death penalty on someone who does not premeditate and deliberate a homicide violates the Eighth and Fourteenth Amendments. (SAP at 61-62.)

In contrast to current law, under the 1977 death penalty law, if the defendant was merely an aider and abettor and did not personally kill the victim, then the felony murder special circumstances did not apply unless the defendant acted "with intent to cause death." (RT at 3244); *see Carlos v. Superior Court*, 35 Cal. 3d 131, 138-39 (1983), *overruled by People v. Anderson*, 43 Cal. 3d 1104, 1138-39 (1987). The special circumstance instructions here required the jury to find both that the murders were "willful, deliberate, and premeditated," and that Kimble either committed them himself or, if he helped another person to kill, physically assisted that person with the intent to cause death. (RT at 3244-45.) The jury verdicts are

consistent with both the prosecutor's theory that Kimble acted alone and the defense theory that the killer had assistance subduing the Margulies. Thus, the jury could have found the felony murder special circumstances to be true on an aiding and abetting theory, as long as it concluded that Kimble intended the killings, even if he did not personally premeditate them.

Petitioner is thus correct that the jury instructions left open the possibility that he could be found death eligible even if he did not premeditate and deliberate the killings. But petitioner is incorrect in concluding that this violates the Constitution. *See Anderson*, 43 Cal. 3d at 1139-41 (citing *Cabana v. Bullock*, 474 U.S. 376, 385 (1986)). The Supreme Court has never held that the death penalty is restricted only to those who premeditate when they kill. Claim 11 is DENIED.[41]

I. Claim 18: Jury Instruction Reduced Burden of Proof

Petitioner claims this guilt phase jury instruction, former CALJIC 3.34, impermissibly reduced the prosecution's burden of proof:

> The intent with which an act is done is shown as follows:
>
> By a statement of his intent made by a defendant.
>
> By the circumstances attending the act, the manner in which it is done, the means used, and the soundness of mind and discretion of the person committing the act.
>
> For the purposes of the case on trial *you must assume that the defendant was of sound mind at the time of his alleged conduct* which, it is charged, constituted the crime described in the Information.

(RT at 3216-17 (emphasis added).) Petitioner contends that this instruction created an impermissible presumption that he "was of sound mind," thereby reducing the prosecution's burden of proving that he committed the charged crimes with the

[41] For independent reasons, the rape murder special circumstance is invalid because of the instructional error under *People v. Green*, as discussed above in connection with Claim 10(H)(2) and Claim 19.

requisite criminal intent. (SAP at 82-83.)[42]

The Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every element of the charged crime. *In re Winship*, 397 U.S. 358, 364 (1970). This principle bars evidentiary presumptions that have the effect of relieving the State of its burden of proof. *Yates v. Evatt*, 500 U.S. 391, 400-401 (1991); *Francis v. Franklin*, 471 U.S. 307, 316 (1985) (unconstitutional presumptions that the "acts of a person of sound mind and discretion are presumed to be the product of the person's will" and that a person "is presumed to intend the natural and probable consequences of his acts."); *Sandstrom v. Montana*, 442 U.S. 510, 513 (1979) (unconstitutional presumption that "the law presumes that a person intends the ordinary consequences of his voluntary acts").

Had petitioner presented any evidence at trial tending to raise a doubt about whether he was "of sound mind" at the time of the crimes, the instruction might have violated these principles. *See, e.g.*, *Starkman v. Hickman*, 455 F.3d 1070, 1074-78 (9th Cir. 2006) (instruction requiring jury to presume defendant sane at guilt phase of murder trial violated due process where "the only real issue at the guilt phase was whether petitioner had a mental disease, defect, or disorder that precluded him from forming the requisite specific intent"); *Patterson v. Gomez*, 223 F.3d 959, 964-67 (9th Cir. 2000) (instruction requiring jury to presume defendant sane violated due process where defendant's mental state was "the primary issue throughout the guilt phase of the trial"). At trial, however, no evidence was introduced from which a reasonable jury could have concluded that Kimble was experiencing any mental problems on the date of the crimes. His mother and sister testified that he was mostly around the house that day, playing

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[42] California courts apparently stopped giving this instruction shortly after Kimble's trial. *See People v. McCaskey*, 207 Cal. App. 3d 248, 258 (1989) (referring to CALJIC 3.34 has having been withdrawn).

music and card games. (RT at 2915.) No witness suggested that there was anything wrong with Kimble or that he behaved in an unusual manner, and counsel did not make any such argument to the jury. Under these circumstances, the "sound mind" instruction did not have a substantial and injurious effect on the jury deliberations.

Claim 18 is DENIED.

J. Claim 12: The Jury Considered Invalid and Prejudicial Findings

1. Great Bodily Injury & Firearm Allegations

In reaching its guilt phase verdict, the jury found true two separate allegations of great bodily injury under Penal Code section 1203.09 based on the injuries suffered by Harry Margulies. Petitioner claims these allegations were improper for various reasons. The instructions made clear that the great bodily injury allegations related to the burglary and robbery charges, asking the jury to determine whether the defendant inflicted great bodily injury "in the commission of burglary or robbery." (RT at 3236.) The jury's conclusion that he did so could not have influenced its subsequent penalty determination for the murders. These allegations were minor in comparison to the aggravating evidence. Even if petitioner's complaints about the way the findings were made are correct, therefore, the error was harmless.

The same analysis applies to petitioner's complaints about overcharging of five firearm use allegations when there allegedly should have been at most one such allegation. The trial judge's subsequent mistaken reference to the firearm allegations as "special circumstances" when pronouncing the sentence after the jury was dismissed does not show that the jurors failed to grasp the distinction between special circumstances and enhancement allegations, or provide any reason to believe that the jurors were unduly influenced in their penalty determination by their prior findings that petitioner used a firearm when committing the enumerated felonies.

2. Two Robbery Special Circumstances

Petitioner was initially charged with two robbery special circumstances. The charge as to Avone Margulies was dismissed at the close of the prosecution's case for lack of evidence that anything was taken from her. Petitioner contends this charge inflated the aggravating factors considered by the jury. But the instructions made clear that they were to deliver a verdict on just one robbery special circumstance allegation. (RT at 3228-29.) At the penalty phase, no one suggested there were two robbery special circumstances. There is no reasonable probability that the dismissed special circumstance charge influenced the jury's penalty decision. *Cf. Williams v. Calderon*, 52 F.3d at 1480 ("[I]t is highly unlikely that the jury simply counted up the special circumstances charged and based its verdict on such calculation.") (citation and internal quotation marks omitted).

