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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

COLIN RAKER DICKEY,  
Petitioner,  
v.  
RON DAVIS, Warden of San Quentin State  
Prison,  
Respondent.<sup>1</sup>

Case No. 1:06-cv-00357-AWI-SAB  
DEATH PENALTY CASE

MEMORANDUM AND ORDER:

(1) DENYING REQUEST TO STRIKE  
SECOND AMENDED ANSWER (DOC.  
NO. 128); (2) DENYING REQUEST FOR  
FACTUAL DEVELOPMENT (DOC. NOS.  
116, 128); (3) DENYING GUILT PHASE  
CLAIMS (DOC. NOS. 51, 51-1); (4)  
SETTING CASE MANAGEMENT  
CONFERENCE; and (5) DIRECTING THE  
COURT CLERK TO SUBSTITUTE  
WARDEN RON DAVIS AS  
RESPONDENT

Case To Remain Open

Case Management Conference:  
Date: February 17, 2017  
Time: 10:00 a.m.  
Courtroom 9  
Judge: Stanley A. Boone

Petitioner Colin Raker Dickey is a state prisoner, sentenced to death, proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. He is represented in this action by appointed counsel David Senior, Ann Tria and Matthew Weston.

<sup>1</sup> Pursuant to Fed. R. Civ. P. 25(d), Ron Davis, Warden of San Quentin State Prison, is substituted as respondent in place of his predecessor wardens.

1 Respondent Ron Davis is named as Warden of San Quentin State Prison. He is  
2 represented in this action by Brian Smiley and Justain Riley of the Office of the California  
3 Attorney General.

4 Before the court for decision are i) petitioner's request to strike respondent's second  
5 amended answer filed September 10, 2014, ii) petitioner's record based guilt phase claims I, II  
6 (portions), IV, VIII, XII (portions), XIII, XIV, XV, XVI, XVII, XVIII, XIX, XXI, XXII, XXIII,  
7 XXIV, XXVI and XXVIII, including subclaims,<sup>2</sup> and iii) petitioner's request for factual  
8 development of claims II(B), II(C), II(F), II(G), II(H), II(S), II(T), II(V), XIII, XIV, XV and  
9 XXIV.<sup>3</sup>

10 Having carefully reviewed the parties' filings and the relevant case law and for the  
11 reasons set out below, the undersigned finds that respondent's second amended answer filed as  
12 an opposition brief shall not be stricken; the petition's noted guilt phase claims shall be denied  
13 on the merits; and petitioner's motion for factual development of the noted guilt phase claims  
14 shall be denied.

15 The court sets a case management conference to discuss proceedings on the penalty phase  
16 claims and for ex parte budgetary discussions with petitioner's counsel.

### 17 I. BACKGROUND

18 Petitioner was charged in Fresno County with counts 1 and 2 for murder (Penal Code §  
19 187), with allegations of robbery-murder and burglary-murder special circumstances (Penal  
20 Code §§ 190.2(a)(17), 211, 459/460); counts 3 and 4 for robbery (Penal Code § 211); count 5 for  
21 burglary (Penal Code §§ 459/460); and allegations of multiple murder special circumstance  
22 (Penal Code §§ 190.2(a)(3) and aider and abettor liability (Penal Code § 190.2(b)).<sup>4</sup> (CT 297-  
23 301, 303-307.) Petitioner pleaded not guilty to all the charges. (RT 126; CT 232, 302.)

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24  
25 <sup>2</sup> The parties do not argue and the court does not reach nominal guilt phase claims II(I) (alleged Marsden error  
26 following the guilt phase verdicts - see Doc. No. 51-1 ¶¶ 342-364) and II(U) (regarding victim family reactions to  
the jury verdict - see Doc. No. 51-1 ¶¶ 409-414), both of which claims address penalty phase issues (People v.  
Dickey, 35 Cal. 4th 884, 916-22 (Cal. 2005)).

27 <sup>3</sup> Although petitioner's motion for factual development does not include claims II(V), XIII, XV and XXIV (Doc.  
No. 116 at 396:10-399:5), his reply brief in support of factual development does reference these claims (Doc. No.  
128 at 30:4-5). The court has considered these claims in ruling on the motion for factual development.

28 <sup>4</sup> Any reference to state law is to California law unless otherwise noted.

1 Petitioner's jury trial began on January 7, 1991 in Fresno County Case No. 416903-3.  
2 (CT 295-296.) On March 15, 1991, the jury found petitioner guilty of the murders of Marie  
3 Caton and Louis Freiri with special circumstances of felony-murder robbery and felony-murder  
4 burglary and multiple murder and found petitioner guilty of first degree robbery of each victim  
5 and first degree burglary of their residence. (CT 380-385, 463-468, 610-614.)

6 On March 19, 1991, petitioner admitted a prior felony conviction (CT 472) and purported  
7 to waive presence at the penalty phase. (CT 472-76.) On March 22, 1991, the jury returned a  
8 penalty phase verdict of death. (CT 478-82, 504; see also Penal Code, § 190.2, subds. (a)(3),  
9 (17)(A)(G).)

10 On March 26, 1991, responsive to petitioner's dissatisfaction with trial counsel Schultz,  
11 the trial court appointed Katherine Hart to represent petitioner on motion for new trial and  
12 motion to modify the verdict. (CT 505; RT 5181-87.) Therein Ms. Hart alleged insufficiency of  
13 evidence, prosecutorial misconduct, instructional error, improper waiver of prior felony  
14 conviction, trial court error and ineffective assistance of counsel at the guilt and penalty phases.  
15 (CT 525-589.) The motion for new trial was denied on January 17, 1992. (CT 516-518.) The  
16 motion for modification of the verdict was denied on February 21, 1992 and petitioner was  
17 sentenced to death. (CT 609-615; Feb. 21, 1992 Transcript, at 50.)<sup>5</sup>

18 On April 14, 2003, petitioner filed a state habeas petition, In re Dickey, S115079 (Lod.  
19 Doc. 7), which the California Supreme Court denied on November 30, 2005. (Lod. Doc. 10.)

20 The California Supreme Court affirmed petitioner's conviction on direct appeal on May  
21 23, 2005. People v. Dickey, 35 Cal. 4th 884 (2005). That court denied petitioner's request for  
22 rehearing on July 13, 2005. People v. Colin Raker Dickey, CSC Case No. S025519.

23 On February 21, 2006, the United States Supreme Court denied petitioner's writ of  
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25 <sup>5</sup> Unless otherwise indicated, throughout this order, "CT" refers to the clerk's transcript on appeal; "SCT" refers to  
26 the supplemental clerk's transcript on appeal regarding juror questionnaires; "SSCT" refers to the supplement to the  
27 supplemental clerk's transcript; "CCT" refers to the corrected clerk's transcript; "RT" refers to the reporter's  
28 transcript on appeal; "CRT" refers to the corrected reporter's transcript on appeal; "CSC" refers to the California  
Supreme Court; "SHCP" refers to the first state habeas corpus petition; and "SSHCP" refers to the second state  
habeas petition. Other transcripts are referenced by date. References to page numbering are to the page numbering  
in the original documents except that Bates numbering is used where available and ECF system numbering is  
otherwise used for electronically filed documents.

1 certiorari. *Dickey v. California*, 546 U.S. 1177 (2006).

2 On March 30, 2006, petitioner began this federal habeas proceeding under 28 U.S.C. §  
3 2254 by filing a combined request for appointment of counsel and temporary stay of execution.  
4 On October 4, 2007, petitioner filed his federal petition for writ of habeas corpus.<sup>6</sup> On May 21,  
5 2008, this court ordered federal proceedings held in abeyance pending state exhaustion of certain  
6 claims. (Doc. No. 69.)

7 On July 21, 2008, petitioner filed his second state habeas petition, *In re Dickey*, S165302.  
8 (Lod. Doc. 30.) On May 23, 2012, the California Supreme Court summarily denied the second  
9 state petition on the merits as to all claim and on procedural grounds as to certain claims. (Lod.  
10 Doc. 31.)

11 Respondent filed his answer in this proceeding (Doc. No. 103) and amended answer  
12 correcting clerical error (Doc. No. 105), on August 29, 2013. Therein respondent admitted the  
13 jurisdictional allegations and asserted exhaustion and procedural defenses and denied all claims 1  
14 through 29.<sup>7</sup>

15 On November 18, 2013, this court ordered bifurcated briefing with the guilt phase claims  
16 briefed separately from and prior to the penalty phase claims. (Doc. No. 111.)

17 On April 16, 2014, petitioner filed his brief in support of guilt phase claims which  
18 includes his noted initial request for factual development. (Doc. No. 116.)

19 On September 10, 2014, respondent filed a second amended answer as his brief in  
20 response to petitioner's brief. (Doc. No. 125.)

21 On November 7, 2014, petitioner filed his brief in reply to respondent's brief including  
22 the noted request that respondent's second amended answer be stricken and for further factual  
23 development. (Doc. No. 128.)

## 24 **II. STATEMENT OF FACTS**

25 The following factual summary is taken from the California Supreme Court's opinion in

26 \_\_\_\_\_  
27 <sup>6</sup> The court takes judicial notice of the state record on appeal, *People v. Colin Raker Dickey*, CSC Case No. S025519  
and the related state habeas proceedings, *In re Colin Dickey*, CSC Case No. S115079 and *In re Colin Dickey*, CSC  
Case No. S165302.

28 <sup>7</sup> The amended answer is the operative answer. (See Doc. No. 114 at 1:20-21.)

1 People v. Dickey, 35 Cal. 4th 884 (2005), and is presumed correct. 28 U.S.C. § 2254(d)(2),  
2 (e)(1). Petitioner does not present clear and convincing evidence to the contrary; thus, the court  
3 adopts the factual recitations set forth by the state court. See Vasquez v. Kirkland, 572 F.3d  
4 1029, 1031 n.1 (9th Cir. 2009) (“We rely on the state appellate court’s decision for our summary  
5 of the facts of the crime.”).

## 6 I. Facts

### 7 A. Guilt Phase

#### 8 1. The Prosecution Case

9 The murder victims were Fresno residents—Marie Caton, 76, and Louis Freiri,  
10 67, a friend and boarder of Mrs. Caton's. Their bodies were discovered by one of  
11 Mrs. Caton's daughters, Lavelle Garratt. Mrs. Garratt or her sister checked on  
their mother every day, “[b]ecause she was lonely, because she was our mother,  
because we loved her and we wanted to see her.”

12 Late in the afternoon of November 8, 1988, when Mrs. Garratt could not reach her  
13 mother by telephone, she drove to her house. She found Mrs. Caton on the floor  
of her bedroom, covered with a bloodstained blanket. Mrs. Caton had been beaten  
14 so badly her eyes bulged out of their sockets like golf balls. Mrs. Caton also had  
knife wounds on her chest and a jagged cut on her back. She lingered for 11 days,  
15 but never regained consciousness. The cause of death was respiratory failure  
associated with “shock lung syndrome,” the shock having been caused by her  
injuries.

16 Mr. Freiri wore a brace on his right leg and required a cane. Mrs. Garratt found  
17 him facedown, stretched across the archway between the dining room and the  
living room. A chair, wall, and window blinds near his body were bloodstained.  
18 Pieces of his cane were found in the living room and one of the bedrooms. Mr.  
Freiri had been stabbed in the chest, armpit, and forearm; he also had a bone-deep  
19 laceration on his forehead. He was stabbed with such force that two of his ribs  
were broken. He died of blood loss.

20 Mrs. Garratt told the police she suspected her son, Richard Cullumber. Cullumber  
21 was, Mrs. Garratt believed, a drug addict, and he asked his grandmother Mrs.  
Caton for money—cash she would take out of a buffet drawer—almost every day.  
22 Mrs. Caton “grew up during the Depression and she was afraid of being hungry  
again, I guess, and so she hid money all over.” Among other caches, Mrs. Caton  
23 kept at least \$6,000 in cash in a metal box placed inside a suitcase stored under  
her bed. She also kept a smaller sum in another suitcase.

24 Cullumber, also known as “R.C.,” lived in an apartment in Fresno, along with  
25 defendant, Gail Goldman, Richard Buchanan, and two other men. The night of the  
murders Cullumber packed his bag and left the apartment. He returned several  
26 days later but fled again when informed the police were looking for him. On  
November 12, 1988, after a high-speed police chase, Cullumber, cornered, killed  
27 himself.

1 The pistol Cullumber used to shoot himself was registered to Mr. Freiri. He had  
earlier warned the driver of a car he commandeered, "I need the car; I've already  
2 killed a woman."

3 Two knives possibly linked to the murders were discovered in Mrs. Caton's  
kitchen—a butcher knife and a steak knife. The steak knife (People's exhibit No.  
4 18) was, in the opinion of defendant's housemates Gail Goldman and Richard  
Buchanan, identical to a knife belonging in their apartment.

5 In addition to his knife wounds, Mr. Freiri had a four-inch-long ligature wound,  
caused by a cord that was wrapped around his neck. It was a cotton cord of the  
6 color, weave, and texture used in venetian blinds. The venetian blinds in Mrs.  
Caton's house were intact, but a venetian blind kept in the hall closet of the  
7 apartment defendant shared with Cullumber and the others was missing its cord.  
On the night of the murders, Gene Buchanan saw defendant remove a venetian  
8 blind from the closet of their apartment, walk into the bedroom with it, and then  
replace it in the closet. Goldman testified it was Cullumber who had done that.  
9 Defendant's thumbprint was found on a slat from the venetian blind found by the  
police in the apartment closet. n.2.

10 -----FOOTNOTE-----

11 n.2 No usable prints were found at the scene of the crime, not even those of Mrs.  
12 Caton or Mr. Freiri.

13 -----END FOOTNOTE-----

14 The case against defendant rested on the testimony of Gail Goldman and Gene  
Buchanan. n.3.

15 -----FOOTNOTE-----

16 n.3 Defendant impeached Buchanan on the grounds, among others, that his  
17 testimony against defendant was motivated by revenge and a desire to collect the  
reward offered by Mrs. Caton's relatives. Defendant was less successful in  
18 attacking Goldman's credibility. If not a hostile witness for the prosecution, she  
was clearly reluctant to testify against defendant, both because she was fond of  
19 him and because she feared the consequences of informing on anyone. A critical  
question, then, is to what extent Goldman's testimony corroborates Buchanan's.  
20 To facilitate consideration of that question, we have set out their testimony  
separately.

21 -----END FOOTNOTE-----

22 a) The Testimony of Gail Goldman n.4.

23 -----FOOTNOTE-----

24 n.4 Because she died before the trial began, Goldman's preliminary hearing  
25 testimony was read into the record. (See Evid. Code, § 240, subd. (a)(3).)

26 -----END FOOTNOTE-----

1 Goldman shared a one-bedroom apartment in Fresno with defendant, Cullumber,  
2 Buchanan, and two other men. According to Detective Doug Stokes, Goldman  
3 told him “about a venetian blind that had been in the hall closet that was ... taken  
4 by the suspect, Dickey, ... into a bedroom and that the cord was removed from  
5 that venetian blind and then the venetian blind was placed back inside the hall  
6 closet.” However, when she testified, Goldman said it was Cullumber who took  
7 the venetian blind out of the closet and went into the bedroom with it. Later, she  
8 testified, the blind had been replaced in the closet, but the cord was missing from  
9 a blind in the bedroom.

10 At approximately the same time that Cullumber was engaged with the venetian  
11 blind, defendant walked into the kitchen and opened a drawer containing knives  
12 and other silverware. n.5 According to Detective Stokes, Goldman told him  
13 defendant removed a knife from the drawer and left the kitchen with it. Again  
14 according to Detective Stokes, when he came to the apartment investigating the  
15 murders, he showed Goldman a knife. She told him, “I have a knife exactly like  
16 that knife, or they are twins.”

17 -----FOOTNOTE-----

18 n.5 Goldman later testified she did not know which drawer defendant had opened.

19 -----END FOOTNOTE-----

20 After the activity just described, Goldman testified, defendant and Cullumber left  
21 the apartment. They had no money, Goldman believed, when they left. If  
22 Cullumber had money, he spent it on drugs; before defendant left he asked  
23 Goldman for money to buy cigarettes. However, when they returned, Cullumber  
24 gave Goldman \$40 or \$50 in cash, saying it was in partial payment of what he  
25 owed her. Cullumber then packed his clothes and left.

26 Sometime thereafter, while Goldman and defendant were watching the news on  
27 television, they saw a story about this crime. Defendant became upset when he  
28 learned Mr. Freiri was dead and that Mrs. Caton, while near death, was still alive.  
He told Goldman to come into the bedroom, that he wanted to talk to her.  
Buchanan followed them into the bedroom.

29 Defendant told them he had accompanied Cullumber to the home of Mrs. Caton.  
30 On the one hand, defendant said that Cullumber had assured him “nothing was  
31 going to happen.” On the other hand, defendant admitted he had gone with  
32 Cullumber “[t]o help [him] get the money.” With Mrs. Caton present, defendant  
33 looked for money in her bedroom, where Cullumber told him it could be found.  
34 When defendant stepped out of the bedroom and saw Mr. Freiri slumped over in a  
35 chair, he “knew something had happened.” Cullumber “went berserk. He came  
36 into the bedroom and started beating up on his grandmother.” Defendant and  
37 Cullumber found \$700, which they split.

38 Defendant was crying, “like he was sad,” when he confessed to Goldman and  
Buchanan. Later, when defendant learned Mrs. Caton had died, “he wasn't as  
depressed as he was before.” While he was confessing, defendant said maybe he  
should turn himself in. Goldman advised him against it. When Detective Stokes  
first asked Goldman whether she knew anything about these crimes, Goldman  
denied that she did. Defendant was a good friend of hers, she still liked him, and  
she did not want to do anything to get him into trouble. She did not want to tell on  
anyone, especially someone she liked as much as she liked defendant. Buchanan

1 told her he was going to turn defendant in for the reward. By contrast, Goldman  
2 testified at the preliminary hearing only because she had been subpoenaed. During  
3 a break, Goldman told the prosecutor she wanted to make sure defendant knew  
4 she was not the one who turned him in. She was afraid for her life. "I always felt  
5 that if you would inform on somebody they would kill you or have you killed."

6 Defendant said he was not concerned that someone would betray him, "because if  
7 they did, they wouldn't do it again." On the other hand, Goldman thought that her  
8 relationship with defendant was such that "it would take an awful lot to make him  
9 hurt me."

10 Goldman had "had 20 surgeries on [her] stomach," and depending on how much  
11 pain she was in, she used "speed ball cocaine and heroin" or other "street drugs"  
12 to kill the pain.

### 13 b) The Testimony of Gene Buchanan

14 One evening in November 1988, defendant took a venetian blind from the hall  
15 closet of the apartment he shared with Buchanan, Cullumber, Goldman, and two  
16 others. Defendant took the blind into the bedroom and shortly thereafter replaced  
17 it in the closet. Buchanan looked into the bedroom. On the bed was a knife  
18 belonging to Gail Goldman, a knife with a bone handle and a serrated edge.  
19 People's exhibit No. 18 was that knife, or else it looked exactly like Goldman's  
20 knife.

21 Defendant and Cullumber left the apartment around 9:00 p.m. That night  
22 everyone living in the apartment was broke, or claimed to be. However, when  
23 defendant and Cullumber returned, defendant opened his wallet and said, "I got  
24 \$350," and, "call the connection."

25 Buchanan ordered drugs, which were injected by defendant, Cullumber,  
26 Goldman, and Buchanan. Afterwards, Cullumber asked Buchanan to take him for  
27 a drive; defendant went along. Defendant directed Buchanan to a canal, and as  
28 they drove over it, defendant threw in a pair of shoes. After looking for a good  
place to do it, defendant also threw his jacket out of the window.

About two days later, Buchanan and defendant were in the living room of the  
apartment; defendant was watching the news on television. Defendant jumped up  
and ran into the bedroom to Goldman. Buchanan heard Goldman say, "'Oh, my  
God, how low can you go,' or 'get'; something to that effect." Buchanan went  
into the bedroom to find out what was going on. Defendant said to him, "I've  
already told her, so I might as well tell you." Defendant told Buchanan that "him  
and R.C. had been over to R.C.'s grandmother's house, and that they had entered  
the house—how he had done it, how he had walked up to the door, knocked,  
faked like R.C. was going to be in jail, needed to use the phone, and then R.C.  
sneaked in, they were supposed to tie them up, get this money and everything.  
And while the defendant is supposedly in the bedroom looking for the money he  
hears a commotion, looked out the bedroom door, sees an elderly man with his  
head slumped down, considers him dead, and that if you kill one you might as  
well kill them both." In response to the prosecutor's questions, Buchanan clarified  
his testimony. "[Defendant] said that he—only what he thought, he didn't say  
what he did. He said that, 'If you kill one you might as well kill them both.'"  
"[H]e didn't say he said it to R.C., he just said it as that was his opinion."  
Defendant did not tell Buchanan what happened after he had this thought.

1 Defendant also told Buchanan that what prompted his confession was a television  
story saying that Mrs. Caton “was still alive when she should have been dead.”

2 Buchanan did not speak to the police until several months after defendant's  
3 confession to him. At a convenience store he saw a flyer announcing a reward,  
and he left his name with the clerk. He was then contacted by a grandson of Mrs.  
4 Caton's, and he agreed to speak to Detective Stokes. However, his willingness to  
do so was not motivated by the reward; it was his “Christian upbringing.” He did  
5 not tell Goldman he was going to turn defendant in for the reward.

6 Defendant had torn up Buchanan's one photograph of his youngest daughter,  
which made Buchanan angry. He wanted to throw defendant off the balcony of a  
7 motel, but Goldman stopped him.

8 Buchanan used drugs “[a]s often as I can get them.” He injected “speedballs,” a  
heroin/cocaine mixture. He used drugs an hour or two before defendant confessed  
9 to him, and he continued to do so as recently as the day before his testimony.

## 10 2. The Defense Case

11 Defendant testified he did not make the statements attributed to him by Goldman  
and Buchanan, and that he did not have anything to do with these crimes. He got  
12 along well with Goldman, but not with Buchanan, who was “just a snake; a  
deceitful person.” His fingerprint was on the venetian blind because it had fallen  
13 off the back door and he had put it into the closet; he did not know why the cord  
was missing from it. He did rip up the photograph of Buchanan's daughter.

14 John Inderrienden had known Goldman for five or six years, and they had once  
lived in the same apartment building. He “wouldn't trust her as far as I could  
15 throw her, and she weighed quite a bit.”

16 Goldman once lived in a house owned by Harry Arax. She did not pay her rent,  
nor did she pay her bill at his market.

17  
18 Goldman, a former neighbor of Peter Najarian's, told him she was going to be a  
witness in a murder case, but that she “didn't know nothing about no murder.”  
19 Magdalena Desumala, who ran a halfway house in which Goldman lived on and  
off for about 10 years, was “like a sister” to Goldman. She said Goldman told her  
20 it was the grandson of the murder victim who had confessed to her.

## 21 B. Penalty Phase

22 The only witness who testified at the penalty phase, Detective Stokes, was called  
by the prosecution to provide a foundation for the admission of the autopsy  
23 photographs. No other evidence, aside from a stipulation to defendant's prior  
burglary conviction, was introduced.

24 Dickey, 35 Cal. 4th at 894-900.

## 25 III. JURISDICTION

26 Relief by way of a petition for writ of habeas corpus extends to a person in custody  
27 pursuant to the judgment of a state court if the custody is in violation of the Constitution or laws

1 or treaties of the United States. 28 U.S.C. §§ 2241(c)(3), 2254(a); *Williams v. Taylor*, 529 U.S.  
2 362, 375 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by the  
3 U.S. Constitution. The challenged conviction arises out of Fresno County Superior Court, which  
4 is located within the jurisdiction of this court. 28 U.S.C. §§ 2241(d), 2254(a).

5 This action was initiated after April 24, 1996. Therefore the amendments to 28 U.S.C. §  
6 2254 enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),  
7 110 Stat. 1214, apply. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997); see also *Van Tran v. Lindsey*,  
8 212 F.3d 1143, 1148 (9th Cir. 2000), overruled on other grounds by *Lockyer v. Andrade*, 538  
9 U.S. 63, 71 (2003).

#### 10 IV. STANDARDS OF REVIEW

##### 11 A. Legal Standard - Habeas Corpus

12 Under the AEDPA, relitigation of any claim adjudicated on the merits in state court is  
13 barred unless a petitioner can show that the state court's adjudication of his claim:

14 (1) resulted in a decision that was contrary to, or involved an unreasonable  
15 application of, clearly established Federal law, as determined by the Supreme  
16 Court of the United States; or

17 (2) resulted in a decision that was based on an unreasonable determination of the  
18 facts in light of the evidence presented in the State court proceeding.

19 28 U.S.C. § 2254(d); see also *Harrington v. Richter*, 562 U.S. 86, 98 (2011); *Lockyer*, 538 U.S.  
20 at 70-71; *Williams*, 529 U.S. at 413.

21 “[A] state has ‘adjudicated’ a petitioner's constitutional claim ‘on the merits’ for purposes  
22 of § 2254(d) when it has decided the petitioner's right to post-conviction relief on the basis of  
23 substance of the constitutional claim advanced, rather than denying the claim on the basis of a  
24 procedural or other rule precluding state court review of the merits.” *Brown v. Walker*, Case No.  
25 C 09-04663 JSW, 2014 WL 4757804, at \*5 (N.D. Cal. Sept. 24, 2014), citing *Lambert v.*  
*Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004).

26 As a threshold matter, this court must “first decide what constitutes clearly established  
27 Federal law, as determined by the Supreme Court of the United States.” *Lockyer*, 538 U.S. at 71,  
28

1 quoting 28 U.S.C. § 2254(d)(1). In ascertaining what is “clearly established Federal law,” this  
2 court must look to the “holdings, as opposed to the dicta, of [the Supreme Court's] decisions as  
3 of the time of the relevant state-court decision.” Williams, 529 U.S. at 412. “In other words,  
4 ‘clearly established Federal law’ under § 2254(d)(1) is the governing legal principle or principles  
5 set forth by the Supreme Court at the time the state court renders its decision.” Id. In addition,  
6 the Supreme Court decision must “squarely address [] the issue in th[e] case; otherwise, there is  
7 no clearly established Federal law for purposes of review under AEDPA.” Moses v. Payne, 555  
8 F.3d 742, 754 (9th Cir. 2009), quoting Wright v. Van Patten, 552 U.S. 120, 125 (2008); see also  
9 Panetti v. Quarterman, 551 U.S. 930, 949 (2007); Carey v. Musladin, 549 U.S. 70, 74 (2006).

10 If no clearly established Federal law exists, the inquiry is at an end and the court must  
11 defer to the state court’s decision. Carey, 549 U.S. 70; Wright, 552 U.S. at 126; Moses, 555 F.3d  
12 at 760. In addition, the Supreme Court has recently clarified that habeas relief is unavailable in  
13 instances where a state court arguably refuses to extend a governing legal principle to a context  
14 in which the principle should have controlled. White v. Woodall, --- U.S. ---, 134 S. Ct. 1697,  
15 1706 (2014). The Supreme Court stated: “[I]f a habeas court must extend a rationale before it  
16 can apply to the facts at hand, then by definition the rationale was not clearly established at the  
17 time of the state-court decision.” Id., quoting Yarborough v. Alvarado, 541 U.S. 652, 666 (2004).

18 If the court determines there is governing clearly established Federal law, the court must  
19 then consider whether the state court's decision was “contrary to, or involved an unreasonable  
20 application of, [the] clearly established Federal law.” Lockyer, 538 U.S. at 72, quoting 28 U.S.C.  
21 § 2254(d)(1)). “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the  
22 state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question  
23 of law or if the state court decides a case differently than [the] Court has on a set of materially  
24 indistinguishable facts.” Williams, 529 U.S. at 412-13; see also Lockyer, 538 U.S. at 72. “The  
25 word ‘contrary’ is commonly understood to mean ‘diametrically different,’ ‘opposite in character  
26 or nature,’ or ‘mutually opposed.’” Williams, 529 U.S. at 405, quoting Webster's Third New  
27 International Dictionary 495 (1976)). “A state-court decision will certainly be contrary to  
28

1 [Supreme Court] clearly established precedent if the state court applies a rule that contradicts the  
2 governing law set forth in [Supreme Court] cases.” Id.

3 “Under the ‘reasonable application clause,’ a federal habeas court may grant the writ if  
4 the state court identifies the correct governing legal principle from [the] Court’s decisions but  
5 unreasonably applies that principle to the facts of the prisoner’s case.” Williams, 529 U.S. at  
6 413. “[A] federal court may not issue the writ simply because the court concludes in its  
7 independent judgment that the relevant state court decision applied clearly established federal  
8 law erroneously or incorrectly. Rather, that application must also be unreasonable.” Id. at 411;  
9 see also Lockyer, 538 U.S. at 75-76. “A state court's determination that a claim lacks merit  
10 precludes federal habeas relief so long as fair-minded jurists could disagree on the correctness of  
11 the state court's decision.” Richter, 562 U.S. at 101, citing Yarborough, 541 U.S. at 664. The  
12 Supreme Court stated:

13 As a condition for obtaining habeas corpus from a federal court, a state prisoner  
14 must show that the state court’s ruling on the claim being presented in federal  
15 court was so lacking in justification that there was an error well understood and  
comprehended in existing law beyond any possibility for fair-minded  
disagreement.

16 Id. at 101-05. In other words, so long as fair-minded jurists could disagree on the correctness of  
17 the state court’s decision, the decision cannot be considered unreasonable. Id. at 98-99. In  
18 applying this standard, “a habeas court must determine what arguments or theories supported ...  
19 or could have supported the state court’s decision; and then it must ask whether it is possible  
20 fair-minded jurists could disagree that those arguments or theories are inconsistent with the  
21 holding in a prior decision of [the Supreme Court].” Id. at 101-03. This objective standard of  
22 reasonableness applies to review under both subsections of 28 U.S.C. § 2254(d). Hibbler v.  
23 Benedetti, 693 F.3d 1140, 1146-47 (9th Cir. 2012). If the court determines that the state court  
24 decision is objectively unreasonable, and the error is not structural, habeas relief is nonetheless  
25 unavailable unless the error had a substantial and injurious effect on the verdict. Brecht v.  
26 Abrahamson, 507 U.S. 619, 637 (1993).

27 Petitioner has the burden of establishing that the decision of the state court is contrary to  
28

1 or involved an unreasonable application of United States Supreme Court precedent. *Baylor v.*  
2 *Estelle*, 94 F.3d 1321, 1325 (9th Cir. 1996). Although only Supreme Court law is binding on the  
3 states, Ninth Circuit precedent remains relevant persuasive authority in determining whether a  
4 state court decision is objectively unreasonable. *LaJoie v. Thompson*, 217 F.3d 663, 669 n.6 (9th  
5 Cir. 2000); *Duhaime v. Ducharme*, 200 F.3d 597, 600-01 (9th Cir. 1999).

6 The AEDPA requires considerable deference to the state courts. “[R]eview under §  
7 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on  
8 the merits,” *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011), and “evidence introduced in federal  
9 court has no bearing on 2254(d)(1) review.” *Id.* at 185. “Factual determinations by state courts  
10 are presumed correct absent clear and convincing evidence to the contrary.” *Miller-El v.*  
11 *Cockrell*, 537 U.S. 322, 340 (2003), citing 28 U.S.C. § 2254(e)(1). However, a state court  
12 factual finding is not entitled to deference if the relevant state court record is unavailable for the  
13 federal court to review. *Townsend v. Sain*, 372 U.S. 293, 319 (1963), overruled by *Keeney v.*  
14 *Tamayo-Reyes*, 504 U.S. 1 (1992).

15 If a petitioner satisfies either subsection (1) or (2) of § 2254 for a claim, then the federal  
16 court considers that claim *de novo*. See *Panetti*, 551 U.S. at 953 (when § 2254(d) is satisfied,  
17 “[a] federal court must then resolve the claim without the deference AEDPA otherwise  
18 requires.”); see also *Frantz v. Hazy*, 533 F.3d 724, 737 (9th Cir. 2008) (same).

19 In this case, some of petitioner’s claims and allegations were raised and rejected by the  
20 California Supreme Court on direct appeal while others were raised in his state habeas petitions  
21 to that court and summarily denied on the merits. In the latter case, where the state court  
22 decision is unaccompanied by an explanation, “the habeas petitioner’s burden still must be met  
23 by showing there was no reasonable basis for the state court to deny relief.” *Richter*, 562 U.S. at  
24 98. The Supreme Court stated that “a habeas court must determine what arguments or theories  
25 supported or ... could have supported, the state court’s decision; and then it must ask whether it  
26 is possible fair-minded jurists could disagree that those arguments or theories are inconsistent  
27 with the holding in a prior decision of this Court.” *Id.* at 101-03 (emphasis added). Petitioner  
28

1 bears “the burden to demonstrate that ‘there was no reasonable basis for the state court to deny  
2 relief.’” *Walker v. Martel*, 709 F.3d 925, 939 (9th Cir. 2013), quoting *Richter*, 562 U.S. at 98.  
3 “Crucially, this is not a de novo review of the constitutional question,” *id.*, as “even a strong case  
4 for relief does not mean the state court’s contrary conclusion was unreasonable.” *Id.*, quoting  
5 *Richter*, 562 U.S. at 102; see also *Murray v. Schriro*, 745 F.3d 984, 996-97 (9th Cir. 2014).

6           When reviewing the California Supreme Court’s summary denial of a petition, this court  
7 must consider that the California Supreme Court’s summary denial of a habeas petition on the  
8 merits reflects that court’s determination that:

9  
10           [T]he claims made in th[e] petition do not state a prima facie case entitling the  
11 petitioner to relief. It appears that the court generally assumes the allegations in  
12 the petition to be true, but does not accept wholly conclusory allegations, and will  
13 also review the record of the trial ... to assess the merits of the petitioner’s claims.

14 *Pinholster*, 563 U.S. 181 n.12, quoting *In re Clark*, 5 Cal. 4th 750, 770 (1993); see also *Johnson*  
15 *v. Williams*, 133 S. Ct. 1088, 1094-96 (2013) (holding that even where the state court does not  
16 separately discuss a federal claim there is a presumption that that state court adjudicated the  
17 federal claim on the merits). Accordingly, if this court finds petitioner has unarguably presented  
18 a prima facie case for relief on a claim, the state court’s summary rejection of that claim would  
19 be unreasonable. *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004); *Nunes v. Mueller*, 350  
20 F.3d 1045, 1054-55 (9th Cir. 2003).

21           For any habeas claim that has not been adjudicated on the merits by the state court, the  
22 federal court reviews the claim de novo without the deference usually accorded state courts under  
23 28 U.S.C. § 2254(d)(1). *Chaker v. Crogan*, 428 F.3d 1215, 1221 (9th Cir. 2005); *Pirtle v.*  
24 *Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002). In such instances, however, the provisions of 28  
25 U.S.C. § 2254(e) still apply. *Pinholster*, 563 U.S. 185 (“Section 2254(e)(2) continues to have  
26 force where § 2254(d)(1) does not bar federal habeas relief.”); *Pirtle*, 313 F.3d at 1167–68  
27 (stating that state court findings of fact are presumed correct under § 2254(e)(1) even if legal  
28 review is de novo).

1 **V. PROCEDURAL BARS**

2 Some of petitioner’s claims were alternatively denied by the California Supreme Court as  
3 procedurally barred. As to those claims, respondent has invoked the independent state ground  
4 doctrine, pursuant to which a federal court will not review a question of federal law decided by a  
5 state court “if the decision of that court rests on a state law ground that is independent of the  
6 federal question and adequate to support the judgment.” Vang v. Nevada, 329 F.3d 1069, 1072  
7 (9th Cir. 2003), quoting Coleman v. Thompson, 501 U.S. 722, 729 (1991).

8 Since “cause and prejudice” can excuse a procedurally defaulted claim, Smith v. Baldwin,  
9 510 F.3d 1127, 1139 (9th Cir. 2007), quoting Coleman, 501 U.S. at 750, and “prejudice”  
10 essentially requires a merits analysis, the court will proceed to the merits of claims found to be  
11 procedurally defaulted without determining whether the state procedural default is adequate and  
12 independent to bar relief in federal court. Id., quoting Coleman, 501 U.S. 732-35. A district  
13 court may exercise discretion to proceed to the merits in advance of litigation of procedural  
14 default. Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002) (courts empowered to reach  
15 the merits if on their face the allegations are clearly not meritorious despite asserted procedural  
16 bar); see also Bell v. Cone, 543 U.S. 447, 451 n.3 (2005) (an application for habeas corpus may  
17 be denied on the merits even if unexhausted in state court); Loggins v. Thomas, 654 F.3d 1204,  
18 1215 (11th Cir. 2011) (relief may be denied on the merits where petition is clearly not  
19 meritorious despite asserted procedural bar).

20 **VI. MOTION TO STRIKE**

21 Petitioner moves that the second amended answer be stricken and respondent directed to  
22 refile the document as an opposition to petitioner’s merits brief. He asserts as grounds that  
23 respondent has not complied with court orders and Rule 15 such that the second amended answer  
24 is a nullity. (See Doc. No. 128 at 57:5-58:24.)

25 **A. Legal Standard – Motion to Strike**

26  
27 Rule 12(f) authorizes the court to strike from the pleadings “any redundant,  
28 immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). “Motions to  
strike are generally viewed with disfavor, and will usually be denied unless the

1 allegations in the pleading have no possible relation to the controversy, and may  
2 cause prejudice to one of the parties.” Champlai v. BAC Home Loans Servicing,  
3 LP, 706 F.Supp.2d 1029, 1039 (E.D. Cal. 2009) (Karlton, J.) [Citations]. “If the  
4 court is in doubt as to whether the challenged matter may raise an issue of fact or  
5 law, the motion to strike should be denied, leaving an assessment of the  
6 sufficiency of the allegations for adjudication on the merits.” [Citation]

7 Carolina Cas. Ins. Co. v. Oahu Air Conditioning Serv., Inc., 994 F. Supp. 2d 1082, 1090–91  
8 (E.D. Cal. 2014).

9 **B. Analysis**

10 Rule 15 provides that:

11 A party may amend its pleading once as a matter of course within: (A) 21 days  
12 after serving it, or (B) if the pleading is one to which a responsive pleading is  
13 required, 21 days after service of a responsive pleading or 21 days after service of  
14 a motion under Rule 12(b), (e), or (f), whichever is earlier.

15 In all other cases, a party may amend its pleading only with the opposing party's  
16 written consent or the court's leave....

17 Fed. R. Civ. P. 15(a)(1-2). Generally service of an amendment that does not comply with Rule  
18 15 has no legal effect. *Hardin v. Wal-Mart Stores, Inc.*, 813 F. Supp. 2d 1167, 1181 (E.D. Cal.  
19 2011) (“If an amended pleading cannot be made as of right and is filed without leave of court or  
20 consent of the opposing party, the amended pleading is a nullity and without legal effect.”)

21 Here, respondent’s opposition brief is captioned as a second amended answer (Doc. No.  
22 125) and purports to amend the amended answer filed August 29, 2013 (Doc. No. 105) “pursuant  
23 to this [c]ourt’s November 18, 2013 order.” (Doc. No. 125 at 25:23-24.)

24 Petitioner correctly argues the court’s November 18, 2013 order did not direct or allow  
25 respondent to file an amended answer. (See Doc. No. 111.) That order directed respondent to  
26 file his “responsive brief and opposition to factual development.” (Id. at 2:13-14.) Respondent  
27 was not therein or subsequently allowed or directed to amend his previously filed amended  
28 answer. (Doc. No. 105; see also Doc. No. 124 (September 9, 2014 clerk’s notice that directed  
the purported second amended answer be re-filed as an opposition brief.)

Petitioner correctly argues that a second amended answer would be unauthorized as  
untimely, unconsented to by petitioner and lacking court approval. However, the purported

1 second amended answer was re-filed as an opposition brief. (Doc. No. 125.) It responds to  
2 petitioner’s merits brief and to that extent serves as an opposition thereto. Moreover, petitioner  
3 has not demonstrated prejudice from respondent’s filing of the purported second amended  
4 answer. The court has held that:

5  
6 The absence of prejudice is a sufficient reason to deny moving defendants' motion  
7 to strike. See, e.g., N.Y.C. Emps.' Ret. Sys. v. Berry, 667 F.Supp.2d 1121, 1128  
8 (N.D. Cal. 2009) (“Where the moving party cannot adequately demonstrate ...  
prejudice, courts frequently deny motions to strike even though the offending  
matter was literally within one or more of the categories set forth in Rule 12(f).”).

9 Carolina Cas. Ins. Co., 994 F. Supp. 2d at 1091.

10 For the reasons stated, the court will not strike under Rule 12(f) as an improper  
11 amendment the purported second amended answer, refiled as an opposition brief. The motion to  
12 strike shall be denied.

## 13 VII. REVIEW OF GUILT PHASE CLAIMS

### 14 A. Ineffective Assistance of Trial Counsel Claims

#### 15 1. Clearly Established Law – Ineffective Assistance of Counsel

16 The Sixth Amendment right to effective assistance of counsel, applicable to the states  
17 through the Due Process Clause of the Fourteenth Amendment, applies through the sentencing  
18 phase of a trial. U.S. Const. amend. VI; U.S. Const. amend. XIV, § 1; see also Gideon v.  
19 Wainwright, 372 U.S. 335, 343–45 (1963); Silva v. Woodford, 279 F.3d 825, 836 (9th Cir. 2002);  
20 Murray, 745 F.3d at 1010-11.

21 The clearly established federal law for ineffective assistance of counsel claims is  
22 Strickland v. Washington, 466 U.S. 668 (1984). In a petition for writ of habeas corpus alleging  
23 ineffective assistance of counsel, the court must consider two factors. First, the petitioner must  
24 show that counsel's performance was deficient, requiring a showing that counsel made errors so  
25 serious that he or she was not functioning as the “counsel” guaranteed by the Sixth Amendment.  
26 Strickland, 466 U.S. at 687. The petitioner must show that “counsel's representation fell below  
27 an objective standard of reasonableness,” and must identify counsel’s alleged acts or omissions  
28

1 that were not the result of reasonable professional judgment considering the circumstances.  
2 Richter, 562 U.S. at 104, citing Strickland, 466 U.S. at 688.

