

1 Petitioner initiated this federal habeas corpus proceeding on July 13, 1992. His state
2 exhaustion petition was denied on September 1, 1999. On November 17, 1999, petitioner filed
3 his second amended petition in this proceeding. Petitioner was allowed to file a third amended
4 petition lodged July 24, 2001, asserting three additional claims.

5 On August 24, 2001, the court denied petitioner's second and third amended petitions on
6 the merits. The Ninth Circuit affirmed in part, reversed in part, and remanded. Certiorari was
7 granted, and on October 11, 2005, the U.S. Supreme Court reversed in part and remanded.

8 On March 16, 2006, the Ninth Circuit, on remand, reversed this court's denial of an
9 evidentiary hearing on petitioner's claim 38 and remanded so that this court could conduct an
10 evidentiary hearing on the question

11 [W]hether [trial counsel's] decision not to conduct a reasonable investigation
12 could have constituted ineffective assistance, i.e., whether [petitioner's] insistence
13 – the rationality of which [trial counsel] at times questioned – that he did not want
14 to present a penalty phase defense excused [trial counsel] from fulfilling his duty
to conduct a thorough investigation.

15 *Sanders v. Brown*, 171 F. App'x 588, 592 (9th Cir. 2006).

16 The court, noting the Supreme Court's May 14, 2007 decision in *Landrigan*, ordered a
17 bifurcated evidentiary hearing. The first stage of the evidentiary hearing was to consider whether
18 trial counsel's decision not to investigate mitigation evidence was deficient performance; how the
19 proffered mitigation evidence might have been used to convince petitioner to change his mind
20 about not presenting a penalty defense at trial; and whether trial counsel should have, or could
21 have presented mitigation evidence in spite of petitioner's objections. The second stage of the
22 evidentiary hearing was to consider whether, had petitioner changed his mind, the mitigation
23 evidence would have convinced the jury to sentence him to life without parole. The court
24 provided that respondent could contest and controvert the mitigation evidence during the second
25 stage of the evidentiary hearing which would take place after resolution of the first stage.

26 The stage one evidentiary hearing was held October 28 through 30, and November 3,
27 2008.

28 On December 2, 2008, the court granted petitioner's motion to expand the record in

1 connection with the first stage hearing as to Exhibits 2, 10, 11, 13-18, 20-23, 24, 25, 28, 30-36,
2 and 56-133, which are deposition transcripts and public records and declarations relating to
3 opinions of petitioner's experts.

4 On July 17, 2009, the court granted petitioner's supplemental motion to expand the record
5 with documents inadvertently omitted from the motion granted on December 2, 2008.

6 On January 20, 2015, the court ordered the noted Landrigan briefing which was
7 completed on July 6, 2015.

8 II.
9 DISCUSSION

10 Whether trial counsel was deficient at the penalty phase as claimed by petitioner is, in the
11 court's estimation, a close call, as is the potential impact of Landrigan upon this claim. The court
12 has not issued a ruling following the first stage evidentiary hearing and is considering vacating
13 the second stage evidentiary hearing. (See Doc. No. 346 at 3:25-4:13.)¹ The court believes it
14 would be helpful to have the parties brief whether the mitigation evidence taken as true at the first
15 stage of the evidentiary hearing, as expanded and supplemented, would have convinced the jury
16 to sentence petitioner to life without parole. The court is mindful that many years have passed
17 since the first stage evidentiary hearing and that significant resources would be expended on a
18 second stage evidentiary hearing.

19 The mitigating evidence which petitioner alleges trial counsel deficiently failed to
20 investigate and present is set out in the record of the first stage hearing. The record includes
21 expert testimony about the prevailing standard for attorney representation in capital cases tried in
22 1981 and the psychological barriers that allegedly kept petitioner from understanding and
23 agreeing to presentation of a penalty phase defense. Also included is documentation of
24 petitioner's statements to counsel and the trial court regarding his decision not to present a
25 mitigation defense at the penalty phase of his trial.

26 Petitioner suggests that not all available mitigating evidence that could have been
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28 ¹ References are to ECF system pagination.

1 presented at his 1982 trial is included in the first stage evidentiary hearing record. (See Doc. No.
2 359 at 9:18-11:1, 14:10-13.) However, petitioner's first stage proffer included the mitigation
3 evidence that could have been presented absent deficient counsel. (See Doc. No. 208 3:4-12.)
4 The order bifurcating the evidentiary hearing contemplates a second stage hearing would analyze
5 prejudice arising from counsel's failure to present the mitigation evidence proffered in the first
6 stage hearing. (See Doc. No. 180 at 2:18-24.) Petitioner appears to concede as much. (See Doc.
7 No. 359 at 13:20-22.) For these reasons, petitioner's supplemental brief shall identify any
8 mitigating evidence not included in the evidentiary hearing record and explain how such evidence
9 may properly be considered at a second stage evidentiary hearing.

10 III.

11 ORDER

12 For the reasons stated, it is hereby ORDERED that:

- 13 1. The parties shall provide supplemental briefing of the following issue: whether the
14 mitigation evidence taken as true at the first stage of the evidentiary hearing, as
15 expanded and supplemented, would have convinced the jury to sentence petitioner
16 to life without parole,
- 17 2. Petitioner's supplemental brief, which shall also identify any mitigating evidence
18 not included in the evidentiary hearing record and explain how such evidence may
19 properly be considered at a second stage evidentiary hearing, shall be due forty-
20 five (45) days from the filed date of this order; respondent's responsive brief shall
21 be due forty-five (45) days from the date on which petitioner files his brief; and
22 petitioner's reply brief shall be due thirty (30) days from the date on which
23 respondent files his brief.

24 IT IS SO ORDERED.

25 Dated: January 11, 2016

/s/ Lawrence J. O'Neill
26 UNITED STATES DISTRICT JUDGE

27 3.