3. Duplicative Aggravating Circumstances

Petitioner claims that the trial court's instruction to consider both "the circumstances of the crime" and "the existence of any special circumstances found to be true," led to a "stacking of aggravating factors" making petitioner appear more deserving of a death sentence. (SAP at 67.) This instruction tracked the language of § 190.3(a), which provides that "[i]n determining the penalty the trier of fact shall take into account . . .

> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to § 190.1."

Cal. Penal Code § 190.3(a). Courts have uniformly rejected the suggestion that this instruction alone, in the absence of misleading argument by the prosecutor, could cause jurors to double count the circumstances of the crime when making their penalty determination. *See, e.g.*, *People v. Jones*, 54 Cal. 4th 1, 77 (2012); *cf. Brown v. Sanders*, 546 U.S. at 222-25 (consideration of invalid sentencing factor does not undermine penalty verdict if "one of the other sentencing factors enables

the [jury] to give aggravating weight to the same facts and circumstances").

Claim 12 is DENIED.

K. Claim 13: Insufficient Evidence

Petitioner claims there was insufficient evidence at trial to support the jury's findings of premeditation and deliberation, the great bodily injury findings, the robbery charge and robbery murder special circumstance, and the rape charge and rape murder special circumstance.

The Supreme Court has held that a state prisoner is entitled to habeas corpus relief on the basis of insufficiency of the evidence only if "upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). The Ninth Circuit has explained that *Jackson* "establishes a two-step inquiry for considering a challenge to a conviction based on sufficiency of the evidence." *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc).

> First, a reviewing court must consider the evidence presented at trial in the light most favorable to the prosecution. This means that a [reviewing court] may not usurp the role of the finder of fact by considering how it would have resolved the conflicts, made the inferences, or considered the evidence at trial. Rather, when faced with a record of historical facts that supports conflicting inferences a reviewing court must presume — even if it does not affirmatively appear in the record — that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.
>
> Second, after viewing the evidence in the light most favorable to the prosecution, the reviewing court must determine whether this evidence, so viewed, is adequate to allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. This second step protects against rare occasions in which a properly instructed jury may

> convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt. More than a mere modicum of evidence is required to support a verdict. At this second step, however, a reviewing court may not ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt, only whether *any* rational trier of fact could have made that finding.

Id. (citations and internal punctuation omitted).

There was plenty of evidence from which a rational jury could infer that Kimble entered the house alone, robbed Harry Margulies of the stereo store keys, inflicted great bodily injury on him, and murdered Harry and Avone with premeditation and deliberation. The jury could have concluded that Ted Dietlin correctly identified Kimble as the individual with the black briefcase (which was later found to contain ammunition) casing the house several hours before the murders. This evidence of advance planning strongly suggests premeditation. The jury could have inferred from the fingerprint evidence that Kimble entered the house, and that no fingerprints of any confederates were found for the simple reason that Kimble acted alone. If Kimble was alone in the house, then it was reasonable to conclude beyond a reasonable doubt that he killed the Margulies.

The evidence that Avone was raped was more circumstantial, as the prosecutor acknowledged in closing argument, and was based on a series of inferences from the physical evidence. (RT at 3012-15.) The semen evidence indicated only someone with Type A blood, consistent with Harry Margulies as well as petitioner. The prosecutor commented: "After all, Harry and Avone Margulies are married. Harry took off half a day. They could have had sex. What's wrong with that?" (RT at 3012.) He then proceeded to explain why this was not a reasonable inference from all of the evidence. The medical examiner testified that Avone had engaged in sexual intercourse within six hours of her death, sometime between 10:00 a.m. and 4:00 p.m. (RT at 1518-19.) Avone's

clothes were scattered across the floor of her son Bill's room, who at the time was living in the house with his parents. (RT at 1550, 1890, 2811.) Her metal headband and a potholder from the kitchen were on Bill's bed. (RT at 1556-58, 1890-91.) Although there was no trauma to Mrs. Margulies' genital area, (RT at 1526), her body had five superficial scrapes of skin on her right breast, a bruise on her left breast, and various other scrapes and bruises on her shoulder, arms, abdomen, and thigh. (RT 1498-99.) And while Avone's body was naked, her husband's was fully dressed.

Viewing this evidence in the light most favorable to the prosecution, a reasonable juror could find it implausible that the Margulies were having sex before or around the time petitioner intruded. Although there was evidence that they had been drinking wine and swimming that afternoon, Avone evidently got dressed at some point afterwards, since her clothing, and not a bathing suit, was found in her son's bedroom. Reasonable jurors could find it unlikely that the Margulies had sex in their son's bedroom, with Avone's clothing "essentially torn off and strewn all over the son's floor in the bedroom." (RT at 3011.) Even if the Margulies did have consensual sex earlier in the afternoon, it is unlikely that Avone would have remained naked after Harry got dressed, leaving her clothing scattered around her son's bedroom when he was expected to return later that day. Jurors would find it even less plausible to believe that, after being interrupted by petitioner, Harry got fully dressed while Avone remained completely naked. Given the flaws in the theory that the Margulies had consensual sex in their son's bedroom, a juror could well conclude that the only rational explanation of the evidence is that petitioner raped Avone Margulies. The evidence was therefore sufficient to support the jury's rape verdict and the associated special circumstance finding.[43] Claim 13 is DENIED.

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[43] As previously discussed in Claim 10(H)(2), the rape murder special circumstance is independently invalid because of the instructional error under *People v. Green*.

L. Claim 7(F)(3)(d,e,i): Misleading Description of Rape Evidence

Petitioner claims that three of the prosecutor's comments about the rape evidence during closing argument constituted misconduct.

1. Reference to Absence of Evidence of Healed Scars

Medical examiner Peter Dykstra testified that his examination of Avone Margulies revealed five superficial scrapes of the skin on her right breast, a bruise on her left breast, and various other scrapes and bruises on her shoulder, arms, abdomen, and thigh. (RT 1498-99.) Referencing this testimony in his closing argument, the prosecutor argued that the fact that the doctor did *not* testify that he found healed scars indicated that the bruises and abrasions on Avone's breasts were not caused by her husband, but by someone else. (RT at 3012-13 ("The doctor did not tell us of any healed scars indicating that that was a part of their marriage.").)