3         Petitioner must show that counsel's errors were so egregious as to deprive him of a fair  
4 trial, one whose result is reliable. Strickland, 466 U.S. at 688. Judicial scrutiny of counsel's  
5 performance is highly deferential, and the habeas court must guard against the temptation "to  
6 second-guess counsel's assistance after conviction or adverse sentence." Id. at 689. Instead, the  
7 habeas court must make every effort "to eliminate the distorting effects of hindsight, to  
8 reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from  
9 counsel's perspective at the time." Id.; see also Richter, 562 U.S. at 106-08. A court indulges a  
10 "'strong presumption' that counsel's representation was within the 'wide range' of reasonable  
11 professional assistance." Richter, 562 U.S. at 104, quoting Strickland, 466 U.S. at 687; see also  
12 Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994) (same). This presumption of  
13 reasonableness means that not only do we "give the attorneys the benefit of the doubt," we must  
14 also "affirmatively entertain the range of possible reasons [defense] counsel may have had for  
15 proceeding as they did." Pinholster, 563 U.S. at 196.

16         The Supreme Court has "declined to articulate specific guidelines for appropriate  
17 attorney conduct and instead ha[s] emphasized that '[t]he proper measure of attorney  
18 performance remains simply reasonableness under prevailing professional norms.'" Wiggins v.  
19 Smith, 539 U.S. 510, 521 (2003), quoting Strickland, 466 U.S. at 688. However, "general  
20 principles have emerged regarding the duties of criminal defense attorneys that inform [a court's]  
21 view as to the 'objective standard of reasonableness' by which [a court must] assess attorney  
22 performance, particularly with respect to the duty to investigate." Summerlin v. Schriro, 427  
23 F.3d 623, 629 (2005). "[S]trategic choices made after thorough investigation of law and facts  
24 relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690. It  
25 follows that:

26  
27         [S]trategic choices made after less than complete investigation are reasonable  
28 precisely to the extent that reasonable professional judgments support the  
limitations on investigation. In other words, counsel has a duty to make

1 reasonable investigations or to make a reasonable decision that makes particular  
2 investigations unnecessary. In any ineffectiveness case, a particular decision not  
to investigate must be directly assessed for reasonableness in all the  
circumstances, applying a heavy measure of deference to counsel's judgment.

3 Wiggins, 539 U.S. at 521, quoting Strickland, 466 U.S. at 690–91; see also Thomas v. Chappell,  
4 678 F.3d 1086, 1104 (9th Cir. 2012) (counsel's decision not to call a witness can only be  
5 considered tactical if he had “sufficient information with which to make an informed decision”);  
6 Reynoso v. Giurbino, 462 F.3d 1099, 1112–1115 (9th Cir. 2006) (counsel's failure to cross-  
7 examine witnesses about their knowledge of reward money cannot be considered strategic where  
8 counsel did not investigate this avenue of impeachment); Jennings v. Woodford, 290 F.3d 1006,  
9 1016 (9th Cir. 2002) (counsel's choice of alibi defense and rejection of mental health defense not  
10 reasonable strategy where counsel failed to investigate possible mental defenses).

11 Second, the petitioner must demonstrate prejudice, that is, he must show that “there is a  
12 reasonable probability that, but for counsel's unprofessional errors, the result ... would have been  
13 different.” Strickland, 466 U.S. at 694. “It is not enough ‘to show that the errors had some  
14 conceivable effect on the outcome of the proceeding.’” Richter, 562 U.S. at 104, quoting  
15 Strickland, 466 U.S. at 693. “Counsel’s errors must be ‘so serious as to deprive the defendant of  
16 a fair trial, a trial whose result is reliable.’” Richter, 562 U.S. at 104, quoting Strickland, 466  
17 U.S. at 687. Under this standard, we ask “whether it is ‘reasonably likely’ the result would have  
18 been different.” Richter, 562 U.S. at 112, quoting Strickland, 466 U.S. at 696.

19 That is, only when “[t]he likelihood of a different result [is] substantial, not just  
20 conceivable,” *id.*, has the defendant met *Strickland’s* demand that defense errors were “so serious  
21 as to deprive the defendant of a fair trial.” *Id.*, at 103-105, quoting Strickland, 466 U.S. at 687.  
22 A court need not determine whether counsel's performance was deficient before examining the  
23 prejudice suffered by the petitioner as a result of the alleged deficiencies. Strickland, 466 U.S. at  
24 697. Since the petitioner must affirmatively prove prejudice, any deficiency that does not result  
25 in prejudice must necessarily fail.

26 Under AEDPA, the court does not apply Strickland de novo. Rather, the court must  
27 determine whether the state court’s application of Strickland was unreasonable. Richter, 562  
28

1 U.S. at 100-101. Establishing that a state court’s application of Strickland was unreasonable  
2 under 28 U.S.C. § 2254(d) is very difficult. See Richter, 562 U.S. at 102, (on deferential  
3 (2254(d)) review relief is granted only for “extreme malfunctions” in the state criminal justice  
4 system, not for ordinary errors that can be corrected on appeal).

5 Since the standards created by Strickland and § 2254(d) are both “highly deferential,”  
6 when the two are applied in tandem, review is “doubly so.” Id., quoting Knowles v. Mirzayance,  
7 556 U.S. 111, 123 (2009). Further, because the Strickland rule is a “general” one, courts have  
8 “more leeway ... in reaching outcomes in case-by-case determinations” and the “range of  
9 reasonable applications is substantial.” Id. at 101; see also Premo v. Moore, 562 U.S. 115, 122-  
10 23 (2011).

## 11 2. Review of Claim I

12 Petitioner alleges that trial counsel was ineffective in the process of selecting jurors,  
13 denying him a fair and impartial jury, violating his rights under the Fifth, Sixth, Eighth and  
14 Fourteenth Amendments. (Doc. No. 51-1 ¶¶ 173-207.)

### 15 a. **Clearly Established Law – Impartial Jury**

16 The Sixth Amendment secures to criminal defendants the right to trial by an impartial  
17 jury. Skilling v. United States, 561 U.S. 358, 377-78 (2010); Irvin v. Dowd, 366 U.S. 717, 722  
18 (1961).

19 “[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of  
20 impartial, ‘indifferent’ jurors.” Irvin, 366 U.S. at 722; see also Skilling, 561 U.S. at 377-78. In a  
21 capital case, “a prospective juror may be excluded for cause because of his or her views on  
22 capital punishment ... if the juror’s views would ‘prevent or substantially impair the performance  
23 of his duties as a juror in accordance with his instructions and his oath.’” Wainwright v. Witt,  
24 469 U.S. 412, 424 (1985), citing Adams v. Texas, 448 U.S. 38, 45 (1980). Thus, “a juror who in  
25 no case would vote for capital punishment, regardless of his or her instructions, is not an  
26 impartial juror and must be removed for cause.” Morgan v. Illinois, 504 U.S. 719, 728 (1992).  
27 Likewise, a juror who would automatically impose the death penalty if a defendant is found  
28

1 guilty is not impartial and must be removed for cause. *Id.* at 733; *Ross v. Oklahoma*, 487 U.S.  
2 81, 85 (1988).

3 “[P]art of the guarantee of a defendant’s right to an impartial jury is an adequate voir dire  
4 to identify unqualified jurors.” *Morgan*, 504 U.S. at 729. “Voir dire ‘is conducted under the  
5 supervision of the court, and a great deal must, of necessity, be left to its sound discretion.’”  
6 *Ristaino v. Ross*, 424 U.S. 589, 594 (1976), quoting *Connors v. United States*, 158 U.S. 408, 413  
7 (1895). “[T]he trial court retains great latitude in deciding what questions should be asked on  
8 voir dire.” *Mu’Min v. Virginia*, 500 U.S. 415, 424 (1991). No hard-and-fast formula dictates the  
9 necessary depth or breadth of voir dire, see *United States v. Wood*, 299 U.S. 123, 145–146  
10 (1936), and “[t]he Constitution ... does not dictate a catechism for voir dire, but only that the  
11 defendant be afforded an impartial jury.” *Morgan*, 504 U.S. at 729. A trial court’s failure to ask  
12 certain questions does not violate the Constitution unless it “render[s] the defendant’s trial  
13 fundamentally unfair.” *Mu’Min*, 500 U.S. at 426.

14 “[T]he trial court retains great latitude in deciding what questions should be asked on voir  
15 dire.” *Id.* at 424. A trial court’s failure to ask certain questions does not violate the Constitution  
16 unless it “render[s] the defendant’s trial fundamentally unfair.” *Id.* at 426.

17 Only two specific inquiries of voir dire are constitutionally compelled: inquiries into racial  
18 prejudice against a defendant charged with a violent crime against a person of a different racial  
19 group, *id.*, at 424, and, in a capital case, inquiries into a juror’s views on capital punishment.  
20 *Morgan*, 504 U.S. at 730-32.

21 **b. State Court Direct and Collateral Review**

22 Petitioner presented some of these allegations to the California Supreme Court in his first  
23 state habeas petition. (Lod. Doc. 7 at 42-52.) That court summarily denied the allegations on the  
24 merits. (Lod. Doc. 10.) Petitioner presented other of these allegations to the California Supreme  
25 Court in his second state habeas petition. (Lod. Doc. 30 at 89-100.) That court summarily  
26 denied the allegations on the merits and on procedural grounds. (Lod. Doc. 31.)

27 **c. Analysis of Claim I**

1 (i) List of Randomly Selected Jurors

2 Petitioner alleges that defense trial counsel, Fresno County public defender Marvin  
3 Schultz, who was appointed to represent him in February 1989, was deficient by stipulating that  
4 counsel for both sides would be provided with a computer generated random list of the jurors in  
5 the order they would be called for Hovey voir dire. (Doc. No. 51-1 ¶ 177.)

6 The record reflects that jury qualification and selection began on January 14, 1991 with  
7 approximately three hundred fifty prospective jurors appearing. (RT 92.) Petitioner alleges that  
8 the noted stipulation impinged upon the “random selection” of the jury [because] [o]nce death  
9 qualification was complete, and seating of the jury began, both counsel knew, with the preprinted  
10 random list in hand, if they exercised a peremptory challenge, which jurors were in line to take  
11 the vacant seat.” (Doc. No. 51-1 ¶ 177, citing RT 112-115; see also RT 3854, 3873.)

12 Petitioner also alleges that given the list, Schultz was deficient by not using all of his  
13 peremptory challenges, resulting in selection of a pro death jury partial to the prosecution. (Doc.  
14 No. 51-1 ¶¶ 200-207; see also Morgan, 504 U.S. at 728-29 (capital defense has a right to  
15 adequate voir dire to identify unqualified jurors and to an impartial jury). Petitioner also faults  
16 Schultz for failing to rehabilitate prospective jurors who voiced initial opposition to the death  
17 penalty. (Doc. No. 51-1 ¶ 205 citing 1989 ABA Guidelines for the Appointment and  
18 *Performance of Counsel in Death Penalty Cases (“ABA Guidelines”)*, Commentary to  
19 Guideline 10.10.2(B)(3).)

20 Here, the state supreme court could reasonably have concluded that Schultz used the  
21 random list of jurors and his peremptory challenges strategically. See e.g., *Davis v. Woodford*,  
22 333 F.3d 982, 995-96 (9th Cir. 2003), amended and superseded 384 F.3d 628, 643 (9th Cir.  
23 2004) (no ineffectiveness in failing to use peremptory challenges where jurors’ statements did  
24 not demonstrate actual or implied bias; each said they could “follow the judge’s instructions and  
25 decide the case impartially”); *United States v. Quintero-Barraza*, 78 F.3d 1344, 1349-50 (9th  
26 Cir. 1995) (where juror stated it would be “difficult” for him to be impartial because he believed  
27 persons to be guilty until proven innocent, no ineffectiveness in failing to strike juror because  
28

1 decision was manifestly tactical and due respect was paid to juror’s oath); *Denham v. Deeds*, 954  
2 F.2d 1501, 1505 (9th Cir. 1992) (where juror stated that defendant may have told her about the  
3 charged crime while she waited on them at work, no ineffectiveness to fail to challenge her  
4 because she said she could be fair and where decision could be tactical).

5 The record reflects that neither side exercised all its available peremptory challenges.  
6 (RT 4075, 4094.) The prosecution exercised eight of twenty peremptory challenges in selecting  
7 the twelve member jury. (RT 3955, 3970, 4012, 4025, 4049, 4054, 4057, 4062.) Schultz  
8 exercised seven of twenty peremptory challenges in selecting this jury as well as one peremptory  
9 challenge in selecting the three alternates. (RT 3959, 3973, 3980, 3997, 4019, 4042, 4059,  
10 4090.)

11 Petitioner suggests that the juror questionnaire responses of the jurors ultimately selected  
12 did not support Schultz’s selection strategy by showing an inclination to require a higher  
13 standard of prosecutorial proof at the guilt phase. (Doc. No. 51-1 ¶195 (c); Doc. No. 116 at  
14 381:1-5.) However, as petitioner acknowledges (Doc. No. 51-1 ¶ 192), Schulz made “for cause”  
15 or peremptory challenges of prospective jurors who were so in favor of the death penalty that  
16 they were not impartial and receptive to defense evidence. (*Id.*)

17 Moreover, peremptory challenges are not necessarily of constitutional dimension. *Ross*,  
18 487 U.S. at 88; *Gray v. Mississippi*, 481 U.S. 648, 663 (1987). The Supreme Court has upheld  
19 use of peremptory challenges that do not discriminate on a constitutionally suspect basis. See  
20 *Holland v. Illinois*, 493 U.S. 474, 478 (1990) (rejecting argument that “a prosecutor’s use of  
21 peremptory challenges to eliminate a distinctive group in the community deprives the defendant  
22 of a Sixth Amendment right to the ‘fair possibility’ of a representative jury”).

23 (ii) Strategy of Selecting Pro-Death Jury

24 Petitioner alleges Schultz was deficient by selecting a pro-death jury, i.e., jurors “who  
25 were predisposed to impose the death penalty” (Doc. No. 51-1 ¶ 185) in the hope that at the guilt  
26 phase these jurors “would be more critical of the prosecution’s case and less likely to convict.”  
27 (*Id.*; see also SHCP, Ex. B ¶ 3.)

1           Petitioner alleges that Schultz’s above noted “pro death” jury strategy led to selection of a  
2 jury that was not impartial. He claims the jury selected was more prone both to convict and  
3 impose the death penalty thus aiding the prosecution. (Doc. No. 116 at 379:10-14.) He argues  
4 that is evident in the approximately four hours of deliberation required by the jury to convict and  
5 find all special circumstances true. (CT 380-85, 463-68.) He argues that “[a] criminal  
6 defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor  
7 of capital punishment by selective ... challenges for cause.” (Doc. No. 116 at 386:27-387:2); see  
8 also *Uttecht v. Brown*, 551 U.S. 1, 9 (2007), citing *Witherspoon v. Illinois*, 391 U.S. 510, 521  
9 (1968).

10           Petitioner argues Schultz’s strategy fell below the experience and competency  
11 requirements for jury selection established by ABA Guidelines. ABA Guidelines, Commentary to  
12 Guideline 1.1; see also *Correll v. Ryan*, 539 F.3d 938, 949 (9th Cir. 2008) ([A]n “uninformed  
13 strategy is not a reasoned strategy. It is, in fact, no strategy at all.”).

14           Petitioner argues Schultz’s strategy was essentially uninformed and therefore  
15 unreasonable. *Correll*, 539 F.3d at 949. He argues Schultz, who had no death penalty case  
16 experience and had not researched this strategy or discussed with jury selection experts,  
17 unreasonably based the strategy upon his own deduction and personal opinion. (SHCP, Ex. B ¶¶  
18 2, 3.) He argues that had Schultz investigated this theory he would have discovered empirical  
19 evidence discounting it. See e.g., *Hovey v. Superior Court*, 28 Cal. 3d 1, 40 (1980), superseded  
20 by statute as stated in *People v. Jackson*, 1 Cal. 5th 269, 360 (2016) (jurors with scruples against  
21 the death penalty vote to acquit more frequently than pro-death jurors).

22           However, the state supreme court was not unreasonable in rejecting this claim. As  
23 respondent notes, Schultz stated that his strategy was to pick jurors who would require the  
24 prosecutor to carry his burden of proof, i.e., “to select jurors who demanded they be absolutely  
25 positively convinced of the defendant’s guilt. [I wanted] [j]urors who said they had to be  
26 completely convinced of the guilt of the accused before they could vote to convict.” (SHCP, Ex.  
27 B ¶ 3.) Schultz’s posited theory finds support in the record. Some prospective jurors who felt  
28

1 death penalty was appropriate where guilt was certain also felt the converse was true. (See e.g.,  
2 prospective juror Driscoll, RT 1158-65; prospective juror Sasaki, RT 2825-41; prospective juror  
3 Whiteman, RT 3425-30; and prospective juror Kincade (RT 3800-3803.) Moreover, the  
4 Supreme Court has suggested that death qualified jurors can be more demanding of proof at the  
5 conviction phase. *Lockhart v. McCree*, 476 U.S. 162, 168-73 (1986) (the Constitution does not  
6 prohibit the States from death qualifying juries in capital cases).

7         Petitioner’s citation to ABA Guidelines does not necessarily suggest otherwise. He  
8 argues the ABA Guidelines “advise counsel to design a jury selection strategy crafted to  
9 minimize the problem of death qualified juries that result from exclusion of prospective jurors  
10 whose opposition to capital punishment effectively skews the jury pool not only as to imposition  
11 of the death penalty but [also] as to conviction.” (Doc. No. 51-1 ¶ 203 citing ABA Guidelines,  
12 Commentary to Guideline 10.10.2(B)(1).) However, the ABA Guidelines are not “inexorable  
13 commands” with which all attorneys must comply to avoid a finding of ineffectiveness. *Bobby*  
14 *v. Van Hook*, 558 U.S. 4, 8 (2009). “Strickland stressed ... that American Bar Association  
15 standards and the like are only guides to what reasonableness means, not its definition. *Id.*”  
16 (Doc. No. 125 at 75:5-8.)

17         Especially so where, as here, counsel could reasonably focus on the guilt phase and  
18 gaining acquittal given the alleged weakness of the physical evidence against the petitioner.  
19 Defense counsel Schultz had “full authority to manage the conduct of the trial.” *Taylor v.*  
20 *Illinois*, 484 U.S. 400, 417-18 (1988); *New York v. Hill*, 528 U.S. 110, 114-15 (2000). Petitioner  
21 was “bound” by the acts of his counsel and, “[a]bsent a demonstration of ineffectiveness,  
22 counsel’s word on such matters is the last.” *Hill*, 528 U.S. at 115; *Allum v. Twomey*, 484 F.2d  
23 740, 745 (7th Cir. 1973) (“assuming the lawyer’s competence, the client must accept the  
24 consequences of his trial strategy”).

25         “[W]hen counsel focuses on some issues [and excludes] others, there is a strong  
26 presumption that he did so for tactical reasons rather than through sheer neglect.” *Jacobs v.*  
27 *Horn*, 395 F.3d 92, 118 (3d Cir. 2005), citing *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003); cf.

1 People v. Lucas, 12 Cal. 4th 415, 482-84 (1995) (rejecting defendant’s claim that he needed a  
2 new penalty jury to avoid potential prejudice caused by court’s voir dire statements that defense  
3 would present evidence in mitigation at penalty trial).

4 That Schultz’s jury selection strategy may have proved unsuccessful is not alone  
5 ineffective assistance. Sloan v. Delo, 54 F.3d 1371, 1384 (8th Cir. 1995) (“Although the  
6 [defense] closing apparently was not persuasive, a strategy need not be successful to be  
7 reasonable.”). “The mere criticism of trial tactics is insufficient to establish ineffectiveness or  
8 prejudice.” United States v. Ferreira-Alameda, 815 F.2d 1251, 1254 (9th Cir. 1986).

9 (iii) Prejudice

10 Petitioner alleges these deficiencies resulted in a complete lack of representation under  
11 United States v. Cronic, 466 U.S. 648, 658 (1984) (no showing of prejudice required).  
12 However, for the reasons stated, the state supreme court could reasonably have found petitioner  
13 was not denied “counsel acting in the role of an advocate” for purposes of Cronic because, for  
14 the reasons stated Schultz’s jury selection process could reasonably be seen as strategic in nature.  
15 Cronic, 466 U.S. at 656.

16 Petitioner also alleges prejudice under Strickland. He argues that Schultz’s strategy  
17 resulted in a jury that was potentially pro-conviction and less diverse than the one that might  
18 have been chosen absent Schultz’s noted strategy. (RT 3855-4095.) However, the state supreme  
19 court could reasonably have found no prejudice under Strickland, i.e., no reasonable probability  
20 of a different outcome.

21 As noted, Schultz removed seven prospective jurors and one alternate juror by  
22 peremptory challenge. (Prospective juror Christiansen, RT 3959; prospective juror Lung, RT  
23 3973; prospective juror Neville, RT 3980; prospective juror Kruse, RT 3997; prospective juror  
24 Clark, RT 4019; prospective juror Zulim, RT 4042; prospective juror Slater, RT 4059; and  
25 prospective juror Snyder, RT 4090.)

26 The record reasonably could suggest that none of these prospective jurors appeared  
27 strongly in favor of a proposed life without parole sentence, or inclined to raise the prosecution’s  
28

1 burden at the guilt phase. (SSCT 3042-57 (prospective juror Christiansen); SSCT 3163-79  
2 (prospective juror Lung); SSCT 3210-26 (prospective juror Neville); SSCT 3103-17 (prospective  
3 juror Kruse); SSCT 3058-72 (prospective juror Clark); SSCT 3009-25 (prospective juror Zulim);  
4 SSCT 2746-60 (prospective juror Slater); SSCT 2793-2809 (prospective juror Snyder).

5         Moreover, the record could reasonably suggest that none of the selected jurors were  
6 strongly in favor of a possible death sentence or inclined to lower the prosecution's burden at the  
7 guilt phase. (RT 3855-4095; see also SSCT 43-47, RT 3342-57 (juror Velluntini); SSCT 48-62,  
8 RT 2777-96 (juror Rye); SSCT 63-78, RT 1787-97 (juror Kozakowski); SSCT 79-94, RT  
9 3415-29, (juror Whiteman); SSCT 112-128, RT 2824-41 (juror Sasaki); SSCT 129-145, RT  
10 3801-13 (juror Kincade); SSCT 163-179, RT 392-402 (juror Allen); SSCT 180-196, RT 750-64  
11 (juror Bystrom); SSCT 197-213, RT 1147-65 (juror Driscoll); SSCT 214-230, RT 2609-29  
12 (juror Ploharz); SSCT 248-264, RT 2052-72 (juror Magyer); SSCT 265-281, RT 2700-10 (juror  
13 Rocholz).

14         All of the selected jurors stated they could follow the law and the trial court's  
15 instructions; put aside personal feelings and remain open-minded and consider all facts and  
16 circumstances of the crimes in making the penalty determination; and stated that the possibility  
17 of a death sentence would not affect his or her guilt phase determination. (See RT 3855-4095;  
18 SSCT 43-47, RT 3342-57; SSCT 48-62, RT 2777-96; SSCT 63-78, RT 1787-97; SSCT 79-94,  
19 RT 3415-29; SSCT 112-128, RT 2824-41; SSCT 129-145, RT 3801-13; SSCT 163-179, RT 392-  
20 402; SSCT 180-196, RT 750-64; SSCT 197-213, RT 1147-65; SSCT 214-230, RT 2609-29;  
21 SSCT 248-264, RT 2052-72; SSCT 265-281, RT 2700-10); see also *Leavitt v. Arave*, 383 F.3d  
22 809, 826-27 (9th Cir. 2004) (giving weight to jurors' assurances of impartiality).

23         Petitioner argues that Schultz's strategy resulted in a jury that was biased because it was  
24 predominantly male (eleven of twelve jurors were male). He reasons that males are more likely  
25 to support the death penalty. (See SSHCP ¶ 196.) He argues that had Schultz exercised his  
26 available peremptory challenges he would have achieved better gender balance because the list  
27 of jurors provided to counsel showed the higher concentration of women was in the second half  
28

1 of the jury panel. (Doc. No. 116 at 382:11-15.)

2 But the state supreme court would not have been unreasonable in finding such allegations  
3 to be speculative. Petitioner does not cite to clearly established law that the gender of jurors is a  
4 basis to find bias. Rather the opposite appears the case. A juror selection strategy that  
5 discriminates based on gender would appear to run counter to the rule of Batson v. Kentucky, 476  
6 U.S. 79 (1986), and its state law corollary, People v. Wheeler, 22 Cal. 3d 258 (1978), rejected by  
7 Johnson v. California, 545 U.S. 162, 170 (2005). See J.E.B. v. Alabama, 511 U.S. 127, 146  
8 (1994) (extending Batson protections to gender-based peremptory challenges).

9 Petitioner argues that Schultz’s jury selection strategy resulted in a jury that included  
10 individuals with law enforcement backgrounds. One juror selected worked for the Fresno  
11 County Probation Department (SSCT 32-47.) Petitioner observes that the spouse of a juror was a  
12 retired Fresno policeman (SSCT 214-230) and that the brothers of another juror worked for  
13 police departments in the Central Valley and Southern California (SSCT 63-78). Here again the  
14 state supreme court would not have been unreasonable in finding such allegations of bias to be  
15 speculative.

16 Petitioner has not demonstrated on the record that the jurors selected included individuals  
17 biased by relatives employed in law enforcement. All of the jurors selected stated during voir  
18 dire that they could remain impartial, even though some of these individuals admitted  
19 connections to, or past run-ins with law enforcement authorities. (See RT 3855-4095; SSCT 43-  
20 47, RT 3342-57; SSCT 48-62, RT 2777-96; SSCT 63-78, RT 1787-97; SSCT 79-94, RT 3415-  
21 29; SSCT 112-128, RT 2824-41; SSCT 129-145, RT 3801-13; SSCT 163-179, RT 392-402;  
22 SSCT 180-196, RT 750-64; SSCT 197-213, RT 1147-65; SSCT 214-230, RT 2609-29; SSCT  
23 248-264, RT 2052-72; SSCT 265-281, RT 2700-10); see also Leavitt, 383 F.3d at 826-27 (giving  
24 weight to jurors’ assurances of impartiality); Quintero-Barraza, 78 F.3d at 1350 & n.5 (trial  
25 court’s conclusion regarding “juror impartiality” is a “factual issue” given “special deference”  
26 under AEDPA).

27 (iv) Conclusions

1 For the reasons stated, the state supreme court could reasonably have found that defense  
2 counsel Schultz was not objectively unreasonable in the process of selecting jurors and that there  
3 was no reasonable probability of a different outcome absent counsel's alleged unprofessional  
4 errors. Strickland, 466 U.S. at 687-98.

5 Accordingly, the California Supreme Court's rejection of this claim was not contrary to,  
6 or an unreasonable application of, clearly established federal law, or an unreasonable  
7 determination of the facts in light of the evidence presented in the state court proceeding. 28  
8 U.S.C. § 2254(d).

9 Claim I is denied.

10 3. Review of Claim II

11 Claim II includes subclaims alleging pre-trial and trial ineffectiveness of counsel relating  
12 to the investigation, preparation and presentation of guilt phase defenses violating petitioner's  
13 rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (Doc. No. 51-1 ¶¶ 208-420.)

14 Petitioner contends that he was wrongfully convicted of aiding and abetting felony  
15 murders in which he did not participate, notwithstanding his alleged confession to his drug addict  
16 roommates Gail Goldman and Gene Buchanan. (Id.) Additionally he contends no robbery of the  
17 victims was intended or took place because valuables and cash remained at the crime scene. (Id.;  
18 see also Doc. No. 11617:1-12.) He contends the crime scene was ransacked by the actual killer,  
19 Richard Cullumber ("RC") searching for victim Freiri's gun (which RC used to kill himself four  
20 days later following a police chase in San Jose, California) after RC killed the victims in a drug  
21 induced rage. (Id.)

22 In these claims, petitioner argues that Schultz failed to investigate potential defenses,  
23 locate and interview witnesses, collect available records, seek out and utilize expert witnesses,  
24 adequately review the physical and impeachment evidence, familiarize himself with the rules of  
25 evidence and object to inadmissible evidence.

26 **a. State Court Direct and Collateral Review**

27 Petitioner presented these claims to the California Supreme Court in his second state  
28

1 habeas petition. (Lod. Doc. 30 at 105-99.) That court summarily denied the claims on the merits  
2 (Lod. Doc. 31) and found claims II(A), II(B), II(C), II(D), II(F), II(G), II(H), II(J), II(L), II(Q),  
3 II(R), II(S), II(T), II(U), II(V), and II(W) to be procedurally barred. (Id.)

4 Additionally, as discussed in the individual claim II subclaims, post, the California  
5 Supreme Court rejected certain of the allegations on direct appeal.

6 **b. Analysis of Claim II(A)**

7 (i) *“Defense Team”*

8 Petitioner alleges that Schultz was ineffective by failing to use a “defense team” concept,  
9 resulting in a breach of the duty of loyalty and a breakdown of the adversarial process. Cronin,  
10 466 U.S. at 656-57 & n.20.

11 Petitioner faults Schultz for not using a defense team composed of two attorneys, an  
12 investigator, mitigation specialist and a mental defense expert as recommended by the ABA  
13 Guidelines. ABA Guidelines Nos. 2.1, 4.1, 5.1 and 104.

14 Petitioner also argues that Schultz, the only attorney assigned to the case was not  
15 adequately assisted by the defense team he did assemble which for the most part was composed  
16 of an assistant attorney in his office to conduct legal research and private investigator Willard  
17 Temple and Temple’s employee Mel King. (Doc. No. 51-1, citing SHCP, Ex. B ¶ 2.) Mr. King,  
18 who lacked capital case experience and was on administrative leave from the Fresno Police  
19 Department while working for Mr. Temple was tasked with investigating key prosecution  
20 witness Buchanan and the penalty defense. (See RT 4848-59.) King worked on petitioner’s case  
21 until it went to trial at which time King returned to employment with the Fresno Police  
22 Department.

23 Petitioner argues that King ended up harming his defense by providing favors to  
24 Buchanan. He alleges that King was conflicted by his relationship with the Fresno Police  
25 Department, the agency which investigated the crimes and arrested petitioner. He alleges that  
26 when King left the case he was replaced by Rick Runcie, a first year law student. (See Doc. No.  
27 51-1 ¶ 213(O); see also SSHCP ¶ 323.) He alleges that Runcie, who assisted Schultz at trial, was  
28

1 similarly inexperienced and inadequate as a capital case investigator. (Id.)

2           However, the state supreme court could reasonably have found Schultz was not deficient  
3 in assembling his defense team. Petitioner has not demonstrated clearly established law entitling  
4 a capital defendant to additional counsel and experts. See *Allen v. Woodford*, 395 F.3d 979, 998  
5 (9th Cir. 2004) (failure to seek second counsel not deficient performance).

6           Under state law in effect at the time of petitioner’s proceeding the decision to appoint a  
7 second attorney for an indigent capital defendant was within the trial court’s sound discretion,  
8 *Keenan v. Superior Court*, 31 Cal. 3d 424, 430 (1982), and required a showing of “genuine  
9 need” for second counsel, *People v. Lucky*, 45 Cal. 3d 259, 280 (1988). Petitioner has not  
10 demonstrated the ABA Guidelines are authority otherwise. Nor may petitioner rely upon the  
11 April 11, 2014 declaration of prosecutor Hahus, wherein Hahus states “[i]t was my  
12 understanding at the time of trial that capitally charged defendants were entitled to two defense  
13 counsel at trial.” (Doc. No. 116-1 ¶ 2.) This declaration, first filed in this federal proceeding, is  
14 not part of the state record and cannot be considered by this court absent a showing sufficient  
15 under 28 U.S.C. § 2254(d).<sup>8</sup> See *Pinholster*, 563 U.S. at 185 n.7.

16           Petitioner has not demonstrated that Schultz and his defense team failed to maintain pre-  
17 trial “close contact” with him as required by ABA Guidelines (see ABA Guideline No. 11.4.2)  
18 (“Counsel shall maintain a close contact with the client throughout the preparation of a case,  
19 discussing (inter alia) the investigation, potential legal issues that exist or develop and the  
20 development of a defense theory.”). Significantly, Schultz in his April 7, 2003 habeas  
21 declaration does not state that he needed second counsel. (SHCP, Ex. B.) As noted, his  
22 assembled defense team assisted him with legal research and preparation of the defense  
23 including investigation of witnesses and generation of a social history for petitioner. (Id.; Lod.  
24 Doc. 30 at 111; see also SHCP, Ex. O-1.) In any event, for the reasons stated the ABA  
25 Guidelines do not alone set the standard of objectively reasonable conduct under Strickland.

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26  
27 <sup>8</sup> The parties refer to the declaration of Hahus (Doc. No. 116-1) in arguing other claims. However, for the reasons  
28 stated, it is not included in the state record and the court does not consider it. Even if the court had considered it, the  
declaration is essentially cumulative of evidence otherwise in the record and the court’s disposition hereunder would  
not change.

1 Petitioner also argues that Schultz acted under a conflict of interest because he  
2 “simultaneously represent[ed] other felony defendants in jury trials at a rate of approximately  
3 one case per month” (Doc. No. 116 at 393:6-7, 19-21, citing SHCP, Ex. B ¶ 2) preventing  
4 Schultz from complying with the noted ABA Guidelines. (Doc. No. 116 at 393:17-21); Cronic,  
5 466 U.S. at 656-57; United States ex rel. Green v. Washington, 917 F. Supp. 1238, 1275 (N.D.  
6 Ill. 1996) (holding that excessive caseload forcing public defender to choose from among rights  
7 of his various clients inevitably creates a conflict of interest).

8 However, petitioner does not demonstrate on the evidentiary record that Schultz’s  
9 obligations in other cases impacted his defense, or that Schultz ever stated as much. (See SHCP,  
10 Ex. B.) Instead, the record reflects that Schultz engaged in the noted pre-trial preparations  
11 including consultation with two mental health experts – psychiatrist Dr. John Hackett who  
12 concluded petitioner was possibly suicidal, and psychologist Larry Thompson who concluded  
13 petitioner mildly depressed. (Doc. No. 51-1 ¶ 523; see also SSHCP, Ex. 19 ¶ 9.) Schultz could  
14 reasonably have relied upon these experts in making strategic decisions not to assert mental  
15 defenses at the guilty phase or conduct further related investigation. (See e.g., claims II(B),  
16 II(C).)

17 Additionally, Schultz and his team discussed petitioner’s background with petitioner’s  
18 mother. The state supreme court could reasonably have found that Schultz had concerns relating  
19 to potentially unfavorable behavioral, character and bad acts evidence and that such were an  
20 objectively reasonable basis not to further pursue such matters during the guilt phase. (SHPC,  
21 Ex. B ¶ 13.)

22 (ii) Prejudice

23 Petitioner alleges that had the work on petitioner’s case been split among two attorneys  
24 and a proper defense team there is a reasonable probability the result would have been more  
25 favorable. (Doc. No. 116-1 ¶¶ 2-4; Doc. No. 128 at 169:9-14; see also SHCP, Ex. B. ¶¶ 2-3.)  
26 He argues that Schultz was unreasonable in not requesting second counsel; a request he contends  
27 would have been granted.

1           However, petitioner has not shown these alleged deficiencies were prejudicial under  
2 Strickland. Petitioner’s habeas proffer does not suggest what different or additional defense  
3 preparation and presentation would have taken place upon appointment of a second attorney.  
4 Schultz’s habeas declaration is uninformative in these regards. (SHCP, Ex. B.) Petitioner has  
5 not demonstrated that Schultz’s reliance upon his defense team was unreasonable. See Bragg v.  
6 Galaza, 242 F.3d 1082, 1088 (9th Cir. 2001) (no ineffective assistance where attorney was well-  
7 informed and defendant fails to show what additional information would have been gained had  
8 counsel acted differently); LaGrand v. Stewart, 133 F.3d 1253, 1274 (9th Cir. 1998) (defense  
9 counsel need not personally conduct interviews where he had transcripts of prosecution  
10 interviews). Furthermore, “[a] lawyer may make reasonable decisions that render particular  
11 investigations unnecessary.” Frye v. Warden, San Quentin State Prison, No. 2:99-CV-0628 KJM  
12 CKD, 2015 WL 300755, at \*18 (E.D. Cal. Jan. 22, 2015).

13           The state supreme court reasonably could have rejected these allegations as speculative.  
14 The issues in this case were relatively straight forward, with the guilt phase focusing on  
15 petitioner’s involvement in the crimes.

16           (iii) Conclusions

17           For the reasons stated, the state supreme court could reasonably have found that defense  
18 counsel Schultz was not objectively unreasonable in assembling and utilizing the defense team,  
19 and that there was not a reasonable probability of a different outcome absent counsel’s alleged  
20 unprofessional errors. Strickland, 466 U.S. at 687-98.

21           Accordingly, the California Supreme Court’s rejection of this claim was not contrary to,  
22 or an unreasonable application of, clearly established federal law, or an unreasonable  
23 determination of the facts in light of the evidence presented in the state court proceeding. 28  
24 U.S.C. § 2254(d).

25           Claim II(A) is denied.

26           **c. Analysis of Claims II(B) and II(C)**

27           Petitioner alleges that Schultz was ineffective in impeaching the primary prosecution  
28

1 witnesses, Buchanan and Goldman, and that he ignored and failed to present exculpatory and  
2 expert testimony and evidence of third party liability. (Doc. No. 51-1 ¶¶ 219-262.)

3 Petitioner argues that the prosecution case was built around the impeachable testimony of  
4 Buchanan and Goldman. (Doc. No. 116 at 178:2-9.) He claims that Schultz was deficient by  
5 failing to develop and present the case for petitioner’s actual innocence. Petitioner’s arguments  
6 are discussed separately below.

7 (i) Timeline of the Murders

8 Petitioner alleges that the trial testimony of Buchanan and Goldman and the prosecution  
9 timeline for the crimes were inconsistent with the crime scene evidence. He notes that Schultz  
10 was aware the testimony of Goldman and Buchanan placed the time of the assaults on the  
11 evening of November 7, 1988. (Id.) He faults Schultz for not retaining a forensic pathologist to  
12 develop evidence in the police and autopsy reports to discount the prosecution theory, based  
13 upon the testimony of Buchanan and Goldman that the crime occurred between 6:00 and 10:00  
14 p.m. on November 7, 1988.

15 Petitioner argues a defense expert could have used the crime scene police reports  
16 (SSHCP, Ex. 9 at 320; id. at Ex. 11 at 345), the coroner’s certificate and verdict (id. at Ex. 22 at  
17 390-93), and crime scene witness statements in the police report (id., Ex. 10 at 333) to opine that  
18 the crimes occurred after lunch on November 8, 1988 rather than during the evening of  
19 November 7, 1988 as argued by the prosecution. He points to autopsy evidence, victim Freiri’s  
20 post-mortem liver temperature and stomach contents and argues the actual time of the assault  
21 upon Ms. Caton and Mr. Freiri was not the evening of November 7, 1988 as theorized by the  
22 prosecution but rather the afternoon of November 8, 1988. (See SSHCP, Ex.’s 9, 11, 22.)

23 However, Schultz reasonably could have decided not to contest the prosecution timeline.  
24 The liver temperature of victim Freiri taken by the deputy coroner at the crime scene may have  
25 been affected by ambient conditions. Although the coroner’s certificate of death stated that  
26 Freiri died “[b]etween November 7, 1998 and November 8, 1988, at an unknown time” (SSHCP,  
27 Ex. 22), the deputy coroner who took Freiri’s liver temperature opined that an operating floor  
28

1 furnace proximal to victim Freiri impacted the liver temperature reading (SSHCP, Ex. 9 at 320).

2 As to Freiri's stomach contents, the deputy coroner opined that Freiri had eaten 1 to 2  
3 hours prior to his death. (SSHCP, Ex. 11 at 345.) But that does not alone suggest Freiri died  
4 after eating lunch on November 8th (as petitioner asserts) rather than following dinner on  
5 November 7th (as the prosecution theorized). (See SSHCP, Ex. 11 at 346-47.) Statements from  
6 victim Caton's daughter, Ms. Garrett, to police suggest the victims ate a rice dinner at  
7 approximately 5:30 p.m. on November 7th, 1988. (Id.) This would be consistent with the  
8 coroner's findings regarding victims' stomach contents, (Id.; SSHCP, Ex. 9 at 320), and the  
9 coroner's stated time of death as "between November 7, 1988 and November 8, 1988, at  
10 unknown time." (SSHCP, Ex. 22 at 390.)

11 Petitioner also alleges that Schultz failed to develop witness testimony that the assaults  
12 likely took place on November 8, 1988. Petitioner points to a statement by Ms. Frutos, a  
13 neighbor of the victims, who reported seeing Caton at a local market at noon on November 8,  
14 1988. (SSHCP, Ex. 10 at 333.) However, the record reflects that the market's owner stated he  
15 "had not seen either of the victims in his store." (Id.)

16 Petitioner also points to a statement by 15 year old neighbor, Valerie Montez, that at 4:00  
17 p.m. on the afternoon of November 8, 1988 she saw what appeared to be a female standing  
18 behind the screen door at the crime scene and assumed it was Caton. (Id.) However, petitioner  
19 appears to concede that the assaults could not have occurred later than the 2:00 p.m. on  
20 November 8th, the time mail remaining the mail slot was delivered that day. (Lod. Doc. 30 at  
21 118.)

22 For the reasons stated, the state supreme court could reasonably have found that Schultz  
23 was tactically motivated when he decided not to further investigate an alternative timeline for the  
24 crimes, and that the habeas proffer does not suggest a reasonable probability of a different  
25 outcome.

26 (ii) Physical Evidence at the Crime Scene

27 Petitioner not linked to Crime Scene

1 Petitioner alleges that Schultz failed to investigate and develop evidence of a single hair  
2 found in victim Freiri's hand, a hair that did not match either the victims or petitioner. (Doc. No.  
3 51-1 ¶ 803.) Petitioner faults Schultz for failing to follow-up to exclude RC as a source of the  
4 hair and thereby possibly exculpate petitioner as RC's accomplice and potentially inculpate other  
5 likely suspects such as Buchanan, Long, Goldman, Sandoval and/or Flores.

6 However, as respondent suggests, the state supreme court could reasonably have  
7 concluded that Schultz determined to forgo further forensic testing because petitioner had  
8 already been excluded as a match (id.) and any retest risked a contrary result, tying petitioner to  
9 the crime scene.

10 As to RC, he was bald (RT 4309; Doc. No. 128 at 101) and an unlikely source of the hair.  
11 As to noted third party suspects, Buchanan, Long, Goldman, Sandoval and Flores, petitioner  
12 speculates that one or more of them might have been an accomplice to the crimes. But he does  
13 not cite to facts in the evidentiary record connecting any one of them to the crimes.

14 The state supreme court could reasonably have determined that further investigation as  
15 suggested by petitioner would not have advanced petitioner's primary defense theory that RC  
16 acted alone in the crimes and petitioner was not present at the crime scene. (RT 4981-95; SHCP,  
17 Ex. B, ¶ 5.)

#### 18 Physical Evidence of Robbery or Burglary

19 Petitioner faults Schultz for failing to discount the prosecution's robbery/burglary motive  
20 given the dearth of supporting physical evidence. (The record reflects the perpetrator(s) entered  
21 the victim's home without force. (See SSHCP, Ex. 9; RT 4248-56.) Petitioner argues that RC  
22 was a frequent and welcome visitor of Caton and Freiri (RT 4311-12) who often borrowed  
23 money from Ms. Caton (RT 4312-13; SSHCP, Ex. 10 at 2-3) and who may have permissively  
24 possessed Freiri's gun.

25 Petitioner's argument finds some support in the record. Money (some bloodstained) and  
26 valuables remained at the crime scene after the murders. (See SSHCP, Ex. 9.) Furthermore,  
27 Goldman testified that she did not see petitioner with any money on the night of the murders.

1 (RT 4353.) In the days after the murders RC stayed with a friend, Ms. Hansen, seemingly  
2 because he had no money. (RT 4834-35.)

3         However, Schultz’s primary defense strategy that Buchanan and Goldman were not  
4 credible and petitioner did not admit to or participate in the crimes could be seen as objectively  
5 reasonable on the facts of this case. As noted, the significant evidence against petitioner was the  
6 testimony of Buchanan and Goldman regarding petitioner’s conduct around the time of the  
7 crimes and petitioner’s admission to them that he participated in the crimes with RC. Schultz’s  
8 tactic of impeaching these witnesses was not objectively unreasonable. Any attempt to discount  
9 criminal motive by pointing to sparse physical evidence might reasonably undermine the primary  
10 defense that petitioner was not a participant in the crimes and was not even present at the crime  
11 scene.

12         Moreover, the evidence of criminal motive seems mixed. Victim Caton was known to  
13 keep large sums of cash in her home. (RT 4277-86, 4298-4307.) Ms. Garrett (RC’s mother and  
14 victim Caton’s daughter) initially stated that \$6000 (RT 4283-84) and her mother’s ring were  
15 missing from the crime scene. (See SSHCP, Ex. 9, 326-27.) Goldman testified that after the  
16 crimes petitioner told her “they took \$700 from Caton’s house” (RT 4361) and that RC partially  
17 repaid her “around \$40 or \$50” on the night of the crimes (RT 4352). (See Doc. No. 116 at  
18 183:18-23.) There also was testimony at trial that Freiri’s wristwatch was taken by the  
19 perpetrator(s). (RT 4325.) The coroner apparently did check the victim (Freiri) for valuables  
20 and found none. (See SSHCP, Ex. 9 at 321.)

#### 21         Insufficient Evidence Defense

22         Petitioner faults Schultz for not investigating and developing a defense of insufficient  
23 evidence to counter the prosecution theory that petitioner aided or abetted RC in felony murder  
24 and that petitioner’s intent to kill allegedly arose from a spontaneous unspoken thought  
25 following the apparent death of the first victim, Mr. Freiri. (See Doc. No. 116 at 259:14-18.)

26         Petitioner in his direct appeal alleged that there was insufficient evidence that he intended  
27 to kill Caton and Freiri. The California Supreme Court rejected the allegation by stating that:

1  
2 As proof of defendant's intent to kill, the prosecution relied on his confession to  
3 Buchanan that, upon seeing the apparently lifeless body of Mr. Freiri, defendant  
4 thought to himself, "If you kill one you might as well kill them both."

5 Defendant contends his statement to Buchanan is susceptible to the interpretation,  
6 not that he intended to kill the victims, but that he realized the penalty provided  
7 by law would be the same whether both or only one of them were killed. While  
8 that is true, defendant did not urge the less damning interpretation below. At trial,  
9 he denied having made the statement to Buchanan at all, and claimed to have had  
10 nothing to do with these crimes. More to the point, although the language used by  
11 defendant was susceptible to more than one reasonable interpretation, the  
12 interpretation urged by the prosecution, that defendant intended to kill his victims,  
13 was certainly one reasonable jurors could reach.

14 In the alternative, and assuming arguendo the evidence of his intent to kill was  
15 sufficient with regard to Mrs. Caton, defendant contends it was insufficient as to  
16 Mr. Freiri. The statement the prosecution relies upon, defendant points out,  
17 concerned a thought—"If you kill one you might as well kill them both"—that  
18 occurred to defendant after he discovered Mr. Freiri had apparently been killed by  
19 Cullumber. "The very basis for the thought was the assumption that Mr. Freiri  
20 was dead.... If one thinks that a person is dead, there can be no intent to kill that  
21 person."

22 However, Buchanan's testimony as to defendant[']s statement did not occur in a  
23 vacuum. While the prosecution did not rely upon it, there was ample evidence  
24 defendant formed the intent to kill Mr. Freiri before he discovered his body.  
25 [Citation]

26 Under the evidence, the jury was entitled to reach the following conclusions: The  
27 cord found around Mr. Freiri's neck came from the venetian blind in defendant's  
28 apartment, and defendant was responsible for bringing it to Mrs. Caton's house.  
Defendant was also responsible for bringing the knife used to stab Mrs. Caton and  
Mr. Freiri. Defendant knew his intended victims were elderly and that Mr. Freiri  
was partially paralyzed, and so he could not have believed he and Cullumber,  
both younger men, needed the knife to commit the robberies. Therefore,  
defendant intended to kill, and not just rob, Mrs. Caton and Mr. Freiri. Moreover,  
defendant knew he could not escape justice if Mr. Freiri were left alive.  
Defendant had gained entry by saying he needed to use the phone because  
Cullumber was going to jail. Even if Mr. Freiri did not recognize defendant, he  
must have known Cullumber, who was an almost daily visitor to his  
grandmother's home. Mr. Freiri would have led the police to Cullumber, and  
Cullumber would have led them to defendant.

29 Dickey, 35 Cal. 4th at 903-04.

30 Petitioner argues the evidence pointed to RC as the actual killer. RC allegedly stated to  
31 witness Flores while commandeering witness Sandoval's car shortly after the crimes, that he had  
32 killed a woman. (RT 4562-63, 4801-02.) RC later killed himself with Freiri's gun. (RT 4318-  
33 19, 4472-74, 4481-84.) The evidence at the crime scene included the perpetrator's covering the  
34

1 body of Caton and the lack of forced entry. (RT 4161-68, 4205.) This suggested to authorities  
2 that the perpetrator might be a family member. (RT 4554-55, 4587-88.) As noted, on the night  
3 of the murders RC moved out of the Harvard Avenue apartment he shared with petitioner,  
4 Buchanan, Goldman and others. (RT 4339, 4683-85, 4735.)

5 Petitioner alleges that Schultz was deficient in not conducting his own investigation of  
6 the charged crimes and the prosecution evidence. Especially so, he claims given that no physical  
7 evidence linked petitioner to the crime scene; police had closed the case until 3 months later  
8 when Buchanan implicated petitioner; and the prosecution case rested almost entirely upon the  
9 statements and testimony of witnesses Buchanan and Goldman.

10 However, the state supreme court could reasonably have found Schultz was not deficient  
11 in formulating a defense theory focused on impeaching the testimony of Buchanan and the  
12 testimony and statements of Goldman, with a view toward casting RC as the single perpetrator.  
13 (See e.g., RT 4553-56, 4985.) To this end Schultz variously attempted to show that the \$5,000  
14 private reward motivated Buchanan and possibly Goldman to come forward; that Goldman and  
15 Buchanan were routine abusers of street drugs with a penchant for lying; and that Buchanan in  
16 particular wanted revenge against petitioner for tearing up the only photo Buchanan had of his  
17 youngest daughter. (RT 4704-05, 4709-10.) Petitioner, in furtherance of the primary defense  
18 strategy took the stand to deny the admissions attributed to him by Goldman and Buchanan and  
19 to deny any involvement in the crimes. (RT 4870-71.)

20 Moreover, prior to and during trial, Schultz consulted with Dr. Peter Barnett, a forensic  
21 expert who examined certain crime scene evidence. (Doc. No. 51-1 ¶¶ 786, 803; Doc. No. 116 at  
22 25-26; Lod. Doc. 30 at 121.) Although Schultz did not call Dr. Barnett as a trial witness, the  
23 record reasonably suggests that Schultz's guilt phase defense considered and was consistent with  
24 Dr. Barnett's findings regarding fingerprint and cordage evidence – findings that in essential part  
25 appear to confirm the DOJ laboratory findings discussed in claims that follow. (RT 4981-95; See  
26 also claims II(F), II(S), II(T), XIV; Doc. No. 116 at 158-59.)

27 Schultz also appears to have considered the possibility of mental state defenses to the  
28

1 charged crimes. Petitioner concedes that Schultz’s pre-trial preparations included noted  
2 consultation with two mental health experts – psychiatrist Dr. John Hackett who found petitioner  
3 possibly suicidal (Doc. No. 51-1 ¶ 523), and psychologist Larry Thompson (id.; SSHCP, Ex. 19)  
4 who found petitioner mildly depressed. The state supreme court could reasonably have found  
5 Schultz’s decision not to pursue guilty phase mental state defenses was objectively reasonable.

6 Additionally, petitioner’s allegation that Schultz deficiently failed to investigate and  
7 present an insufficiency of the evidence defense fails for reasons discussed below in claim  
8 XXVI. To summarize that discussion, the state supreme court could reasonably have concluded  
9 that the crimes resulted from the joint motive of RC and petitioner to obtain money and property  
10 from victims Caton and Freiri (RT 4325, 4352, 4360-62); that RC and petitioner armed  
11 themselves (RT 4343-50) with the intent to kill victims who were frail and aged, (RT 4239-41);  
12 that the victims knew the perpetrators and could have identified them to authorities (RT 4311-  
13 13); and that the jury was properly instructed on the charges. (See claims XII and XXVI, post.)

14 Accordingly, the state supreme court was not unreasonable in finding a rational trier of  
15 fact could have found the essential elements of the crimes charged beyond a reasonable doubt.

#### 16 Actual Innocence

17 Petitioner faults Schulz for failing to develop and present an actual innocence defense.  
18 He argues in essence that his actual innocence is established by the insufficient and unreliable  
19 evidence of his guilt and the prosecution’s misconduct regarding the evidence.

20 This claim fails for the reasons stated in claims XXVI and XXVIII, post. In sum, it is not  
21 likely any reasonable juror would have reasonable doubt that the essential elements of the  
22 criminal counts could have been found beyond a reasonable doubt, for reasons stated in claims  
23 XXVI and XXVIII. Petitioner’s allegations that false evidence was presented, evidence was  
24 suppressed and destroyed and third parties were involved in the crimes appear insufficiently  
25 supported in the evidentiary record at a level greater than harmless error. (See claims II(B),  
26 II(C), II(S), XIII.) Moreover, no facts or discrepancies in the testimony and physical evidence  
27 establish or compel the conclusion that Buchanan was motivated to and did testify falsely or  
28

1 inaccurately (see claims II(E), XIII and XVII), or that Goldman, by virtue of her alleged  
2 substance addiction, was motivated to and did testify falsely or inaccurately (see claims II(L),  
3 XXI).

4           Significantly, petitioner’s confession to Buchanan and Goldman and the uncontroverted  
5 testimony of Buchanan and Goldman inculcating petitioner is consistent with the noted physical  
6 evidence (see claims II(B), II(C), II(L), II(S), XIII, XIV, XXI, XXVI and XXVIII).

7           A fair-minded jurist could have found that petitioner failed to establish his actual  
8 innocence sufficient to pass through the Schlup v. Delo gateway and even if he had his record  
9 claims fail for the reasons stated. 513 U.S. 298, 326 (1995) (procedurally defaulted petitioner  
10 must show that a constitutional violation has probably resulted in the conviction of one who is  
11 actually innocent); cf., Smith, 510 F.3d at 1139-40 (procedural default excused upon a showing  
12 of actual innocence of his conviction).

13           (iii) Impeachment Evidence

14           Petitioner alleges that Schultz did not make use of certain then available evidence  
15 impeaching Goldman and Buchanan.

16           Statement of Intent to Kill

17           Petitioner argues that Schultz failed to impeach Buchanan’s testimony of petitioner’s  
18 statement “if you kill one, you might as well kill them both” (RT 4689) with Goldman’s failure  
19 to corroborate that petitioner made that statement even though Goldman was then present.

20           However, the fact Goldman’s preliminary hearing testimony, which occurred months  
21 before trial, does not mention this statement is not necessarily a failure to corroborate. Petitioner  
22 has not demonstrated on the record that either attorney asked Goldman about such a statement.  
23 (See e.g., RT 4334-4403.) Nor has petitioner demonstrated that Goldman ever denied petitioner  
24 made the statement. (Id.)

25           Taped Defense Interview

26           Petitioner argues that Schultz failed to impeach Goldman with her June 1989 taped  
27 statements to a defense investigator that contrary to her preliminary hearing testimony (RT  
28

1 4349), petitioner and RC did not return to their apartment together on the night of November 7,  
2 1988. (Doc. No. 116 at 22:1-5.) Petitioner also argues that a roommate in the apartment, Jerry  
3 Hodgeboom, would have testified, consistent with his statements to police that petitioner was at  
4 the apartment with Hodgeboom and Goldman all evening on November 7, 1988, the night the  
5 prosecution contends the crimes occurred. (Doc. No. 116 at 23:27-24:2.)

6         However, as discussed in claim XXII, the trial record shows that Schultz, at the  
7 preliminary hearing, considered and confronted Goldman with the noted 1989 tape recorded  
8 statements and gave her the opportunity to explain. (RT 4384-87.) Goldman’s taped statement  
9 that RC returned to the apartment alone on the night of the crimes is equivocal given that RC  
10 apparently made two trips from the apartment on the evening of November 7, 1988. (See id.)  
11 Goldman’s later testimony at the preliminary hearing appears to clarify in these regards;  
12 suggesting that although she could not remember making the taped statement that “[RC] and  
13 [petitioner] did not come back to the [apartment] together after they had left” (RT 4388), RC and  
14 petitioner made two trip from the apartment that night, the first to the nearby mini-store and the  
15 second after they apparently armed themselves as discussed above; and that she saw RC and  
16 petitioner return to the apartment “later on when they came back into the house and [RC] got ---  
17 or started packing his clothes” (RT 4393).

18         Statements to police by Jerry Hodgeboom, a roommate in the apartment, suggesting that  
19 petitioner was at the apartment with Hodgeboom and Goldman all evening on November 7,  
20 1988, appear otherwise unsupported by and contrary to the record including the statements under  
21 oath by Buchanan and Goldman and petitioner’s own admission to them. The state supreme  
22 court would not have been unreasonable in finding Schultz not to be deficient for failure to  
23 further investigate and develop Hodgeboom’s note statements. Especially so given Goldman’s  
24 testimony that she liked petitioner and that she did not want to testify against him. (RT 4364.)

#### 25         Other Defense Witnesses

26         Petitioner argues that Schultz failed to impeach Buchanan and Goldman with testimony  
27 from other witnesses. However, the record reasonably could suggest otherwise. In addition to  
28

1 petitioner, nine defense witnesses were called. (Lod. Doc. No. 24.) Defense witnesses, Messrs.  
2 Inderrienden, Araz, Najarian, gave testimony potentially impeaching Goldman. They each  
3 testified that Goldman had been untruthful about debts she owed and did not pay her debts and  
4 that she had a poor reputation for truthfulness. (RT 4776-95.) Witness Najarian also testified  
5 that in June of 1989 Goldman told him that she had been called as a witness in a murder and that  
6 “she didn’t know nothing about no murder.” (RT 4793.)

7           Witness Sandoval gave testimony potentially impeaching Goldman and Buchanan.  
8 Sandoval testified about events surrounding the alleged killer, RC, that shortly after the crimes,  
9 RC stated he had “killed a woman” (RT 4801), making no mention of an accomplice.

10           Witness Desumala gave testimony potentially impeaching Goldman’s testimony of  
11 petitioner’s admission to her. Desumala testified that Goldman told her a boy living with her  
12 “killed his grandmother” (RT 4809), that “the grandparents of the boy ... were killed” (RT 4825)  
13 and that Goldman would “be given some kind of reward for her [preliminary hearing] testimony”  
14 (RT 4809).

15           Witness Hansen gave testimony potentially suggesting that, contrary to Goldman and  
16 Buchanan’s testimony, RC acted alone in the crimes. Hansen testified that she found a  
17 newspaper article about the murders stuffed under a chair at her apartment after RC stayed with  
18 her for several days following the murders (RT 4831-35); that he seemed worried (RT 4840);  
19 that he arranged to meet a roommate twice while staying there (RT 4841), a roommate whose  
20 name was “something close to Dickey” (RT 4843) but she was not sure (id.).

21           Witness Heuter testified that he owned the store where the poster regarding the \$5000  
22 reward was placed in a window (RT 4846), but denied any further knowledge.

23           Witness King, a defense investigator, gave testimony potentially undermining the  
24 credibility of Buchanan. King testified that Buchanan told him he did not like petitioner (RT  
25 4849); that he was “living room and board free” with those costs being deducted from this \$5000  
26 reward (RT 4851); and that Buchanan stated he used drugs daily and appeared to be under the  
27 influence during the majority of King’s meetings with him (RT 4856-57).

28

1           Petitioner for his part took the stand and testified about his roommates at the Harvard  
2 Avenue apartment (RT 4873-77); admitted his prior 1982 conviction for second degree burglary  
3 (RT 4870); denied he made the admission to which Buchanan and Goldman testified (RT 4870-  
4 71); and stated he had nothing to do with events at the crime scene on November 7th (RT 4871-  
5 4927).

6           Based thereon, a fair-minded jurist could have found that petitioner failed to establish  
7 Schultz was deficient by failing to present defense witness testimony impeaching Buchanan and  
8 Goldman. Notably, Schultz in his habeas declaration does not suggest presentation of these  
9 witnesses including petitioner was the result of anything other than trial tactics. See Strickland,  
10 466 U.S. at 691 (“The reasonableness of counsel’s actions may be determined or substantially  
11 influenced by the defendant’s own statements or actions.”).

12           (iv)    Social History and Mental Defenses

13           Petitioner faults Schultz for not investigating social history and presenting mental  
14 defenses at the guilt phase.

15           The Trial Record

16           Petitioner argues that Schultz failed to investigate and present evidence that the murders  
17 of Caton and Freiri were not the result of a planned robbery or burglary, but rather an unplanned  
18 and sudden drug induced and mental illness related outburst by RC, who along with petitioner,  
19 Goldman and Buchanan routinely used street drugs. (RT 4171-79, 4314-16, 4369-71, 4640-41.)  
20 He contends in particular that RC had no motive to steal from Caton because she voluntarily  
21 gave him money. (RT 4312-13.)

22           However, the record could reasonably suggest Schultz investigated and developed such  
23 evidence including as to petitioner’s social and family history and drug use. Schultz had defense  
24 investigator King prepare such a report derived from interviews with petitioner’s family and  
25 friends. (Lod. Doc. 30 at 111; see also SHCP, Ex. B.) Schultz also personally interviewed  
26 petitioner’s mother and contemplated calling her to the stand at the penalty phase. (SHCP, Ex. B  
27 ¶ 13; id., Ex. O.)

1 As noted, prior to petitioner’s trial Schultz consulted with defense psychiatrist John  
2 Hackett and defense psychologist Larry Thompson. Petitioner was interviewed in jail by Dr.  
3 Hackett, ((Doc. No. 51-1 ¶ 523; SSHCP, Ex. 2 at 119-120), who diagnosed him with antisocial  
4 personality disorder but nonetheless found him competent to assist in his defense (id.). Petitioner  
5 also was evaluated by Dr. Thompson<sup>9</sup> (id. at 114), who found petitioner mildly depressed  
6 (SSHCP, Ex. 2 at 121-23; id. at Ex. 19) but showing no obvious symptoms of psychosis either  
7 manifest or latent. (SSHCP, Ex. 2 at 122). Dr. Thompson opined that a psychiatric defense  
8 would be of no value (id.).

9 Additionally, in August of 1991, counsel on the new trial motion, Ms. Hart, retained  
10 psychiatrist Dr. Callahan to examine petitioner with a view toward possible sympathetic or  
11 character mitigation evidence including as to petitioner’s prior felony involving alleged  
12 necrophilia. (SSHCP, Ex. 2 at 121.) Dr. Callahan testified that petitioner by age 17 “was  
13 manifesting grossly defective interpersonal functioning and poor impulse control, which are all  
14 factors in necrophilia behavior.” (SSHCP, Ex. 2 at 131) Dr. Callahan diagnosed petitioner as an  
15 unstable and depressed personality exacerbated by self-medication with drugs and alcohol. (Id.  
16 at 130.)

17 Here, the state supreme court reasonably could have found that Schultz did reasonably  
18 develop a social history and investigate mental defenses. The noted record suggests Schultz  
19 reasonably relied upon his investigation and expert consultations in deciding not to further  
20 develop and present mental state defenses at the guilt phase. (See SHCP, Ex. B ¶ 5); see also  
21 *Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990) (“It is certainly within the ‘wide range of  
22 professionally competent assistance’ for an attorney to rely on properly selected experts.”);  
23 *Williams v. Woodford*, 384 F.3d 567, 611 (9th Cir. 2004) (holding counsel’s decision not to  
24 investigate mental defense further was reasonable in light of conclusions of mental health  
25 experts).

#### 26 The Habeas Proffer

27 \_\_\_\_\_  
28 <sup>9</sup> Soon after Dr. Thompson’s evaluation of petitioner, Thompson was found to be practicing without a license.  
(SSHCP, Ex. 2 at 222.)

1           Petitioner argues the following information offered in his state habeas proceedings shows  
2 Schultz’s prejudicially deficient investigation and presentation of guilt phase social history and  
3 mental defenses.

4           In 2005, defense habeas expert, clinical psychologist Dr. Natasha Khazanov examined  
5 petitioner over two days looking for brain damage and cognitive impairment. (SSHCP, Ex. 2 at  
6 265.) Dr. Khazanov determined that petitioner had an IQ in the average range and exhibited  
7 multiple indicia of serious organic brain damage and impairment exacerbated by substance abuse  
8 disorder, affecting his ability to plan and rationally respond to his environment and function in  
9 everyday life (id. at 287-89). Dr. Khazanov suggests the damage to petitioner’s brain was  
10 present at the time of his trial as was the need for a neurological assessment. (Id.) She suggests  
11 the neurological evidence would have been mitigating at petitioner’s penalty phase. (Id.)

12           Dr. Khazanov faults trial experts, Drs. Hackett and Thompson for not addressing the  
13 possibility of neuropsychological defenses including frontal lobe deficits. (Id. at 273-74.)  
14 Especially so given then existing multiple risk factors of brain damage including childhood  
15 trauma and post-traumatic stress disorder (“PTSD”), hyperactivity and probable attention  
16 deficient and hyperactivity disorder (“ADHD”), chronic motor tic disorder, a predisposition to  
17 polysubstance abuse, depression, and related clinical symptoms in petitioner’s social history.  
18 (Id. at 265-89.) She stated that these mental conditions impaired petitioner’s ability to perceive,  
19 plan and make decisions and control impulses. (Id.)

20           In 2007, defense habeas expert, Dr. Barbara Counter, a clinical and forensic psychologist,  
21 reviewed petitioner’s social history documents and interviewed him in prison for about 8 hours.  
22 She provided habeas counsel with a psychosocial history that found indicia of childhood ADHD,  
23 chronic motor tic disorder, depression, and post-traumatic stress disorder. (See SSHCP, Ex. 2 at  
24 27-28.) Dr. Counter’s report chronicles petitioner’s family history of mental illness, abuse (drug,  
25 alcohol, physical and sexual), domestic violence and crime. (Id. at 14-20.) She notes  
26 petitioner’s prior felony conviction in Nevada involving apparent necrophilia during the course  
27 of which petitioner received a psychiatric evaluation by Dr. William Terry, who found  
28

1 petitioner's history to be compatible with a diagnosis of ADHD and depression (id. at 23-24, 94-  
2 98) and recommended psychiatric treatment of petitioner's difficulties relating to other people.

3         However, the state supreme court reasonably could have found the habeas proffer  
4 insufficient to suggest Schultz was prejudicially deficient in investigating and presenting social  
5 and mental state history and defense information. The record could reasonably suggest that  
6 petitioner then functioned at a level inconsistent with a significant mental state deficit or  
7 impairment. Petitioner graduated from high school in June of 1983 (id. at 102), approximately 5  
8 years prior to the instant crimes. Later, while incarcerated in Nevada for the noted prior felony,  
9 he received certificates for education courses taken while in prison. (Id. at 108.) Several months  
10 before the instant crimes, he graduated from truck driving school at the top of his class. (Id. at  
11 110.) Petitioner worked as a roofer and at an auto parts store just prior to his arrest for the  
12 instant crimes. (Id. at 112.)

13         Notably, the habeas experts examined petitioner 17 or more years after the instant crimes.  
14 The state supreme court reasonably could have found the habeas experts' conclusions as to  
15 petitioner's mental state at the time of the crime to be speculative. Especially so given the  
16 contrary conclusions reached by experts examining petitioner more proximal to his trial. In this  
17 regard, the state supreme court presumptively considered a 1992 examination of petitioner by  
18 prison psychologist M. Lyons, who found "no signs or symptoms of psychosis, organicity or  
19 serious psychological impairment in social functioning." (Id. at 135.) Around that time  
20 petitioner also was examined by prison psychiatrist Dr. John Geiger, who also found "no mental  
21 disorder ... or condition of functioning which would indicate additional psychiatric concern."  
22 (Id. at 136.)

23         Petitioner does not demonstrate that any of the defense mental health professionals who  
24 evaluated petitioner prior to trial requested or required then existing information that was not  
25 provided to them by the defense team. Furthermore, the state supreme court reasonably could  
26 have rejected petitioner's argument that Schultz was or should have been on notice of the need to  
27 further investigate petitioner's mental state defenses. Petitioner bases this argument on his  
28

1 habeas experts’ suggestion that the need for such further investigation would have been evident  
2 to mental health professionals at the time of trial. But disagreement among experts is not alone a  
3 basis to find Schultz deficient. See e.g., *Toler v. Troutt*, 2015 WL 1408490 at \*9 (W.D. Okla.,  
4 Feb. 20, 2015) (medical difference of opinion not actionable under the Eighth Amendment).

5         Additionally, the state supreme court could reasonably have found that the primary  
6 defense theory, that petitioner was not present during or involved in the crimes, would not have  
7 been advanced by further investigation and consideration of matters relating to petitioner’s social  
8 and mental history. (See claim XXVI, XXVIII.) Petitioner has not otherwise shown facts and  
9 circumstances surrounding the crimes reasonably placed Schultz on notice of any need for  
10 further social history and mental state defense investigation.

11         Accordingly, a fair-minded jurist could have found that petitioner failed to overcome the  
12 strong presumption that Schultz made decisions relating to investigation and presentation of  
13 petitioner’s social history and mental state in the exercise of professional judgment. *Strickland*,  
14 466 U.S. at 690; see also *United States v. Farr*, 297 F.3d 651, 658 (7th Cir. 2002) (counsel “is  
15 not obligated to ... personally investigate every conceivable lead”); *Morris v. State of California*,  
16 966 F.2d 448, 456 (9th Cir. 1991) (a defendant seeking to prove ineffective assistance of counsel  
17 “must overcome the presumption that, under the circumstances, the challenged action might be  
18 considered sound trial strategy). “The mere criticism of trial tactics is insufficient to establish  
19 ineffectiveness or prejudice.” *Ferreira-Alameda*, 815 F.2d at 1254. Here, counsel’s noted  
20 primary defense theory could be seen as reasonably furthered by the guilt phase investigation and  
21 presentation.

22         (v)       Mishandled Crime Scene Evidence

23         Petitioner faults Schultz for failing to develop and present defenses relating to crime  
24 scene evidence. He argues that the Fresno Police Department Identification (“I”) Bureau  
25 collected at the crime scene a scant “six reference samples (from the victims and from petitioner)  
26 and 12 other items of biologic evidence.” (Doc. No. 51-1 ¶¶ 230-236.) Moreover, he argues that  
27 some of this crime scene evidence was mishandled. (*Id.*)

1           However, as noted, Schultz obtained discovery of the available crime scene evidence and  
2 retained defense forensic expert, Dr. Barnett, to examine it. (See Doc. No. 51-1 ¶¶ 230,786, 803;  
3 Doc. No. 116 at 25-26; Lod. Doc. 30 at 121.) Dr. Barnett apparently confirmed the DOJ  
4 laboratory findings regarding fingerprint and ligature (cordage) evidence. (RT 4981-95; see also  
5 claims II(F), II(S), II(T), XIV; Doc. No. 116 at 158-59.) The state supreme court would not have  
6 been unreasonable in concluding that Schultz considered the findings of his expert. Moreover,  
7 Schultz’s cross-examination of prosecution fingerprint expert Hall did elicit testimony regarding  
8 the existence of additional ridge detail, not sufficient for print comparison, found on the venetian  
9 blind from which the ligature was allegedly taken (RT 4575); and that no other prints were found  
10 on that venetian blind or its casing (RT 4576).

11           Furthermore, petitioner has not demonstrated prejudice. He argues the crime scene  
12 evidence, had it been properly collected, preserved and examined would have exculpated him.  
13 But the state supreme court would not have been unreasonable in concluding that none of this  
14 evidence inculpated him, discounting any argued necessity for exculpation.

15           Petitioner’s further argument this evidence might have inculpated potential accomplices  
16 Buchanan, Sandoval, Flores, Long and Goldman is speculative and fails for the reasons that  
17 follow.

18           For the reasons stated above and those discussed in claims II(D), II(F) and XIV, the state  
19 supreme court could reasonably have rejected these allegations relating to allegedly mishandled  
20 crime scene evidence.

21           (vi)   Alternative Potential Accomplices

22           Petitioner faults Schultz for not developing a defense theory under which someone other  
23 than petitioner acted as RC’s accomplice. Especially so he argues, given that detective Stokes  
24 believed more than one perpetrator was involved in the crimes in light of the distance between  
25 the victims and the brutal nature of their wounds (RT 4626-30) and that petitioner denied he was  
26 present at and participated in the crimes. (RT 4871-4927); see also Jones (Jerry) v. Wood, 207  
27 F.3d 557 (9th Cir. 2000) (ineffective assistance where counsel failed to investigate and present  
28

1 circumstantial evidence of alternative murder suspect).

2 Mr. Buchanan

3 Petitioner argues that Buchanan may have been RC's accomplice in the murders of Caton  
4 and Freiri. He points out that Buchanan fled the apartment shortly after the murders and knew  
5 too much about the crimes not to be involved. He further argues that:

- 6 • RC's accomplice probably had a car because the crime scene was 1.5 miles from  
7 the Harvard Ave. apartment; Buchanan was the only roommate who had ready  
8 access to a car (RT 4683);
- 9 • Buchanan could have been motivated by a need for money and drugs and a desire  
10 to put the blame on petitioner for tearing up Buchanan's only picture of his  
11 daughter (RT 4704-05);
- 12 • Buchanan's prescription bottle was found in RC's belongings after his suicide  
13 (RT 4541-42);
- 14 • When Buchanan learned of the reward (RT 4698-4702), he first went to Dean  
15 Long (victim Caton's other grandson and RC's cousin) who put Buchanan in  
16 contact with detective Stokes (RT 4702-03);
- 17 • Buchanan was likely the roommate RC met and phoned during RC's time with  
18 Ms. Hansen (RT 4841-45) because Buchanan had ready access to a car and a  
19 phone (RT 4661).

20 However, the state supreme court would not have been unreasonable in discounting these  
21 allegations given the weight of the noted evidence including the uncontroverted testimony of  
22 Goldman and Buchanan linking petitioner to the crimes. Buchanan told the police that on the  
23 day the murders occurred, petitioner and RC removed a blind in their apartment and took it into  
24 the bedroom; that petitioner and RC then left, walking toward downtown; that the two later  
25 returned with \$350 to buy drugs; that RC then packed and fled the apartment; that petitioner  
26 disposed of his shoes and jacket shortly after the crimes; and that a few days later petitioner  
27 confessed to Goldman and Buchanan that he participated with RC in robbing the victims when  
28

1 RC went berserk and beat the victims to death. (See Doc. No. 51-1 ¶ 241-42.)

2 Furthermore, Goldman statements to police and her preliminary hearing testimony could  
3 reasonably corroborate Buchanan's testimony, that on the evening of November 7, 1988,  
4 petitioner and RC left the apartment together (RT 4339-40); before leaving they armed  
5 themselves with a cord and a knife (RT 4343-50); when they returned RC packed up and left the  
6 apartment (RT 4350); petitioner later admitted that he was present when RC killed his  
7 grandmother and Louis Freiri (RT 4357-58); and that after petitioner found out RC and Caton  
8 were dead, he appeared less depressed (RT 4378).

9 It follows that a fair-minded jurist could have concluded that Buchanan's testimony  
10 reflected what petitioner had admitted to him and that the record does not support an inference  
11 Buchanan aided and abetted the crimes in order to inculcate petitioner and commit robbery and  
12 burglary. Moreover, the argument attempting to inculcate Buchanan appears contrary to the  
13 noted primary defense theory that RC acted alone.

14 Ms. Goldman

15 Petitioner argues that Goldman may have been RC's accomplice in the murders of Caton  
16 and Freiri. He suggests that Goldman was motivated by self-interest and drug use. He suggests  
17 Goldman may have been the woman that witness Montez said she saw standing in the crime  
18 scene doorway on the afternoon of November 8, 1988. (SSHCP, Ex. 10 at 333.) However, any  
19 inference that Goldman was aware of a plan to commit the crimes and that she was motivated to  
20 and physically able to participate and that she did so is unsupported by the weight of the  
21 evidentiary record. Witness Montez's testimony is uncorroborated, contrary to Buchanan's  
22 testimony and asserts a time of death later than that supported by the noted record. Moreover,  
23 the argument attempting to inculcate Goldman appears contrary to the primary defense theory  
24 that RC acted alone.

25 Messrs. Sandoval and Flores

26 Petitioner argues that witnesses Sandoval and/or Flores may have been RC's  
27 accomplice(s) in the murders of Caton and Freiri. He argues detective Stokes investigated this  
28

1 possibility because RC previously purchased drugs from them; and RC's co-worker, Ms.  
2 Hemseth, told Stokes that on the morning of November 7, 1988 she saw RC in the company of a  
3 Mexican male who might have been either Sandoval or Flores. (See Doc. No. 105 at 69:22-23;  
4 SSHCP, Ex. 11 at 347.) Petitioner suggests it is inculcating that Sandoval and Flores initially  
5 denied knowing RC and that after the crime RC apparently stole Sandoval's car from Flores to  
6 leave Fresno. (Id.; see also Doc. No. 116 at 230; RT 4803-04; RT 4561-63, 4582-87.)

7         However, petitioner has not cited evidence in the record suggesting that detective Stokes  
8 concluded either Sandoval or Flores was involved in the crimes against Caton and Freiri.  
9 Moreover, Schultz appears to have investigated Flores and Sandoval prior to trial. Although  
10 Flores had by then been deported to Mexico (see claim XV), the defense team interviewed  
11 Sandoval and Schultz called him as a witness at trial. (Doc. No. 116 at 220-21.) Schultz elicited  
12 testimony from Sandoval inculcating RC, that RC stated "I've already killed a woman. I've got  
13 to get away." (RT 4800-06; see also Doc. No. 51-1 ¶¶ 252-59.) This could reasonably be  
14 viewed as consistent with the defense theory that RC acted alone in the crimes.

15         Furthermore, the state supreme court would not have been unreasonable in concluding  
16 that neither Sandoval nor Flores had a motive to and participated in the robbery/burglary of  
17 Caton and Freiri. Even if Sandoval and Flores were drug dealers who may have been seen with  
18 RC around the time of the crimes, petitioner has not demonstrated the weight of the evidentiary  
19 record shows that either of them acted as RC's accomplice in the murders. Especially so as RC  
20 was a routine drug user of street drugs and presumably associated with drug dealers. (RT 4314-  
21 16, 4369-71.) To the extent Sandoval and Flores denied knowing RC, Schultz could reasonably  
22 have considered this a reflection of their desire to avoid police scrutiny of their drug dealing  
23 enterprise, rather than evidence they were involved in the crimes against Caton and Flores. RC's  
24 absconding with Sandoval's car is not alone a reasonable basis to find either Sandoval or Flores  
25 was involved in these crimes.

26         For the reasons stated, a fair-minded jurist could have found Schultz was not deficient by  
27 failing to develop an accomplice theory as to Sandoval and Flores and that petitioner was not  
28

1 prejudiced thereby.

2           Moreover, the argument attempting to inculcate these witnesses appears contrary to the  
3 primary defense theory that RC acted alone.

4           Mr. Long

5           Petitioner faults Schultz for not developing a defense theory that Dean Long (victim  
6 Caton's other grandson and RC's cousin) acted as RC's accomplice. He argues that Ms. Garret,  
7 victim Caton's daughter, told detective Stokes that she suspected Long was involved in the  
8 crimes. (SSHCP, Ex. 10, at 334.) He argues that Long lived near the crime scene and allegedly  
9 was a drug user who may have purchased drugs from Buchanan. He argues that Long knew too  
10 much about the crimes not to have been involved; (see RT 4253-67); for example petitioner  
11 notes that Long, who along with Ms. Garrett discovered the victims at the scene around 6 p.m.  
12 on November 8, 1988, purported to quickly pronounce Freiri dead and Caton still alive. (Id.) He  
13 argues that Long fit the police belief the perpetrator was a family member. (RT 4587-88.)

14           However, the state supreme court could reasonably have concluded that Schultz's failure  
15 to develop Long as an accomplice was not unreasonable. Petitioner's surmise is not alone  
16 evidence that Long planned and participated in the crimes. Such surmise is contrary to the  
17 weight of witness testimony and evidence in the record including petitioner's admission to  
18 Buchanan and Goldman.

19           For the reasons stated, a fair-minded jurist could have found Schultz was not deficient by  
20 failing to develop an accomplice theory as to Long and that petitioner was not prejudiced  
21 thereby. Moreover, the argument attempting to inculcate Long appears contrary to the primary  
22 defense theory that RC acted alone.

23           (vii) Alternative Unknown Female Suspect

24           Finally, petitioner faults Schultz for failing to develop a defense theory that an unknown  
25 female acted as RC's accomplice. He points to the noted statement by a 15 year old neighbor of  
26 the victims, Valerie Montez, that in the late afternoon of November 8, 1988 she saw what  
27 appeared to be a female standing behind the screen door at the crime scene (Pet. Ex. No. 10 at  
28

1 333) whom she “assumed ... was the lady ... that lived at that location.” (Id.)

2         Petitioner argues this statement suggests the possibility that RC may have had a female  
3 accomplice in the murders – something he argues Schultz should have investigated.

4         But the record reflects that Ms. Montez was uncertain whether she actually saw a female  
5 in the doorway. (Id.) The noted evidence in the record suggests the crimes occurred the day  
6 before Ms. Montez’s alleged observation. Schultz could reasonably have discounted the  
7 possibility that Goldman, or any perpetrator was seen standing in the doorway of the crime scene  
8 at the time Ms. Montez passed by.

9         For the reasons stated, a fair-minded jurist could have found Schultz was not deficient by  
10 failing to develop an accomplice theory as to an unknown female and that petitioner was not  
11 prejudiced thereby. Here again, a theory attempting to inculcate a third party accomplice  
12 appears contrary to the primary defense theory that RC acted alone.

13         (viii) Conclusions

14         For the reasons stated, a fair-minded jurist could have found that petitioner failed to  
15 establish that Schultz acted unreasonably regarding impeachment of Buchanan and Goldman and  
16 that he otherwise failed to develop and present exculpatory evidence and expert testimony and  
17 evidence of third party liability and that because of such errors there is a reasonable probability  
18 of a different outcome of petitioner’s proceeding. Strickland, 466 U.S., at 687-98. Moreover,  
19 the police investigation file did not discount the possibility that RC acted alone, which was  
20 Schultz’s primary defense theory.

21         It does not appear that the California Supreme Court’s rejection of the claim was contrary  
22 to, or an unreasonable application of, clearly established federal law, as determined by the  
23 Supreme Court, or that the state court’s ruling was based on an unreasonable determination of  
24 the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. §  
25 2254(d).

26         Claims II(B) and II(C) are denied.

27         **d. Analysis of Claim II(D)**

1           Petitioner faults Schultz for inadequately investigating the destruction of crime scene  
2 evidence and by failing to prepare and file related motions. Petitioner also faults Schultz for  
3 inadequately responding to crime scene evidence (i.e., fingernail scrapings, saliva, debris from a  
4 wound on Mr. Freiri's head, blood evidence and hair found at the crime scene) that went missing  
5 for 5 months while in custody of the authorities only to subsequently re-appear in partially  
6 degraded form.