Petitioner contends the prosecutor's comment about the absence of evidence of healed scars was misleading because the bruises and abrasions could have been caused by some other nonsexual impact, and would not typically leave scars. "Counsel are given latitude in the presentation of their closing arguments, and courts must allow the prosecution to strike hard blows based on the evidence presented and all reasonable inferences therefrom." *Ceja*, 97 F.3d at 1253-54. The prosecutor made his comment immediately after urging the jury to "really question whether you could find it reasonable that Harry inflicted the bruises and abrasions on Avone's breasts." (RT at 3013.) The inference that the injuries could have been caused by *someone's* hand squeezing the breast was directly supported by Dr. Dykstra's testimony that "these scrapes would be consistent with the effect of the thumb and four fingers." (RT at 1499-1500.) The reference to a lack of scars, in the context of the prosecutor's argument, was offered in support of his contention that it was more likely that Avone was the victim of sexual battery than that violence or forceful sex was a part of this marriage between a 60-year-old man and

his 50-year-old wife. (*See* RT at 3012-13.) The prosecutor never pretended to present dispositive proof of the nature of the Margulies' sex life; he simply asked the jurors to draw a reasonable inference about it. His argument on this subject was not improper.

2. Misstatement of Medical Examiner's Testimony

As part of his summary of the evidence supporting the rape charge, the prosecutor asserted that although there was no trauma to Avone's genital area, the medical examiner "testified that that was not inconsistent with rape of a person of Avone Margulies' age, having had two children — " (RT at 3015.) In fact, the medical examiner gave no such testimony.

Defense counsel immediately interrupted, saying "Your Honor, I challenge that statement. He did not so testify." The prosecutor replied, "That is my recollection," and the trial court confirmed, "That is his recollection." The prosecutor then told the jurors, "If you have any doubt at to that, then I urge you to ask that Dr. Dykstra's testimony be read." He also explained that if the jurors were curious about just one part of his testimony, they could specify that when requesting the testimony be read back, and thereby "save us all a lot of time." (RT at 3015.)

Petitioner's trial attorney objected to the prosecutor's erroneous statement, but the prosecutor claimed that it was his recollection of the doctor's testimony, and the court did not sustain defense counsel's challenge. (RT at 3015.) Although the prosecutor advised the jury that they could request readback of any or all of Dr. Dykstra's testimony (RT at 3015), the trial court later gave the jury an instruction cautioning them against "perfunctory" requests to have testimony reread. (CT at 335.) Thus, the jury was left with the prosecutor's erroneous argument, uncontradicted and uncorrected by the trial court, and apparently buttressed by the prosecutor's suggestion that the jury could confirm for themselves with readback. Petitioner claims the prosecutor's misstatement of the medical testimony

constituted prosecutorial misconduct.

The wide latitude afforded prosecutors in closing argument does not, of course, include "manipulating and misstating the evidence." *Drayden*, 232 F.3d at 713. Here, the prosecutor misrepresented what Dr. Dykstra said. Nevertheless, this isolated error did not so infect petitioner's trial with unfairness as to make the rape conviction a violation of due process. *Id.* (standard of review for prosecutorial misconduct in habeas cases). Defense counsel's immediate objection, and the response of counsel and the trial judge, emphasized the distinction between evidence (which could be found in the transcript of Dr. Dykstra's testimony) and the prosecutor's personal "recollection" of the evidence. In his rebuttal, defense counsel reminded the jurors that the prosecutor had made this claim about Dr. Dykstra's testimony, adding: "I challenged him on that. I don't recall the testimony. If he could find it and present it to you in his closing I am apologizing to him right now and to you." (RT at 3122.) The prosecutor did not address this dispute in his closing argument. He did, however, tell the jurors: "Again, if I state the facts any different from your recollection, rely on your recollection." (RT at 3161.) The trial court gave a standard instruction on the difference between evidence and statements of counsel. (RT at 3201-3203.) Under all these circumstances — especially given the prosecutor's failure to defend his initial recollection after he was challenged to point to the alleged testimony — the jurors probably were skeptical of the prosecutor's misstatement.

Even if the jury accepted the prosecutor's statement at face value, however, the error would not have appreciably strengthened the case for rape. The point remained that the record evidence about the condition of Avone's body was consistent both with consensual sex with her husband and sexual assault by petitioner. If the jurors trusted the prosecutor's incorrect recollection of Dr. Dykstra's testimony, this would have at most reinforced the conclusion that rape could not be proved from the condition of her body alone. Instead, as the

prosecutor argued, the evidence of rape came primarily from the fact of recent intercourse, apparently accompanied by some force, combined with the condition and location of Avone's clothing in contrast to Harry's fully clothed body. Under these circumstances, the prosecutor's misstatement did not have a substantial and injurious effect on the jury's verdict.

3. Claim that Forensic Evidence Exonerated Ortez Winfrey

Petitioner claims the prosecutor falsely asserted that blood type evidence established that Ortez Winfrey could not have committed the rape. (SAP at 32-33.) To evaluate this claim, it is necessary to review the forensic evidence and then consider how the prosecutor described it.

At this 1980 trial, the only bodily fluid identification evidence introduced was broad blood-typing evidence. It showed that petitioner, as well as both Avone and Harry Margulies, had blood type A. (RT at 1991-92, 2000.) Ortez Winfrey's blood type was O. (RT at 2510-11.) William Grant's blood type was also O, although this fact was not covered in testimony before the jury.[44]

Evidence was also introduced that Kimble is a "secretor," meaning that like 80% of the human population, he secretes his blood type into his bodily fluids. (RT at 1995-96.) No evidence was introduced on whether anyone else was a secretor, and neither side asked questions about the secretor status of other potential suspects. Thus, even if Grant or Winfrey, with blood type O, committed the rape and ejaculated, there is approximately a one in five chance that their blood type would not have been detected in the vaginal sample.[45] Yet the sample likely would still have tested positive for blood type A because this was Avone

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[44] Exhibit 47D — a fingerprint exemplar with a blood type report attached to it — showed that William Grant had type O blood. (RT at 2274.) This exhibit was admitted into evidence. (RT at 2281A.) However, only the fingerprint exemplar was referenced in testimony before the jury. (RT at 2111.)

[45] This inference follows from Dr. Dickerson's testimony but was not explicitly stated at trial. (*See* RT at 1994-96.)

Margulies' blood type, secreted in her own bodily fluids. (RT at 1994-95.)

During his closing, defense counsel argued that the prosecution's evidence of rape was based on little more than conjecture, and that the obvious alternative possibility that the Margulies had recently engaged in consensual sex meant the jury had a duty to find reasonable doubt on rape. (RT at 3121-25.) In rebuttal, the prosecutor discussed the physical evidence supporting the rape charge, agreeing with defense counsel that "the type A donor surely is not indicative of rape. As [defense] counsel says, Mr. Margulies is also type A, everybody except Bill Grant III and Ortez Winfrey that we have seen has been a type A." (RT at 3185.)

Petitioner claims that this argument "misrepresented the evidence, arguing it established that the prosecution star witness Ortez Winfrey could not have raped Mrs. Margulies." (SAP at 32.)[46] The prosecutor made no such argument. He did not contend that the fact that Winfrey and Grant were type O conclusively exonerated them; he simply repeated the uncontroverted evidence that their blood type was different from the blood type found in every sample recovered from the crime scene. Their different blood type was not entirely *irrelevant* to the question of their involvement, since although their secretor status was not established, there was an 80% probability that if Winfrey or Grant had contributed the seminal fluid then it would have shown up in the vaginal sample as type O.

Petitioner also complains about an earlier statement made during the prosecutor's closing argument, that Ortez and Orthy Winfrey "could not be the ones that raped Avone Margulies." (RT at 3157.) But the prosecutor made this argument without any reference to the forensic evidence. He was instead addressing defense counsel's questions about why the Winfrey brothers were not

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[46] In support of this claim, petitioner also quotes from the *post-verdict* hearing on petitioner's motion for new trial, where the prosecutor argued, "we know for sure they weren't involved in the rape because the blood test and so forth excluded both Grant and Mr. Winfrey." (SAP at 33 (citing RT at 3450).) Obviously the jurors did not hear this argument.

included in the lineup at which Ted Dietlin identified Kimble as "similar" to the man he saw casing the Margulies house. He argued that it would be improper for the jurors to speculate about why others were not charged:

> Ortez Winfrey is not on trial today, he is not accused of murder, except by Mr. Walton maybe. Ortez Winfrey has been granted a different type of plea. They could not be the ones that raped Avone Margulies. [¶] Hodel believed both Ortez and Orthy to be murderers at the time of the execution of the search warrant, no question that he believed that, and properly so. . . . [¶] But after talking to Ortez and talking to Orthy, after talking to William Grant III, after talking to Eric Kimble, they changed their minds, and I suggest to you that it would be grossly improper for you to speculate why they changed their minds, because after all, Ortez, Orthy, William Grant are surely not on trial today.

(RT at 3157-58.) Rather than a misrepresentation of the forensic evidence, this comment was well within the bounds of reasonable inference from the evidence.

The foregoing three portions of Claim 7(F)(3) are DENIED.

M. Claims 20-26: Penalty Phase Instructional Error

Petitioner raises several challenges to the penalty phase jury instructions.

In Claims 20 and 21, he argues that the ten-factor sentencing guidelines provided to the jurors led them to conclude that they could only consider evidence relating to these circumscribed factors, and could not consider the other matters raised by defense counsel as a reason to spare Kimble's life, such as the fact that he was a well-behaved child who was loved by his family. The instructions therefore allegedly precluded the jury from giving full consideration to his mitigating evidence, in violation of the principle of *Lockett* and its progeny. (SAP at 86-90.) This argument has repeatedly been rejected by the United States Supreme Court in cases involving various types of mitigating evidence and similar jury instructions.

See Ayers v. Belmontes, 549 U.S. 7, 15 (2006); *Brown v. Payton*, 544 U.S. 133, 141-42 (2005); *Boyde v. California*, 494 U.S. 370, 382 (1990).

Petitioner also argues that a typographical error in factor (j) — the critical catch-all factor requiring the jurors to consider his mitigating evidence — "rendered the instruction meaningless and confusing." (SAP at 87.) The court instructed the jury to consider "any other circumstances which extenuate the gravity of the crime even though it is not a legal excuse for the crime." (RT at 3387.)[47] It should have been "any other circumstance which extenuates . . ." *See* Former Penal Code § 190.3(j) (1977); Penal Code § 190.3(k) (1978). Petitioner contends that the erroneous plural likely caused jurors to conclude that the pronoun "it" later in the instruction did not mean "any other circumstance," but instead could only refer to one of the preceding singular nouns ("gravity" or "crime"), which would make no sense. This theory gives too little credit to the jurors. They surely understood the instruction despite the failure of number agreement, which is a common mistake in human speech. "As long as human beings rather than computers preside over jury trials, slips of the tongue will occur. But not every such lapsus linguae requires setting aside a jury verdict." *United States v. Pennue*, 770 F.3d 985, 987 (1st Cir. 2014). Only if an error was "reasonably likely to mislead the jury" will it render a trial unfair. *Id.* at 989; *Middleton v. McNeil*, 541 U.S. 433, 437 (2004). The jurors at petitioner's trial demonstrated their willingness to ask questions when they needed clarification, and they required no assistance to understand factor (j).

In Claim 22, petitioner objects to the trial court's response to the jury's question during the penalty deliberations, "Is there any further criteria that can be used to determine one penalty as opposed to the other, or is it simply a matter of our personal choice?" (RT at 3390-91.) The trial court replied:

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[47] The written version of the instruction provided to the jury had the same error. (CT at 365.)

> It is not a matter of your personal choice. At the time that you were sworn you were sworn to follow the law as I read it to you. This takes it out of the province of it being your personal choice. [¶] You are to follow the law, regardless of what your personal choice may be. [¶] I again will emphasize that there is [sic] no further criteria other than the instructions that have previously been given you, and I will read the instructions again to you.

(RT at 3394.) The court then reread the entire penalty phase instructions and advised the jury "to use those guidelines and . . . not to simply make it a matter of your personal choice." (RT at 3396-3401.)

Petitioner argues that this response to the jurors' question diminished their sense of responsibility for their capital sentencing decision, precluded them from exercising mercy, sympathy, or pity, and therefore undermined the reliability of the penalty verdict. (SAP at 92-93.) To the contrary, the judge answered the jury's questions correctly by telling them that the decision was not "simply a matter of [their] personal choice" and "there [are] no further criteria." *Cf. Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (original instruction was adequate and judge correctly answered jury's question about it); *Beardslee v. Woodford*, 358 F.3d 560, 574-75 (9th Cir. 2004) (trial judge should attempt to answer jury's questions). California's capital sentencing scheme does not violate the Constitution by directing jurors to consider certain specified factors in reaching their decision. *Tuilaepa*, 512 U.S. at 978. The trial court correctly emphasized to the jurors their duty to consider the statutory sentencing factors in their penalty deliberations. *See Boyde*, 494 U.S. at 377 (Constitution does not require "unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence in an effort to achieve a more rational and equitable administration of the death penalty.") (citation and internal quotation

marks omitted).