7           The record reflects that on May 10, 1989, Schultz filed a written request for the results of  
8 comparative testing conducted by the state crime lab on physical evidence collected from the  
9 crime scene and samples collected from petitioner and the victims. (CT 15.) The trial court  
10 granted Schultz's request. (CT 6.)

11           However, prior to the preliminary hearing, the prosecution informed Schultz that the state  
12 crime laboratory could not locate the samples to be tested. (CT 6, 14-16, 95-98.) The missing  
13 evidence inexplicably re-appeared months later. As more fully discussed in claim XIV, some of  
14 the biologic samples had not been preserved and degraded such that test results were  
15 inconclusive. (RT 4565-69; see also SHCP, Ex. L.) The results that were obtained served to  
16 exclude petitioner as the source of the biologic materials and the hair collected from the crime  
17 scene. (RT 4413-16, 4565-69.) Schultz argued as much as trial. (RT 4970-87, 4917, 4987; Doc.  
18 No. 51-1 ¶¶ 801-804; Doc. No. 103 at 37, 68.) Schultz's cross-examination of the state serology  
19 expert emphasized that petitioner was not a match for any sample that could be tested (RT 4565-  
20 69), i.e., the undegraded evidence did not link petitioner to the crime scene.

21           Petitioner contends that had Schultz investigated the disappearance of this evidence, he  
22 might have been able to get the charges dismissed on grounds of the state's bad faith destruction  
23 of potentially exculpatory evidence. See *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (bad  
24 faith of police to preserve potentially useful evidence denied defendant due process).

25           However, the state supreme court would not have been unreasonable in concluding  
26 petitioner merely speculates that degradation of the evidence was due to the state's bad faith.  
27 Petitioner has not demonstrated on the record that the blood swabs were testable when collected,  
28

1 or that the state failed to preserve the swabs, or that the swabs were potentially exculpatory.  
2 Youngblood. 488 U.S. at 53-58. Though the noted evidence apparently degraded while in the  
3 custody of the state crime lab, petitioner has not demonstrated on the record how and why the  
4 evidence degraded and that the state was anything more than negligent. A merely negligent  
5 degradation is not a due process violation. Youngblood, 488 U.S. at 58 (“[U]nless a criminal  
6 defendant can show bad faith on the part of the police, failure to preserve potentially useful  
7 evidence does not constitute a denial of due process of law.”).

8         Furthermore, as in Youngblood, the evidence and the state’s test results were made  
9 available to the defense – suggesting an absence of bad faith. *Id.* The state supreme court could  
10 reasonably have determined that petitioner was not denied access to potentially favorable  
11 evidence material to guilt. See *California v. Trombetta*, 467 U.S. 479, 489 (1984) (“Whatever  
12 duty the Constitution imposes on the States to preserve evidence, that duty must be limited to  
13 evidence that might be expected to play a significant role in the suspect’s defense.”). At bottom,  
14 all the noted evidence was ultimately located prior to trial and to the extent testing was possible,  
15 petitioner was not implicated.

16         Even if Schultz was deficient as alleged, the state supreme court could reasonably have  
17 found no reasonable probability of a different outcome absent such deficient conduct. Neither  
18 the undegraded evidence nor the degraded evidence linked petitioner to the crime scene. This  
19 coupled with petitioner’s failure to attribute bad faith to the state could suggest no reasonable  
20 probability of a different outcome absent the allegedly deficient conduct. Moreover, absent bad  
21 faith, petitioner’s argument the degraded evidence might have implicated third party accomplices  
22 is speculative and fails for the reasons stated. Absent bad faith on the part of the police, a mere  
23 failure to preserve potentially useful evidence does not constitute a denial of due process of law.  
24 See *Trombetta*, 467 U.S. at 488.

25         A fair-minded jurist could have found that petitioner failed to establish that Schultz acted  
26 unreasonably in investigating and responding to the crime scene evidence, and that absent the  
27 allegedly deficient conduct a different outcome was reasonably probable. See *Strickland*, 466  
28

1 U.S., at 687-98.

2 It does not appear that the California Supreme Court's rejection of the claim was contrary  
3 to, or an unreasonable application of, clearly established federal law, as determined by the  
4 Supreme Court, or that the state court's ruling was based on an unreasonable determination of  
5 the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. §  
6 2254(d).

7 Claim II(D) is denied.

8 **e. Analysis of Claim II(E)**

9 Petitioner alleges that Schultz was deficient by failing to investigate and present evidence  
10 of prosecution inducements to witness Buchanan.

11 (i) Buchanan's *Housing* Arrangement with Ms. Strickland

12 Petitioner alleges that Schultz was ineffective by failing to impeach Buchanan with a  
13 room and board agreement facilitated by the prosecution which he claims served as an  
14 inducement for Buchanan to testify at trial.

15 Petitioner points to March 29, 1989 agreement between Buchanan and boarding house  
16 operator Margie Strickland. The agreement was memorialized by and witnessed by prosecution  
17 investigators William Martin and A. Braga. (SHCP, Ex. G; RT 5266-5330; see also SHCP, Ex.  
18 H; RT 5324-25.) Petitioner alleges that under this agreement the prosecution or the police  
19 department promised to pay Strickland \$350 per month for Buchanan's room and board out of  
20 the private reward money Buchanan expected to receive upon petitioner's conviction. (RT 5266-  
21 83, 5324-25.)

22 Petitioner alleges that Schultz failed to develop this impeachment evidence even though  
23 he had a copy of the document memorializing the agreement prior to trial (Doc. No. 116 at  
24 107:19-22; SHCP, Ex. B ¶ 6; Id. at Ex. G) and was aware Ms. Strickland was sending copies of  
25 bills thereunder to the prosecution, bills which Schultz allegedly declined the opportunity to  
26 review. (RT 5406; see also SHCP, Ex.'s G, I.)

27 Petitioner argues that agreement was strong evidence that Buchanan was dishonest; that  
28

1 Martin and Strickland so distrusted Buchanan that they put the agreement in writing. This  
2 dishonesty, petitioner asserts was demonstrated when Buchanan testified falsely that he had not  
3 received anything from the prosecution in return for his testimony (RT 4765-67); and that he  
4 worked as a manager and maintenance man at the boarding house and owed Ms. Strickland  
5 nothing, but that she owed him \$25,000 (RT 4715-16, 5322-25).

6 Petitioner argues that failure to impeach Buchanan with the Strickland agreement was  
7 particularly harmful to the defense for several reasons. The jury was aware defense investigators  
8 had purchased a few beers, lunch and a pair of shoes for Buchanan (RT 4714-15, 4765), while  
9 Buchanan denied the prosecution had purchased anything for him (RT 4766, 5002, 5409). The  
10 other primary prosecution witness, Ms. Goldman, was untrustworthy and had been characterized  
11 as a liar by other witnesses. (See e.g., RT 4783-93.) Petitioner argues the Strickland agreement  
12 gave Buchanan a financial incentive to see to it that petitioner was convicted.

13 However, the state supreme court could reasonably have determined petitioner failed to  
14 demonstrate Buchanan's testimony was dependent upon or biased by the prosecution's  
15 involvement in the housing arrangement. The housing agreement on its face was solely between  
16 Buchanan and Strickland. The agreement as memorialized provided that Buchanan would pay  
17 Strickland \$350/month in the form of an IOU. (SHCP, Ex. G.)

18 Petitioner has not demonstrated that the prosecution was a party to the housing  
19 agreement. He has not demonstrated that the prosecution financed or guaranteed the agreement.  
20 He has not demonstrated that the prosecution was to pay or paid any portion of the noted reward  
21 that funded the agreement. The record reflects that the Fresno District Attorney's Office  
22 expressly advised Buchanan that it lacked funds to pay his living expenses pending his  
23 testimony. (SHCP, Ex. H.) The record reflects that the reward was paid by the victim families  
24 directly to Buchanan and that no public funds were involved; nor did Ms. Strickland hold or  
25 assert a lien or prior entitlement to the private reward funds. (RT 5310-38.) Petitioner has not  
26 demonstrated that the agreement stated or was intended to provide otherwise. (See e.g., SHCP,  
27 Ex.'s G, H.)

1 The record reasonably supports respondent's contention that the Strickland agreement  
2 was facilitated in the normal course and in order to ensure Buchanan would be and remain  
3 available to testify at petitioner's proceeding. (RT 5293-94.) For her part, Strickland testified  
4 that the agreement was not unprecedented; she had taken in boarders on an IOU basis on 30 to 40  
5 other occasions. (RT 5314-25.)

6 Moreover, the jury was aware from the noted testimony that Buchanan was seeking the  
7 private reward offered by the victim families. Schultz argued to the jury that Buchanan may  
8 have implicated petitioner in order to get the reward. (RT 4990-91.) Schultz cross-examined  
9 Buchanan about the housing arrangement in the context of Buchanan's expectation of receiving  
10 the wholly private reward money. (RT 4715-16.) Notably, the trial court denied these same  
11 allegations when raised on the motion for new trial. (RT 1/17/92 9-15.)

12 Nor does the record reasonably suggest the prosecution was chargeable with any  
13 relationship or arrangement between Buchanan and Strickland not set forth in the agreement as  
14 memorialized. Although Buchanan testified, apparently falsely, that he worked for Strickland as  
15 a manager and maintenance man and that she owed him \$25,000 under this relationship (RT  
16 4615-16; 5322-25), prosecutor Hahus testified at the motion for new trial that he knew nothing of  
17 any such arrangement. (RT 5449, CT 583.)

18 Accordingly, petitioner has not demonstrated on the record that the prosecution had any  
19 involvement in any Buchanan-Strickland relationship apart from merely facilitating the  
20 agreement. Petitioner's suggestion that Strickland acted on behalf of the prosecution appears  
21 unsupported by the record. To the contrary, Ms. Strickland testified at trial that pursuant to the  
22 agreement Buchanan owed her over \$5000; she also testified to her concern that Buchanan was  
23 not a trustworthy person. (RT 5325-28.)

24 (ii) *Buchanan's Criminal Charges*

25 Petitioner alleges that Schultz was ineffective by failing to impeach Buchanan's  
26 testimony with evidence the prosecution agreed to provide and provided assistance on separate  
27 felony and misdemeanor charges brought against Buchanan around the time of petitioner's trial.  
28

1 (Doc. No. 51-1 ¶¶ 299-313; SSHCP, Ex. 12 ¶ 7; Doc. No. 116 at 113:2-6.)

2 Petitioner points to dismissal of two felony drug possession counts against Buchanan  
3 after he was identified as a witness and prior to petitioner’s trial. (SHCP, Ex. J.) Additionally,  
4 he points to a separate misdemeanor drug possession charge that arose prior to Buchanan’s trial  
5 testimony (RT 5396-5403; see also SHCP, Ex. K) that was dismissed at the request of prosecutor  
6 Hahus after petitioner’s trial. (Id.; see also Supp. CT. 68-83.) Petitioner argues the dismissals  
7 suggest a plea bargain connected to Buchanan’s testimony in petitioner’s capital trial. (See RT  
8 5341-79); see *Reynoso*, 462 F.3d at 1114 (counsel ineffective in murder case for failing to cross-  
9 examine state witnesses about their motivation for testifying); *Thompson v. Calderon*, 120 F.3d  
10 1045, 1053-55 (9th Cir. 1997) (en banc), reversed on other grounds, *Calderon v. Thompson*, 523  
11 U.S. 538 (1998) (counsel’s failure to discover and present impeaching evidence against jailhouse  
12 informants was deficient).

13 The state supreme court reviewed and rejected some of these allegations on direct appeal.  
14 That court conceded the information tended to impeach Buchanan’s credibility, but nevertheless  
15 determined the information “was not material because it would have added little to the  
16 cumulative impact of the other impeachment evidence.” *Dickey*, 35 Cal. 4th at 908, 909 n.9.

17 The state supreme court’s rejection of these allegations was not unreasonable. Prosecutor  
18 Hahus, at the new trial hearing, testified to Buchanan’s June 1989 assertion that he had a deal for  
19 dismissal of the felony drug case due to his status as prime witness against petitioner in the  
20 capital case. (RT 5380-82, 5394.) However, Hahus did not believe Buchanan. (RT 5385-88.)  
21 The district attorneys who were involved in Buchanan’s felony drug case, Ms. Dotta and Mr.  
22 Hoff, denied a deal existed, stating the drug charges were dismissed on the merits because of a  
23 lack of proof; problems with the search warrant. (RT 5341-79; see also RT 1/17/92 at 14-16.)  
24 Petitioner argues a deal nonetheless implicitly existed, pointing to the time and effort the district  
25 attorney’s office devoted to the felony drug case (id.; Supp. CT 8-84), and to the guilty plea by  
26 Buchanan’s co-defendant in that case. (Id.)

27 However, the state supreme reasonably could have given weight to the direct testimony  
28

1 over petitioner’s surmise. Especially so, given Schultz’s statement in his habeas declaration that  
2 he was aware of the pending charges and dismissal prior to trial, but did not believe this  
3 information would be beneficial to the defense. (SHCP, Ex. B ¶ 7.)

4 For the reasons it stated, the state supreme court could reasonably have concluded that  
5 this alleged impeachment evidence had it been presented would not in reasonable probability  
6 have resulted in a different outcome.

7 Accordingly, a fair-minded jurist could have found that petitioner failed to establish that  
8 Schultz acted deficiently by failing to investigate and present evidence of prosecution  
9 inducements to witnesses Buchanan and Goldman, and that absent the allegedly deficient  
10 conduct a different outcome was reasonably probable. Strickland, 466 U.S., at 687-98.

11 It does not appear that the California Supreme Court’s rejection of the claim was contrary  
12 to, or an unreasonable application of, clearly established federal law, as determined by the  
13 Supreme Court, or that the state court’s ruling was based on an unreasonable determination of  
14 the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. §  
15 2254(d).

16 Claim II(E) is denied.

17 **f. Analysis of Claims II(F) and II(S)**

18 Petitioner next claims that Schultz was ineffective by failing to retain an expert to  
19 investigate the venetian blind evidence and by failing to object to related prosecution testimony  
20 and argument. (Doc. No. 51-1 ¶¶ 314-20; 403-05.)

21 (i) Chain of Custody and Admissibility

22 Petitioner faults Schultz for failing to object to the venetian blind from which a cord  
23 found around victim Freiri’s neck (People’s Ex. 19) was allegedly taken. He argues Schultz  
24 should have objected to Stokes’s seizure of the blind from the landlady of the Harvard Avenue  
25 apartment, Ms. Hays, without a search warrant and proper authentication and foundation. He  
26 suggests the blind retrieved by detective Stokes from Hays may have been altered by Hays when  
27 she removed and stored it and then voluntarily delivered it to detective Stokes at his request. (See  
28

1 RT 4519-22.)

2 Petitioner also argues that Schultz was ineffective by failing to object to the prosecution's  
3 alleged failure to link the cord found at the crime scene (see SSHCP, Ex. 11 at 345); People's  
4 Ex. 19) to that particular venetian blind, pointing out the state supreme court unreasonably  
5 concluded police (rather than Ms. Hays) removed the venetian blind from the hall closet of the  
6 apartment. Dickey, 35 Cal. 4th at 895-96.

7 Here, it appears that Hays evicted the remaining roommates from the Harvard Avenue  
8 apartment shortly after the murders and then cleaned the apartment, removing a blind without  
9 attached cord from the hall closet. (RT 4521-37.) She stored the blind and when later contacted  
10 by detective Stokes delivered the blind to him. (RT 4519-37.)

11 The state supreme court could reasonably have found that petitioner failed to demonstrate  
12 a search warrant was required on these facts. See e.g., U.S. v. Cormier, 220 F.3d 1103, 1112 (9th  
13 Cir. 2000) (Fourth Amendment rights waived by voluntary consent to warrantless search).  
14 Additionally, foundation, authentication and chain of custody supporting the venetian blind  
15 admitted into evidence (People's Ex. 28) reasonably could be found in the trial testimony of  
16 Hays. She testified that the subject blind was originally on the (Hollywood) back door of the  
17 apartment; she removed it from the apartment closet without any attached cord; stored it in her  
18 garage; delivered it to Stokes; and identified the blind, People's Exhibit 28, at trial. (RT 4521-  
19 30.) Detective Stokes confirmed as much in his testimony. (RT 4530-39.) Both Buchanan and  
20 Goldman testified the blind was last seen in the hall closet of the apartment. (RT 4534-37,  
21 4666.)

22 (ii) Fingerprint Evidence

23 Petitioner faults Schultz for not developing and presenting expert testimony discounting  
24 the evidentiary value of petitioner's thumb print that prosecution expert Mike Hall found on a  
25 slat of the subject venetian blind from the Harvard Avenue apartment where petitioner lived with  
26 Goldman and Buchanan.

27 Petitioner presented a portion of this claim on direct appeal which the California Supreme  
28

1 Court rejected, stating that:

2  
3 [A] prosecutor is given wide latitude during argument ... includ[ing] stating  
4 matters not in evidence, but which are common knowledge. It is a matter of  
5 common knowledge that, assuming an object is of the sort that takes fingerprints,  
6 and that one is barehanded, the harder one presses on it with one's fingers, the  
7 more likely one is to leave a fingerprint. Therefore, the prosecutor's argument was  
not misconduct, and, a fortiori, it was not ineffective assistance for defense  
counsel not to object it. In any event, the jury was instructed that statements made  
by counsel were not evidence, and that they were to reject interpretations of the  
evidence they found to be unreasonable.

8 Dickey, 35 Cal. 4th at 915.

9 Petitioner discounts the evidentiary value of his print on the venetian blind which had  
10 been in the apartment for 29 years. (RT 4515-19); see also *Mikes v. Borg*, 947 F.2d 353, 356-  
11 357 (9th Cir. 1991) (in fingerprint only cases, prosecution must present evidence sufficient to  
12 permit the jury to conclude that the objects on which the fingerprints appear were inaccessible to  
13 the defendant prior to the time of the commission of the crime.) Petitioner argues he had access  
14 to and may have touched a slat of the blind during his time as a resident of the apartment,  
15 unconnected to the crimes. He notes that detective Hall found other ridge detail on the venetian  
16 blind which was insufficient for comparison. (RT 4575.)

17 However, the state supreme court could reasonably have given weight to the fingerprint  
18 evidence in the context of the evidentiary record as a whole. The testimony of prosecution  
19 fingerprint expert Hall suggested that fingerprint details are left by gripping an object. (RT  
20 4577.) Hahus's argument could have relied thereon, and upon common experience as suggested  
21 by the state supreme court. See *Dickey*, 35 Cal. 4th at 914-15.

22 The jury was aware of and presumably considered petitioner's testimony that he put the  
23 venetian blind in the closet after it fell off the back door (RT 4883-84; see also RT 4345-46) and  
24 his suggestion his fingerprint may have been left at this time. Nothing in this testimony or the  
25 opinion of petitioner's forensic expert, Dr. Peter Barnett, or the existence of additional  
26 fingerprint details on the venetian blind (acknowledged by both experts Hall and Barnett)  
27 necessarily controverts Hall's conclusions and Hahus's noted argument. (See RT 4981-95; see  
28

1 also claims II(F), II(S), II(T), XIV; Doc. No. 116 at 158-59.) Moreover, Schultz acknowledged  
2 the additional print detail and argued it as a basis to discount the evidentiary value of petitioner's  
3 print. (See RT 4985-86.)

4 Petitioner's surmise that firm pressure on the blind would have left a print on the top  
5 frame of the blind rather than a slat (where petitioner's print was found) is alone unpersuasive.  
6 (Doc. No. 51-1 ¶ 319; RT 4576.) Although Goldman testified that she saw RC handle the  
7 venetian blind, Goldman's testimony in this regard was equivocal. (See claim XXI.)

8 Petitioner's reliance on Mikes is misplaced because there, unlike here the conviction was  
9 based upon the fingerprint evidence alone. See Mikes, 947 F.2d at 356-57. Furthermore, Schultz  
10 offered the jury reasons to discount the fingerprint evidence. He cross-examined prosecution  
11 witnesses regarding this evidence, offered an alternative theory for petitioner's fingerprint being  
12 on the blind and argued the location of the fingerprint on the blind was inconsistent with the  
13 prosecution theory of the crime. (See e.g., RT 4575-80, 4985-86.)

14 Petitioner also faults Schultz for failing to develop and present evidence of an  
15 unreasonable crime scene investigation by the authorities wherein investigators recovered no  
16 useable fingerprints. (See RT 4226-33, 4332.) He points out that not one print from RC was  
17 found at the crime scene even though RC has been to the crime scene multiple times prior to the  
18 crimes. (RT 4311-12.) But petitioner's own forensic expert, Dr. Barnett, though finding the  
19 noted details of other prints apparently found no identifiable prints on the subject blind other  
20 than petitioner's fingerprint. (Doc. No. 116 at 133:27-134:10.) Petitioner has not shown that the  
21 state's processing of the crime scene and the venetian blind resulted in the failure to recover  
22 additional identifiable fingerprints. (RT 4981-95; See also claims II(F), II(S), II(T), XIV; Doc.  
23 No. 116 at 158-59.) Petitioner's speculation that such prints existed, but due to prosecution bad  
24 faith were not developed (Doc. No. 116 at 134:11-12, citing Doc. No. 116-1 ¶¶14-17) is not  
25 supported in the record.

26 It follows the state supreme court could reasonably have found that Schultz could  
27 properly have refrained from making what would have been a meritless objection to the  
28

1 prosecution's fingerprint evidence. That Schultz stated in his habeas declaration that "[he] did  
2 not object to [the prosecution's fingerprint argument] because he did not recognize the basis for  
3 an objection, not as a tactical choice" (SHCP, Ex. B ¶ 10), does not alone suggest the state  
4 supreme court was unreasonable in finding as much. See Strickland, 466 U.S. at 688 (whether  
5 counsel's performance was deficient inquires into the objective reasonableness of counsel's  
6 performance, not counsel's subjective state of mind).

7 Additionally, the state supreme court could reasonably have found no prejudice from  
8 Schultz's alleged deficiencies. For the reasons stated, petitioner has not demonstrated facts  
9 suggesting reasonable probability of a different outcome had unspecified fingerprint evidence  
10 been presented to the jury. The jury was instructed to "reject interpretations of or inferences  
11 from the evidence they found to be unreasonable" (RT 5010; CT 392-94) and that "statements  
12 made by the attorneys during the trial are not evidence." (RT 5008; see also 5146; CT 390).  
13 Jurors are presumed to follow instructions. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000), citing  
14 *Richardson v. Marsh*, 481 U.S. 200, 211, (1987) ("A jury is presumed to follow its  
15 instructions.").

16 (iii) Cord Evidence

17 Petitioner faults Schultz for failing to object to testimony by prosecution criminalist  
18 Cortner that the cord found tied around victim Freiri's neck was similar to "the part still on the  
19 venetian blind." (RT 4414; see also SSHCP, Ex. 11 at 345.) This testimony was false, petitioner  
20 contends because as noted no cord remained on the subject blind recovered by detective Stokes.  
21 (RT 4537.) He argues that the prosecution, by referring to reference samples of cord taken from  
22 other venetian blinds in the apartment as "attached to a (subject) venetian blind" (RT 4413-14)  
23 and "left on the (subject) venetian blind" (RT 4415) misrepresented that the cord used in the  
24 murder was compared to cord taken from that (subject) venetian blind retrieved by Stokes. (RT  
25 4415-16.) He suggests Hahus made this false argument to the jury. (RT 4965-68.)

26 Petitioner argues that based in part on this false testimony and argument, the state  
27 supreme court unreasonably determined that "[t]he cord found around Mr. Freiri's neck came  
28

1 from the [v]enetian blind in defendant's apartment, and defendant was responsible for bringing it  
2 to Mrs. Caton's house.” (Doc. No. 116 at 168:12-15, citing Dickey, 35 Cal. 4th at 904.) He  
3 highlights prosecutor Hahus’s related argument that “[t]he only thing that the lab can tell us is  
4 [the crime scene cord] ... appears to be from the same material; same dimensions and the same  
5 weave [as the samples taken by Stokes from other blinds in the apartment].” (RT 4966.)

6         However, the state supreme court could reasonably have found Schultz was not  
7 objectively unreasonable by failing to object to Cortner’s noted testimony. The record is clear  
8 that Stokes took three reference samples not from the subject venetian blind but rather from other  
9 blinds hanging in the then vacant Harvard Street apartment, (id.; RT 4413-14; 4538) and that it  
10 was these three samples that Cortner compared to the crime scene ligature. (Id.) Any suggestion  
11 by petitioner that the three samples were irrelevant could reasonably be rejected given the  
12 equivocal testimony of Goldman that the cord may have been taken from the blind hanging in the  
13 bedroom (RT 4347) and that multiple blinds were in the apartment at times relevant (RT 4518-  
14 19).

15         It follows that the jury was aware the reference samples were taken from blinds  
16 contemporaneously in the Harvard Avenue apartment. Cortner testified at trial that the cord  
17 from Freiri’s neck was similar to these reference samples but “[he] was not able to make a  
18 physical match to positively say it came from that particular cord that came from the venetian  
19 blind.” (RT 4416.) Cortner opined that cord from Freiri’s neck (SSHCP, Ex. 11 at 345; RT  
20 4532) and the reference cords are consistent with each other in color, weave, pattern and  
21 thickness; that they are both made of cotton; but that a positive match could not be made due to  
22 the fibrous nature of the cord. (RT 4416; SHCP, Ex. L; RT 4203-04, 4346-47, 4413-16;  
23 People’s Exhibits 26, 28, 30.)

24         The cord analysis of defense forensic expert Barnett was not necessarily inconsistent with  
25 Cortner’s noted analysis. Prior to trial, Barnett determined the ligature around Mr. Freiri’s neck  
26 could have come from the venetian blind introduced at trial and that the reference samples  
27 collected by Stokes from the other blinds in the apartment were in some ways inconsistent with  
28

1 the neck ligature. (Doc. No. 51-1 ¶ 803.)

2 A fair-minded jurist could conclude that in context, the noted testimony of Cortner was  
3 not materially misleading. Moreover, Cortner’s testimony that the cord from the murder scene  
4 did not match any cord samples from the apartment was seemingly helpful to the defense and not  
5 prejudicial. The jury was presumably aware no comparison was made to cordage from the  
6 venetian blind admitted in evidence because they knew that blind had no cord on it when  
7 retrieved by Stokes. Cortner did not testify otherwise.

8 As noted, the jury was instructed to reject inferences from the evidence they found to be  
9 unreasonable and that “statements made by the attorneys during the trial are not evidence.” The  
10 state supreme court could reasonably have concluded that the fact the subject blind had no cord  
11 on it when retrieved by Stokes did not discount the materiality of that venetian blind admitted as  
12 evidence at petitioner’s trial.

13 For the reasons stated, Schultz’s statement in his habeas declaration that “he did not  
14 object to this argument because he did not recognize the basis for an objection, not as a tactical  
15 choice” (SHCP, Ex. B ¶ 10) is not necessarily evidence that his failure to object was  
16 unreasonable. In assessing his performance, there is a “strong presumption” that counsel did not  
17 object “for tactical reasons.” *Yarborough*, 540 U.S. at 8. Schultz does not appear to concede the  
18 basis for an objection.

19 (iv) Conclusions

20 Accordingly, a fair-minded jurist could have found that petitioner failed to establish  
21 Schultz acted deficiently by failing to retain an expert to investigate the venetian blind evidence;  
22 and by failing to object to related testimony and argument; and that absent this allegedly  
23 deficient conduct a different outcome was reasonably probable. *Strickland*, 466 U.S., at 687-98.

24 It does not appear that the California Supreme Court’s rejection of these claims was  
25 contrary to, or an unreasonable application of, clearly established federal law, as determined by  
26 the Supreme Court, or that the state court’s ruling was based on an unreasonable determination  
27 of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. §  
28

1 2254(d).

2 Claims II(F) and II(S) are denied.

3 **g. Analysis of Claims II(G) and II(H)**

4 Petitioner alleges that Schultz was ineffective in preparing, calling and examining  
5 defense witnesses, Maxine Hansen and petitioner. (Doc. No. 51-1 ¶¶ 321-341.)

6 (i) Testimony of Maxine Hansen

7 Petitioner alleges that Schultz inadequately investigated and prepared witness testimony  
8 of Hansen, a friend of RC's with whom he briefly stayed following the murders. Petitioner  
9 complains Schultz called Hansen even though he knew or should have known that her testimony  
10 was mostly hearsay and harmful to the defense by suggesting RC may have contacted petitioner  
11 during this time. (Doc. No. 51-1 ¶¶323-325; RT 4829-44.)

12 Petitioner argues the defense team interviewed Hansen only once, when defense  
13 investigator Runcie spoke with her for less than an hour. (Doc. No. 51-1 ¶ 322.) Schultz,  
14 according to petitioner largely ignored Runcie's report that RC had said nothing to Hansen about  
15 the crimes; that a person named Boyd Anderson who was staying with Hansen at the time might  
16 have more information than Hansen; and that Hansen could not hear very well (RT 4843) and  
17 "tends to run on and get side tracked." (Doc. No. 116 at 319:15-19.)

18 Schultz nonetheless called Hansen to testify. Hansen testified that while RC was staying  
19 with her, he contacted a roommate, as follows:

20 Q. Do you remember the name?

21 A. Well, I thought it was something close to Dickey  
22 because when I was a kid I remember this name Dukie,  
23 that's what put me in mind of it when RC said the name ...Q. Right. And you  
24 think that was ... the name of the  
25 roommate that he called?

A. That's what I thought. That's what I thought, I'm not  
sure.

(RT 4843:7-44:1.)

26 Petitioner argues this testimony allowed the jury to speculate that petitioner was involved  
27 in the crimes – speculation encouraged by prosecutor Hahus during argument where he

1 emphasized that Hansen was the least likely of the witnesses to be lying. (RT 5003-04.)

2       However, as petitioner seems to concede, based on the defense team’s interview of  
3 Hansen, Schultz reasonably could have called her in support an argument that RC’s accomplice,  
4 if there was one, was Buchanan or some other third party. The record provides some support for  
5 such a tactic. Petitioner apparently was not called “Dickey” by others, suggesting it is unlikely  
6 RC would have referred to him in this manner. (RT 4362, 4657, 4718.) Buchanan’s personal  
7 items were found in RC’s hotel room after the crimes. (RT 4541-42.) Buchanan was known to  
8 use the phone at the nearby Circle K Market (RT 4661), whereas petitioner had no access to a  
9 phone at the Harvard Avenue apartment (id.).

10       For these reasons, the state supreme court could reasonably have concluded that Schultz  
11 anticipated Hansen’s testimony would be exculpatory of petitioner and that Schultz was not  
12 objectively unreasonable in calling Hansen to the stand.

13       Additionally, Schultz may have believed the prosecution would call Hansen and desired  
14 the defense be the first to elicit any potentially harmful testimony. Especially so in that Hansen’s  
15 testimony was equivocal as to whether the contacted roommate was petitioner or one of the other  
16 roommates – offering the initial opportunity to the defense to focus the jury on Buchanan as  
17 RC’s accomplice. Notably, petitioner has not offered Schultz’s reasons for calling Hansen.

18       In any event, petitioner has not demonstrated prejudice. The state supreme court  
19 reasonably could have found petitioner has not shown a reasonable probability that absent  
20 Hansen’s testimony the outcome of petitioner’s trial would have been different. The jury was  
21 aware of petitioner’s admission to Buchanan and Goldman. To the extent Hansen’s direct  
22 testimony did not support the primary defense theory that RC acted alone, her testimony  
23 nonetheless could have been exculpatory of petitioner for the reasons stated. Moreover, that RC  
24 checked into a Fresno hotel after the crimes does not necessarily conflict with Ms. Hansen’s  
25 testimony that RC stayed with her. Petitioner has not pointed to facts suggesting otherwise.

26       (ii) Testimony of Petitioner

27       Petitioner alleges that Schultz failed to adequately consult with and prepare him to take  
28

1 the stand. He contends Schultz visited him at most six times during the approximately two years  
2 between his arrest and trial and that during these visits Schultz merely reassured him without  
3 discussing the charges or the defense, or soliciting petitioner’s assistance with the defense. (Doc.  
4 No. 51-1 ¶¶ 331-341; Doc. No. 116 at 311.) He argues he was prejudicially unprepared to  
5 testify.

6 Here, the record suggests Schultz’s decision to call petitioner to testify could have been  
7 strategically motivated. Petitioner concedes he wanted to testify and told Schultz as much.  
8 (Doc. No. 116 at 302.) Defense psychologist, Dr. Thompson, examined petitioner 6 month  
9 before trial and found him credible and consistent in denying any involvement in the crimes, (see  
10 SSHCP, Ex. 19 at 381-84), and believed that if properly coached petitioner could perform well  
11 on the stand. (Id.)

12 The state supreme court reasonably could have found petitioner failed to demonstrate the  
13 defense team as a whole failed to consult with him, or that he was denied participation in his  
14 defense. Significantly, petitioner does not appear to address or account for the number of  
15 appearances and hearings he had with Schultz during the trial. See Daniels v. Woodford, 428  
16 F.3d 1181, 1197 (9th Cir. 2005) (complete breakdown in communication between defendant and  
17 counsel is constructive denial of counsel); Crandell v. Bunnell, 144 F.3d 1213, 1217 (9th Cir.  
18 1998), overruled on other grounds by Schell v. Witek, 218 F.3d 1017, 1025 (9th Cir. 2000),  
19 quoting ABA Guidelines, Guideline 11.4.2, (“counsel shall maintain close contact with the client  
20 throughout preparation for the case, discussing (inter alia) the investigation, potential legal issues  
21 that exist or develop and the development of a defense theory.”).

22 Schultz could reasonable have made a tactical decision to avoid too much preparation and  
23 the risk petitioner would sound rehearsed on the stand. Moreover, brevity in testimony could  
24 serve to limit the risk of contradictions and harmful cross-examination. Here again, it is notable  
25 that petitioner has not provided any declaration of Schultz regarding his reasoning in these  
26 matters.

27 The state supreme court also could have found no reasonable probability of a different  
28

1 outcome absent Schultz’s alleged deficiencies. Petitioner claims prejudice from Schultz’s failure  
2 to elicit foundational facts supporting petitioner’s complete denial of involvement in the crimes.  
3 He complains Schultz briefly asked him about his prior conviction for burglary (RT 4870) and  
4 elicited Petitioner’s general denial of involvement in the crimes, as follows:

5  
6 Q: Okay. You heard the – you know what you’re accused of?

7 A: Yes.

8 Q: You heard the testimony of Gene Buchanan?

9 A: Yes.

10 Q: And you heard the testimony of Gail Goldman that was  
11 read into the record?

12 A: Yes.

13 Q: Okay. Did you make those statements to Gene and Gail?

14 A: No.

15 Q: Did you have anything to do with what happened on  
16 Lewis Street on November 7th?

17 A: No

18 (RT 4870-71.) Petitioner points out that after a less-than-two-page direct examination, Mr.  
19 Schultz turned his client over to the prosecutor for a cross-examination that occupies 54 pages of  
20 the reporter’s transcript, with no redirect examination. (RT 4871-4927; see also Doc. No. 51-1 ¶  
21 213(S).) Albeit twelve pages were consumed with evidentiary argument outside the jury’s  
22 presence. (RT 4888-4901.)

23 However, the state supreme court reasonably could have rejected these allegations. The  
24 primary defense theory was consistent with petitioner’s testimony denying any involvement in  
25 the crimes. Significantly, petitioner’s testimony was directly contrary to the primary prosecution  
26 witnesses, Goldman and Buchanan. Moreover, a terse up front admission of the prior felony,  
27 which the prosecution was going to introduce in any event might suggest candor and be tactically  
28 advantageous. Petitioner’s disagreement with counsel’s strategy is not alone a basis to find  
deficient performance. See Strickland, 466 U.S. at 690-91; see also Lord v. Wood, 184 F.3d  
1083, 1095 (9th Cir. 1999) (observing that “few decisions draw so heavily on professional  
judgment as whether or not to proffer a witness at trial”).

Furthermore, petitioner’s suggestion that Schultz should have elicited social and mental

1 history testimony at the guilt phase (see Doc. No. 116 at 304-309) appears contrary to the noted  
2 primary defense and fails to consider potentially negative information which motivated Schultz  
3 not to put petitioner's mother on the stand during the penalty phase (see SHCP, Ex. B ¶¶ 13-14).  
4 Petitioner's suggestion such additional testimony would have furthered alternative third party  
5 accomplice and timeline defenses fails for reasons discussed in claims II(B), II(C).

6 Petitioner has not demonstrated a reasonable probability of a different outcome had he  
7 not testified, or had he testified differently. Especially so given the evidence supporting  
8 conviction including petitioner's admission to Buchanan and Goldman. (See claims XXVI,  
9 XXVIII.) Likewise the habeas proffer regarding facts and circumstances surrounding the  
10 Harvard Avenue apartment, the crimes and their aftermath. (Id.)

11 (iii) Conclusions

12 Accordingly, a fair-minded jurist could have found that petitioner failed to establish  
13 Schultz was ineffective in preparing, calling and examining trial witnesses, Maxine Hansen and  
14 petitioner, and that absent this allegedly deficient conduct a different outcome was reasonably  
15 probable. Strickland, 466 U.S., at 687-98.

16 It does not appear that the California Supreme Court's rejection of these claims was  
17 contrary to, or an unreasonable application of, clearly established federal law, as determined by  
18 the Supreme Court, or that the state court's ruling was based on an unreasonable determination  
19 of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. §  
20 2254(d).

21 Claims II(G) and II(H) are denied.

22 **h. Analysis of Claim II(J)**

23 Petitioner alleges that Schultz was ineffective by failing to object to holding jury  
24 instruction discussions off the record and outside of petitioner's presence. (Doc. No. 51-1 ¶¶  
25 365-373.) He claims prejudice to the extent post-conviction counsel was left with an incomplete  
26 record to review and analyze.

27 (i) Off the Record Jury Instruction Conference

1           Petitioner alleges that Schultz should have objected to the trial court’s holding guilt phase  
2 jury instruction discussions off the record. (RT 4938-49.) He argues the lack of such a complete  
3 record deprived petitioner of meaningful appellate review. See *Coppedge v. United States*, 369  
4 U.S. 438, 446 (1962) (“the Court of Appeals must provide the would-be appellant with ... a  
5 record of sufficient completeness[.]”; *People v. Howard*, 1 Cal. 4th 1132, 1166 (Cal. 1992)  
6 (“[u]nder the Fourteenth Amendment, the record of the proceedings must be sufficient to permit  
7 adequate and effective appellate review.”). Specifically, petitioner argues the summary record  
8 does not show “what arguments his counsel made regarding jury instructions, and what errors the  
9 court made with respect to handling such requests, issues which could have been raised on  
10 appeal.” (Doc. No. 116 at 270:26-271:1.)

11           It appears then applicable California law required death penalty proceedings to be  
12 conducted on the record, viz.:

13  
14           In any case in which a death sentence may be imposed, all proceedings conducted  
15 in the superior court, including all conferences and proceedings, whether in open  
16 court, in conference in the courtroom, or in chambers, shall be conducted on the  
record with a court reporter present. The court reporter shall prepare and certify a  
daily transcript of all proceedings commencing with the preliminary hearing.

17 Penal Code § 190.9(a)(1).

18           The record reflects that on March 14, 1991, the trial judge, the prosecutor and Schultz  
19 had an unrecorded conference on jury instructions outside the presence of petitioner and the jury.  
20 (RT 4938-49.) This, according to the trial judge was to avoid an “awkward record.” (RT 4938.)  
21 Subsequently, in petitioner’s presence the trial judge and counsel for both sides placed on the  
22 record a summary of the conference including objections by the parties. (RT 4938-46.) The  
23 court at that time specifically invited counsel to:

24  
25           [S]peak up if you think that something should be added or stricken, if there’s  
26 some disagreement with the form of the instruction that the Court has indicated it  
will give. And I invite both of you to let me know if there’s any instruction that  
you think ought to be given after we’re through ....

1 (RT 4939), and the trial court invited:

2       Any comment concerning our instruction conference that either of you feel we  
3       ought to put on the record?

4 (RT 4946.) The court and counsel with petitioner present walked through each of the  
5 instructions to be given including modifications. (RT 4938-49). The court stated and the parties  
6 agreed that no theory of murder other than felony murder with aider and abettor liability was in  
7 issue. (RT 4946-47.) Petitioner was given a copy of the proposed instructions and Schultz  
8 discussed them with him. (RT 4947-49.)

9       The court finds that the state supreme court would not have been unreasonable in  
10 determining the erroneous failure to record the jury instruction conference to be harmless error.  
11 Petitioner concedes that to show prejudice he must demonstrate the resulting appellate record  
12 was inadequate to permit meaningful appellate review. (Doc. No. 116 at 270:5-9, citing *People*  
13 *v. Frye*, 18 Cal. 4th 894, 941 (Cal. 1998).) A fair-minded jurist could have found that  
14 petitioner has failed to make such a showing.

15       Petitioner has not demonstrated on the record that the instructions were constitutionally  
16 infirm. (See claims II(N), II(O), II(P), II(Q), XII.) The state supreme court would have been  
17 reasonable in finding off the record discussion regarding otherwise proper instructions did not  
18 deny petitioner adequate appellate review. That is, absent constitutional error there is no basis  
19 for federal habeas relief and no prejudice under *Strickland*. See *Estelle v. McGuire*, 502 U.S. 62  
20 at 67-68 (1991) (it is not the province of a federal habeas court to reexamine state court  
21 determinations of state law questions). Notably, petitioner’s allegations in these regards are not  
22 supported by a declaration of trial counsel Schultz. Petitioner’s speculation alone is not  
23 sufficient to entitle him to habeas relief. See *Johnson v. Alabama*, 256 F.3d 1156, 1187 (11th  
24 Cir. 2001), quoting *Aldrich v. Wainwright*, 777 F.2d 630, 636 (11th Cir. 1985) (“Speculation that  
25 [a] missing witness[] would have been helpful ... is insufficient to carry the burden of a habeas  
26 corpus petitioner.”; see also *Dickey*, 35 Cal. 4th at 905, citing *Estelle*, 502 U.S. 62 at 71-75  
27 (“Mere instructional error under state law regarding how the jury should consider evidence does  
28

1 not violate the United States Constitution.”).