Claim 23 challenges the trial court's response to the jurors' question about what would happen if they could not agree on the penalty. The court said only, "That is not within your province," and then turned to the jurors' question about sentencing criteria. (RT at 3390.) In re-reading the penalty phase instructions, the court repeated its original statement that "in order to make a determination as to penalty, all 12 jurors must agree." (RT at 3264, 3399.) Petitioner argues that this response failed to answer the jury's question and left them to speculate about the consequences of a failure to agree on the penalty. (SAP at 93-95.) This claim is foreclosed by the Supreme Court's decision in *Jones v. United States*, 527 U.S. 373 (1999). In *Jones*, the Court affirmed a trial court's refusal to instruct a capital sentencing jury that in the event it could not reach a unanimous verdict, the trial court would then impose a sentence of life imprisonment without the possibility of release. *Id.* at 379. (This would also have been the result of a deadlocked penalty jury at petitioner's trial under former Penal Code § 190.4(b).) The Supreme Court rejected the view that the refusal to inform jurors about the consequences of deadlock violates the constitutional principle against affirmatively misleading a jury about its role in the capital sentencing process. *Id.* at 382. The Court explained: "We have never suggested . . . that the Eighth Amendment requires a jury be instructed as to the consequences of a breakdown in the deliberative process. On the contrary, we have long been of the view that the very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." *Jones*, 527 U.S. at 382 (citation and internal quotation marks omitted).

In Claim 24, petitioner objects to the trial court's failure to clarify which sentencing factors are mitigating and which are aggravating, and its failure to delete factors that had no relevance to any issue in the case (*e.g.*, factor (d): "Whether or not the victim was a participant in the defendant's homicidal conduct

or consented to the homicidal act.")). He argues that these errors, together with the prosecutor's closing argument, "led to an artificial inflation of the factors in aggravation, which skewed the penalty phase weighing process and injected an impermissible element of unreliability into the jury's capital sentencing determination." (SAP at 95-97.) This claim is foreclosed by the Supreme Court's decision in *Tuilaepa v. California*. Addressing an identical challenge to California's 1978 death penalty law, the Court held that "[a] capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." *Tuilaepa*, 512 U.S. at 979; *see also People v. Jackson*, 28 Cal. 3d 264, 316 (1980) (unnecessary to specify whether factors are aggravating or mitigating because "the aggravating or mitigating nature of these various factors should be self-evident to any reasonable person within the context of each particular case."). The prosecutor did not mischaracterize the sentencing factors in his closing argument. (*See* Claim 7(E)(6,7), *supra* (rejecting claim of *Davenport* error).) Nor was it error "to read to the jury the entire list of factors the state considered relevant to the sentencing decision, even when some did not apply." *Williams v. Calderon*, 52 F.3d at 1481. The jurors were told to be "guided by the following factors *if applicable*." (RT at 3385 (emphasis added).)

Claim 25 is based on the trial court's error in submitting two separate multiple murder special circumstance allegations to the jury, one for each victim. *See People v. Kimble*, 44 Cal. 3d at 504 (prosecutor "should allege one multiple-murder special circumstance relating to all individual murder counts"). Petitioner argues that the erroneous additional special circumstance finding artificially inflated the number of aggravating factors and skewed the jury's penalty decision toward death. (SAP at 97-98.) This claim is foreclosed by the Ninth Circuit's decision in *Allen v. Woodford*. There, the jury erroneously found six multiple murder special circumstances based on three murders. *Allen*, 395 F.3d at 1011. The Court of Appeals concluded that the error was harmless because "Allen's

actual conduct was never inflated; the jury had before it all the relevant facts from which any one special circumstance, supporting the death penalty, could be formed." *Id.* "The jury's weighing of aggravating and mitigating factors in California is a mental balancing process, but not one that involves a mechanical counting of factors on either side of some imaginary scale, or the arbitrary assignment of weights to any factor." *Id.* (citations and internal quotation marks omitted); *see also Williams v. Calderon*, 52 F.3d at 1480 ("[I]t is highly unlikely that the jury simply counted up the special circumstances charged and based its verdict on such calculation.") (citation and internal quotation marks omitted). As in *Allen*, the prosecutor here did not appeal to the number of special circumstance findings as a reason to return a death verdict. (*See* RT at 3343-51, 3369-74 (focusing on the circumstances of the crimes and only once mentioning "the special circumstances found" without listing them or elaborating on them (RT at 3350).)

Finally, Claim 26 asserts that the penalty phase jury instructions should have required the state to prove beyond a reasonable doubt that death was the appropriate penalty. (SAP at 98-100.) Neither state nor federal law imposes such a requirement on capital sentencing procedures. *Williams v. Calderon*, 52 F.3d at 1485; *People v. Elliott*, 53 Cal. 4th 535, 593-94 (2012); *cf. Kansas v. Marsh*, 548 U.S. at 173 ("state death penalty statute may place the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances").

Claims 20-26 are DENIED.

N. Claims Challenging Denial of Motion to Modify Sentence

Pursuant to standard capital sentencing procedure in California, several months after the trial was over, the trial court considered petitioner's motion to reduce the sentence to life imprisonment. Cal. Penal Code § 190.4(e); (RT at 3463-66.) Petitioner raises several related claims challenging the trial court's denial of that motion.

In Claims 15, 16, and 28 petitioner complains that in ruling on the motion, the trial court erroneously considered facts contained in a probation report, which had not been admitted into evidence in the penalty phase. (SAP at 72-80, 102.) Claim 28 alternatively argues that if the trial court did not consider evidence from the probation report, then the record shows that it must have incorrectly analyzed the factors in aggravation by erroneously double-counting the circumstances of the crimes under both factor (a) and factor (b) of Penal Code § 190.3. (SAP at 102-103.)

In Claim 27, petitioner contends that the trial court failed to consider and give effect to the mitigating evidence that petitioner presented at the penalty phase, in violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *Hitchcock v. Dugger*, 481 U.S. 393 (1987), and other cases. (SAP at 100-02.)

In Claim 29, petitioner argues that the trial court considered the factors listed in Penal Code § 190.3 without regard to which ones were aggravating and which were mitigating, and erred by classifying mitigating factors as aggravating factors. (SAP at 103-106.)

Claim 30 incorporates the allegations of the preceding claims and argues cumulative error in the ruling on the motion to modify the sentence. (SAP at 106-107.)