2 (ii) Jury Instruction Conference Without Petitioner Present

3 Petitioner alleges that Schultz failed to object to jury instruction discussions held without  
4 petitioner being present. (RT 4938-48.) He argues the jury instruction conference was a “critical  
5 stage” of his trial proceeding that required his assistance and that he had a right to be present,  
6 citing *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (a criminal defendant has the right to  
7 be present for all critical stages of his trial). He argues this error denied him a sufficient  
8 opportunity to assist in his defense because he might have raised concerns that could have been  
9 addressed by the trial court.

10 However, petitioner has not demonstrated that jury instruction discussions presented a  
11 critical phase of his proceeding. See *Moore v. Campbell*, 344 F.3d 1313, 1323 (11th Cir. 2003)  
12 (“the issue of whether a defendant must be present at all times in a capital trial has not yet been  
13 settled by the Supreme Court”). “It has long and clearly been held that criminal defendants are  
14 entitled to effective assistance of counsel during all critical stages of the criminal process.”  
15 *Nunes*, 350 F.3d at 1052. “[I]t is counsel's dut[y] to consult with the defendant on important  
16 decisions and to keep the defendant informed of important developments in the course of the  
17 prosecution. Those obligations ensure that the ultimate authority remains with the defendant to  
18 make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a  
19 jury, testify in his or her own behalf, or take an appeal.” *Id.* at 1053.

20 Petitioner has not demonstrated clearly established law that he be present during jury  
21 instruction discussions. A defendant has a right to be present “whenever his presence has a  
22 relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.”  
23 *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987), quoting *Snyder v. Massachusetts*, 291 U.S. 97,  
24 105-06 (1934). But he need not be present “when presence would be useless, or the benefit but a  
25 shadow.” *Id.*, quoting *Snyder*, 291 U.S. at 106-07; see *Rice v. Wood*, 77 F.3d 1138, 1140 at n.2  
26 (listing cases finding right to presence not violated). A defendant’s “absence from various court  
27 proceedings, even without waiver, may be declared non-prejudicial in situations where his  
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1 presence does not bear a reasonably substantial relation to the fullness of his opportunity to  
2 defend against the charge.” People v. Johnson, 6 Cal. 4th 1, 18 (1993), citing People v.  
3 Garrison, 47 Cal. 3d 746, 782 (1989), quoting People v. Bloyd, 43 Cal. 3d 333, 359-60 (1987),  
4 abrogated on other grounds by People v. Rogers, 39 Cal. 4th 826, 879 (2006). For the reasons  
5 stated, the state supreme court could reasonably have found this to be such a case.

6 Even if petitioner could demonstrate absence during a critical phase, the state court could  
7 reasonably have found petitioner waived presence at the instructional conference. The California  
8 Supreme Court has “repeatedly rejected the argument that the Sixth Amendment [C]onfrontation  
9 [C]ause of the United States Constitution or the due process clause of the California  
10 Constitution prevents a criminal defendant from waiving the right of presence at a critical stage  
11 of a capital trial.” People v. Bolin, 18 Cal. 4th 297, 325 (Cal. 1998). Defense counsel Schultz  
12 represented petitioner at the instructional conference. Both Schultz and petitioner acquiesced in  
13 petitioner’s absence from the instructional conference. (RT 4938-49.)

14 In any event, that state supreme court could reasonably have found that petitioner has not  
15 demonstrated a reasonable probability of a different outcome had he been present at the  
16 instruction conference. As noted, the trial court reviewed the final instructions with counsel and  
17 petitioner present. (Id.) The court allowed petitioner to review the instructions overnight and  
18 provide any comments or issues to counsel. (Id.) Petitioner apparently had none. (Id.) Instead,  
19 petitioner stated on the record that he was “satisfied” with proceedings as to the instructions.  
20 (RT 4948.)

21 Petitioner’s argument that the summary record of the instructional conference is  
22 insufficient to determine unspecified errors which could have been raised on appeal, could  
23 reasonably be seen as speculative. Petitioner does not support any such errors on the record.

24 (iii) Conclusions

25 Accordingly, a fair-minded jurist could have found that petitioner failed to establish  
26 Schultz was ineffective by failing to object to holding jury instruction discussions off the record  
27 and outside of petitioner’s presence, and that absent this allegedly deficient conduct a different  
28

1 outcome was reasonably probable. Strickland, 466 U.S. at 687-98.

2 It does not appear that the California Supreme Court's rejection of the claim was contrary  
3 to, or an unreasonable application of, clearly established federal law, as determined by the  
4 Supreme Court, or that the state court's ruling was based on an unreasonable determination of  
5 the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. §  
6 2254(d).

7 Claim II(J) is denied.

8 **i. Analysis of claims II(K) and VIII**

9 Petitioner alleges Schultz was ineffective by failing to object when the trial court  
10 erroneously took notice of Penal Code section 128 and read it to the jury, and by failing to  
11 address the resultant harm in closing argument. (Doc. No. 51-1 ¶¶ 374-375, 678-682.)

12 The record shows the prosecutor was allowed elicit testimony from prosecution witness  
13 Buchanan that the prosecutor had made him aware of Penal Code section 128, which at that time  
14 provided that:

15 Every person who, by willful perjury or subornation of perjury, procures the  
16 conviction and execution of any innocent person, is punishable by death or life  
17 imprisonment without possibility of parole. The penalty shall be determined  
18 pursuant to Sections 190.3 and 190.4.

19 See Dickey, 35 Cal. 4th at 911; (see also RT 4759-65).

20 (i) Ineffective Assistance of Counsel

21 Petitioner argues that Schultz should have objected because section 128 is not a  
22 meaningful deterrent to perjury and the chance of a successful prosecution under section 128 is  
23 so remote as to make that statute irrelevant to petitioner's proceeding. See Dickey, 35 Cal. 4th at  
24 912. Respondent counters that these allegations are unexhausted.<sup>10</sup>

25 The California Supreme Court considered and rejected these allegations on direct appeal,

---

26 <sup>10</sup> The record reflects respondent has stipulated and admitted that petitioner's record claims are exhausted (see Doc.  
27 No. 69 at 12;13-13:4; Doc. No. 105 at 11:7-8; Lod. Doc. 31). The court rejects respondent's arguments to the  
28 contrary. (See e.g., Doc. No. 125 at 27:1-9; 28, 84:11-13, 147:3, 149 n.48, 164 n.55, 173:19; see also 28 U.S.C.  
2254(b)(1-2),(c)); Robinson v. Schriro, 595 F.3d 1086, 1102 (9th Cir. 2010) (petitioner required only to present to  
the state court the legal and factual basis of his federal constitutional claim in order to exhaust the claim).

1 stating that:

2  
3 Defendant contends reference to section 128 by the court and prosecutor  
4 constituted prejudicial error. The contention lacks merit. [People v. Harris, 47  
5 Cal.3d 1047, 1083, fn.17 (1989)]

6 ...

7 On redirect, the prosecutor asked Buchanan whether he recalled being informed  
8 by the prosecutor of a Penal Code section dealing with testimony in a capital case.  
9 Buchanan responded, "Oh, yes, sir, yes; definitely remember that one." Defense  
10 counsel objected, without specifying any ground. Outside the presence of the jury,  
11 the prosecutor supported the propriety of this line of questioning by citing [People  
12 v. Harris, 47 Cal.3d 1047 (1989)].

13 In Harris, the defendant claimed "the prosecutor ... improperly attempted to  
14 establish [a witness's] credibility by eliciting testimony that [the witness] was  
15 aware of Penal Code section 128, and that the section provided for the death  
16 penalty for a witness who gave perjured testimony leading to a conviction in a  
17 capital case. Again, there was no objection, and the question was proper."  
18 [Harris, 47 Cal.3d at 1083 n.17.]

19 After he had an opportunity, along with the court, to read Harris, defense counsel  
20 did not renew his objection. Rather, he said the prosecutor should be limited to  
21 asking Buchanan whether he was "aware" of section 128. The prosecutor so  
22 confined his query, and after Buchanan again testified he was aware of the  
23 section, the court read it to the jury. Finally, during his closing argument, the  
24 prosecutor asked the jury, "Do you think Gene Buchanan would lie to send a man  
25 to prison? Perhaps. Do you think Gene Buchanan would lie to send a man to  
26 prison that he doesn't like? Even more perhaps. Do you think that Gene Buchanan  
27 would lie to send a man to prison behind a murder charge where Gene Buchanan  
28 himself could face a capital case for it?"

Defendant argues section 128 is not a meaningful deterrent to perjury. "Given the  
inevitable time lapse between potential conviction and execution, and the remote  
prospect of conclusive exonerating evidence being discovered after an execution,  
the chances of a successful prosecution under Penal Code section 128 in any case  
are so remote as to make the proffered evidence wholly irrelevant."

We decline to second-guess the Legislature, which in enacting the section, clearly  
believed it would have a meaningful deterrent effect. Admittedly, the delay  
between conviction and execution has grown exponentially since section 128 was  
enacted in 1872. However, by 1997, when the Legislature amended and thereby  
reaffirmed the section, the notion of swift justice in capital cases was already a  
thing of the past. Moreover, with the advent of DNA testing, "the prospect of  
conclusive exonerating evidence being discovered after an execution" is, if  
anything, less "remote." In any event, the stakes under section 128, "death or life  
imprisonment without possibility of parole," are so high a potential perjurer may  
well decide it is not worth the risk, however small.

-----FOOTNOTE-----

1 n.11 The 1977 amendment added the phrase “or life imprisonment without  
2 possibility of parole,” as well as the second sentence. (Stats. 1977, ch. 316, § 3, p.  
3 1256, eff. Aug. 11, 1977.)

4 -----END FOOTNOTE-----

5 Dickey, 35 Cal. 4th at 911-12.

6 The state supreme court’s rejection of these allegations on grounds stated by that court  
7 was not unreasonable. Petitioner has not demonstrated on the clearly established federal law that  
8 Schultz erred by not objecting to Penal Code section 128, a then effective state statute.  
9 Schultz’s statement in his habeas declaration that he did not object because he “did not recognize  
10 undue prejudice to the defense” rather than as a “tactical choice” (see SHCP, Ex. B ¶ 8) does not  
11 demonstrate he was objectively unreasonable by withholding objection to proper questions by  
12 the prosecutor or to judicial notice of the then effective statute. See *Vieira v. Chappell*, 2015 WL  
13 641433, at \*53 (E.D. Cal. February 5, 2015), citing *Dickey*, 35 Cal. 4th at 911-12 (prosecutor’s  
14 establishing witness aware of Penal Code section 128 not improper, but rather an accurate  
15 statement of then prevailing state law).

16 Even if Schultz did err as alleged, petitioner has not demonstrated prejudice, a reasonable  
17 probability of a different outcome absent the error. Buchanan’s testimony was largely  
18 corroborated by Goldman (see claims XXVI, XXVIII) and the jury otherwise was aware of the  
19 parties’ substantial direct and indirect evidence and argument relating to Buchanan’s credibility  
(see claims II(P), XIII, XVII, XXVI, XXVIII).

20 Accordingly, a fair-minded jurist could have found that petitioner failed to establish  
21 Schultz was ineffective by failing to object to and argue against the trial court’s notice of Penal  
22 Code section 128 and reading of that statute to the jury, and that absent this allegedly deficient  
23 conduct a different outcome was reasonably probable. *Strickland*, 466 U.S., at 687-98.

24 (ii) Trial Court Error

25 Petitioner alleges the trial court erred in taking judicial notice of section 128 for the same  
26 reasons stated above.

27 As discussed more fully in claims that follow, trial court error violates due process where  
28

1 it renders the resulting criminal trial fundamentally unfair. *Chambers v. Mississippi*, 410 U.S.  
2 284, 294, 303 (1973). Here, the trial court’s reference to and notice of section 128 was not  
3 prejudicially erroneous for the reasons discussed above including those stated by the California  
4 Supreme Court in denying these allegations.

5 (iii) Conclusions

6 For the reasons stated, the state supreme court could reasonably have found the trial court  
7 properly took notice of and read to the jury section 128, and that defense counsel Schultz was not  
8 objectively unreasonable by failing to object to such and by failing to address such in closing  
9 argument.

10 Accordingly, the California Supreme Court’s rejection of these claims was not contrary  
11 to, or an unreasonable application of, clearly established federal law, or an unreasonable  
12 determination of the facts in light of the evidence presented in the state court proceeding. 28  
13 U.S.C. § 2254(d).

14 Claims II(K) and VIII are denied.

15 **j. Analysis of Claim II(L)**

16 Petitioner alleges that Schultz was ineffective by failing to object to detective Stokes trial  
17 testimony of statements of then deceased prosecution witness, Ms. Goldman, that were allegedly  
18 inconsistent with Goldman’s preliminary hearing testimony. (Doc. No. 51-1 ¶¶ 376-379.) He  
19 argues that Stokes’s testimony should not have been admitted under the state law hearsay  
20 exception for inconsistent statements (Evid. Code §§ 770, 1235) because doing so violated the  
21 Confrontation Clause. He argues that Goldman was not given the opportunity at the preliminary  
22 hearing to explain or deny her alleged prior statements to Stokes. He points out that Goldman  
23 was not a witness at trial and could not have given further trial testimony. (See Doc. No. 116 at  
24 338:23-27, Doc. No. 128 at 150:25-151:5.)

25 (i) Clearly Established Law – Confrontation of Testimonial Hearsay

26 The Supreme Court held in *Crawford v. Washington* that “[o]ur cases have thus remained  
27 faithful to the Framers’ understanding: [t]estimonial statements of witnesses absent from trial  
28

1 have been admitted only where the declarant is unavailable, and only where the defendant has  
2 had a prior opportunity to cross-examine.” 541 U.S. 36, 59 (2004).

3 “Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’  
4 design to afford the States flexibility in their development of hearsay law - as does [Ohio v.]  
5 Roberts, and as would an approach that exempted such statements from Confrontation Clause  
6 scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment  
7 demands what the common law required: unavailability and a prior opportunity for cross-  
8 examination.” Crawford, 541 U.S. at 68; see also Williams v. Illinois, 132 S.Ct. 2221, 2223  
9 (2012) (“[B]efore Crawford [ ], this Court took the view that the Confrontation Clause did not  
10 bar the admission of out-of-court statements that fell within a firmly rooted exception to the  
11 hearsay rule. In Crawford, the Court held that such statements could be “admitted only where  
12 the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-  
13 examine.”

14 Crawford abrogated the rule Ohio v. Roberts, prevailing at the time of petitioner’s trial  
15 that “[the prosecutor] was permitted to elicit hearsay testimony if the declarant was unavailable  
16 and there was a firmly-rooted hearsay exception (or indicia of reliability) that applied to the  
17 testimony.” 448 U.S. 56, 66 (1980), abrogated by Crawford, 541 U.S. at 68 (2004); see also  
18 Doc. No. 125 at 97:20-22.)

19 (ii) California Supreme Court Summary of Facts:

20  
21 According to Detective Doug Stokes, Goldman told him “about a venetian blind  
22 that had been in the hall closet that was ... taken by the suspect, Dickey, into a  
23 bedroom and that the cord was removed from that venetian blind and then the  
24 venetian blind was placed back inside the hall closet.” However, when she  
25 testified, Goldman said it was Cullumber who took the venetian blind out of the  
26 closet and went into the bedroom with it. Later, she testified, the blind had been  
27 replaced in the closet, but the cord was missing from a blind in the bedroom.

28 At approximately the same time that Cullumber was engaged with the venetian  
blind, defendant walked into the kitchen and opened a drawer containing knives  
and other silverware.n.5

-----FOOTNOTE-----  
n.5 Goldman later testified she did not know which drawer defendant had opened.

1  
2 According to Detective Stokes, Goldman told him defendant removed a knife  
3 from the drawer and left the kitchen with it. Again according to Detective Stokes,  
4 when he came to the apartment investigating the murders, he showed Goldman a  
5 knife. She told him, "I have a knife exactly like that knife, or they are twins."

6  
7 After the activity just described, Goldman testified, defendant and Cullumber left  
8 the apartment. They had no money, Goldman believed, when they left. If  
9 Cullumber had money, he spent it on drugs; before defendant left he asked  
10 Goldman for money to buy cigarettes. However, when they returned, Cullumber  
11 gave Goldman \$40 or \$50 in cash, saying it was in partial payment of what he  
12 owed her. Cullumber then packed his clothes and left.

13  
14 Sometime thereafter, while Goldman and defendant were watching the news on  
15 television, they saw a story about this crime. Defendant became upset when he  
16 learned Mr. Freiri was dead and that Mrs. Caton, while near death, was still alive.  
17 He told Goldman to come into the bedroom, that he wanted to talk to her.  
18 Buchanan followed them into the bedroom.

19  
20 Defendant told them he had accompanied Cullumber to the home of Mrs. Caton.  
21 On the one hand, defendant said that Cullumber had assured him "nothing was  
22 going to happen." On the other hand, defendant admitted he had gone with  
23 Cullumber "[t]o help [him] get the money." With Mrs. Caton present, defendant  
24 looked for money in her bedroom, where Cullumber told him it could be found.  
25 When defendant stepped out of the bedroom and saw Mr. Freiri slumped over in a  
26 chair, he "knew something had happened." Cullumber "went berserk. He came  
27 into the bedroom and started beating up on his grandmother." Defendant and  
28 Cullumber found \$700, which they split.

Defendant was crying, "like he was sad," when he confessed to Goldman and  
Buchanan. Later, when defendant learned Mrs. Caton had died, "he wasn't as  
depressed as he was before."

While he was confessing, defendant said maybe he should turn himself in.  
Goldman advised him against it. When Detective Stokes first asked Goldman  
whether she knew anything about these crimes, Goldman denied that she did.  
Defendant was a good friend of hers, she still liked him, and she did not want to  
do anything to get him into trouble. She did not want to tell on anyone, especially  
someone she liked as much as she liked defendant. Buchanan told her he was  
going to turn defendant in for the reward. By contrast, Goldman testified at the  
preliminary hearing only because she had been subpoenaed. During a break,  
Goldman told the prosecutor she wanted to make sure defendant knew she was  
not the one who turned him in. She was afraid for her life. "I always felt that if  
you would inform on somebody they would kill you or have you killed."  
Defendant said he was not concerned that someone would betray him, "because if  
they did, they wouldn't do it again." On the other hand, Goldman thought that her  
relationship with defendant was such that "it would take an awful lot to make him  
hurt me."

Dickey, 35 Cal. 4th at 896-97.

(iii) *Goldman's Preliminary Hearing Testimony*

1 As noted, Goldman testified at the August 1989 preliminary hearing. (CT 19-98.) She  
2 died on December 17, 1990, two months before the start of petitioner's trial. (RT 4289, 4807.)  
3 Goldman's preliminary hearing testimony was admitted at trial as the prior testimony of an  
4 unavailable witness. (RT 4289-97, 4335-4403, 4417-4420.)

5 Goldman testified in pertinent part at the preliminary hearing that:

- 6 • She saw petitioner and RC leave the apartment right around the day of the  
7 Presidential election. (RT 4339-40.)
- 8 • Before they left "[t]he only thing [petitioner] did was walk into the kitchen and he  
9 looked in the drawer. That's all he did." (RT 4343.)
- 10 • She saw RC open the hallway closet, and "get a cord." (RT 4345.)
- 11 • She saw that a cord on one of the venetian blinds in the apartment's bedroom, not  
12 the hallway closet, was gone. (RT 4347.)
- 13 • She did not know how long [petitioner and RC] were gone. (RT 4349.)
- 14 • When they returned, RC packed his bags and left. (RT 4350.)
- 15 • Petitioner admitted to her that he was present when RC killed his grandmother  
16 and Louis Freiri, but that "Gail, I swear I had nothing to do with this." (RT 4357.)
- 17 • Petitioner made the "general statement" that "he wasn't afraid of anyone saying  
18 anything about him, because if they did, they wouldn't do it again." (RT 4375.)
- 19 • After petitioner found out RC and Caton had died, "he wasn't as depressed as he  
20 had been before." (RT 4378.)

21 (iv) *Goldman's* Statements to Detective Stokes

22 At trial, the prosecutor elicited testimony from detective Stokes that prior to the  
23 preliminary hearing Goldman told him:

- 24 • She saw petitioner remove a knife from a drawer in the apartment kitchen before  
25 he and RC left the apartment on the night of the crimes. (RT 4602-04.)
- 26 • Two days later petitioner "asked her to go into the bedroom with him, he want --  
27 he wanted to tell her something." (RT 4606.)
- 28 • Buchanan followed them in (RT 4607) and petitioner stated "he had been  
involved in something bad." (RT 4608.)
- "[Petitioner] had said that he would kill her if she or anyone else talked about  
what he had told them." (RT 4615.)
- After the deaths of Ms. Caton and RC petitioner "became aggressive toward her  
and Buchanan, and made statements regarding the fact that if they revealed what  
he had told them that they would be hurt and killed, as would anyone else." (RT  
4616.)
- Goldman told him about "a venetian blind that had been in the hall closet that was  
removed from the hall closet the night of the homicide, and that that venetian  
blind was - taken by [petitioner] ... into a bedroom and that the cord was removed  
from that venetian blind and then the venetian blind was placed back inside the  
hall closet." (RT 4534.)

1 (v) Crawford Applies to Petitioner's Proceeding

2 Petitioner argues that Crawford should apply retroactively to his proceeding. Respondent  
3 disagrees, arguing the trial court could not have anticipated the *Crawford's* abrogation of the rule  
4 in Roberts.

5 However, the state supreme court could reasonably have applied Crawford to petitioner's  
6 case. Crawford has been retroactively applied to cases which were pending on direct review  
7 when it was decided, because it repudiated Roberts and announced a new rule on the effect of the  
8 Confrontation Clause on hearsay statements. *Colon v. Paramo*, 2014 WL 1330562, at \*13 (E.D.  
9 Cal. Apr. 2, 2014).) Crawford has been found not retroactively applicable to cases on collateral  
10 review. See *Whorton v. Bockting*, 549 U.S. 406, 420 (2007).

11 Here, the California Supreme Court did not affirm petitioner's conviction until May 23,  
12 2005, *Dickey*, 35 Cal. 4th 884 (2005), and the United States Supreme Court did not deny  
13 petitioner's writ of certiorari until February 21, 2006. *Dickey*, 546 U.S. 1177. The Supreme  
14 Court's decision in Crawford issued on March 8, 2004. Direct review of petitioner's conviction  
15 was pending when the Crawford decision issued. See *Griffith v. Kentucky*, 479 U.S. 314, 322-23  
16 (1987) (new rule of constitution criminal procedure applies to all similar cases pending on direct  
17 review). Accordingly, the new rule of Crawford applies to petitioner's case.

18 (vi) Petitioner did not Waive Confrontation

19 The state supreme court would not have been unreasonable in determining that Schultz's  
20 failure to object to Stokes's noted testimony was not a waiver of petitioner's right to confront  
21 this testimony. The record does not appear to suggest that Schultz intentionally waived  
22 confrontation as a matter of trial tactics. See e.g., *Wilson v. Gray*, 345 F.2d 282, 286 (9th Cir.  
23 1965) ("the accused may waive his right to cross-examination and confrontation and that the  
24 waiver of this right may be accomplished by the accused's counsel as a matter of trial tactics or  
25 strategy"; see also *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2534 at n.3 (same).  
26 Schultz has not provided a declaration stating why he did not object. Petitioner was present in  
27 court during Stokes's testimony and apparently did nothing that might suggest such a waiver.

1 Respondent has not pointed to evidence in the record showing such a waiver.

2           Moreover, Schultz may not have anticipated *Crawford's* new rule. See Colon, 2014 WL  
3 1330562 at \*14 citing *People v. Johnson*, 121 Cal. App. 4th 1409, 1411 at fn. 2 (2004) (Roberts,  
4 the governing law at the time “afforded scant grounds for objection.”). Especially so as “[t]he  
5 right of an accused to cross-examine and confront prosecution witnesses in a state criminal trial  
6 is an essential ingredient of a fair trial. As such it is necessarily a right embodied in the due  
7 process clause of the Fourteenth Amendment.” Gray, 345 F.2d at 286, citing *Pointer v. State of*  
8 *Texas*, 380 U.S. 400, 403 (1965).

9           (vii) *Goldman's Statements were Testimonial*

10           Petitioner argues that noted statements were testimonial in nature.

11           Witness statements are nontestimonial when made in the course of police interrogation  
12 under circumstances objectively indicating that the primary purpose of interrogation is to enable  
13 police assistance to meet an ongoing emergency. *Davis v. Washington*, 547 U.S. 822 (2006).  
14 Witness statements are testimonial when the circumstances objectively indicate that there is no  
15 such ongoing emergency, and that the primary purpose of the interrogation is to establish or  
16 prove past events potentially relevant to later criminal prosecution. *Id.*

17           In *People v. Geier*, the California Supreme Court “reviewed *Crawford* and *Davis* as to  
18 the determination of whether a statement is testimonial under the Sixth Amendment and held:  
19 [W]hat we extract from those decisions is that a statement is testimonial if (1) it is made to a law  
20 enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to  
21 criminal activity for (3) possible use at a later trial. Conversely, a statement that does not meet  
22 all three criteria is not testimonial.” 41 Cal. 4th 555, 605 (2007), overruled on other grounds by  
23 *People v. Seumanu*, 61 Cal. 4th 1293, 1320 (2015).

24           The record in this case reasonably suggests Goldman's statements were testimonial in  
25 nature. Goldman's statements were made during detective Stokes's investigation of Buchanan's  
26 statements implicating petitioner in the crimes against Freiri and Caton. (RT 4494-4503.)  
27 Stokes apparently interrogated Goldman to confirm past events. That is, he “wanted to talk to  
28

1 Gail Goldman as a result of some information that Mr. Buchanan had given.” (RT 4592.) There  
2 was no apparent ongoing emergency because Buchanan implicated petitioner several months  
3 after the murders and RC’s suicide. See Dickey, 35 Cal. 4th at 894-900. Testimonial  
4 statements under Crawford would typically include such statements during police interrogation  
5 under circumstances where an objective witness would reasonably believe the statement would  
6 be available for use later at trial. See Crawford, 541 U.S. at 51-51, 68. Given the circumstances  
7 surrounding Goldman’s interrogation, an objective witness would have expected he statements to  
8 be available for use at petitioner’s trial.

9 (viii) No Opportunity to Cross-Examine Goldman

10 Petitioner argues that Schultz had no opportunity to cross-examine Goldman’s statements  
11 to detective Stokes.

12 The state supreme court reasonably could have found that Goldman was an unavailable  
13 witness whom petitioner was denied the opportunity to cross-examine. Petitioner’s allegation  
14 that the prosecution intended to and succeeded in making Goldman unavailable for defense  
15 cross-examination by failing to make a good faith effort to set his trial before Goldman’s death  
16 reasonably could have been denied. Petitioner supports this allegation by arguing the  
17 prosecution did not oppose two continuances of trial (CT 241-46, 250) even though Goldman’s  
18 health problems were a matter of record as early as the preliminary hearing (CT 22-24; RT  
19 4369). Such surmise by petitioner is largely unsupported by the record and not alone a sufficient  
20 basis for relief. Nevertheless, that court could reasonably have found Goldman unavailable upon  
21 her death prior to trial. (RT 4289, 4807.)

22 The state supreme court also could reasonably have found that Schultz was denied the  
23 opportunity to cross-examine Goldman on her statements to Stokes. See Ocampo v. Vail, 649  
24 F.3d 1098, 1113 (9th Cir. 2011) (a non-testifying declarant is not subject to cross-examination).  
25 Respondent argues Schultz could have cross-examined Goldman at the preliminary hearing on  
26 the gist of her statements to Stokes because prosecutor Hahus asked Goldman about statements  
27 she made to Stokes. However, it appears Goldman denied making and did not specifically  
28

1 discuss her statements to Stokes during her preliminary hearing testimony. (See e.g., RT 4346-  
2 47, 4363-67, 4373-77, 4396-4403.)

3 The state supreme court could reasonably have found that Schultz was not afforded the  
4 opportunity to cross-examine Goldman at the preliminary hearing about her prior statements to  
5 Stokes.

6 (ix) Stokes Testimony Admissible as Non-Hearsay

7 Petitioner argues that Stokes’s testimony included hearsay admitted for the truth of  
8 Goldman’s statements to him. But the state supreme court could have found Goldman’s noted  
9 statements went toward impeaching her credibility.

10 The Confrontation Clause also does not bar statements introduced for a non-hearsay  
11 purpose. *Tennessee v. Street*, 471 U.S. 409, 414 (1985) (defendant’s rights under Confrontation  
12 Clause not violated by introduction of accomplice’s confession for non-hearsay purpose); see  
13 also *Gonzales v. Virga*, 2012 WL 6004520, at \*\*16-17 (E.D. Cal. Nov. 30, 2012) (the rule of  
14 Crawford only applies to testimonial statements that were introduced to establish the truth of the  
15 matter asserted); *Crawford*, 541 U.S. at 59 n. 9, citing *Street*, 471 U.S. at 414 (“The  
16 (Confrontation) Clause ... does not bar the use of testimonial statements for purposes other than  
17 establishing the truth of the matter asserted.”).

18 In California, inconsistent statements are admissible to attack credibility of the declarant  
19 even without any giving the declarant an opportunity to explain or deny the inconsistent  
20 statement. See *Gonzales*, 2012 WL 6004520, at \*13, citing Evid. Code § 1202. The rule of  
21 Crawford “only applies to testimonial statements that were introduced to establish the truth of  
22 the matter asserted.” *Id.*; accord, *Davis*, 547 U.S. at 823 (Confrontation Clause applies only to  
23 testimonial hearsay).

24 Here, the state supreme court could reasonably have determined Stokes’s testimony was  
25 offered to impeach Goldman’s preliminary hearing testimony, a non-hearsay purpose. See  
26 *People v. Marquez*, 88 Cal. App. 3d 993, 998-99 (1979) (police officer’s trial testimony of  
27 hearsay declarant’s statements impeaching declarant’s preliminary hearing testimony was  
28

1 admissible as non-hearsay). Goldman’s credibility was a significant issue at trial and was argued  
2 by both petitioner and respondent. (See e.g., claims II(P), XXVI, XXVIII.) Both parties invoked  
3 Stokes’s testimony in arguing Goldman’s credibility (directly) and Buchanan’s credibility  
4 (indirectly). (See e.g., RT 4767-76 4964-74, 4989.) The state supreme court would have been  
5 reasonable in concluding that Schultz, as a result of Stokes’s testimony reasonably hoped the  
6 jury would discount Goldman as a witness and discount Buchanan at least to the extent his  
7 testimony was consistent with Goldman’s.

8           Furthermore, the jury was instructed regarding consideration of Stokes’s testimony for  
9 purposes of determining the believability of trial witnesses as follows:

10  
11           [Y]ou may consider anything that has a tendency in reason to prove or disprove  
12 the truthfulness of the testimony of the witness, including but not limited to ... the  
13 character and quality of that testimony ... a statement previously made by the  
14 witness that is [consistent] [or] [inconsistent] with the testimony of the witness ...  
15 the character of the witness for honesty or truthfulness or their opposites.

16 (CT 400-01, CALJIC 2.20.) The jury was also instructed as to witness credibility that:

17  
18           Evidence that on some former occasion, a witness made a statement or statements  
19 that were inconsistent ...with ... testimony in this trial, may be considered by you  
20 not only for the purpose of testing the credibility of the witness, but also as  
21 evidence of the truth of the facts as stated by the witness on such former occasion.

22 (CT 399, CALJIC 2.13.)

23           The court is unpersuaded by petitioner’s passing argument that Goldman’s statements to  
24 Stokes lacked foundation. Goldman testified as an eye witness to petitioner’s actions and words  
25 around the time of the crimes. Petitioner points to Goldman’s alleged statement to her friend,  
26 Ms. Desumala around the time of the preliminary hearing, seemingly controverting Goldman’s  
27 statements by suggesting a grandson of the victims (rather than petitioner) may have confessed to  
28 Goldman. But Desumala’s testimony could reasonably be seen as vague and in the nature of  
generalities and not necessarily contrary to Goldman’s testimony of petitioner’s admission to  
her. Nor does Desumala’s testimony necessarily controvert the noted foundational facts for  
Goldman’s statements to Stokes. (RT 4807-29); see also Dickey, 35 Cal. 4th at 907, n.8.

1           Additionally, petitioner’s brief argument that Stokes coerced Goldman’s statements has  
2 scant support when considered in context. Goldman testified that during her February 1989  
3 interview by Stokes she was scared of him because he threatened to take her to jail as an  
4 accessory if she did not tell him what she knew. (RT 4374.) However, the record reflects that  
5 months earlier, when detective Stokes was seeking information in the immediate wake of the  
6 crimes, he had explained to Goldman and others at the Harvard Avenue apartment about being  
7 an accessory after the fact. (RT 4595-97). Stokes denied making such statements or threatening  
8 to arrest Goldman during the February 1989 interview. (Id.) Instead, according to Stokes,  
9 Goldman then admitted “Detective Stokes, I’m sorry, I lied to you. I’m sorry I lied to you. I  
10 want to tell you the whole truth right now.” (Id.) The state supreme court reasonably could have  
11 found Goldman’s statements to Stokes during the interrogation were not coerced, but voluntary.

12           (x)     Prejudice

13           Petitioner alleges that Stokes’s noted testimony regarding Goldman’s statements to him  
14 was prejudicial because it attributed to petitioner possession of murder weapons (a knife - RT  
15 4228, 4603, 4640-49; and a cord -RT 4416, 4532-34); and a consciousness of guilt (threats to  
16 those who might expose him - RT 4375-77, 4616; his hiding in the attic of the Harvard Avenue  
17 apartment when detective Stokes showed up wanting to question him - RT 4367, albeit petitioner  
18 denied hiding in the attic - RT 4901). (See also Doc. No. 51-1 ¶ 863; Doc. No. 116 at 370:19-  
19 22; RT 4595-4616.) Petitioner argues that absent Stokes’s testimony there is a reasonable  
20 probability he would not have been convicted.

21           But even if Schultz was ineffective by failing to object to detective Stokes trial testimony  
22 of Goldman’s statements to him, the state supreme court reasonably could have found it not to be  
23 prejudicial. Stokes’s testimony of Goldman’s statements appears significantly cumulative of and  
24 corroborated by Buchanan’s testimony. Cf., Ocampo, 649 F.3d at 1114 (inquiry into  
25 Confrontation Clause error considers whether errantly admitted evidence was cumulative). For  
26 example, Buchanan testified that on the night of the murders, he saw petitioner take the venetian  
27 blind out of the hall closet and go into the bedroom (RT 4665-66), and then exit the bedroom and  
28

1 return the venetian blind to the closet; he also saw a kitchen knife in the bedroom (RT 4706-07).  
2 See also Dickey, 35 Cal. 4th at 898. He also testified that RC and petitioner returned later than  
3 night and bought drugs for the roommates with money RC and petitioner did not have earlier that  
4 evening and that petitioner then disposed of some of his clothing by throwing it into a canal.  
5 (RT 4682-85.)

6 Significantly, petitioner's admission of his role in the crimes to Goldman and Buchanan  
7 and discussion of events surrounding the crimes (see RT 4355-79; 4606-08, 4687-93) were  
8 consistently in the record and not implicated in Stokes's testimony of Goldman's statements.

9 Furthermore, petitioner's admission was corroborated by Goldman's consistent testimony  
10 that RC and petitioner left the apartment together the night of the crimes and returned together  
11 later that evening whereupon RC acted strangely; (RT 4349-79); see also Dickey, 35 Cal. 4th at  
12 898; and by petitioner's initial depression following the crimes (RT 4352-54, 4378). Goldman's  
13 testimony about petitioner being essentially fearless and aggressive also was not necessarily  
14 controverted by Stokes's testimony (RT 4398) or by Buchanan's testimony that petitioner "never  
15 threatened my life in my presence." (RT 4745.)

16 For the same reasons, the state supreme court could reasonably have concluded there was  
17 no reasonable probability of a more favorable result had the jury been given an instruction  
18 limiting use of Stokes's testimony to non-hearsay purposes.

19 Finally, petitioner's suggestion that Stokes, by testifying as a police detective effectively  
20 vouched for Buchanan's consistent testimony could reasonably be seen as speculative. Petitioner  
21 does not demonstrate on the evidentiary record that Stokes either expressed his personal belief in  
22 Goldman's veracity or suggested information not known to the jury supported Goldman's  
23 testimony. See *United States v. Hermanek*, 289 F.3d 1076, 1098 (9th Cir. 2002) (prosecutor's  
24 reference to being a participant in the underlying criminal investigation during closing argument  
25 constituted improper vouching); see also *U.S. v. McKoy*, 771 F.2d 1207, 1210-11 (9th Cir. 1985)  
26 ("The rule that a prosecutor may not express his personal opinion of the defendant's guilt or his  
27 belief in the credibility of witnesses is firmly established.").

1 (xi) Conclusions

2 Accordingly, a fair-minded jurist could have found that petitioner failed to establish  
3 Schultz was ineffective by failing to object to detective Stokes trial testimony of statements made  
4 by then deceased prosecution witness, Ms. Goldman, and that absent this allegedly deficient  
5 conduct a different outcome was reasonably probable. Strickland, 466 U.S., at 687-98.

6 It does not appear that the California Supreme Court's rejection of the claim was contrary  
7 to, or an unreasonable application of, clearly established federal law, as determined by the  
8 Supreme Court, or that the state court's ruling was based on an unreasonable determination of  
9 the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. §  
10 2254(d).

11 Claim II(L) is denied.

12 **k. Analysis of Claims II(M), II(N), II(O), II(P) & II(Q)**

13 Petitioner alleges that Schultz was deficient in requesting and failing to object to guilt  
14 phase instructions. (Doc. No. 51-1 ¶¶ 380-399.)

15 (i) CALJIC 8.80 - Actus Reus Requirement

16 Petitioner alleges that Schultz was deficient by failing to object to the prosecutor's  
17 modified CALJIC 8.80 which he claims deleted the act in aid of first degree murder ("actus  
18 reus") requirement. He claims this error was prejudicial because the prosecutor argued in  
19 closing that the state was not required to prove actus reus on the part of petitioner for purposes of  
20 proving special circumstances. (RT 4952-4975, 4979-80.) He argues that absent this error there  
21 was a reasonable probability the result of the proceedings would have been different.

22 State Law – Aider and Abettor of Felony Murder

23 Petitioner was charged as an aider and abettor of the two murders, robbery of each  
24 victim, burglary, four felony murder special circumstances, and one multiple murder special  
25 circumstance. (CT 297-301; see also RT 4952, 4975, 4979-80.) At the time of his trial, Penal  
26 Code section 190.2, former subdivision (b), under which petitioner was charged, stated:

27 Every person whether or not the actual killer found guilty of intentionally aiding,  
28

1 abetting ... or assisting any actor in the commission of murder in the first degree  
2 shall suffer death or confinement in state prison for a term of life without the  
3 possibility of parole, in any case in which one or more of the special  
circumstances enumerated in [specified paragraphs covering, among others, the  
crimes of burglary and robbery] of subdivision (a) of this section has been  
charged and specially found under Section 190.4 to be true.

4 Penal Code § 190.2(b) (eff. Nov. 8, 1978). The standard CALJIC 8.80 special circumstance  
5 instruction (for murder committed before June 5, 1990) read in relevant part:

6  
7 If you find beyond a reasonable doubt that the defendant was an aider or abettor,  
8 then you must also find beyond a reasonable doubt that the defendant with intent  
to kill aided and abetted an actor in the commission of the murder in the first  
degree, in order to find the special circumstance to be true.

9  
10 (SHCP, Ex. A.)

11 Prosecution Theory

12 Petitioner argues the prosecution's primary theory was that "petitioner aided or abetted in  
13 the underlying felonies making him guilty of felony-murder, and that he formed an intent to kill  
14 in a spontaneous, unspoken thought following the apparent death of the first victim [Mr. Freiri]  
15 making him liable for five special circumstances, including three with regard to the first victim."  
16 (Doc. No. 51-1 ¶¶ 381, 385.) Petitioner points to the prosecution argument that petitioner  
17 confessed to Buchanan that after he saw Mr. Freiri apparently dead, slumped over in a chair, he  
18 formed the spontaneous thought "if you kill one, you might as well kill them both." (Doc. No.  
19 51-1 ¶ 385; RT 4691-93.) The prosecutor argued this unspoken thought to the jury as mens rea,  
20 as follows:

21  
22 Now, the evidence of the intent, his intent, is there from Gene Buchanan's relating  
23 to you his statement in the bedroom ... he says he saw what looked like Louis the  
24 old man slumped over and dead, he said or thought--it makes no difference,  
because intention is a state of mind—"If you kill one you might as well kill the  
other." That's an intention that someone die.

25 (RT 4980.)

26 Modified CALJIC 8.80

27 Petitioner argues the prosecution improperly modified CALJIC 8.80 to omit any  
28

1 component of the actus reus in aid of first degree murder. The record reflects that the trial court  
2 instructed the jury with a modified CALJIC 8.80 instruction, in relevant part as follows:

3  
4 If you find beyond a reasonable doubt that the defendant was an aider or abettor,  
5 then you must also find beyond a reasonable doubt that the defendant intended  
6 either to kill a human being or to aid another in the killing of a human being in  
7 order to find the special circumstance to be true.

8 (CT 425; see also RT 5021-22.)