1. Improper Consideration of Probation Report

Under California law, when a jury returns a death verdict, the defendant is automatically deemed to have moved for modification of the sentence to reduce it to life imprisonment without the possibility of parole. Cal. Penal Code § 190.4(e). In ruling on the motion, the trial judge is required "to independently reweigh the evidence of aggravating and mitigating circumstances and then to determine whether, in the judge's independent judgment, the weight of the evidence supports the jury verdict . . . ." *People v. Clark*, 50 Cal. 3d 583, 634-35 (1990). Because the trial court's sole function is to determine whether the evidence supports the

jury's verdict, "the only evidence the court is to review is that which was before the jury." *Id.* Therefore, the trial court "should not read or consider a presentence report before ruling on an automatic motion to modify penalty." *People v. Kipp*, 18 Cal. 4th 349, 383 (1998). It is undisputed that in this case, the trial court erroneously read the probation report before ruling on the § 190.4(e) motion.

An error in the application of California Penal Code § 190.4(e) is an error of state law, and as such does not warrant federal habeas corpus relief. *See Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (federal habeas corpus relief does not lie for errors of state law); *Turner v. Calderon*, 281 F.3d 851, 871 (9th Cir. 2002) (violation of § 190.4(e) was state law error that raised no federal constitutional question).

Petitioner's contention that the trial court considered evidence in the probation report that was unreliable and was not subject to adversarial testing in accordance with federal constitutional requirements is unsupported by the record. In explaining its reasons for denying the § 190.4(e) motion, the trial court did not cite any evidence that was not presented to the jury during the penalty phase trial. (RT at 3462-66.) The trial court analyzed the motion by proceeding through the statutory factors listed in Penal Code § 190.3. (*Compare* RT at 3463-66 *with* RT at 3386-87.) For unexplained reasons, the judge apparently consulted a list of the eleven factors in the 1978 death penalty law, instead of the original ten factors in the 1977 law applicable to Kimble's crimes.[48] This made no practical difference, however, because the factors are identical except for the addition of a new factor (c) in the 1978 law: "The presence or absence of any prior felony conviction." Cal. Penal Code § 190.3(c). Consideration of this new factor caused no harm to petitioner because the judge correctly found no prior felony convictions. (RT at

[48] This change caused the labels of the eight factors (c) - (j) in the 1977 law to become factors (d) - (k) in the 1978 law. The transcript reveals that the parties were juggling both versions of the statute in court that day. (RT at 3425.)

3464.)

Under both the 1977 and the 1978 versions of California's death penalty law, the first two factors to be considered are:

> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true . . .
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

Cal. Penal Code § 190.3.

The transcript of the judge's discussion of factors (a) and (b) is confusing because he appears to conflate the two factors,[49] and to misuse the statutory term "special circumstance" to refer to any findings in addition to the crimes of conviction:

> The Court finds the following circumstances in aggravation and denies the request for modification of the verdict inflicting the death penalty for the following reasons:
>
> Penal Code Section 190.3(a), the circumstances of the crime of which the defendant was convicted in the present proceeding, and the existence of any special circumstances found to be true;
>
> Count I, defendant was convicted of murder of Harry

[49] This was probably due to the fact that judge as well as the prosecutor incorrectly believed that the criminal activity referenced in factor (b) included the defendant's crimes of conviction. *See People v. Kimble*, 44 Cal. 3d at 504-505; Claim 7(E)(4), *supra*. At trial, defense counsel objected to this characterization of factor (b), and he turned out to be correct, as the California Supreme Court held on direct appeal. *Id.* ("[W]e must read former section 190.3 to mean that only evidence of criminal activity *other* than the capital offense is relevant to subdivision (b)."). The state court concluded that the error did not affect the jury's assessment of the aggravating evidence. *Id.* at 505-506.

> Margulies, a human being;
>
> The special circumstance found that he personally used a handgun within the meaning of Section 12022.5 and 1203.06(a)(1);
>
> That the said murder was willful, deliberate and premeditated and committed by the defendant during the commission of a robbery in violation of Section 211 of the Penal Code;
>
> That the murder of Harry Margulies was personally committed by the defendant;
>
> And in addition to such murder, the defendant murdered Avone Margulies on and about the same date;
>
> *That the special circumstances were found to be true that the defendant had engaged in other criminal activity which involved use or attempted use of force or violence;*
>
> That the present criminal activity by the defendant involved a use or attempted use of a firearm, in that at the time the defendant committed the burglary on the home of the Margulies, he was armed with a firearm;
>
> That a firearm was used in the commission of the murder of Harry Margulies and in the commission of the murder of Avone Margulies;

(RT at 3463-64 (emphasis added).) The judge continued to refer to the firearm use allegations as "special circumstances" in pronouncing sentence. (RT at 3467-68.)

Petitioner points to the judge's reference to "the special circumstances . . . that the defendant had engaged in other criminal activity" as evidence that the court considered hearsay evidence from the probation report that was not before

the jury. (SAP at 71-72.) The judge's words are mysterious, since he appears to refer to some but not all of the jury's findings at the guilt phase: Kimble murdered the Margulies, used a handgun, and committed the murders in the course of a robbery. He did not specifically reference the rape conviction or special circumstance, although it is possible this is what he meant by "the special circumstances . . . that the defendant had engaged in other criminal activity," since he referred to this as a special circumstance that was "found to be true." These garbled words do not demonstrate that the trial court relied on information in the probation report. In any event, even if the trial judge had in mind the additional acts described in the probation report, this error was harmless. Whatever acts these may have been, the record reflects the fact that the trial judge did not consider them significant enough to warrant specific mention, in contrast to the crimes committed against the Margulies. And as previously described, defense counsel had essentially provided no reason to spare Kimble's life. His presentation of mitigating evidence was so anemic that the judge simply concluded, "the Court finds no circumstances in mitigation." (RT at 3463.)[50] Under these circumstances, consideration of the probation report did not have a substantial and injurious effect on the judge's analysis of the motion to modify the sentence.

2. Failure to Consider Mitigating Evidence

Petitioner contends that the trial court's findings, as stated on the record in denying the motion to modify the sentence, reveal that the court failed to consider and give effect to petitioner's mitigating evidence.

Lockett v. Ohio, 438 U.S. 586 (1978) and its progeny established a core Eighth Amendment requirement of capital sentencing procedure: "individualized assessment of the appropriateness of the death penalty" by a sentencer who is

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[50] The judge later clarified that "the only factor in mitigation the Court finds [is] the age of the defendant at the time of the crime," (RT at 3465), but it is evident that he considered this one circumstance to be so lacking in mitigating value that it made no difference to the penalty decision.

"allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense." *Penry v. Lynaugh*, 492 U.S. 302, 319, 327-28 (1989). In *Lockett*, the plurality opinion concluded that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*. 438 U.S. at 606 (Burger., J., concurring) (emphasis in original). In 1982 in *Eddings v. Oklahoma*, the Court as a whole endorsed this rule, explaining that "[t]he sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." *Eddings*, 455 U.S. at 114-15; *Smith v. McCormick*, 914 F.2d 1153, 1165 (9th Cir. 1990) ("Montana courts were entitled to conclude that the mitigating evidence [petitioner] submitted . . . was not persuasive enough to grant a sentence less than death; but they were not entitled to refuse to consider it as mitigating evidence simply because it fell below a certain weight."). In short, both the jury and the sentencing judge must "consider and give effect" to a petitioner's mitigating evidence in a capital sentencing proceeding. *Penry*, 492 U.S. at 319; *Hitchcock*, 481 U.S. at 398-99 (sentencing judge may not refuse to consider evidence of nonstatutory mitigating circumstances); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) ("[T]he sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'").

"Although a sentencing court may not refuse to consider any relevant mitigating evidence, 'a sentencer is free to assess how much weight to assign to such evidence.'" *Williams v. Stewart*, 441 F.3d 1030, 1057 (9th Cir. 2006) (quoting *Ortiz v. Stewart*, 149 F.3d 923, 943 (9th Cir. 1998)). The Court of Appeals explained:

> Once mitigating evidence is allowed in, a finding that there are no mitigating circumstances does not violate the Constitution. Further, the trial court is not required to itemize and discuss every piece of evidence offered in mitigation. But it must be clear to the reviewing court that the sentencing court considered all relevant mitigating evidence that was offered. It is sufficient that a sentencing court state that it found no mitigating circumstances that outweigh the aggravating circumstances.

Id. at 1057 (citations and internal quotation marks omitted).

"[W]here . . . the sentencing court states that it has considered all the mitigating evidence offered, we may not second-guess its actions." *Schad v. Ryan*, 671 F.3d 708, 725 (9th Cir. 2011), *overruled on other grounds by McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc), *cert. denied*, 137 S. Ct. 39 (2016); *Moormann v. Schriro*, 426 F.3d 1044, 1055 (9th Cir. 2005) ("This court may not engage in speculation as to whether the trial court actually considered all the mitigating evidence; we must rely on its statement that it did so."); *see also Parker v. Dugger*, 498 U.S. 308, 314 (1991) ("We must assume that the trial judge considered all this evidence before passing sentence. For one thing, he said he did.").

The court heard extensive argument on two motions simultaneously: petitioner's motion for a new trial, and the motion to modify the sentence. The argument focused on three issues: whether Kimble acted alone, whether a juror was improperly excused for expressing reluctance to impose the death penalty, and whether the 1977 death penalty statute was unconstitutional because it failed to distinguish between aggravating and mitigating sentencing factors, and more generally failed to prevent arbitrary sentencing decisions. These arguments were more relevant to the new trial motion than to the § 190.4(e) motion. There was no discussion of the mitigating evidence introduced at the penalty phase. (*See* RT at 3420-61.)

After denying the motion for a new trial, the judge turned to the § 190.4(e) motion:

> The Court having reviewed all of the evidence at the guilt phase and the penalty phase of the trial and having considered all the aggravating and mitigating circumstances delineated in Penal Code Section 190.3 and having heard argument, the Court finds no circumstances in mitigation.

(RT at 3463.).

The judge then set forth what he called "the following circumstances in *aggravation*" (emphasis added), addressing in turn each factor under § 190.3. As previously described, the judge apparently referenced a list of the eleven factors in the 1978 law rather than the ten factors in the 1977 law, and mistakenly conflated factors (a) and (b), relating to the circumstances of the crime and the presence or absence of criminal activity involving the use of force. When the judge reached the age factor (§ 190.3(i)) he remarked, "The only factor in mitigation the Court finds, the age of the defendant at the time of the crime was 19 years old."[51] It was odd to call this the only factor in mitigation after just having acknowledged that Kimble had no prior felony convictions (§ 190.3(c)). Finally, addressing the catch-all factor that implements the *Lockett/Eddings* rule,[52] the judge concluded, "There were no other circumstances which extenuates [sic] the gravity of the crime and no legal excuse for the crime." Having completed his analysis of the motion, he then proceeded to pronounce sentence. (RT at 3463-66).

Petitioner contends the judge's statements show that he failed to consider his mitigating evidence from the penalty phase. As previously discussed, defense

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[51] The prosecutor interrupted to point out that petitioner was actually 18 at the time of the crimes, and the judge corrected himself. (RT at 3465.)

[52] "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Cal. Penal Code § 190.3(k).

counsel presented six witnesses who described Kimble as a good child and a considerate neighbor who would not commit these terrible crimes. This was not much, but technically it was mitigating evidence. In petitioner's view, the judge's failure to specifically mention this evidence on the record shows that he failed to consider it at all. The Court disagrees. The trial judge made clear at the outset that he had "reviewed all of the evidence at the guilt phase and the penalty phase of the trial." (RT at 3463.) The Court must presume that the judge did what he said. *Schad*, 671 F.3d at 725. He was not required to analyze on the record every piece of mitigating evidence. *See Moormann*, 426 F.3d at 1055. The most likely reason the trial judge gave such short shrift to petitioner's mitigating evidence is that there was so little of it.

The judge's concluding statement that "[t]here were no other circumstances" in mitigation under factor (k) cannot be read in isolation. In view of the judge's earlier statement that he had reviewed all the penalty phase testimony, the most natural reading of the judge's conclusion is that he was aware of petitioner's character evidence, but found the circumstances of his early life and the his family's love insufficient to "extenuate[] the gravity of the crime" and lacking in mitigating value for the purpose of weighing the sentencing factors. *Cf. Ortiz*, 149 F.3d at 943 (sentencing court did not commit error where it considered the mitigating factors but concluded that "after considering all of these factors there are no mitigating circumstances sufficiently substantial to call for leniency"). There was no violation of the *Lockett/Eddings* rule.[53]

[53] Even if the trial court erroneously refused to consider the testimony of petitioner's family and neighbors, the error was harmless under *Brecht* given the stark imbalance between the aggravating circumstances of the crimes and the meager mitigation evidence. *See McKinney v. Ryan*, 813 F.3d at 821 (*Lockett*/*Eddings* error is not structural and is subject to harmless error analysis under *Brecht*).

3. Confusion over Sentencing Factors

As just mentioned, both the prosecutor and trial judge mistakenly believed that factor (b)'s reference to "criminal activity" permitted consideration of the crimes of which the defendant had just been convicted, even though factor (a) also encompasses those crimes. Petitioner reasons that if the judge's finding that "the defendant had engaged in other criminal activity which involved use or attempted use of force or violence" was not an improper reference to inadmissible prior criminal activity that was described only in the probation report, then the judge must instead have been referring to the circumstances of the crimes of which Kimble was found guilty at the guilt phase. (SAP at 102.) This too would have been an error, since the circumstances of the crimes had already been considered under factor (a). *People v. Kimble*, 44 Cal. 3d at 505 ("[O]nly evidence of criminal activity *other* than the capital offense is relevant to subdivision (b)."). This error, petitioner argues, caused the trial judge to consider the circumstances of the crimes as two different aggravating factors, and thereby "improperly inflate the aggravating factors calling for death, and artificially skew the sentencing determination." (SAP at 103.) The Court concludes, however, that just as this error was unlikely to affect the jury's assessment of the weight of the aggravating and mitigating evidence, so too it was unlikely to affect the trial judge. There is no reason to believe that the judge simply tallied the sentencing factors and, upon seeing eight or nine in the aggravating column and just one or two in the mitigating column, concluded that petitioner should be sentenced to death. Instead, what was significant to the trial judge was undoubtedly the simple fact that the crimes were egregious and the defense presented next to nothing in mitigation. The judge's error in misunderstanding the role of factor (b) was harmless in this case.

Petitioner also argues that the trial court erroneously converted several mitigating factors into aggravating factors. (SAP at 103-04.) He points to the following exchange between defense counsel and the court:

MR. WALTON: . . . Circumstance (c)[54] is whether or not the defendant was under the influence of extreme mental or emotional disturbance when the offense was committed.

Well, in this case there was no evidence that he was. It sounds as though the legislature is trying to inform juries that if he was in that condition it would be something to take into consideration in mitigation.

THE COURT: Or aggravation, depending on how you read it.

MR. WALTON: You know, I am giving my interpretation, but the court is certainly entitled to quite another. But that, of course, points up the ambiguity in the statute.

So here with no evidence that the defendant was suffering that kind of extreme disturbance, does that ipso facto become a circumstance in aggravation?

(RT at 3464.) Before going through the sentencing factors, the judge announced that he "finds the following factors in aggravation," and stated, for example, "that the offenses were *not* committed while the defendant was under the influence of extreme mental or emotional disturbance." (RT at 3463-64 (emphasis added).) He also said that he found only one factor in mitigation: Kimble's age. Although the trial judge might have misspoken in part (since it is odd to consider the absence of prior felony convictions to be aggravating), the record supports petitioner's contention that the judge found most of the statutory sentencing factors to be

[54] Defense counsel was correctly referring to factor (c) from the 1977 law; the judge subsequently referred to this as factor (d), using the 1978 law. (RT at 3464.)

aggravating. He did not say that any of them were inapplicable.

In *Allen v. Woodford*, the Ninth Circuit considered a similar case in which the trial court, in ruling on the § 190.4(e) motion, "concluded that the mitigating circumstances addressed in [sentencing factors (d) through (k)] did not apply to Allen's case and converted each to an aggravating factor." *Allen*, 395 F.3d at 1017. The Court of Appeals held that this was an error since the California Supreme Court had previously made clear that "the absence of mitigating circumstances under these factors should not be considered aggravating." *Id.* (citing *People v. Davenport*, 41 Cal. 3d at 289.) The error was harmless, however, because "[t]he trial court's review merely ensured that the jury's death verdict was not contrary to the weight of the evidence" and even without the misclassified sentencing factors, "extensive aggravating evidence supported the jury's verdict." *Id.* at 1018. The same result is required here. In providing its view of the circumstances in aggravation, the trial court focused primarily on the circumstances of the crimes themselves. As just discussed, the contrast between those circumstances and the complete absence of an effective mitigation case is what drove the jury's penalty decision. It is also what led the trial judge, despite his confusion over the role of the inapplicable sentencing factors, to reach the correct conclusion that "the weight of the evidence supports the jury verdict." *People v. Lang*, 49 Cal. 3d. 991, 1045 (1989) (cited by *Allen*, 395 F.3d at 1018 (noting limited nature of trial court's § 190.4(e) inquiry)).

To the extent that petitioner argues that the 1977 statute (like the 1978 statute) is unconstitutional for failing to distinguish between aggravating and mitigating factors, this argument fails for the reasons discussed above in connection with Claim 24. *See Tuilaepa*, 512 U.S. at 979 ("A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision.")

For the foregoing reasons, there was no prejudicial error in the trial court's

ruling on petitioner's motion to modify his sentence. Claims 15, 16, and 27-30 are DENIED.

O. Cumulative Error

Petitioner raised a claim of cumulative error for the first time in his traverse. The claim has not been presented to the California Supreme Court. Because the claim is unexhausted, petitioner is not entitled to habeas corpus relief on this basis. *See* 28 U.S.C § 2254(b); *Rose v. Lundy*, 455 U.S. 509, 516 (1982) ("state remedies must be exhausted except in unusual circumstances"); *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507–08 (9th Cir. 1994) ("A Traverse is not the proper pleading to raise additional grounds for relief.").

VI. Order

For the foregoing reasons, the Court hereby orders as follows:

1. The Second Amended Petition is **GRANTED** on the basis of the portions of Claim 10 alleging ineffective assistance of counsel with respect to the rape murder special circumstance instruction and the penalty trial, and the portion of Claim 19 challenging the rape murder special circumstance instruction. All other claims in the Second Amended Petition are **DENIED**.

2. Accordingly, judgment will be entered vacating the rape murder special circumstance finding and the sentence of death, and in all other respects denying petitioner's challenge to his conviction.

3. Pursuant to Rule 11 of the Rules Governing Section 2254 Proceedings, the Court hereby issues a certificate of appealability on Claim 13(C) (sufficiency of the evidence for rape), Claim 14(G) (juror concealed son's robbery conviction), and Claim 19 (to the extent it challenges the robbery murder special circumstance), and denies a certificate of appealability on all other claims.

IT IS SO ORDERED.

Dated: June 19, 2017

STEPHEN V. WILSON

United States District Judge