9 Petitioner argued on direct appeal that the modified instruction was inconsistent with then  
10 applicable Penal Code § 190.2(b) because the modified instruction erroneously relieved the  
11 prosecution of this requirement to show petitioner assisted in the actual killings. That is, he  
12 argued Penal Code § 190.2(b) required the prosecution to prove not only that he aided or abetted  
13 the burglaries and robberies, but also that he assisted in the actual killings themselves. See  
14 Dickey, 35 Cal. 4th at 900. The California Supreme Court disagreed, stating that:

15 Section 190.2, former subdivision (b) is not helpful to defendant because, under  
16 the felony-murder doctrine, he was found guilty of aiding or abetting first degree  
17 murders. All persons aiding or abetting the commission of burglary or robbery are  
18 guilty of first degree murder when one of them kills while acting in furtherance of  
19 the common design

20 Dickey, 35 Cal. 4th at 900.

21 Petitioner, in his direct appeal relied upon *People v. Anderson*, 43 Cal. 3d 1104 (Cal.  
22 1987), superseded by statute as stated in *People v. Mil*, 53 Cal. 4th 400, 408-09 (Cal. 2012), for  
23 the proposition that the “actus reus of a special circumstance requires that a defendant aid or abet  
24 the actual killing, not just the underlying felony.” Specifically, petitioner pointed to the  
25 statement in *Anderson* that:

26 [G]iven a realistic reading the statutory requirement that the aider and abetter  
27 intentionally aid, abet, counsel, command, induce, solicit, request, or assist any  
28 acts in the commission of first degree murder—even when applied to felony  
murder—is not ambiguous: the aider and abetter must intentionally aid in a  
killing.

Anderson, 43 Cal. 3d at 1145. The state supreme court again disagreed, stating that:

1 [Petitioner's] reliance on Anderson is unfounded. It is axiomatic a decision does  
2 not stand for a proposition not considered by the court ... The proposition  
3 advanced by defendant—for a felony—murder special circumstance, the aiding or  
4 abetting has to relate to the act of killing itself, rather than just the underlying  
5 felony was not considered by the court in Anderson. The question we considered  
in Anderson—reconsidered, actually—was “whether and under what  
circumstances intent to kill is an element of the felony—murder special  
circumstance.” [Citation]

6 Dickey, 35 Cal. 4th at 901. That court further noted that recasting the sufficiency of the evidence  
7 argument (see claim XXVI) as an instructional claim, that the trial court prejudicially erred by  
8 failing to instruct the jury that petitioner had to have aided or abetted the actual killings not just  
9 the underlying felonies, also failed. For the reasons stated above and in claims XII and XXVI,  
10 post, such is the case here. See also Dickey, 35 Cal. 4th at 903-4.

11 The modified CALJIC 8.80 instruction could reasonably be seen as sufficient under then  
12 applicable state felony murder analysis. A felony murderer jointly engaged in the underlying  
13 felony commits first degree murder. See e.g., *People v. Pulido*, 15 Cal. 4th 713, 716 (1997).  
14 Petitioner has not demonstrated the clearly established law dictates otherwise.

15 The jury also was instructed regarding felony murder that an aider and abettor must  
16 intend to kill before a special circumstance can be found true. The state supreme court's  
17 rejection of petitioner's Anderson argument need not be seen as a retroactive expansion of his  
18 criminal liability. As that court concluded, the Anderson holding did not reach issues of *actus*  
19 *reus* and the challenged instruction correctly stated California law. This court is not in a position  
20 to conclude otherwise. See *Bradshaw v. Richey*, 546 U.S. 74, 98 (2005) (state supreme court's  
21 authoritative interpretation of state law is controlling of sufficiency of evidence claim). It is not  
22 enough for habeas relief that “[an] instruction was allegedly incorrect under state law.” *Estelle*,  
23 502 U.S. at 71-72. “In the absence of a federal constitutional violation, no relief can be granted  
24 even if the instruction given might not have been correct as a matter of state law.” *Mitchell v.*  
25 *Goldsmith*, 878 F.2d 319, 324 (9th Cir. 1989).

26 For the reasons stated, petitioner has not demonstrated he was denied due process rights  
27 under his cited *Bouie v. City of Columbia*. 378 U.S. 347, 350 (1964) (criminal statute must give  
28

1 fair warning of the conduct it makes a crime). Schultz’s statement in his habeas declaration that  
2 was unaware the modified instruction prejudicially omitted any required element (see SHCP, Ex.  
3 B ¶ 5(a)) does not suggest an objection to the modified instruction would have been other than  
4 futile. Notably, Schultz stated on the record that he was happy with the modified CALJIC 8.80  
5 that was ultimately read to the jury. (RT 4944; see also Doc. No. 116 at 280:4-6.)

6 (ii) Concurrence of Act and Intent in Felony Murder Rule Aiding and Abetting

7 Petitioner cites *Bouie* and alleges Schultz was deficient by failing to request an  
8 instruction or argue that the special circumstances charged for victim Mr. Freiri required a  
9 concurrence of intent to kill and an act in aid of the actual killings. 378 U.S. at 352.

10 Petitioner argues prejudice, that had the omitted instruction been given the jury would  
11 have determined that the special circumstances involving Mr. Freiri were not proven. That is, he  
12 argues that Freiri was seemingly already dead when Petitioner allegedly formed the intent to kill  
13 attributed to him by Buchanan. (Doc. No. 51-1 ¶ 388; see also CT 159-60.)

14 Ms. Hart, petitioner’s counsel on motion for new trial, argued as much; that the special  
15 circumstance instructions failed to inform jurors that specific intent to kill must precede or  
16 accompany the act of killing. (RT 5243-46; see also CT 556.) The trial court rejected the  
17 argument by noting the lack of certainty as to when Freiri died as well as evidence in the record  
18 suggesting petitioner brought murder weapons to the crime scene, the cord found wrapped  
19 around Freiri’s neck and the knife. (See RT 1/17/92 21-24.)

20 The California Supreme Court on direct appeal also considered and rejected these  
21 allegations, stating that:

22  
23 The jury was properly instructed on concurrence of act and intent with regard to  
24 the special circumstances. In accordance with CALJIC No. 3.31, the jury was  
25 instructed that, with regard to each of the crimes charged in the information,  
26 “there must exist a union or joint operation of act or conduct and a certain specific  
27 intent in the mind of the perpetrator. Unless such specific intent exists, the crime  
28 to which it relates is not committed. [¶] The specific intent required is included in  
the definition of the crimes charged. [¶] All of the special circumstances  
allegations require an intent to kill.”

1 Dickey, 35 Cal. 4th at 904-05; see also CT 395.

2 The state supreme court was not unreasonable in rejecting these allegations. The  
3 instructions given in their totality are sufficient to cover concurrence of act and intent, for the  
4 reasons discussed above. Although Schultz stated in his habeas declaration that he was unaware  
5 the approved special circumstance instructions prejudicially lacked a specific instruction on the  
6 required concurrence of intent to kill and an act in aid of the murders, (SHCP, Ex. B ¶ 5(b);  
7 SHCP, Ex. C ¶ 1), for the reasons stated his failure to make a futile objection was not objectively  
8 unreasonable and prejudicial.

9 (iii) Oral Confession to be viewed with Caution

10 Petitioner alleges that Schultz was deficient by failing to request CALJIC No. 2.70 or  
11 2.71 which would have instructed the jury to view evidence of Petitioner’s alleged oral  
12 admissions or confessions with caution, and by failing to argue the inherent principles thereof to  
13 the jury. (Doc. No. 51-1 ¶ 391; SHCP, Ex. B ¶ 5(c).)

14 The record shows that Ms. Hart raised these allegations on motion for new trial. (CT  
15 547-51.) Prosecutor Hahus conceded that a cautionary instruction was not requested by either  
16 party and should have been given sua sponte. (CT 595-99; RT 5226-31.) Hahus went on to  
17 argue the error was harmless. (CT 595-99.) The trial court found the error non-prejudicial,  
18 stating that because petitioner denied the substance of his alleged admission, the jury “of  
19 necessity would have viewed his admission with caution ... they could only convict in this case  
20 if they found that Goldman and Buchannan were being truthful and not the defendant.” (RT  
21 January 17, 1992 at 20.)

22 The California Supreme Court reviewed and also rejected these allegations on direct  
23 appeal, finding only harmless error. Dickey, 35 Cal. 4th at 905. That court stated:

24

25 Mere instructional error under state law regarding how the jury should consider  
26 evidence does not violate the United States Constitution. [Citation] Failure to give  
the cautionary instruction is not one of the “very narrow[ ]” categories of error  
that make the trial fundamentally unfair.

27

The purpose of the cautionary instruction is to assist the jury in determining if the  
statement was in fact made. [Citation] Since the cautionary instruction is

28

1 intended to help the jury to determine whether the statement attributed to the  
2 defendant was in fact made, courts examining the prejudice in failing to give the  
3 instruction examine the record to see if there was any conflict in the evidence  
4 about the exact words used, their meaning, or whether the admissions were  
5 repeated accurately. [Citation]

6  
7 Where [as here] there was no such conflict in the evidence, but simply a denial by  
8 the defendant that he made the statements attributed to him, we have found failure  
9 to give the cautionary instruction harmless.

10 ...

11 [T]he question for the jury was whether Buchanan and Goldman were credible  
12 witnesses or had fabricated their testimony concerning his admissions to  
13 them...[T]he court, while neglecting to give the cautionary instruction, did in  
14 other respects thoroughly instruct the jury on judging the credibility of witnesses.  
15 The jury was instructed on the significance of prior consistent or inconsistent  
16 statements of witnesses, discrepancies in a witness's testimony or between his or  
17 her testimony and that of others, witnesses who were willfully false in one  
18 material part of their testimony being distrusted in other parts, weighing  
19 conflicting testimony, evidence of the character of a witness for honesty and  
20 truthfulness to be considered in determining the witness's believability, and was  
21 given a general instruction on witness credibility that listed other factors to  
22 consider, including a witness's bias, interest or other motive, ability to remember  
23 the matter in question, and admissions of untruthfulness.

24 As the Attorney General contends, given these instructions, and given the  
25 extensive impeachment of Buchanan and Goldman raising credibility issues to  
26 which the instructions were pertinent, n.8 the jury was unquestionably aware their  
27 testimony should be viewed with caution.

28 -----FOOTNOTE-----

n.8 The jury knew Goldman and Buchanan were drug addicts, that they had been  
using drugs almost daily around the time of defendant's statements, and that  
Buchanan had used drugs the day before his testimony. It knew that, even though  
he had initially denied it, Buchanan was aware of the \$5,000 reward, that  
Buchanan had told others he wanted the reward for turning defendant in, and that  
he had then testified the reward was not the reason he had come forward. It knew  
room and board expenses incurred by Buchanan were to be deducted from the  
reward. (See post, 28 Cal.Rptr.3d at pp. 665–667, 111 P.3d at pp. 937–938.) It  
knew Buchanan disliked defendant, and that he wanted revenge against defendant  
for tearing up a picture of his daughter.

The jury also knew Goldman had initially lied to the police, disclaiming any  
knowledge of the crimes. One witness testified he would not trust Goldman as far  
as he could throw her. Another witness, a former neighbor, testified Goldman told  
him she had been called as a witness in a murder case, but that she “didn’t know  
nothing about no murder.” Another witness, who testified she was “like a sister”  
to Goldman, said Goldman told her it was the grandson of the murder victim who  
had confessed to her.

-----END FOOTNOTE-----

1 For the same reason, we reject defendant's contention that defense counsel was  
2 ineffective in having failed to request the cautionary instruction.

3 ...

4 Even assuming arguendo that defense counsel's performance, in failing to request  
5 the cautionary instruction, fell below an objective standard of reasonableness, it is  
6 not reasonably probable that, but for counsel's failure, the result of the trial would  
7 have been different.

7 Dickey, 35 Cal. 4th at 905-07.

8 Here, Schultz admitted he was unaware such a cautionary instruction was missing from  
9 the instructions approved by the trial court. (SHCP, Ex. B ¶ 5(c).) In any event, the respondent  
10 conceded the failure to instruct.

11 The state supreme court acted reasonably in finding non-prejudicial the failure to instruct,  
12 for the reasons noted above and stated by that court.

13 Petitioner goes on to argue that even if the jury was aware of argument by counsel  
14 placing the credibility of Buchanan and Goldman in issue, a cautionary instruction to that effect  
15 would have carried more weight with the jury. See *Boyde v. California*, 494 U.S. 370, 384  
16 (1990) (arguments of counsel generally carry less weight with a jury than do instructions from  
17 the court). Especially so, according to petitioner, given the prosecutor essentially vouched for  
18 these witnesses. (Doc. No. 116 at 290:4-6.) But petitioner has not demonstrated that vouching  
19 occurred. (See e.g., claim XVII.)

20 Furthermore, as noted the jury was instructed on witness credibility including tests for the  
21 veracity of witnesses making prior inconsistent statements. The jury was instructed a  
22 determination of witness believability should consider “the extent of the opportunity or the  
23 ability of the witness to see or hear or otherwise become aware of any matter about which the  
24 witness has testified ... the ability of the witness to remember or to communicate any matter  
25 about which the witness has testified ... [and] the demeanor and manner of the witness while  
26 testifying.” (CT 400.) Moreover, Schultz’s closing argument emphasized not the wording of the  
27 alleged admission but rather that the jury should discount the admission completely because  
28

1 Goldman and Buchanan were untrustworthy. (See RT 4983-95.)

2 (iv) Unreliable Testimony by Goldman and Buchanan

3 Petitioner alleges that Schultz was deficient by failing to request case law based  
4 instructions allowing the jury to discount or disregard the testimony of Goldman and Buchanan  
5 as alleged drug addicts and drug abusers. See *People v. Barnett*, 54 Cal. App. 3d 1046, 1050-51  
6 (1976) (cautioning instruction proper where a witness was under the influence of alcohol or  
7 drugs at the time of his or her testimony); *United States v. Collins*, 472 F.2d 1017, 1018-19 (5th  
8 Cir. 1972) (cautionary instruction proper where a witness was then a drug addict).

9 Petitioner argues that both Buchanan and Goldman were drug addicts. (Doc. No. 51-1 ¶  
10 394.) He argues that Goldman (see CT 60-61, 74-75, 78, 92-93; RT 4369, 4382, 4401, 4676,  
11 4754,) and Buchanan (see CT 81-82, RT 4390, 4717, 4733-37-42, 4856-57) may have been  
12 under the influence of drugs at the time of their respective observations and testimony.

13 However, the state supreme court could reasonably have found that Schultz was not  
14 deficient in these regards. The jury was instructed on witness credibility, that they could  
15 consider anything that might prove or disprove witness veracity including “the extent of the  
16 opportunity or the ability of the witness to see or hear or otherwise become aware of any matter  
17 about which the witness has testified ... the ability of the witness to remember or to communicate  
18 any matter about which the witness has testified ... [and] the demeanor and manner of the witness  
19 while testifying.” (CT 400.)

20 Petitioner claims prejudice by arguing that had Barnett and/or Collins instructions been  
21 given, Schultz could have convincingly argued the testimony of these pivotal witnesses should  
22 have been discounted or disregarded. He argues that Schultz’s failure to request such  
23 instructions was not tactical because Schultz stated that “he was not aware of the potential use of  
24 the Barnett or Collins instructions in this case, and that his omission of a request for these  
25 instructions was not a conscious or strategic choice on his part.” (Doc. No. 116 at 295:23-26;  
26 SHCP, Ex. B ¶ 5(d-e).)

27 Even if the Barnett and Collins instructions should have been given, the failure to do so  
28

1 was not necessarily prejudicial. The Barnett court found the failure to give an instruction on  
2 witness intoxication not prejudicial where, as here, the jurors themselves could judge the issue  
3 from the demeanor and testimony of the witness.

4 Collins, unlike this case, involved testimony by a witness who was a drug addicted  
5 prosecution informant. Petitioner has not demonstrated concerns of bias and reliability evident  
6 in this case rise to the level seen in Collins. (See claims II(E) and XIII.) Also, the Collins court  
7 suggests prejudice attenuates with presentation of evidence corroborating the witness's  
8 statements. Here, the noted testimony of Buchanan and Goldman was consistent and  
9 corroborated in significant part. Furthermore, petitioner has not shown on the evidentiary record  
10 that either Goldman or Buchanan was intoxicated at the time of their testimony. Rather, the  
11 record suggests otherwise. (RT 4401, 4737, 4742, 4993.)

12 (v) Cumulative Ineffectiveness Regarding Instructions

13 Petitioner argues cumulative prejudice from the above noted instructional claims as well  
14 as claim II(J) wherein petitioner faults Schultz for allowing the instruction conference to be held  
15 off the record and outside petitioner's presence. He again argues that the defense closing  
16 argument can be no substitute for proper jury instructions, the law the jury is bound to follow.  
17 See Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985) (jurors strive to understand, make sense  
18 of, and follow the instructions given them).

19 However, for the reasons stated, claims II(J), II(M), II(N), II(O), II(P) and II(Q) present  
20 no individual errors. Petitioner fails to demonstrate any singular errors for this court to  
21 aggregate. Thompson v. Calderon, 86 F.3d 1509, 1521 (9th Cir. 1996), amended by 109 F.3d  
22 1358, 1369 (9th Cir. 1997), *rev'd*, 120 F.3d 1045 (en banc), opinion reinstated, Calderon, 523  
23 U.S. at 566 ("finding no prejudice from the errors considered separately, we also find no  
24 cumulative prejudice"); see also Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996) (holding that  
25 there was no reason to reverse for cumulative error because there was no violation of federal  
26 rights in the guilt phase); United States v. Chandler, 2016 WL 4039748 at \*2 (9th Cir. July 28,  
27 2016) (absent individual error there can be no cumulative error).

1 (vi) Conclusions

2 For the reasons stated, a fair-minded jurist could have found that petitioner failed to  
3 establish Schultz was ineffective in requesting and failing to object to guilt phase instructions,  
4 and that absent this allegedly deficient conduct a different outcome was reasonably probable.  
5 Strickland, 466 U.S. at 687-98.

6 It does not appear that the California Supreme Court's rejection of the claims was  
7 contrary to, or an unreasonable application of, clearly established federal law, as determined by  
8 the Supreme Court, or that the state court's ruling was based on an unreasonable determination  
9 of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. §  
10 2254(d).

11 Claims II(M), II(N), II(O), II(P) and II(Q) are denied.

12 **I. Review of Claim II(R)**

13 Petitioner alleges that Schultz was ineffective by failing to object to evidence of the  
14 character of both RC and petitioner. (Doc. No. 51-1 ¶¶ 400-402.)

15 (i) Propensity toward Violence

16 Petitioner argues that Schultz should have objected to and excluded Goldman's  
17 preliminary hearing testimony which suggested that RC had a non-violent character while  
18 petitioner had a violent character. (Doc. No. 116 at 348:27-349:22.)

19 The record reflects the prosecutor elicited the following testimony from Goldman at the  
20 preliminary hearing:

21 Q. Was R.C. violent?

22 A. No, he was a very funny person. He kept me laughing all the time.

23 Q. Was he mean?

24 A. No.

25 Q. Did he have a temper?

26 A. No.

27 Q. That you ever saw?

28 A. I never seen, he never displayed a temper to me.

(RT 4397-98.)

Q. How about the defendant, [petitioner]?

A. Well, [petitioner] didn't let anyone push him around.

1 Q. Do you remember telling me he would strike like a cobra?

A. Right.

2 Q. That [petitioner] would strike like a cobra?

A. I saw him whip a man that was over 200 pounds; he whipped him.

3 Q. [Petitioner] did?

A. Right.

4 Q. [Petitioner] is not afraid of anybody, right?

A. No.

5 Q. Colin wouldn't be afraid of R.C., would he?

A. Oh, definitely not, R.C. was small.

6 (RT 4398.)

7 The California Supreme Court considered and rejected this allegation on direct appeal,  
8 stating that:

9  
10 [Ms. Goldman's preliminary hearing] testimony must be placed in context.  
11 Shortly before, Goldman had testified, in response to the prosecutor's question,  
12 that she wanted to make sure defendant knew she wasn't the person who turned  
13 him in.

14 Generally, evidence that a witness is afraid to testify is admissible as relevant to  
15 the witness's credibility. [Citations] In apparent recognition of this rule, defendant  
16 does not complain of Goldman's earlier testimony that she was afraid defendant  
17 might "do something to [her] if [she] talked to the police," nor does he complain  
18 of Detective Stokes's subsequent testimony that Goldman told him defendant "had  
19 said he would kill her if she or anyone else talked about what he had told [her and  
20 Buchanan]. The testimony defendant does complain of simply went to Goldman's  
21 belief that defendant was capable of carrying out his threats of retaliation.

22 ...

23 Defendant complains his trial counsel was also ineffective in failing to object to  
24 [the above noted] testimony by Goldman concerning [RC's] ... benign character.

25 Again, to establish ineffective assistance of counsel, a defendant must  
26 demonstrate his attorney's performance fell below an objective standard of  
27 reasonableness, and there is a reasonable probability that, but for counsel's  
28 unprofessional errors, the result of the proceeding would have been different.  
[Citation] A reasonable probability is a probability sufficient to undermine  
confidence in the outcome. [Citation] We do not find it reasonably probable the  
outcome here would have been different in the absence of this testimony.

Dickey, 35 Cal. 4th at 912-13.

The state supreme court was not unreasonable in rejecting these allegations for the  
reasons stated by that court. Moreover, the record as a whole does not necessarily demonstrate  
Goldman's noted testimony was improper evidence of bad character offered to show a  
propensity to commit crimes of violence or lack thereof. Goldman's noted testimony does not

1 appear to contravene petitioner's statements that RC assaulted the victims in sudden drug  
2 induced and mental illness related outburst. (RT 4173-77, 4314-17, 4483, 4640-42.) Nor does it  
3 suggest petitioner was prone to violence when viewed in the context of Schultz's cross-  
4 examination of Goldman which elicited the following:

5 Q. How long did you know R.C.?

6 A. Six or seven months.

7 Q. How long did you live together?

8 A. Three months.

9 Q. You saw Colin and another person get into a fight?

10 A. Yes.

11 Q. Did you know what the fight was over, what they were fighting about?

12 A. The man did something wrong to Colin.

13 Q. Do you know what?

14 A. No, I don't know what.

15 Q. Did you see it start?

16 A. I saw the man strike Colin. He - the man was the first one that threw the blow.  
17 And I saw Colin, the guy that lived with us, the name was Jerry, he was in the  
18 kitchen cooking and he- he is a karate expert and he jumped up in Colin's face  
19 and I guess Colin thought that he was fixing to hit him and he hit him so fast I  
20 couldn't believe it.

21 Q. The first time that you talked about, the man hit Colin first?

22 A. Yes.

23 Q. And the second time, this Jerry came at him?

24 A. Yes.

25 Q. Did it appear to you that Jerry was being aggressive?

26 A. Well, Jerry is aggressive.

27 (RT 4398-99.) Actions taken in self-defense or response to aggression might not suggest an  
28 inclination or predisposition toward violence. Schultz's statement in his habeas declaration that  
he did not recognize a basis for objection or prejudice to the defense from Goldman's noted  
testimony (see SHCP, Ex. B ¶ 9) does not necessarily suggest otherwise or that he failed to make  
a valid character evidence objection. State law error alone is not a basis for relief. *Estelle*, 502  
U.S. at 71 (1991), citing *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983) ("[T]he Due  
Process Clause does not permit the federal courts to engage in a finely tuned review of the  
wisdom of state evidentiary rules").

(ii) False Testimony – Use of Cocaine

Petitioner alleges that Schultz failed to object to false evidence in the form of the  
prosecution's misreading at trial of Goldman's preliminary hearing testimony to attribute

1 Goldman's use of cocaine to petitioner. (Doc. No. 116 at 352:9-19.)

2 Goldman testified at preliminary hearing that on the day after the crimes she injected  
3 cocaine purchased by petitioner. (RT 4371.) However, when the prosecution read Goldman's  
4 testimony into the record, it stated that petitioner (rather than Goldman) injected cocaine the day  
5 after the crimes. (CT 61.)

6 Nevertheless, the state supreme court could reasonably have denied relief on this basis.  
7 Petitioner has not demonstrated and the record seems not to suggest that the prosecution's  
8 misstatement was anything more than an errant reading of the passage. See *Tayborn v. Scott*,  
9 251 F.3d 1125, 1130 (7th Cir. 2001) (statements that are merely inconsistent, rather than  
10 fabrications fall short of being perjurious statements).

11 In any event, the errant reading considered in context would not suggest a reasonable  
12 likelihood that the error could have affected the jury's verdict. Goldman's testimony both at the  
13 preliminary hearing and as read into the record at trial was clear that petitioner used cocaine with  
14 Goldman on the day after the crime and that this was the only time Goldman saw petitioner use  
15 cocaine. (RT 4367-71.) Any error of state law alone is not a basis for federal habeas relief.  
16 *Estelle*, 502 U.S. at 71.

17 (iii) Prejudice

18 Petitioner argues that absent the noted bad and false character evidence suggesting  
19 petitioner's predisposition to participate in and commit the crimes there is a reasonable  
20 probability petitioner would not have been convicted.

21 However, that state supreme court could reasonably have admitted the alleged character  
22 evidence as going to Goldman's credibility, a valid purpose under state law. See Evid. Code §  
23 1101(c) ("[n]othing in this section affects the admissibility of evidence offered to support or  
24 attack the credibility of a witness."); see also Evid. Code § 780. Goldman had testified that she  
25 was afraid of petitioner and that he had threatened to kill her (RT 4373-77, 4615-17), such that  
26 she wanted assurance petitioner knew she did not turn him in to authorities. (RT 4397-98.)  
27 Similarly, Buchanan testified that he felt both he and Goldman were in danger from petitioner

1 following the latter's confession to them. (RT 4756.)

2 Furthermore, as noted the alleged false testimony could reasonably be seen as non-  
3 prejudicial. Notwithstanding the errant reading into the record of Goldman's preliminary  
4 hearing testimony, the jury reasonably would have been aware petitioner used cocaine only on  
5 the day after the crimes given the noted evidence.

6 (iv) Conclusions

7 Accordingly, a fair-minded jurist could have found that petitioner failed to establish  
8 Schultz was ineffective by failing to object to evidence of the character of both RC and petitioner  
9 and the alleged false testimony regarding petitioner's use of cocaine, and that absent this  
10 allegedly deficient conduct a different outcome was reasonably probable. Strickland, 466 U.S.,  
11 at 687-98.

12 It does not appear that the California Supreme Court's rejection of the claim was contrary  
13 to, or an unreasonable application of, clearly established federal law, as determined by the  
14 Supreme Court, or that the state court's ruling was based on an unreasonable determination of  
15 the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. §  
16 2254(d).

17 Claim II(R) is denied.

18 **m. Analysis of Claim II(T)**

19 Petitioner alleges that Schultz was ineffective by failing to object to prosecutorial  
20 misstatements during guilt phase closing argument that were unsupported in the record. (Doc.  
21 No. 51-1 ¶¶ 406-408.)

22 Petitioner complains that Hahus engaged in improper hyperbole in arguing Penal Code  
23 section 128, as follows:

24  
25 Do you think Gene Buchanan would lie to send a man to prison? Perhaps.  
26 Do you think Gene Buchanan would lie to send a man to prison that he  
27 doesn't like? Even more perhaps. Do you think Gene Buchanan would lie to  
28 send a man to prison behind a murder charge where Gene Buchanan himself  
could face a capital case for it?

1 (RT 4971-72; see also claims II(K) and VIII.)

2 The California Supreme Court considered and rejected this allegation, stating that:

3  
4 Defendant argues section 128 is not a meaningful deterrent to perjury. Given the  
5 inevitable time lapse between potential conviction and execution, and the remote  
6 prospect of conclusive exonerating evidence being discovered after an execution,  
7 the chances of a successful prosecution under Penal Code section 128 in any case  
8 are so remote as to make the proffered evidence wholly irrelevant.

9 We decline to second-guess the Legislature, which in enacting the section, clearly  
10 believed it would have a meaningful deterrent effect. Admittedly, the delay  
11 between conviction and execution has grown exponentially since section 128 was  
12 enacted in 1872. However, by 1997, when the Legislature amended and thereby  
13 reaffirmed the section, the notion of swift justice in capital cases was already a  
14 thing of the past. Moreover, with the advent of DNA testing, the prospect of  
15 conclusive exonerating evidence being discovered after an execution is, if  
16 anything, less “remote.” In any event, the stakes under section 128, “death or life  
17 imprisonment without possibility of parole,” are so high a potential perjurer may  
18 well decide it is not worth the risk, however small.

19 -----FOOTNOTE-----

20 n.11 The 1977 amendment added the phrase “or life imprisonment without  
21 possibility of parole,” as well as the second sentence. [Citation]

22 -----END FOOTNOTE-----

23 Finally, since it was proper for the prosecutor to ask Buchanan whether he had  
24 been made aware of section 128, defense counsel was not ineffective insofar as he  
25 failed to perfect his objections to this line of inquiry.

26 Dickey, 35 Cal. 4th at 912. That court’s rejection of the allegation was not unreasonable for the  
27 reasons stated and those discussed in claims II(K) and VIII. Petitioner has not demonstrated  
28 clearly established law that Schultz erred by not objecting to Penal Code section 128 on the facts  
of this case. Failure to object is not ineffectiveness where an objection would have lacked merit.  
United States v. Aguon, 851 F.2d 1158, 1172 (9th Cir. 1988), overruled on other grounds by  
Evans v. United States, 504 U.S. 255 (1992); see also Strickland, 466 U.S., at 687-698.

29 Petitioner also complains that Schultz failed to object to Hahus’s allegedly false and  
30 prejudicial argument that: i) that the cord around Louis Freiri’s neck matched the cord on a  
31 venetian blind provided to Detective Stokes by Edith Hays; and ii) that the only fingerprint found  
32

1 on the venetian blind was petitioner's fingerprint. (Doc. No. 116 at 203:6-205:5; Doc. No. 128  
2 at 104:21-25, see also RT 4966-68, 4998.)

3 The California Supreme Court considered and rejected these allegations, stating that:

4  
5 Defendant claims the prosecutor, in his closing argument to the jury in the guilt  
6 phase of the trial, made two "misstatements amounting to misconduct." His  
7 counsel's failure to perfect objections to these instances of alleged misconduct,  
8 defendant contends, constituted ineffective assistance.

9 "As we have noted repeatedly, the mere failure to object rarely rises to a level  
10 implicating one's constitutional right to effective legal counsel. [Citation]

11 With regard to the first instance of alleged misconduct by the prosecutor, defense  
12 counsel did object, and the objection was sustained, and so ineffective assistance  
13 cannot be claimed. As to the second, we find no misconduct.

14 The prosecutor, defendant complains, "took on the role of an unsworn forensics  
15 expert in constructing an unreasonable inference that a single fingerprint  
16 [belonging to defendant] found on a blind accessible to everyone at the apartment  
17 before and after the incident implied some form of special handling by the owner  
18 of the print that could only be explained by the act of cutting a cord from the  
19 blind. Since there obviously was no expert testimony to support this contrived  
20 inference, the argument constituted statements of supposed facts not in evidence,  
21 to which counsel failed to object."

22 In his argument, defense counsel acknowledged that defendant's fingerprint was  
23 on one of the slats of the venetian blind. He then raised the question why the  
24 fingerprints of others who had handled the blind, including Cullumber and a Jerry  
25 Lilliard, were not. "[S]omething to consider," he said.

26 The prosecutor responded, "[D]efense counsel points out that neither Jerry's  
27 fingerprint nor R.C.'s fingerprint was found on there. I submit to you, all they did  
28 was pick it up. They didn't have to hold it securely while the cord was cut from it.  
They didn't have to apply pressure to it. They didn't have to hold it immobile  
while the cord was being cut from it. That will explain the pressure that results in  
the oils being left that results in a latent being lifted, that results in finding it was  
his fingerprint, and not simply being picked up off the floor because it fell off the  
door. If that's all that happened wouldn't there have been other prints on it?"

It is well settled that a prosecutor is given wide latitude during argument. The  
scope of this latitude includes stating matters not in evidence, but which are  
common knowledge. [Citation] It is a matter of common knowledge that,  
assuming an object is of the sort that takes fingerprints, and that one is  
barehanded, the harder one presses on it with one's fingers, the more likely one is  
to leave a fingerprint. Therefore, the prosecutor's argument was not misconduct,  
and, a fortiori, it was not ineffective assistance for defense counsel not to object it.  
In any event, the jury was instructed that statements made by counsel were not  
evidence, and that they were to reject interpretations of the evidence they found to  
be unreasonable.

1 Dickey, 35 Cal. 4th at 914-15.

2 The state supreme court reasonably rejected the allegation of improper argument  
3 regarding whether the crime scene cord matched the venetian blind retrieved by Stokes. Hahus  
4 argued to the jury that the prosecution:

5  
6 Can't match the cut [of the ligature to the samples]. There's no magic - - no  
7 magic way to put this under a magic microscope and match the cut. The only  
8 thing that the lab can tell us is essentially the same thing your naked eye can tell  
9 you, it appears to be from the same material, same dimensions and the same  
10 weave. And there's no cord on that [v]enetian blind and that's the [v]enetian blind  
11 that was seen taken out of the closet by the [petitioner]; taken into a bedroom,  
12 where a knife was found shortly thereafter. A knife that could cut the cord off of  
13 it, and the cord was then found around the ne[ck] of Louis Freiri."

14 (RT 4966.) This argument was not without support in the record.

15 Hahus stated that no cord sample was taken from the venetian blind retrieved by Stokes,  
16 but rather the samples were taken from the larger blinds remaining in the apartment. (RT 4413-  
17 14; 4536-39.) He also stated that the cord samples from the larger blinds did not match the cord  
18 around Freiri's neck. (RT 4416, 4966.)

19 Prosecution expert Cortner's report and testimony was not inconsistent with Hahus's  
20 noted argument. Cortner testified that the cord from Freiri's neck was similar to the reference  
21 samples but that "[he] was not able to make a physical match to positively say it came from that  
22 particular cord that came from the venetian blind." (RT 4416; see also claims II(F), II(S).) He  
23 opined that cord from Freiri's neck (RT 4532) and reference cords, are consistent with each other  
24 in color, weave, pattern and thickness; that they are all made of cotton; but that a positive match  
25 between the two samples could not be made due to the fibrous nature of the cord. (RT 4203-04,  
26 4347, 4413-16; see also SHCP, Ex. L; People's Exhibits 26, 28, 30.)

27 The state supreme court also could reasonably have rejected the allegation of improper  
28 argument regarding the only fingerprint on the venetian blind being petitioner's fingerprint.  
Petitioner contends that Hahus improperly argued an inference that only petitioner's print was  
found on the blind because only he held it with sufficient pressure, while cutting the cord, to

1 leave a print. (RT 4573, 4998.) However, the testimony of prosecution fingerprint expert Hall  
2 provided some support for this argument, he suggested that fingerprint details are a function of  
3 gripping an object. (RT 4577.)

4 Hahus reliance thereon, as well as on common experience as suggested by the state  
5 supreme court, could reasonably have supported his argument. See Dickey, 35 Cal. 4th at 914-  
6 15. Furthermore, nothing in the testimony of petitioner’s forensic expert, Dr. Barnett, or the  
7 existence of additional fingerprint details on the venetian blind as acknowledged by both experts  
8 Hall and Barnett, appears to suggest otherwise. (See RT 4981-95; see also claims II(F), II(S),  
9 II(T), XIV.) Likewise petitioner’s surmise that firm pressure on the blind would have left a print  
10 on the top frame of the blind rather than a slat (where petitioner’s print was found) could  
11 reasonably be seen as unpersuasive. (See Doc. No. 51-1 ¶ 319; RT 4576.)

12 Additionally, the Ninth Circuit has repeatedly held that, “absent egregious  
13 misstatements,” failing to object to error during closing argument falls within the “wide range”  
14 of reasonable assistance. *Cunningham v. Wong*, 704 F.3d 1143, 1159 (9th Cir. 2013), quoting  
15 *United States v. Necoechea*, 986 F.2d 1273, 1281 (9th Cir. 1993).

16 Here, the jury was instructed that counsel’s argument was not evidence. (RT 5008.)

17 Accordingly, a fair-minded jurist could have found that petitioner failed to establish  
18 Schultz was ineffective by failing to object to prosecutorial misstatements during guilt phase  
19 closing argument, and that absent this allegedly deficient conduct a different outcome was  
20 reasonably probable. *Strickland*, 466 U.S., at 687-98.

21 It does not appear that the California Supreme Court’s rejection of the claim was contrary  
22 to, or an unreasonable application of, clearly established federal law, as determined by the  
23 Supreme Court, or that the state court’s ruling was based on an unreasonable determination of  
24 the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. §  
25 2254(d).

26 Claim II(T) is denied.

27 **n. Review of Claims II(V) and XXIV**

1           Petitioner alleges that Schultz and all prior counsel were ineffective by failing to object to  
2 his pretrial and trial conditions of confinement and that he suffered violation of his rights under  
3 the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution. (Doc. No.  
4 51-1 ¶¶ 415-418, 892-898.)

5           The California Supreme Court on habeas review summarily denied these allegations on  
6 the merits and on procedural grounds. (Lod. Doc. No. 31.)

7           (i)       Ineffective Assistance

8           Petitioner alleges that counsel were deficient by failing to object to his pretrial and trial  
9 conditions of confinement that severely limited his ability to concentrate and left him unable to  
10 participate in and assist with his defense, denying him due process and a fair trial. He purports to  
11 incorporate all other allegations and claims in the petition. (Doc. No. 51-1 ¶ 893.) He argues  
12 that counsel knew petitioner was housed with mentally ill prisoners who at all times screamed  
13 and were noisy and prevented his sleeping and focusing on his trial, such that he “could not  
14 consult with his lawyer with a reasonable degree of rational understanding and did not have a  
15 rational as well as factual understanding of the proceedings against him.” (Doc. No. 116 at  
16 397:27-398:22 citing *Drope v. Missouri*, 420 U.S. 162, 172 (1975), quoting *Dusky v. United*  
17 *States*, 362 U.S. 402, 402 (1960). He argues that all his prior post-judgment counsel were  
18 similarly deficient by failing to bring this claim.

19           However, the state supreme court could reasonably have denied this claim. Petitioner has  
20 not demonstrated by reference to the evidentiary record what Schultz and his post-conviction  
21 counsel knew of his housing conditions and any negative impact therefrom on petitioner.  
22 Assuming without deciding that petitioner may incorporate into these claims his other claims and  
23 allegations, see *Robinson v. Miller*, 2011 WL 2193393, at \*1 (N.D. Cal. June 3, 2011) (petitioner  
24 must clearly state each ground for relief, and provide sufficient facts to support each claim); see  
25 also Rules Governing § 2254 Cases, Rule 2, 28 U.S.C. foll. § 2254), it remains here that none of  
26 petitioner’s guilt phase claims passes through the § 2254(d) gateway for the reasons stated.

27           Nor has petitioner shown prejudice, how and why the record suggests he was unable to  
28

1 concentrate and participate in and assist with his defense. Significantly, neither Schultz nor  
2 petitioner's prior post-conviction counsel provided a declaration in support of these allegations.  
3 His allegation that additional sleep would have resulted in a different outcome reasonably could  
4 be seen as only speculative. The state supreme court would not have been unreasonable in  
5 denying the allegation on that basis.

6 (ii) Due Process

7 Similarly, the state supreme court could reasonably have found petitioner's alleged  
8 conditions of confinement did not deny him due process and a fair trial. The Supreme Court has  
9 stated that a due process claim requires a showing that the error "so infected the entire trial that  
10 the resulting conviction violate[d] due process", *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977),  
11 quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973), making the trial fundamentally unfair.  
12 *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir. 1991). As discussed above, petitioner  
13 does not point to facts showing a lack of sleep impacted much less denied him a fair trial.

14 Even if there was constitutional error, the federal court must still determine whether there  
15 was structure error or actual prejudice. Petitioner argues the error was structural so as to  
16 dispense with any need to show Brecht prejudice. 507 U.S. at 637-38 & n.9. Structural error is  
17 error that permeates "[t]he entire conduct of the trial from the beginning to end" or "affect[s] the  
18 framework within which the trial proceeds." *Campbell v. Rice*, 408 F.3d 1166, 1171, citing  
19 *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). The list of structural errors is short and  
20 includes "total deprivation of the right to counsel at trial"; "a judge who was not impartial";  
21 "unlawful exclusion of members of the defendant's race from a grand jury"; "the right to self-  
22 representation at trial"; "the right to[a] public trial"; and "[d]enial of the right to a jury verdict of  
23 guilt beyond a reasonable doubt." See *id.*, at 1172.

24 For the reasons stated the state court could reasonably have found no structural error by  
25 virtue of a denial of due process. The question remaining is then whether any such error "had  
26 substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S.  
27 at 637. Petitioner has not pointed to facts in the record demonstrating sleep deprivation impaired  
28

1 his abilities to assist in his defense and to comprehend the proceedings so as to deny him due  
2 process and a fair trial. (See e.g., Doc. No. 116 at 397:18-23, citing *Dillard v. Pitchess*, 399 F.  
3 Supp. 1225, 1237 (C.D. Cal. 1975) (“[D]ue process of law requires that a defendant not be  
4 denied the opportunity for a reasonable night's sleep before each day of his trial.”).) The state  
5 supreme court could reasonably have found allegations that sleep deprivation negatively  
6 impacted petitioner’s performance at trial to be unsupported in the record and without merit.

7 Accordingly, petitioner has not made any factual showing that his ability to participate  
8 and assist with the defense was impacted and that absent such conditions a more favorable result  
9 was reasonably probable.

10 A fair-minded jurist could have found that petitioner’s pretrial and trial conditions of  
11 confinement were not unconstitutional; and that petitioner failed to establish counsel were  
12 ineffective by failing to object to such conditions of confinement and that absent this allegedly  
13 deficient conduct a different outcome was reasonably probable. *Strickland*, 466 U.S., at 687-98.

14 It does not appear that the California Supreme Court’s rejection of these claims was  
15 contrary to, or an unreasonable application of, clearly established federal law, as determined by  
16 the Supreme Court, or that the state court’s ruling was based on an unreasonable determination  
17 of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. §  
18 2254(d).

19 Claims II(V) and XXIV are denied.

20 **o. Analysis of Claim II(W)**

21 Petitioner alleges ineffective assistance of counsel by the cumulative effect of all pretrial  
22 and guilt phase errors, violating his rights under the Sixth, Eighth and Fourteenth Amendments  
23 to the U.S. Constitution. (Doc. No. 51-1 ¶¶ 419-420.)

24 The California Supreme Court considered and rejected for lack of merit claimed guilt  
25 phase cumulative error as to the claims then before it. *Dickey*, 35 Cal. 4th at 915.

26 Petitioner alleges *Strickland* prejudice resulting from the cumulative effect of all  
27 counsel’s pretrial and guilt phase errors including i) failure to investigate and prepare adequately

1 for trial; ii) failure to consult adequately with petitioner; iii) failure to conduct proper voir dire;  
2 iv) failure to object to evidence; and v) failure to propose, or object to, jury instructions. He cites  
3 to *Harris v. Wood*, a case where the Ninth Circuit found eleven serious errors by counsel  
4 suggesting a reasonable probability of a different outcome absent the errors. 64 F.3d 1432, 1438  
5 (9th Cir. 1995) (“[T]he plethora and gravity of [counsel’s] deficiencies rendered the proceeding  
6 fundamentally unfair.”).

7         However, for the reasons stated, petitioner presents no individual errors for this court to  
8 aggregate. See *Thompson*, 86 F.3d at 1521, (“finding no prejudice from the errors considered  
9 separately, we also find no cumulative prejudice”); see also *Rupe*, 93 F.3d at 1445 (holding that  
10 there was no reason to reverse for cumulative error because there was no violation of federal  
11 rights in the guilt phase).

12         Accordingly, a fair-minded jurist could have found that petitioner failed to establish that  
13 Schultz performed deficiently as a result of the cumulative effect of all alleged pretrial and guilt  
14 phase errors, and that absent this allegedly deficient conduct a different outcome was reasonably  
15 probable. *Strickland*, 466 U.S. at 687-98.

16         It does not appear that the California Supreme Court’s rejection of the claim was contrary  
17 to, or an unreasonable application of, clearly established federal law, as determined by the  
18 Supreme Court, or that the state court’s ruling was based on an unreasonable determination of  
19 the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. §  
20 2254(d).

21         Claim II(W) is denied.

22 **B. Trial Court Error Claims**

23 1. Clearly Established Law

24         Trial court error violates due process where it renders the resulting criminal trial  
25 fundamentally unfair. *Chambers*, 410 U.S. at 294, 303.

26 2. Review of claim IV

27         Petitioner alleges that the trial court denied him due process by holding jury instruction  
28

1 discussions off the record and outside of his presence, violating his rights under the Fifth, Sixth,  
2 Eighth and Fourteenth Amendments to the U.S. Constitution.<sup>11</sup> (Doc. No. 51-1 ¶ 617-26.)

3 **a. State Court Direct and Collateral Review**

4 Petitioner presented this claim to the California Supreme Court in his second state habeas  
5 petition and that court denied the claim summarily on the merits and on procedural grounds.  
6 (Lod. Doc. No. 31.)

7 **b. Analysis of Claim IV**

8 (i) Discussions Off the Record

9 Petitioner revisits allegations in claim II(J), that California law requires death penalty  
10 proceedings be conducted on the record (see Penal Code. § 190.9(a)(1)). He argues this error left  
11 an incomplete appellate record and denied him meaningful appellate review. See Coppedges,  
12 369 U.S. at 446 (“[a] Court of Appeals must provide the applicant with the assistance of counsel  
13 and with a record of sufficient completeness” to effect his appeal); Draper v. Washington, 372  
14 U.S. 487, 496 (1963) (state must provide the indigent defendant with means of presenting his  
15 contention to the appellate court which are as good as those available to a non-indigent defendant  
16 with similar contentions); Frye, 18 Cal. 4th at 941 (reversal required when the resulting appellate  
17 record is not adequate to permit meaningful appellate review). He argues that as a result the  
18 appellate record did not show what arguments and objections his counsel made regarding jury  
19 instructions, and what errors the court made with respect to handling such requests, issues which  
20 might have been raised on appeal. He cites to modified CALJIC 8.80 (see discussion claim  
21 II(M)), as an example of such an incomplete record. (See also RT 4944.)

22 The state supreme court was not unreasonable in denying this claim. Petitioner does not  
23 provide authority that on the facts of this case the failure to record jury instruction discussion  
24 resulted in a fundamentally unfair trial. (See e.g., claim II(M).) The allegation reasonably could  
25 be denied as speculative. See e.g., Madera v. Risley, 885 F.2d 646, 648 (9th Cir. 1989) (“There

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26 <sup>11</sup> Respondent contends this claim is not cognizable because it creates and retroactively applies a “new rule” of  
27 constitutional law under Teague v. Lane, 489 U.S. 288 (1989). Respondent advances this argument as to numerous  
28 other claims as well. Unless otherwise noted, the court declines to address Respondent’s Teague arguments where  
the claim lacks merit.

1 is no Supreme Court or Ninth Circuit authority on the due process implications of a state court's  
2 failure to record portions of a criminal trial.”). In Madera, the Ninth Circuit found no due  
3 process violation or ineffective assistance where a reconstructed transcript of unrecorded  
4 proceedings considered in the context of the entire trial record did not demonstrate prejudice.  
5 See *Id.*, at 649.

6 Petitioner’s citation to *Britt v. North Carolina* is not clear authority otherwise. 404 U.S.  
7 226 (1971). In *Britt*, the Supreme Court identified two criteria relevant to the determination of  
8 need for a transcript without cost: “(1) the value of the transcript to the defendant in connection  
9 with the appeal or trial for which it is sought, and (2) the availability of alternative devices that  
10 would fulfill the same functions as a transcript.” *Id.* at 227, n.2. Here, petitioner has not  
11 demonstrated how and why the summary record of the jury instruction proceedings, acquiesced  
12 in by petitioner and his counsel was inadequate. (See e.g., claim II(M); see also *Britt*, 404 U.S.  
13 at 230 (no prejudice where petitioner concedes sufficiency of alternative record); RT 4947-49.)

14 (ii) *Discussions Out of Petitioner’s Presence*

15 Petitioner also alleges that the trial court erred by allowing these jury instruction  
16 discussions, which he regards as a critical stage of his proceeding to be held while he was absent.  
17 (RT 4938-49; see also claim II(J).) He argues that Schultz did not adequately prepare for the  
18 jury instruction conference and did not research and discuss the instructions with petitioner prior  
19 to the conference. (See claims II(H), II(M), II(N), II(O), II(P), II(Q); SHCP, Ex. C ¶ 1.) He  
20 argues that he was given only a few minutes to review the instructions at proceedings  
21 summarizing the conference. (RT 4948-49.)

22 *Knowing and Intentional Waiver*

23 Petitioner argues he was denied his right to be present at all critical states of trial. See  
24 *Stincer*, 482 U.S. at 745 (“[A] defendant is guaranteed the right to be present at any stage of the  
25 criminal proceeding that is critical to its outcome if his presence would contribute to the fairness  
26 of the procedure.”); *Gagnon*, 470 U.S. at 526 (a defendant has a federal due process right to be  
27 present at court proceedings if his presence has a reasonably substantial relation to his ability to  
28

1 defend himself).

2           However, a capital defendant may validly waive his presence at critical stages of the trial,  
3 at least where evidence is not taken. See e.g., *People v. Weaver* 26 Cal. 4th 876, 966 (2001);  
4 *People v. Jackson* 13 Cal. 4th 1164, 1209–1210 (1996). Such a waiver is ordinarily an  
5 intentional relinquishment or abandonment of a known right or privilege. *Johnson v. Zerbst*, 304  
6 U.S. 458, 464 (1938).

7           Here, petitioner was advised why he was not present during the instruction conference,  
8 i.e., that the trial court wanted to avoid an “awkward record” and focus on the “end result”. (RT  
9 4938.) The trial court placed on the record a summary the jury instruction discussions and asked  
10 petitioner whether he was satisfied with those proceedings that were conducted outside his  
11 presence; petitioner responded in the affirmative. (RT 4938-49.) The state supreme court could  
12 reasonably have found that Petitioner failed to show on the evidentiary record that his waiver  
13 was other than knowing and intentional.

#### 14           Critical Stage of the Proceeding

15           Petitioner argues the instruction conference was a critical part of his trial. (Doc. No. 51-1  
16 ¶ 626.) He points to state law, Penal Code section 190.9(a)(1) discussed in claim II(J), ante, and  
17 argues that death penalty cases require greater protections to ensure reliability. See *Woodson v.*  
18 *North Carolina*, 428 U.S. 280, 305 (1976) (death sentence qualitatively different from sentence  
19 of imprisonment; there is a corresponding difference in the need for reliability). However,  
20 petitioner fails to identify clearly established law for the proposition that a jury instruction  
21 conference is a critical stage of trial.

22           Respondent points to Ninth Circuit authority suggesting otherwise. See e.g. *United States*  
23 *v. Sherman*, 821 F.2d 1337, 1338-39 (9th Cir. 1987) (not plain error to exclude federal criminal  
24 defendant from jury instruction conference). Petitioner responds that *Sherman* is distinguishable  
25 because in that case defendant was not facing capital charges and did not claim instructional  
26 error such as petitioner claims here, citing claims II(M), II(N), II(O), II(P), II(Q), XII and XVIII.

27           As noted, the Supreme Court has stated that a defendant has a right to be present  
28

1 “whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to  
2 defend against the charge.” Stincer, 482 U.S. at 745, quoting Snyder, 291 U.S. at 105-06.  
3 However, he need not be present “when presence would be useless, or the benefit but a shadow.”  
4 Id., quoting Snyder, 291 U.S. at 106-07; see Rice, 77 F.3d at 1140 n.2 (listing cases finding right  
5 to presence not violated). Moreover, “the issue of whether a defendant must be present at all  
6 times in a capital trial has not yet been settled by the Supreme Court.” Moore, 344 F.3d at 1323.

7 California courts are in accord that a defendant’s “absence from various court  
8 proceedings, even without waiver, may be declared non-prejudicial in situations where his  
9 presence does not bear a reasonably substantial relation to the fullness of his opportunity to  
10 defend against the charge.” Johnson, 6 Cal. 4th at 18.

11 It appears the Supreme Court has not clearly established what would contribute to the  
12 fairness of the procedure at a stage critical to [the criminal proceeding’s] outcome for purposes  
13 of a due process violation). See Stincer, 482 U.S. at 745. Here, for the reasons stated in claims  
14 II(M), II(N), II(O), II(P), II(Q), XII, XVIII and XIX, the state supreme court reasonably could  
15 have found petitioner has not demonstrated that his presence at the conference on jury  
16 instructions could have contributed to the fairness of his trial proceeding. Petitioner has not  
17 demonstrated that any evidence was taken at the conference. Defense counsel was present at the  
18 conference and represented petitioner without objection. See Campbell, 408 F.3d at 1173  
19 (defendant’s absence from chambers conference regarding defense counsel’s potential conflict of  
20 interest not a due process violation where no denial of fair and impartial trial).

21 (iii) Prejudice

22 Petitioner alleges these deficiencies had a substantial and injurious effect on the verdict  
23 under Brecht. 507 U.S. at 637.

24 However, for the reasons stated, the California Supreme Court could reasonably have  
25 found petitioner did not demonstrate that his presence would have prevented alleged instructional  
26 errors. As noted, petitioner, when given the opportunity to do so at trial following review of the  
27 final instructions and consultation with Schultz did not object to the final instructions or raise  
28

1 any concern with them. Instead, petitioner concedes that “the court and counsel later met with  
2 the reporter and summarized the contents of the conference and any objections by the parties.”  
3 (RT 4938.)

4 The state supreme court could reasonably have found that petitioner failed to demonstrate  
5 the trial record was incomplete in a way that impacted his constitutional rights. Similarly, that  
6 court could reasonably have found petitioner’s absence from the jury instruction conference was  
7 not substantially related to his ability to completely defend the charges.

8 The state supreme court could reasonably have found that even if the trial court erred as  
9 alleged such did not have a substantial impact on the jury’s verdict.

10 (iv) Conclusions

11 For the reasons stated, a fair-minded jurist could have found that petitioner failed to  
12 establish that the trial court denied him due process by holding jury instruction discussions off  
13 the record and outside of his presence, substantially affecting the jury’s verdict.

14 It does not appear that the California Supreme Court’s rejection of the claim was contrary  
15 to, or an unreasonable application of, clearly established federal law, as determined by the  
16 Supreme Court, or that the state court’s ruling was based on an unreasonable determination of  
17 the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. §  
18 2254(d).

19 Claim IV is denied.

20 **3. Review of Claim XII<sup>12</sup>**

21 Petitioner alleges the trial court erred by giving erroneous guilt phase instructions,  
22 violating his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S.  
23 Constitution. (Doc. No. 51-1 ¶¶ 701-721.)

24 **a. State Court Direct and Collateral Review**

25 The California Supreme Court, on habeas review summarily denied these allegations on  
26 the merits and certain of the allegations were denied on procedural grounds. (Lod. Doc. No. 31.)  
27

---

28 <sup>12</sup> The court does not reach the penalty phase allegations included in claim XII.

1 Certain of the allegations were also denied on direct appeal. Dickey, 35 Cal. 4th at 900-07.

2 **b. Clearly Established Law – Instructional Error**

3 Any error in the state court’s determination of whether state law supported an instruction  
4 in this case cannot form the basis for federal habeas relief. See Estelle, 502 U.S. at 71 (“[T]he  
5 Due Process Clause does not permit the federal courts to engage in a finely tuned review of the  
6 wisdom of state evidentiary rules”). “Failure to give [a jury] instruction which might be proper  
7 as a matter of state law, by itself, does not merit federal habeas relief.” Menendez v. Terhune,  
8 422 F.3d 1012, 1029 (9th Cir. 2005), quoting Miller v. Stagner, 757 F.2d 988, 993 (9th Cir.  
9 1985).

10 The Supreme Court has stated instead that a claim that a court violated a petitioner’s due  
11 process rights by omitting an instruction requires a showing that the error “so infected the entire  
12 trial that the resulting conviction violat[e]d due process.” Kibbe, 431 U.S. at 154. The burden  
13 on petitioner is especially heavy “where ... the alleged error involves the failure to give an  
14 instruction.” Clark v. Brown, 450 F.3d 898, 904 (9th Cir. 2006).

15 Even if constitutional instructional error has occurred, the federal court must still  
16 determine whether Petitioner suffered actual prejudice, that is, whether the error “had substantial  
17 and injurious effect or influence in determining the jury’s verdict.” Brecht, 507 U.S. at 637. A  
18 “substantial and injurious effect” means a “reasonable probability” that the jury would have  
19 arrived at a different verdict had the instruction been given. Clark, 450 F.3d at 916.

20 **c. Analysis of Claim XII**

21 Petitioner revisits allegations in certain of his ineffective assistance of counsel –  
22 instructional error claims, ante. Here, he recasts claims II(M), II(N), II(O), II(P), II(Q) as alleged  
23 trial court error. Because petitioner has not demonstrated any prejudicial instructional error for  
24 the reasons stated in those claims as summarized below, the following allegations were  
25 reasonably rejected as court error claims by the California Supreme Court.

26 (i) Actus Reus

27 Petitioner alleges that former Penal Code section 190.2(b) under which petitioner was  
28

1 charged required proof of some act by petitioner in aid of the killing(s) to which the five charged  
2 special circumstances related. (Doc. No. 128 at 122:3-9, citing Sanders, 51 Cal. 3d at 517,  
3 quoting Anderson, 43 Cal. 3d at 1145) (“the special circumstance instruction on aiding and  
4 abetting mirrors the language in section 190.2, subdivision (b), and thus unambiguously sets  
5 forth the rule that the aider and abetter must intentionally aid in a killing.”.)

6 Petitioner argues the trial court erred in giving CALJIC 8.80 as modified by the  
7 prosecution because the modified instruction omitted an actus reus component, i.e., the special  
8 circumstance requirement of an act in aid of a killing. He claims the jury was erroneously  
9 instructed that “the only finding required by the instruction for aider or abettor special  
10 circumstance liability was an act in aid of the burglary/robbery and an intent to kill or an intent to  
11 aid another in a killing.” (Doc. No. 51-1 ¶ 704; see also Doc. No. 128 at 122:2-20.)

12 Petitioner argues the instructional error was compounded by the prosecutor’s closing  
13 argument that the special circumstance could be established without any act in aid of a killing  
14 (RT 4973-81) and Schultz’s conceded failure to object to the modified instruction (see SHCP,  
15 Ex. B ¶ 5).

16 In denying these allegations on direct appeal the California Supreme Court stated that:

17  
18 Defendant contends the evidence was insufficient to support the felony-murder  
19 special-circumstance findings. Defendant does not contend the evidence was  
20 insufficient to prove he planned and participated in the burglaries and robberies;  
21 he concedes it was sufficient. Rather, defendant contends the prosecution was  
22 required to prove, not only that he aided or abetted the burglaries and robberies,  
23 but also that he “assisted in the killings themselves.”

24 Defendant relies upon the language we italicize in section 190.2, former  
25 subdivision (b). “Every person whether or not the actual killer found guilty of  
26 intentionally aiding, abetting ... or assisting any actor in the commission of  
27 murder in the first degree shall suffer death or confinement in state prison for a  
28 term of life without the possibility of parole, in any case in which one or more of  
the special circumstances enumerated in [specified paragraphs covering, among  
others, the crimes of burglary and robbery] of subdivision (a) of this section has  
been charged and specially found under Section 190.4 to be true.” (§ 190.2,  
former subd. (b), added by initiative measure Prop. 7, § 6, approved by the  
electorate Nov. 7, 1978; see now § 190.2, subd. (c).)

Section 190.2, former subdivision (b) is not helpful to defendant because, under  
the felony-murder doctrine, he was found guilty of aiding or abetting first degree  
murders. All persons aiding or abetting the commission of burglary or robbery are

1 guilty of first degree murder when one of them kills while acting in furtherance of  
2 the common design. (§ 189; *People v. Pulido* (1997) 15 Cal.4th 713, 716 [63 Cal.  
Rptr. 2d 625, 936 P.2d 1235]; *People v. Washington* (1965) 62 Cal.2d 777, 782  
[44 Cal. Rptr. 442, 402 P.2d 130].)

3 Defendant also relies on *People v. Anderson* (1987) 43 Cal.3d 1104 [240 Cal.  
4 Rptr. 585, 742 P.2d 1306] (*Anderson*), to support his argument that the “actus  
5 reus of a special circumstance requires that a defendant aid or abet the actual  
6 killing, not just the underlying felony.” In particular, defendant relies upon the  
7 following statement in *Anderson*: “[G]iven a realistic reading the statutory  
requirement that the aider and abetter intentionally aid, abet, counsel, command,  
induce, solicit, request, or assist any acts in the commission of first degree  
murder—even when applied to felony murder—is not ambiguous: the aider and  
abettor must intentionally aid in a killing.” (*Anderson*, at p. 1145.)

8 Defendant’s reliance on *Anderson* is unfounded. It is axiomatic a decision does  
9 not stand for a proposition not considered by the court. (*People v. Barker* (2004)  
10 34 Cal.4th 345, 354 [18 Cal. Rptr. 3d 260, 96 P.3d 507]; *People v. Harris* (1989)  
11 47 Cal.3d 1047, 1071 [255 Cal. Rptr. 352, 767 P.2d 619] (*Harris*)). The  
proposition advanced by defendant—for a felony-murder special circumstance,  
the aiding or abetting has to relate to the act of killing itself, rather than just the  
underlying felony—was not considered by the court in *Anderson*.

12 The question we considered in *Anderson*—reconsidered, actually—was “whether  
13 and under what circumstances intent to kill is an element of the felony-murder  
special circumstance.” (*Anderson*, *supra*, 43 Cal.3d at p. 1141.

14 *Anderson* overruled *Carlos v. Superior Court* (1983) 35 Cal.3d 131 [197 Cal.  
15 Rptr. 79, 672 P.2d 862] (*Carlos*). “In *Carlos* ..., we held that intent to kill was an  
16 element of the felony-murder special circumstance whether or not the defendant  
was the actual killer.” (*Anderson*, *supra*, 43 Cal.3d at p. 1139.) In *Anderson*, we  
17 concluded “the broad holding of *Carlos* that intent to kill is an element of the  
18 felony-murder special circumstance cannot stand, and that the following narrow  
holding must be put in its place: intent to kill is not an element of the felony-  
murder special circumstance; but when the defendant is an aider and abetter rather  
19 than the actual killer, intent must be proved before the trier of fact can find the  
special circumstance to be true.” (*Id.* at pp. 1138–1139.)

20 The premise of the decision in *Carlos*, the *Anderson* court explained, “was our  
21 determination that section 190.2[, subdivision] (a)(17) is ambiguous. As shown  
22 above, on further reflection we now believe that premise was mistaken: given a  
fair reading, section 190.2[, subdivision] (a)(17) provides that intent is not an  
element of the felony-murder special circumstance.” (*Anderson*, *supra*, 43 Cal.3d  
at p. 1143.)

23 According to *Anderson*, *Carlos*’s mistaken premise rested on two bases.  
24 (*Anderson*, *supra*, 43 Cal.3d at pp. 1143–1145.) The statement relied upon by  
25 defendant appears in the context of *Anderson*’s reexamination of the second of the  
two bases.

26 “The second basis of our analysis in *Carlos* was our belief that unless section  
27 190.2 [, subdivision] (a)(17) were read to require intent to kill, the meaning and  
28 function of section 190.2[, subdivision] (b) would be hard to determine: ‘In the  
first place, paragraph 17, alone of the listed paragraphs, already contains language  
equating the liability of principal and accomplice. In addition, the requirement

1 that the accomplice “intentionally” aid in the commission of a murder is  
2 inherently ambiguous when applied to a felony murder, for it could mean either  
3 that the accomplice must intentionally aid in a killing, or that he need only  
4 intentionally aid the commission of the underlying felony.” ([Carlos, supra,] 35  
5 Cal.3d at p. 142.)

6 “On reexamination we now find this basis, too, to be lacking. First, section  
7 190.2[, subdivision] (a)(17) does not treat the liability of the murderer and his  
8 aider and abetter, but rather the liability of the perpetrator of the underlying felony  
9 and his aider and abetter. Thus, the statutory provision does nothing more than  
10 declare that both the perpetrator of the underlying felony and his aider and abetter  
11 are felony murderers. Section 190.2[, subdivision] (b) then declares that the  
12 felony-murder aider and abetter is eligible for the death penalty if intent to kill is  
13 proved. Second, given a realistic reading the statutory requirement that the aider  
14 and abetter intentionally aid, abet, counsel, command, induce, solicit, request, or  
15 assist any acts in the commission of first degree murder—even when applied to  
16 felony murder—is not ambiguous: the aider and abetter must intentionally aid in a  
17 killing.” (Anderson, supra, 43 Cal.3d at pp. 1144–1145.)

18 In the paragraph immediately following the statement upon which defendant  
19 relies we reiterated the issue we were actually resolving in Anderson. “Thus, in  
20 Carlos we mistook the first and crucial step in our analysis by determining that  
21 section 190.2[, subdivision] (a)(17) is ambiguous: given a fair reading in  
22 conjunction with section 190.2[, subdivision] (b), the provision can realistically  
23 be read only to require intent to kill for the aider and abetter but not for the actual  
24 killer.” (Anderson, supra, 43 Cal.3d at p. 1145.) n7

25 -----FOOTNOTE-----

26 n7 Defendant’s reliance upon *People v. Sanders* (1990) 51 Cal.3d 471 [273 Cal.  
27 Rptr. 537, 797 P.2d 561], is also unavailing. The *Sanders* court quoted the  
28 statement in question from *Anderson*. (*Sanders*, at p. 517.) However, like the  
*Anderson* court, the *Sanders* court did not hold the aiding or abetting underlying a  
felony-murder special-circumstance finding has to relate to the act of killing itself,  
rather than just the underlying felony. In *Sanders*, the defendant claimed the  
evidence did not show whether he or his confederate was the actual killer.  
Therefore, he contended, two felony-based special-circumstance findings should  
be reversed because the jury was not instructed to determine whether he intended  
to kill the victim. (*Id.* at p. 516.) We held the jury had been adequately instructed  
on this point. (*Id.* at p. 517.)

-----END FOOTNOTE-----

Finally, defendant recasts this argument as an instructional claim. He contends the  
trial court prejudicially erred by failing to instruct the jury he had to have aided or  
abetted the actual killings, not just the underlying felonies. For the reasons stated,  
this contention lacks merit.

Dickey, 35 Cal. 4th at 900-03.

The state supreme court was not unreasonable in finding the modified CALJIC 8.80 to be

1 sufficient. A felony murderer jointly engaged in the underlying felony commits first degree  
2 murder. Pulido, 15 Cal. 4th at 716. Petitioner has not demonstrated the clearly established law  
3 dictates otherwise. The jury was instructed on felony murder, that an aider and abettor must  
4 intend to kill before a special circumstance can be found true. (RT 5021-22; CT 425.)

5 The Anderson holding did not reach issues of actus reus. The challenged instruction  
6 correctly stated California law. As noted, “the proposition advanced by defendant - for a felony-  
7 murder special circumstance the aiding or abetting has to relate to the act of killing itself rather  
8 than just the underlying felony - was not considered by the court in Anderson.” Dickey, 35 Cal.  
9 4th at 901. It follows that that state supreme court’s rejection of petitioner’s Anderson allegation  
10 did not expand the reach of Penal Code 190.2(b) as applied to petitioner. Absent any state error,  
11 the state supreme court was not unreasonable in finding no constitutional error, i.e., error that “so  
12 infected the entire trial that the resulting conviction violate[d] due process.” Cupp, 414 U.S. at  
13 147.

14 Petitioner goes on to argue that the state supreme court violated his due process rights  
15 because its foregoing determination was an unreasonable application of clearly established  
16 Supreme Court law, citing Bouie, 378 U.S. at 353-54 (due process precludes a state supreme  
17 court from retroactively and unforeseeably enlarging a criminal statute by means of judicial  
18 construction). He argues this error so infected the entire trial that his conviction violated due  
19 process under Cupp.

20 The state supreme court could reasonably find that petitioner was not denied due process  
21 under Bouie because his Anderson argument is unavailing for the reasons stated. See Mitchell,  
22 878 F.2d at 324 (“In the absence of a federal constitutional violation, no relief can be granted  
23 even if the instruction given might not have been correct as a matter of state law.”). Schultz’s  
24 noted statement in his habeas declaration that he was unaware the modified instruction  
25 prejudicially omitted any required element (see SHCP, Ex. B ¶ 5(a)) does not suggest that an  
26 objection to the modified instruction would have been other than futile.

27 As noted, Schultz stated on the record that he was satisfied with the modified CALJIC  
28

1 8.80 that was ultimately read to the jury. (See RT 4944; Doc. No. 116 at 280:4-6.)

2 For the same reasons, petitioner has not shown prejudice, that any essential element of  
3 each special circumstance (actus reus) was not proven. Brecht, 507 U.S. at 637; Hedgpeth v.  
4 Pulido, 555 U.S. 57, 58 (2008) (Brecht standard applicable to instructional error). The  
5 California Supreme Court was not unreasonable in determining as a matter of state law that the  
6 special circumstances do not require a showing of an act in aid of the killings.

7 Whether or not the modified CALJIC 8.80 given by the trial court was a correct statement  
8 of California law is not a basis for federal relief. See Estelle, 502 U.S. at 67 (whether some  
9 action violated a state’s law forms “no part” whatsoever (i.e., not a little, not at all) of an inquiry  
10 whether that action violated the Constitution.); see also Richey, 546 U.S. at 76 (“a state court’s  
11 interpretation of state law ... binds a federal court sitting in federal habeas”).

12 (ii) Concurrence of Act and Intent

13 Petitioner alleges the trial court erred by failing to instruct on the required concurrence of  
14 act and intent to kill for each of the murders. (Doc. No. 51-1 ¶¶ 706-707.)

15 The California Supreme Court considered and rejected this allegation on direct appeal, in  
16 stating that:

17  
18 Defendant contends the trial court prejudicially erred by failing to instruct the jury  
19 that, for purposes of the special circumstances, he had to possess the intent to kill  
20 concurrently with his aiding or abetting the actual killings. This contention lacks  
21 merit because it rests on the premise we earlier rejected, that the prosecution was  
22 required to prove not only that defendant aided or abetted the burglaries and  
23 robberies, but also that he aided or abetted the actual killings. [Citation]

24 The jury was properly instructed on concurrence of act and intent with regard to  
25 the special circumstances. [Citation] In accordance with CALJIC No. 3.31, the  
26 jury was instructed that, with regard to each of the crimes charged in the  
27 information, “there must exist a union or joint operation of act or conduct and a  
28 certain specific intent in the mind of the perpetrator. Unless such specific intent  
exists, the crime to which it relates is not committed. [¶] The specific intent  
required is included in the definition of the crimes charged. [¶] All of the special  
circumstances allegations require an intent to kill.”

26 Dickey, 35 Cal. 4th at 904-05.

27 The state supreme court reasonably rejected these allegations because the instructions

1 given in their totality sufficiently covered concurrence of act and intent for the reasons stated in  
2 claims II(M), II(N), II(O), II(P), II(Q), XVI, XVIII and XIX. In sum, the record demonstrates  
3 that for each of the crimes charged and in addition to CALJIC No. 8.80 discussed ante, the jury  
4 was instructed as follows:

5  
6 There must exist a union or joint operation of act or conduct and a certain specific  
7 intent in the mind of the perpetrator ... [T]he specific intent required is included in  
8 the definitions of the crimes charged. All of the special circumstances allegations  
9 require an intent to kill.

8 (CALJIC No. 3.31; RT 5010-11; CT 395.)

9  
10 To find that the special circumstances, referred to in these instructions as murder  
11 in the commission of robbery, is true, it must be proved:

11 The murder was committed while the defendant was engaged in the  
12 commission of a robbery ...

12 The murder was committed in order to carry out or advance the  
13 commission of the crime of robbery or to facilitate the escape therefrom or to  
14 avoid detection. In other words, the special circumstance referred to in these  
15 instructions is not established if the robbery was merely incidental to the  
16 commission of the murder.

15 To find that the special circumstances, referred to in these instructions as murder  
16 in the commission of burglary, is true, it must be proved:

17 The murder was committed while the defendant was engaged in the  
18 commission of a burglary ...

18 The murder was committed in order to carry out or advance the  
19 commission of the crime of burglary or to facilitate the escape therefrom or to  
20 avoid detection. In other words, the special circumstance referred to in these  
21 instructions is not established if the burglary was merely incidental to the  
22 commission of the murder.

21 (CALJIC No. 8.81.17; RT 5017-23; CT 427-28.)

22  
23 The specific intent with which an act is done may be shown by the circumstances  
24 surrounding its commission. But you may not find a special circumstance alleged  
25 in this case to be true unless the proved circumstances are not only,

24 One, consistent with the theory that the defendant had the required specific  
25 intent, but

25 Two, cannot be reconciled with any other rational conclusion.

26 Also, if the evidence as to any such specific intent is susceptible of two  
27 reasonable interpretations, one of which points to the existence of the specific  
28 intent and the other to the absence of the specific intent, you must adopt that  
interpretation which points to the absence of the specific intent.

If, on the other hand, one interpretation of the evidence as to such specific

1 intent appears to you to be reasonable and the other interpretation to be  
2 unreasonable, you must accept the reasonable interpretation and reject the  
unreasonable.

3 (CALJIC No. 8.83.1; RT 5024-25; CT 430.)

4 Petitioner argues that the concurrency requirement of CALJIC 3.31 on its face extended  
5 only to the crimes charged and not the special circumstances. But on the facts of this case, an  
6 objectively reasonable juror considering the instructions in their totality would understand these  
7 instructions to require concurrence of act and specific intent as to each of the crimes charged  
8 including the charged related special circumstance and aider and abettor allegations. Notably,  
9 the concurrence of act and specific intent instruction (CALJIC 3.31, CT 395) specifically  
10 includes a reference to the special circumstance requirement for intent to kill. (CT 387-438.)

11 Moreover, the jury was instructed to consider the instructions as a whole. (RT 5008.)  
12 They were instructed that statements by counsel are not evidence and that they must follow the  
13 law given them by the court. (RT 5007-08.) They were instructed that for each of the crimes  
14 charged in counts 1-5 of the information, there must be a union of act and a specific intent in the  
15 mind of the perpetrator. (RT 5010.) They were instructed that the specific intent required was  
16 included in the definitions of the crimes charged and that the special circumstance allegations  
17 required an intent to kill. (RT 5011.) They were instructed that if they found defendant guilty of  
18 first degree murder, they must then find true or not true the charged special circumstances (RT  
19 5021). They were instructed that if they found defendant was an aider and abettor, then they  
20 must find beyond a reasonable doubt that the defendant intended either to kill a human being or  
21 to aid another in the killing of a human being in order to find the special circumstance to be true.  
22 (RT 5022.)

23 The state supreme court could also reasonably conclude that petitioner failed to show any  
24 essential element of the special circumstances upon which the jury was not instructed or that the  
25 jury based its verdict upon an essential element of a special circumstance (actus reus) that was  
26 not proven. See Brecht, 507 U.S. at 637; Dickey, 35 Cal. 4th at 904-05.

27 Petitioner also argues that the trial court erred in allowing the prosecutor to argue,  
28

1 incorrectly, that concurrence of intent to kill was not required and that the unexpressed thought  
2 attributed to petitioner by Buchanan, that “If you kill one you might as well kill them both” was  
3 sufficient to prove petitioner intended to kill both victims. (RT 4691-93; see also Doc. No. 51-1  
4 ¶ 706.) Specifically, he argues the multiple murder special circumstance requires proof of intent  
5 to kill concurrent with an act in aid of each murder. (See CT 426, CALJIC 8.81.3; CT 395,  
6 CALJIC 3.31.) He complains the prosecution took advantage of this instructional error at  
7 closing by arguing that for purposes of the multiple murder special circumstance petitioner’s  
8 intent to kill could be shown by the robbery or burglary, as follows:

9  
10 I neglected in my opening argument to mention that along with the special  
11 circumstance murder during a robbery and murder during a burglary there’s the  
12 additional special circumstance of multiple murders. That is another special  
13 circumstance that will be given to you that -- for you to find that it did or it did  
14 not happen. In this case it would be that in this proceeding -- that means that in  
15 this trial the defendant has been convicted of more than one first degree murder,  
16 essentially. Since felony murders are first degree murders, if you find him  
17 responsible for the burglary or the robberies and that the deaths occurred during  
18 the – during that burglary or during those robberies, then he’s guilty of first  
19 degree murders.

20  
21 (RT 4995.)

22 Petitioner argues that nothing in the evidentiary record suggests petitioner formed the  
23 intent to kill before finding Freiri dead or that he committed any act with the intent to kill that  
24 would prove felony murder. He argues the prosecutor conceded as much in argument to the jury:

25  
26 You don't have to have knowledge that a homicide is going to be committed, you  
27 have to have knowledge and intend to aid in the burglary or the robbery. You  
28 have to stay focused on that. We don't know if, when they went in there, they  
went in there to kill. There's no evidence of that at all. There's evidence that they  
had weapons but that could have been to help in the burglary and the robberies.  
The mental state was to aid and abet in taking the property, the burglary or the  
robbery.

(RT 4975; see also RT 4952.)

However, the California Supreme Court could reasonably have denied these allegations.  
The actus reus allegation based on Anderson fail for reasons discussed above and stated in the

1 discussion of claims II(M), II(N), II(O), II(P), II(Q). Prosecutor Hahus’s argument regarding the  
2 requirements for felony murder-robbery and felony murder-burglary does not seem to conflate or  
3 dispense with special circumstance requirement of intent to kill. Shortly after he made the above  
4 noted argument, Hahus argued to the jury that [t] the special circumstance, the killing of Marie,  
5 or the killing of Louis, as a special circumstance killing can only be found true if the defendant –  
6 this man – intended to kill ... you can’t find the special circumstance true unless you find that  
7 not only were they killed, but that he intended to kill ... that he had in his mind the intent, the  
8 desire that one or both of them die.” (RT 4979-80.)

9 Moreover, as discussed more fully in claim XXVI, post, the record could reasonably  
10 suggest that Freiri died after petitioner formed the above noted intent to kill and that petitioner  
11 may have participated in that killing. A fair-minded jurist could consider RC’s alleged statement  
12 to third party Flores shortly after the crimes, that RC “had just killed woman” (RT 4801) as also  
13 suggesting the possibility that petitioner participated in the killing of Mr. Freiri.

14 (iii) Cautionary Instruction Regarding Oral Admissions

15 Petitioner alleges that trial court erred by failing to instruct the jury with CALJIC No.  
16 2.70 or 2.71, that oral admissions or confession must be viewed with caution. (Doc. No. 51-1 ¶¶  
17 708-710.) He argues this error, conceded by Schultz (SHCP, Ex. B ¶ 5(c)) and the prosecution  
18 (CT 595) and the trial court ((RT 1/17//92 at 20) was prejudicial error because the prosecution’s  
19 case was built around the oral admissions he allegedly made to Goldman and Buchanan.

20 The trial court rejected this allegation as raised in the motion for new trial, finding no  
21 prejudicial error. (RT 1/17/92 at 20-21.) The California Supreme Court reviewed and also  
22 rejected the allegation on direct appeal, finding only harmless error, as follows:

23  
24 When the evidence warrants, the court must instruct the jury sua sponte to view  
evidence of a defendant's oral admissions or confession with caution. [Citation]

25 Failure to give the cautionary instruction here was raised by defendant in his  
26 motion for a new trial. The prosecution conceded the error, but contended it was  
harmless, and the trial court agreed.

27 Mere instructional error under state law regarding how the jury should consider  
28 evidence does not violate the United States Constitution. [Citation] Failure to give

1 the cautionary instruction is not one of the “very narrow[ ]” categories of error  
2 that make the trial fundamentally unfair.

3 The purpose of the cautionary instruction is to assist the jury in determining if the  
4 statement was in fact made. [Citation] Since the cautionary instruction is  
5 intended to help the jury to determine whether the statement attributed to the  
6 defendant was in fact made, courts examining the prejudice in failing to give the  
7 instruction examine the record to see if there was any conflict in the evidence  
8 about the exact words used, their meaning, or whether the admissions were  
9 repeated accurately. [Citation]

10 Where [as here] there was no such conflict in the evidence, but simply a denial by  
11 the defendant that he made the statements attributed to him, we have found failure  
12 to give the cautionary instruction harmless.

13 ...

14 [T]he question for the jury was whether Buchanan and Goldman were credible  
15 witnesses or had fabricated their testimony concerning his admissions to  
16 them...[T]he court, while neglecting to give the cautionary instruction, did in  
17 other respects thoroughly instruct the jury on judging the credibility of witnesses.  
18 The jury was instructed on the significance of prior consistent or inconsistent  
19 statements of witnesses, discrepancies in a witness's testimony or between his or  
20 her testimony and that of others, witnesses who were willfully false in one  
21 material part of their testimony being distrusted in other parts, weighing  
22 conflicting testimony, evidence of the character of a witness for honesty and  
23 truthfulness to be considered in determining the witness's believability, and was  
24 given a general instruction on witness credibility that listed other factors to  
25 consider, including a witness's bias, interest or other motive, ability to remember  
26 the matter in question, and admissions of untruthfulness.

27 As the Attorney General contends, given these instructions, and given the  
28 extensive impeachment of Buchanan and Goldman raising credibility issues to  
which the instructions were pertinent, n.8 the jury was unquestionably aware their  
testimony should be viewed with caution.

-----FOOTNOTE-----

n.8 The jury knew Goldman and Buchanan were drug addicts, that they had been  
using drugs almost daily around the time of defendant's statements, and that  
Buchanan had used drugs the day before his testimony. It knew that, even though  
he had initially denied it, Buchanan was aware of the \$5,000 reward, that  
Buchanan had told others he wanted the reward for turning defendant in, and that  
he had then testified the reward was not the reason he had come forward. It knew  
room and board expenses incurred by Buchanan were to be deducted from the  
reward. (See post, 28 Cal.Rptr.3d at pp. 665–667, 111 P.3d at pp. 937–938.) It  
knew Buchanan disliked defendant, and that he wanted revenge against defendant  
for tearing up a picture of his daughter.

The jury also knew Goldman had initially lied to the police, disclaiming any  
knowledge of the crimes. One witness testified he would not trust Goldman as far  
as he could throw her. Another witness, a former neighbor, testified Goldman told  
him she had been called as a witness in a murder case, but that she “didn’t know  
nothing about no murder.” Another witness, who testified she was “like a sister”

1 to Goldman, said Goldman told her it was the grandson of the murder victim who  
had confessed to her.

2 -----END FOOTNOTE-----  
3

4 Dickey, 35 Cal. 4th at 905-07; see also RT 5012-15; CT 399-407.)

5 The state supreme court's rejection of the allegation was not unreasonable. As alluded to  
6 by that court, the jury was instructed on witness credibility including tests for the veracity of  
7 witnesses making prior inconsistent statements. (RT 5012-15; CT 399-407.) The jury was  
8 specifically instructed that a determination of witness believability should consider "the extent of  
9 the opportunity or the ability of the witness to see or hear or otherwise become aware of any  
10 matter about which the witness has testified ... the ability of the witness to remember or to  
11 communicate any matter about which the witness has testified ... the demeanor and manner of the  
12 witness while testifying ... the existence or nonexistence of bias, interest, or other motive ...  
13 evidence of the existence or nonexistence of any fact testified to by the witness ... a statement  
14 previously made by the witness that is ... inconsistent with the testimony of the witness ... the  
15 character of the witness for honesty or truthfulness ... [and] the witness' prior conviction of a  
16 felony." (CT 400-401.)

17 In these regards, the jury was aware of the significant evidence impacting the credibility  
18 of Goldman and Buchanan including that they each routinely used street drugs around the time  
19 of petitioner's admission and that the drugs impacted Buchanan's ability to "pay attention"; and  
20 that Buchanan had used street drugs the day prior to this testimony in court. (See e.g., RT 4382-  
21 91, 4676-82, 4717, 4737-42.) The jury was aware that Buchanan testified inconsistently  
22 regarding whether he was motivated by the \$5000 private reward (RT 4704, 4851); that  
23 Buchanan was giving Ms. Strickland IOU's payable from the private reward (RT 4716, 4757,  
24 4851); and that Buchanan did not like petitioner and wanted revenge against him (RT 4387,  
25 4391, 4704-05, 4849-51, 4857). The jury was also aware that Goldman had a reputation for  
26 being untruthful (RT 4777-85) and initially lied to police and delayed speaking to them in order  
27 to protect her friend, petitioner (RT 4590-99); that Goldman was aware of the private reward (RT  
28

1 4809-10, 4820); that Goldman took medication four times on the day she testified (RT 4387);  
2 that Goldman has stated she had no knowledge of the murders (RT 4789-93); and that it may  
3 have been RC who had confessed to her (RT 4819-25). The record reflects that Schultz spent  
4 substantial time attempting to impeach the credibility of Buchanan and Goldman in these  
5 regards. (See e.g., RT 4809, 4983-95.)

6 The jury had before it such facts of drug use and presumably considered any impact(s)  
7 upon the witnesses' ability to perceive and relate events, lifestyle, trustworthiness, and personal  
8 and financial motivation. It was not unreasonable to conclude these facts would suggest the jury  
9 viewed with circumspection and caution testimony regarding petitioner's alleged admission that  
10 he participated in the crimes. On these facts, it was not unreasonable for the state supreme court  
11 to conclude that the instructions given the jury on weighing witness credibility were a sufficient  
12 substitute for the omitted cautionary admonition.

13 Furthermore, the thrust of Schultz's argument at trial was not directed to the wording of  
14 the alleged admission but rather that the jury should discount the admission completely because  
15 Goldman and Buchanan were untrustworthy. (See e.g., RT 4983-95); see *People v. Bunyard*, 45  
16 Cal. 3d 1189, 1224 (Cal. 2005), abrogated on other grounds by *People v. Diaz*, 60 Cal. 4th 1176,  
17 1190 (Cal. 2015) (failure to give cautionary instruction constituted only state law error where  
18 facts in conflict related to witness credibility rather than the oral admission). In this case,  
19 petitioner testified that he never made the admissions attributed to him by Goldman and  
20 Buchanan; he claims that those witnesses fabricated their testimony in this regard. (RT 4870-71;  
21 CT 598.)

22 Additionally, petitioner's argument that a cautionary instruction was needed because of  
23 prosecutorial vouching fails for reasons stated in claim XVII.

24 (iv) Conclusions

25 For the reasons stated, the state supreme court could reasonably have rejected allegations  
26 that the trial court committed prejudicial instructional error at the guilt phase. Even if petitioner  
27 established state law instructional error, such error is not alone a basis for federal habeas relief.

1 Pulley v. Harris, 465 U.S. 37, 41 (1984).

2 It does not appear that the California Supreme Court's rejection of the claim was contrary  
3 to, or an unreasonable application of, clearly established federal law, as determined by the  
4 Supreme Court, or that the state court's ruling was based on an unreasonable determination of  
5 the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. §  
6 2254(d).

7 Claim XII is denied.

8 **4. Review of Claim XXI**

9 Petitioner revisits allegations in his ineffective assistance of counsel claim II(L), that he  
10 was denied the right to confront and cross-examine statements Goldman made to detective  
11 Stokes, inconsistent statements that were used to impeach Goldman's preliminary hearing  
12 testimony. He recasts these allegations here as alleged trial court error. (Doc. No. 51-1 ¶¶ 857-  
13 870.)

14 Because petitioner has not demonstrated any error in admitting this testimony for the  
15 reasons stated in claim II(L), summarized below, the state supreme court was not unreasonable in  
16 rejecting these same allegations brought as trial court error.

17 **a. State Court Direct and Collateral Review**

18 The California Supreme Court summarily denied these allegations presented for habeas  
19 review on the merits and on procedural grounds. (Lod. Doc. No. 31.)

20 **b. Clearly Established Law - Confrontation Clause**

21 "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with  
22 the witnesses against him." U.S. Const. amend. VI.

23 The Supreme Court held in Crawford that "[o]ur cases have thus remained faithful to the  
24 Framers' understanding: [t]estimonial statements of witnesses absent from trial have been  
25 admitted only where the declarant is unavailable, and only where the defendant has had a prior  
26 opportunity to cross-examine." 541 U.S. at 59. A statement is testimonial if made with a  
27 primary purpose of creating an out-of-court substitute for trial testimony. See Michigan v.  
28

1 Bryant, 562 U.S. 344, 358 (2011).

2 “Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’  
3 design to afford the States flexibility in their development of hearsay law - as does Roberts, and  
4 as would an approach that exempted such statements from Confrontation Clause scrutiny  
5 altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands  
6 what the common law required: unavailability and a prior opportunity for cross-examination.”  
7 Crawford, 541 U.S. at 68.

8 As discussed in claim II(L), Crawford abrogated the rule Roberts, prevailing at the time  
9 of petitioner’s trial that “[the prosecutor] was permitted to elicit hearsay testimony if the  
10 declarant was unavailable and there was a firmly-rooted hearsay exception (or indicia of  
11 reliability) that applied to the testimony.” 448 U.S. 56, 66 (1980), abrogated by Crawford, 541  
12 U.S. at 68 (2004); (see also Doc. No. 125 at 97:20-22).

13 “The [C]onfrontation [C]ause may be violated by an extra-judicial statement which is  
14 admitted as an exception to the hearsay rule.” U.S. v. King, 552 F.2d 833, 845 (1976). The  
15 Confrontation Clause does not absolutely require cross-examination, but rather safeguards of  
16 reliability. *Id.*, at 846. However, where nontestimonial hearsay is at issue, evidence is exempt  
17 “from Confrontation Clause scrutiny altogether” and may be admitted pursuant to the hearsay  
18 law. Crawford, 541 U.S. at 68. Similarly, the Confrontation Clause does not bar statements  
19 introduced for a non-hearsay purpose. Gonzales, 2012 WL 6004520, at \*16; Crawford, 541 U.S.  
20 at 59 n. 9.

21 “A habeas petitioner is entitled to relief only if an alleged error had a substantial and  
22 injurious effect or influence in determining the jury's verdict,” i.e., only if he can establish actual  
23 prejudice. Brecht, 507 U.S. at 623, 637; see also United States v. Berry, 683 F.3d 1015, 1020  
24 (9th Cir. 2012) (Confrontation Clause violations are subject to harmless error analysis).

25 **c. Analysis of Claim XXI**

26 Petitioner alleges that the trial court erroneously failed to exclude sua sponte Stokes’s  
27 testimony of unconfrosted statements Goldman made shortly before petitioner’s arrest.

1 On August 31, 1989, months after she made the statements to Stokes, Goldman testified  
2 at petitioner's preliminary hearing. (RT 4334-4403; CT 19-95.) Goldman died on December 17,  
3 1990, two months before petitioner's trial started. (Doc. No. 51-1 ¶ 861.) Her preliminary  
4 hearing testimony was admitted at trial as that of an unavailable witness and read into the record  
5 on February 27, 1991.

6 Petitioner alleges that at trial, Hahus elicited from Stokes's certain of Goldman's  
7 statements that were allegedly inconsistent with Goldman's preliminary hearing testimony, as  
8 follows:

9  
10 The prosecutor began by asking the witness whether he had gone over the police  
11 reports and reviewed Goldman's preliminary hearing testimony and whether [he]  
12 had seen any inconsistencies between the two. Mr. Hahus then questioned  
13 Detective Stokes on the details, which included allegations that [Petitioner's]  
behavior changed when he found out about the deaths of Ms. Caton and R.C. and  
had made threats against Goldman's life if she or anyone else talked about his  
involvement in the crime.

14 (Doc. No. 51-1 ¶ 863; see also RT 4591-4617.) Petitioner points out that at the preliminary  
15 hearing, Goldman testified that:

16  
17 [S]he saw petitioner and RC leave the apartment "right around the day of the  
18 election, the Presidential election." RT 4339-40. She did not know how long they  
19 were gone. RT 4349. After they came back, "Colin sit [sic] down on the couch  
20 and watched television and RC went into the bedroom and started packing his  
21 bags." RT 4350. RC left that night. Id. Goldman testified that, before petitioner  
22 left the apartment, "[t]he only thing Colin did was walk into the kitchen and he  
23 looked in the drawer. That's all he did." RT 4343. Goldman testified that she saw  
24 RC open the hallway closet, and "get a cord." RT 4345. She testified that a cord  
25 on one of the venetian blinds in the apartment's bedroom was missing, which  
certainly was different from the one in the hallway closet. RT 4347. Goldman  
testified that at a later date, petitioner informed her that he was present when RC  
killed his grandmother and Louis Freiri, but "Gail, I swear I had nothing to do  
with this." RT 4357. Later, Goldman testified that petitioner made the "general  
statement" that "he wasn't afraid of anyone saying anything about him, because if  
they did, they wouldn't do it again." RT 4375. According to Goldman, petitioner  
was distraught over RC's murders, but after petitioner found out RC and Caton  
had died, "he wasn't as depressed as he had been before." RT 4378.

26 (Doc. No. 116 at 361:12-362:11.) Petitioner points out that at trial, Stokes testified Goldman  
27 told him that:

1 [P]etitioner and RC “left together” that night and returned around two hours later.  
2 RT 4603, 4604. According to Stokes, Goldman stated that when petitioner and  
3 RC returned, “R.C. walked right through the living room, right into his bedroom  
4 and started packing and that – Colin had walked in and just sat down on the  
5 couch.” RT 4604. Stokes testified that Goldman “told me about a venetian blind  
6 that had been in the hall closet that was removed from the hall closet the night of  
7 the homicide, and that that venetian blind was - taken by the suspect, Dickey, and  
8 taken into a bedroom and that the cord was removed from that venetian blind and  
9 then the venetian blind was placed back inside the hall closet.” RT 4534. Stokes  
10 testified that Goldman “told me that she saw him [petitioner] go to kitchen  
11 drawers [sic] and was looking through the drawers, believed that he removed a  
12 knife.” RT 4602. Stokes testified that Goldman “stated that he had said that he  
13 would kill her if she or anyone else talked about what he had told them.” RT  
14 4615. Stokes testified that Goldman told him that, “[petitioner] was nervous, on  
15 the verge of tears quite often prior to learning about the deaths, that after learning  
16 of the grandmother’s death that he was not as tearful, wasn’t walking and pacing  
17 the apartment as much, and that after he learned that RC was dead that he became  
18 aggressive toward her and Buchanan, and made statements regarding the fact that  
19 if they revealed what he had told them that they would be hurt and killed, as  
20 would anyone else.” RT 4616.

21 (Id., at 362:21-363:19.)

22 Petitioner argues that Stokes’s testimony should not have been admitted under the state  
23 law hearsay exception for inconsistent statements (Evid. Code §§ 770, 1235) because doing so  
24 violated the Confrontation Clause. Crawford, 541 U.S. at 68. He argues that Goldman was not  
25 given the opportunity to explain or deny her alleged statements at the preliminary hearing [and]  
26 Goldman was not a witness at trial [and] could not have given further testimony. (See Doc. No.  
27 116 at 336:23-348:15; Doc. No. 128 at 150:6-152:11); Evid. Code §§ 770, 1235.

28 (i) *Goldman’s Preliminary Hearing Testimony was Unconfronted but Admissible*

As noted, Goldman died shortly before trial. Her August 1989 preliminary hearing  
testimony was admitted at trial as testimony of an unavailable witness. (RT 4334.)

It is clear that the Confrontation Clause also does not bar statements introduced for a non-  
hearsay purpose. See Street, 471 U.S. at 414 (defendant’s rights under Confrontation Clause not  
violated by introduction of accomplice’s confession for non-hearsay purpose); see also Gonzales,  
2012 WL 6004520, at \*16 (the rule of Crawford only applies to testimonial statements that were  
introduced to establish the truth of the matter asserted); Crawford, 541 U.S. at 59 n. 9, citing  
Street, 471 U.S. at 414 (same). For reasons stated in claim II(L), absent any valid waiver by

1 petitioner, Crawford bars use of Goldman’s uncontroverted testimonial hearsay statements, but not  
2 use of Goldman’s statements for the non-hearsay purpose of impeaching Goldman’s credibility.

3 In California, inconsistent statements are admissible to attack the credibility of a  
4 declarant even without any giving the declarant an opportunity to explain or deny the  
5 inconsistent statement. See Gonzales, 2012 WL 6004520, at \*13, citing Evid. Code § 1202. The  
6 rule of Crawford “only applies to testimonial statements that were introduced to establish the  
7 truth of the matter asserted.” Id.; accord, Davis, 547 U.S. at 823 (Confrontation Clause applies  
8 only to testimonial hearsay).

9 Here, the state supreme court could reasonably have determined Stokes’s testimony was  
10 offered to impeach Goldman’s preliminary hearing testimony. As discussed in claim II(L),  
11 Goldman’s credibility was a significant issue at trial and was argued by both petitioner and  
12 respondent. Both parties invoked Stokes’s testimony in arguing Goldman’s credibility (directly)  
13 and Buchanan’s credibility (indirectly). (See e.g., claims II(P), XXVI, XXVIII.) Schultz, as a  
14 matter of tactics may have hoped that as a result of Stokes’s testimony the jury would discount  
15 Goldman as a witness and discount Buchanan at least to the extent his testimony was consistent  
16 with Goldman’s.

17 In any event, the jury was instructed regarding consideration of Stokes’s testimony  
18 including for purposes of determining the believability of Goldman and other trial witnesses.  
19 (CT 399-401.)

20 (ii) No Prejudice

21 Even if there was trial court error as alleged, the California Supreme Court reasonably  
22 could have found such error not prejudicial under Brecht.

23 A Confrontation Clause violation is harmless and so does not justify habeas relief unless  
24 it “had substantial and injurious effect or influence in determining the jury's verdict.” Brecht,  
25 507 U.S. at 623. “[W]hen a habeas court is in grave doubt as to the harmlessness of an error that  
26 affects substantial rights, it should grant relief.” O’Neal v. McAninch, 513 U.S. 432, 445 (1995).  
27 In general, the inquiry into whether the constitutionally erroneous introduction of a piece of  
28

1 evidence had a substantial and injurious effect is guided by several factors: “the importance of  
2 the testimony, whether the testimony was cumulative, the presence or absence of evidence  
3 corroborating or contradicting the testimony, the extent of cross-examination permitted, and the  
4 overall strength of the prosecution's case.” Ocampo, 649 F.3d at 1114.

5 Here, Stokes’s testimony appears significantly cumulative of and corroborated by  
6 Buchanan’s testimony. See e.g., Ocampo, 649 F.3d at 1114 (inquiry into Confrontation Clause  
7 error considers whether errantly admitted evidence was cumulative). For example, Buchanan  
8 testified that on the night of the murders, he saw petitioner take the venetian blind out of the hall  
9 closet and go into the bedroom (RT 4665-66), and then exit the apartment bedroom and return  
10 the venetian blind to the closet; he also saw a kitchen knife in the bedroom (RT 4706-07). See  
11 Dickey, 35 Cal. 4th at 898.

12 Buchanan also testified that RC and petitioner returned later that night and bought drugs  
13 for the roommates with money they did not have earlier that evening and that petitioner later  
14 disposed of some of his clothing by throwing it out of Buchanan’s car. (RT 4675-85.)  
15 Significantly, petitioner’s admission of his role in the crimes to Goldman and Buchanan and  
16 discussion of events surrounding (RT 4352-79; 4606-08, 4687-9494) were consistent in the  
17 record and not controverted by Stokes’s testimony of Goldman’s statements.

18 Petitioner’s admission was corroborated by evidence of RC and petitioner leaving the  
19 apartment together the night of the crimes and returning together later that evening with RC  
20 acting strangely (id.; see also Dickey, 35 Cal. 4th at 898) and petitioner initially depressed  
21 following the crimes (RT 4352-63).

22 Goldman’s testimony about petitioner being essentially fearless and aggressive was not  
23 directly controverted by Stokes’s testimony (RT 4398) or by Buchanan’s testimony that  
24 petitioner “never threatened my life in my presence.” (RT 4745.)

25 Petitioner’s suggestion that Stokes, by testifying as a police detective effectively vouched  
26 for Goldman’s consistent (with the preliminary hearing) statements appears to be merely  
27 speculative. Petitioner does not demonstrate on the evidentiary record that Stokes either  
28

1 expressed his personal belief in Goldman’s veracity or suggested information not known to the  
2 jury supported Goldman’s statements. See Hermanek, 289 F.3d at 1098; see also McKoy, 771  
3 F.2d at 1210-11 (“The rule that a prosecutor may not express his personal opinion of the  
4 defendant's guilt or his belief in the credibility of witnesses is firmly established.”).

5 (iii) Conclusions

6 Accordingly, a fair-minded jurist could have found that petitioner failed to establish  
7 prejudicial trial court error in admitting Stokes’s testimony of Goldman statements to him.

8 It does not appear that the California Supreme Court’s rejection of the claim was contrary  
9 to, or an unreasonable application of, clearly established federal law, as determined by the  
10 Supreme Court, or that the state court’s ruling was based on an unreasonable determination of  
11 the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. §  
12 2254(d).

13 Claim XXI is denied.

14 **C. Prosecutorial Misconduct Claims**

15 1. Clearly Established Law

16 A petitioner is entitled to habeas corpus relief if the prosecutor’s misconduct “so  
17 infected the trial with unfairness as to make the resulting conviction a denial of due process.”  
18 *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

19 To constitute a due process violation, the prosecutorial misconduct must be “of  
20 sufficient significance to result in the denial of the defendant’s right to a fair trial.” *Greer v.*  
21 *Miller*, 483 U.S. 756, 765 (1987), quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985).  
22 “Before a federal court may overturn a conviction resulting from a state trial ... it must be  
23 established not merely that the [State’s action] is undesirable, erroneous, or even universally  
24 condemned, but that it violated some right which was guaranteed to the defendant by the  
25 Fourteenth Amendment.” *Smith v. Phillips*, 455 U.S. 209, 221 (1982), quoting *Cupp*, 414 U.S.  
26 at 146.

27 Any claim of prosecutorial misconduct must be reviewed within the context of the  
28

1 entire trial. Greer, 483 U.S. at 765-66; United States v. Weitzenhoff, 35 F.3d 1275, 1291 (9th  
2 Cir. 1994). The court must keep in mind that “[t]he touchstone of due process analysis in cases  
3 of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the  
4 prosecutor” and “the aim of due process is not punishment of society for the misdeeds of the  
5 prosecutor but avoidance of an unfair trial to the accused.” Phillips, 455 U.S. at 219.  
6 “Improper argument does not, per se, violate a defendant’s constitutional rights.” Thompson v.  
7 Borg, 74 F.3d 1571, 1576 (9th Cir. 1996), quoting Jeffries v. Blodgett, 5 F.3d 1180, 1191 (9th  
8 Cir. 1993).

9 Furthermore, the Supreme Court has stated:

10 [A]rguments of counsel generally carry less weight with a jury than do instructions  
11 from the court. The former are usually billed in advance to the jury as matters of  
12 argument, not evidence ... and are likely viewed as the statements of advocates; the  
13 latter, we have often recognized, are viewed as definitive and binding statements of the  
14 law. Arguments of counsel which misstate the law are subject to objection and to  
15 correction by the court. This is not to say that prosecutorial misrepresentations may  
16 never have a decisive effect on the jury, but only that they are not to be judged as  
17 having the same force as an instruction from the court. And the arguments of counsel,  
18 like the instructions of the court, must be judged in the context in which they are made.

19 Boyde, 494 U.S. at 384-85.

20 If prosecutorial misconduct is established, and it was constitutional error, the error must  
21 be evaluated pursuant to the harmless error test set forth in Brecht. See Thompson, 74 F.3d at  
22 1577 (“Only if the argument were constitutional error would we have to decide whether the  
23 constitutional error was harmless.”). A petitioner is entitled to relief in this context only where  
24 the constitutional violations exerted a “substantial and injurious” effect on the judgment. Brecht,  
25 507 U.S. at 620; Fields v. Woodford, 309 F.3d 1095, 1109 (9th Cir. 2002) (stating the Ninth  
26 Circuit applies Brecht if misconduct of constitutional dimension is established), amended 315  
27 F.3d 1062 (9th Cir. 2002).

## 28 2. Review of claim XIII

Petitioner alleges prosecutorial misconduct by failing to disclose evidence under Brady v.  
Maryland and by knowingly presenting false and misleading evidence under Napue v. Illinois,  
violating his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S.

1 Constitution. (Doc. No. 51-1 ¶¶ 722-768.)

2 **a. State Court Direct and Collateral Review**

3 The California Supreme Court summarily denied all these allegations as presented in  
4 petitioner's state habeas petition. (Lod. Doc. No. 10.)

5 That court also considered and rejected certain of these allegations on the merits on direct  
6 appeal, as discussed, post.

7 **b. Analysis of False Testimony Allegations**

8 Petitioner alleges the prosecutor knowingly allowed witnesses to testify falsely.

9 (i) Clearly Established Law – False Testimony

10 The knowing use of false or perjured testimony against a defendant to obtain a conviction  
11 is unconstitutional. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (prosecutor's knowing  
12 presentation of false testimony violates due process); see also *Mooney v. Holohan*, 294 U.S. 103,  
13 112 (1935) (conviction contrived by prosecution's deliberate presentation of perjured testimony  
14 violated due process).

15 In *Napue*, the Supreme Court held that the knowing use of false testimony to obtain a  
16 conviction violates due process regardless of whether the prosecutor solicited the false testimony  
17 or merely allowed it to go uncorrected when it appeared. 360 U.S. at 269. The Court explained  
18 that the principle that a state may not knowingly use false testimony to obtain a conviction - even  
19 false testimony that goes only to the credibility of the witness - is "implicit in any concept of  
20 ordered liberty." *Id.*

21 A conviction obtained by the knowing use of perjured testimony "must be set aside if  
22 there is any reasonable likelihood that the false testimony could have affected the judgment of  
23 the jury." *Bagley*, 473 U.S. at 678. Nevertheless, simple inconsistencies in testimony are  
24 insufficient to establish that a prosecutor knowingly permitted the admission of false testimony.  
25 *United States v. Zuno-Arce*, 44 F.3d 1420, 1423 (9th Cir. 1995). "Discrepancies in ... testimony  
26 ... could as easily flow from errors in recollection as from lies." *Id.*

27 To warrant habeas relief, Petitioner must establish that: 1) the testimony was actually  
28

1 false; 2) the prosecution knew or should have known it to be false; and 3) there is a reasonable  
2 likelihood that the false testimony could have affected the jury’s verdict. Tayborn, 251 F.3d at  
3 1130.

4 (ii) False Evidence - Room and Board, Personal Loans and Trial Preparation

5 Petitioner revisits allegation discussed in claim II(E), and alleges that the prosecution  
6 allowed false testimony by Buchanan that might reflect on his credibility - testimony regarding  
7 the favorable room and board agreement with Ms. Strickland facilitated by the prosecution  
8 including alleged personal loans to Buchanan thereunder. He also alleges the prosecution  
9 downplayed the extent of its preparation of Buchanan for trial. (Doc. No. 116 at 28:21-29:2.)

10 Petitioner points to Buchanan’s allegedly false testimony that “he did not receive a single  
11 thing” from the prosecution team (RT 4766); that he had been working for Strickland at her  
12 boarding house and did not owe her anything and that she owed him \$25,000 (RT 4716); and that  
13 he met with prosecutor Hahus only a couple times before trial. (RT 4766.)

14 Room and Board

15 Petitioner alleges Buchanan testified falsely about the “[room and board] deal, brokered  
16 by the District Attorney’s Office, between Buchanan and [boarding house operator] Ms.  
17 Strickland” under which Buchanan’s room and board payments were deferred and payable from  
18 the anticipated private reward monies. (Doc. No. 51-1 ¶¶ 735-39; RT 5268-81, 5309-29; SHCP,  
19 Ex.’s G, H; see also Brady allegations, post.) He alleges that prosecution investigator William  
20 Martin arranged the deal and memorialized the agreement on Fresno County District Attorney  
21 letterhead, for “long-term and (room and board) [on a] deferred basis.” (Doc. No. 51-1 ¶ 736;  
22 RT 5276; CT 583.) The memorializing document was signed by Buchanan and witnessed by  
23 Martin and another prosecution investigator in order to “protect Ms. Strickland because [Martin]  
24 did not trust Buchanan to fulfill his obligations to her” (RT 5268-5282; see CT 582-83), and to  
25 ensure Buchanan could be located when needed to testify, (id.).

26 Under this deal, petitioner alleges Buchanan received room and board in exchange for a  
27 promise to pay \$350 per month out of the \$5,000 private reward he expected to receive for  
28

1 helping to convict petitioner. (RT 5276; SHCP, Ex. G; Doc. No. 116 at 44:11-16.)

2 Petitioner alleges that by the end of trial 24 months later, Buchanan's debt to Strickland  
3 had risen to over \$9100 covering room, board and personal loans. (Doc. No. 116 at 44:18.)  
4 Strickland herself placed the final debt at a little over \$5000 and ultimately reduced it to the  
5 \$3,500 paid by Buchanan, leaving \$1,500 of the private reward money for Buchanan to keep.  
6 (RT 5325-28.) The record reflects that Strickland wrote down the debt because she felt sorry for  
7 Buchanan and to help his family. (Id.)

8 The trial court, on motion for new trial rejected petitioner's claim that the foregoing  
9 constituted prejudicial prosecutorial misconduct. (CT 541-47; RT 1/17/92 at 9-17.) That court  
10 viewed the Strickland deal as "a [prosecution] favor." (RT 5212.) Prosecutor Hahus agreed that  
11 "[w]ell, sure it's something, yeah, absolutely, absolutely." (Id.) But ultimately, the trial court  
12 concluded that:

13  
14 Although there was assistance given to Mr. Buchanan, it's true that the District  
15 Attorney's Office did not buy him anything. He did receive something of value,  
16 and I have to agree to that, having a place to stay for who knows how long is  
17 obviously valuable. It's valuable if it's just one day. It's certainly more valuable  
18 as time goes on. And Mr. Buchanan benefitted by that. But I do have to find that  
19 they only acted as a conduit for Mr. Buchanan, that Mrs. Strickland [the landlady]  
20 could have thrown him out anytime she wanted to. The fact that she did not was  
21 not something that I can find the District Attorney's Office or the Police  
22 Department was somehow involved in.

19 (RT, Jan. 17, 1992, 16-17.)

20 Similarly, the California Supreme Court on direct appeal considered these same  
21 allegations and found the noted false testimony to be harmless error, stating that:

22  
23 We conclude the prosecutor did knowingly fail to correct a false impression -  
24 indeed, knowingly exploited the false impression in his argument to the jury - that  
25 the prosecution had not done Buchanan any favors that might reflect on his  
26 credibility.

25 The impression was false because a prosecution investigator facilitated an  
26 arrangement with the proprietor of a boarding house under which Buchanan  
27 received room and board in return for IOU's backed by the reward money he was  
28 hoping to receive. However, we conclude that, in light of other information the  
jury had about Buchanan's arrangement with the proprietor of the boarding house,  
as well as other indications of his interest in obtaining the reward, the prosecutor's

1 action was harmless beyond a reasonable doubt.

2 On cross-examination, Buchanan was asked about his contacts with Melvin King,  
3 a defense investigator. Buchanan said, among other things, that King bought him  
4 lunch, as well as a beer, and “wanted to take me to church and wanted to take me  
5 skydiving and stuff like that.”

6 On redirect, the prosecutor asked Buchanan how many times he had spoken to  
7 defense investigator King. Buchanan responded he had done so perhaps a dozen  
8 times, in person or on the phone. The prosecutor asked him what King had bought  
9 him. Buchanan said King had bought him lunch, beer on three occasions, and a  
10 pair of shoes.

11 ...

12 The prosecutor and Buchanan then engaged in the following colloquy. “Q. At any  
13 time have you spoken with anybody who's told you they were from my office,  
14 from the D.A.'s office? [¶] A. No, sir, only when they've come to pick me up for  
15 court. [¶] Q. You've talked to me a couple of times; is that right? [¶] A. Yes, sir.  
16 [¶] Q. At any time have the folks who've come to pick you up from my office or  
17 me, have we bought you anything? [¶] A. Not a single thing, sir.”

18 In his argument to the jury, the prosecutor sought to exploit the false impression  
19 he had created—that unlike the defense, the prosecution had done nothing for  
20 Buchanan that might reflect on his credibility. “His statements to Mel King, the  
21 only investigator who supplied him with money or alcohol or food was never to  
22 back off of his statement that [defendant] made that confession. Now, he's con-  
23 wise. ‘This guy has taken me out to lunch. This guy is taking me out buying me  
24 beer, why kill the goose that's laying the golden egg? You want to hear  
25 something, pal, say whatever you want to hear, let's have another Colt 45.’ But  
26 did he ever, ever back out of that statement?”

27 As previously stated, the impression was false because a prosecution investigator  
28 facilitated an arrangement with the proprietor of a boarding house under which  
Buchanan received room and board in return for IOU's, amounting to \$3,000 or  
\$4,000, backed by the reward money he was hoping to receive. The prosecution  
investigator even went so far as to draft a document signed by Buchanan under  
which he agreed the district attorney's office had his permission to discharge his  
IOU's before he received the remainder of the reward. The prosecutor was aware  
of this arrangement; he so testified at the hearing on the motion for a new trial.

That said, we conclude there is no reasonable likelihood the false impression  
created by Buchanan's testimony could have affected the judgment of the jury.  
While the jury did not know of the role the prosecution investigator played in  
facilitating the agreement between Buchanan and the proprietor of the boarding  
house, the jury knew, through Buchanan's testimony and that of the defense  
investigator, of the agreement itself. They knew, through the defense  
investigator's testimony, that Buchanan has said on “many” occasions “[h]e was  
expecting to receive the reward, deduct what money he owed his landlord, buy  
himself a pickup truck or a car and leave town and start his life over.” Finally,  
they knew through Goldman's testimony that Buchanan had told her “he was  
going to turn in [defendant] so he could get the reward.”

Defendant contends his trial counsel was ineffective in failing to impeach  
Buchanan with the room and board agreement backed by his IOU's, as well as

1 with the role of the prosecutor's investigator in facilitating the arrangement.  
2 However, for the reasons stated, it is not reasonably probable that, but for  
3 counsel's inaction, the result of the trial would have been different. [Citation]

4 -----FOOTNOTE-----

5 n.10 Defense counsel knew of the arrangement.

6 -----END FOOTNOTE-----

7 Dickey, 35 Cal. 4th at 909-11.

8 The state supreme court's rejection of these allegations for the reasons stated by that  
9 court was not unreasonable. The record suggests Buchanan requested assistance from  
10 investigator Martin because he had nowhere to stay upon his noted March 1989 OR release from  
11 jail and pending his testimony against petitioner. (SHCP, Ex. H.) While the jury may not have  
12 known the extent to which the prosecutor's office helped arrange the agreement between  
13 Buchanan and Strickland, the jury was aware of the agreement and its terms and conditions. (See  
14 e.g., RT 4387, 4857.)

15 Investigator Martin testified at the hearing on motion for new trial that this type of  
16 agreement was not unusual. (RT 5293-97.) He testified that he told both Buchanan and  
17 Strickland that issues relating to Buchanan's payment obligation were totally between them. (RT  
18 5275.) He testified that notwithstanding Strickland's unsolicited mailing of Buchanan's account  
19 statements (bills) to the District Attorney's office, (RT 5288-90, 5309), the parties (Buchanan  
20 and Strickland) intended that Buchanan's promise to pay was limited to any reward proceeds that  
21 might become available and that no public funds would be used to pay the debt. (RT 5280-82,  
22 5305-06.) Strickland acknowledged as much. (RT 5321-23.) Strickland testified she did not  
23 send the bills to the prosecution with the expectation that the latter was responsible for paying or  
24 would pay them. (Id.)

25 Strickland testified that she sometimes took in boarders on an IOU basis. (Id.) That she  
26 may have periodically phoned Hahus's office asking when she would get paid (see e.g., RT  
27 5289, 5321-26, 5326, 5404-06) does not alone demonstrate public funds backstopped the  
28

1 agreement. Moreover, Hahus confirmed to Strickland that the private reward was contingent  
2 upon conviction and Buchanan's entitlement to the reward. (RT 5404-06.)

3 Petitioner fails to support with evidence his allegation that the prosecution was  
4 financially liable under the Buchanan-Strickland agreement. Petitioner argues, but does not  
5 support in the evidence that the prosecution provided \$9,100 in benefits and/or participated with  
6 Strickland in her decision to write-down Buchanan's debt, (Doc. No. 116 at 74:28-75:2), and/or  
7 that Strickland offered benefits to Buchanan as an agent of the prosecution, (see id. at 98:11-27).

8 To the contrary, prosecutor Hahus testified at the new trial motion that he was unaware of  
9 any relationship or dealing between Buchanan and Strickland apart from the noted agreement  
10 facilitated by Martin that was reimbursable from the private reward money. (RT 5449-50; CT  
11 582-583; SHCP, Ex.'s G, H.) Hahus noted that the room and board agreement with Strickland  
12 was in place when he as assigned to the case. (RT 5394.) Hahus also testified at the motion for  
13 new trial that the only thing he bought Buchanan was lunch once while Buchanan was testifying  
14 (RT 5408-09); and that Buchanan refused anything else for fear it would appear the prosecution  
15 was trying to buy his testimony (RT 5409-10).

16 In sum, the documentation prepared by investigator Martin memorializing the Strickland-  
17 Buchanan arrangement and the noted testimony of Martin, Hahus and Strickland demonstrate the  
18 prosecution was not financially responsible under the Buchanan-Strickland agreement and the  
19 prosecution was unaware of any dispute between Strickland and Buchanan regarding sums  
20 owing between them and/or write-down thereof.<sup>13</sup>

#### 21 Personal Loans

22 Petitioner alleges that Buchanan received personal loans from Strickland of at least \$760.  
23 (Doc. No. 116 at 44:18-23, 98:20-22; RT 5321; SHCP, Ex.'s H, I.) Petitioner points to line item  
24 loan amounts included in the above noted bills Strickland sent to the prosecution, (see SHCP, Ex.  
25 I), and suggests these loans were an undisclosed inducement for Buchanan's testimony given that  
26

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27 <sup>13</sup> The court does not reach respondent's argument that petitioner's debt write-down allegations are unexhausted  
28 (Doc. No. 125 at 146:22-147:3) because the allegations lack merit. See n.10; see also Cone, 543 U.S. at 451 n.3 (an  
application for habeas corpus may be denied on the merits even if unexhausted in state court).

1 Buchanan was “a key [prosecution] witness.” (RT 5271, 5390.)

2 The record reflects that during the time the agreement was in effect, Strickland sent to the  
3 Fresno District Attorney’s Office copies of Buchanan’s IOU’s that included line itemed loans.  
4 (SHCP, Ex. I.) Nonetheless, this allegation fails for the same reasons the immediately above  
5 room and board allegations fail. At bottom, petitioner has not demonstrated on the evidentiary  
6 record that prosecution funds were loaned or paid to either Strickland or Buchanan for purposes  
7 of the alleged Strickland loans, or otherwise.

8 Trial Preparation

9 Petitioner alleges Buchanan testified falsely about the number of times prosecutor Hahus  
10 met with him prior to trial. Petitioner argues the falsely reduced number of meetings Hahus had  
11 with Buchanan was prejudicial to the extent it caused Buchanan to appear uncoached and more  
12 credible. (See Doc. No. 116 at 29:6-10, 47:19-23, 55:6-10, 62:1-12, 64:19-23.)

13 As noted, Buchanan testified that he had met with Hahus “a couple of times.” (RT 4766.)  
14 Hahus later admitted at the motion for new trial hearing that he had “met” with Buchanan  
15 approximately 12 times prior to trial, had spoken to Buchanan by phone at least once, and his  
16 investigators had contacted Buchanan several times. (RT 5390; SHCP, Ex. N at 1-3.)<sup>14</sup> Notably,  
17 Hahus in his closing argument explaining discrepancies between Buchanan’s testimony at  
18 preliminary hearing and at trial, stated that “it’s pretty clear Buchanan was not prepared to  
19 testify, that he was not scripted to testify.” (RT 4968.)

20 As an initial matter, the state supreme court reasonably could have rejected respondent’s  
21 argument that Hahus was speaking in merely colloquial terms – such that there was no false  
22 impression or that any impression as to the number of meetings was neither false nor material.  
23 (See Doc. No. 125 at 138:24-140:24.) The record reflects that Buchanan significantly  
24 understated the number of pretrial meetings he had with Buchanan.

25 Nevertheless, the state supreme court reasonably could have denied this allegation as

26 \_\_\_\_\_  
27 <sup>14</sup> Respondent may suggest the allegation that Buchanan’s credibility was bolstered by this false testimony regarding  
28 the number of meetings between Buchanan and Hahus was not adjudicated on direct appeal. See Dickey, 35 Cal. 4th  
at 910; RT 5390). But in any event, the allegation was summarily denied and thus adjudicated by the California  
Supreme Court on habeas review for purposes of 28 U.S.C. § 2254(d).

1 harmless error. (See e.g., RT 4969.) Petitioner has not demonstrated on the evidentiary record  
2 that additional trial preparation would cause jurors to discount the credibility of a witness.  
3 Moreover, the jury was well aware of the facts relating to Buchanan’s credibility including the  
4 testimony and statements of Goldman. (See claim(s) II(E), II(P), XXVI, XXVIII.)

5 The state supreme court concluded in these regards that:

6  
7 The jury knew Goldman and Buchanan were drug addicts, that they had been  
8 using drugs almost daily around the time of defendant's statements, and that  
9 Buchanan had used drugs the day before his testimony. It knew that, even though  
10 he had initially denied it, Buchanan was aware of the \$5,000 reward, that  
11 Buchanan had told others he wanted the reward for turning defendant in, and that  
12 he had then testified the reward was not the reason he had come forward. It knew  
13 room and board expenses incurred by Buchanan were to be deducted from the  
14 reward. [Citation] It knew Buchanan disliked defendant, and that he wanted  
15 revenge against defendant for tearing up a picture of his daughter.

16 Dickey, 35 Cal. 4th at 907 n.8. A fair-minded jurist could have concluded that these same facts  
17 would be related to the need to prepare Buchanan for trial.

#### 18 Harmless Error

19 For the reasons stated, it was not unreasonable for the state supreme court to find  
20 pursuant to Napue that the foregoing alleged false testimony was harmless rather than material  
21 error. 360 U.S. at 269; see also Dow v. Virga, 729 F.3d 1041, 1047 (9th Cir. 2013), quoting  
22 Giglio v. United States, 405 U.S. 150, 154 (1972) (a new trial is required if “the false testimony  
23 could ... in any reasonable likelihood have affected the judgment of the jury...”).

24 The jury was aware of the Strickland-Buchanan room and board agreement and the  
25 entirely private reward funding that backed it. They were aware of Buchanan’s desire to get the  
26 reward, pay his bill to Strickland and leave town. They were aware Buchanan’s alleged grudge  
27 against petitioner. The jury was aware of other noted facts relating to Buchanan’s credibility; his  
28 observations on the night of the murders and his statements regarding petitioner’s admission of  
involvement in the murders.

The jury was aware that Buchanan had met with Hahus, the prosecution team and the  
defense team. They were instructed that the argument of counsel, including Hahus’s noted

1 closing argument that defense investigators had made several apparently minor purchases for  
2 Buchanan and that the prosecution had not purchased “a single thing” for him, was not evidence.

3 For the reasons stated the state supreme court could have found no reasonable likelihood  
4 the noted alleged false testimony could have affected the judgment of the jury. Napue, 360 U.S.  
5 at 269; see also Dow, 729 F.3d at 1047 (a new trial is required if “the false testimony could ... in  
6 any reasonable likelihood have affected the judgment of the jury....”) That same court reasonably  
7 could have found that considering the record as a whole, the alleged false testimony did not  
8 “falsely buttress” Buchanan’s credibility. Cf., Hayes v. Brown, 399 F.3d 972, 986 (9th Cir.  
9 2005) (reversing conviction under Napue because concealment of a leniency deal allowed the  
10 State to “falsely buttress[ ]” credibility of a key witness). Petitioner was not denied a fair trial  
11 for these same reasons.

12 (iii) False Evidence - Penal Code Section 128

13 Petitioner revisits allegations in claims II(K) (alleging ineffective assistance of counsel)  
14 and VIII (alleging trial court error), alleging here that the prosecutor engaged in misconduct,  
15 bolstering Buchanan’s noted alleged false testimony by making him aware of the potential for  
16 perjury provided by Penal Code section 128. (Doc. No. 116 at 40:3-13; RT 4764-66.)

17 Petitioner argues that Buchanan’s bolstered testimony was false for the same reasons  
18 argued in claims II(K) and VIII, i.e., that section 128 is not a meaningful deterrent to perjury and  
19 the chances of a successful prosecution under section 128 are so remote as to be irrelevant. As  
20 discussed in those claims, the state supreme court rejected this reasoning on direct appeal. See,  
21 Dickey, 35 Cal. 4th at 912.

22 Respondent contends these allegations are unexhausted (Doc. No. 125 at 146:18-147:3)  
23 and lack support in the record (id.). The court does not reach respondent’s exhaustion argument  
24 for the reasons stated in claims II(K) and VIII and because the claim is denied on the merits.<sup>15</sup>

25 As noted, the prosecutor was allowed to elicit testimony from Buchanan that the  
26 prosecutor had made him aware of Penal Code section 128, which provided that:

27 \_\_\_\_\_  
28 <sup>15</sup> See n.10; see also Cone, 543 U.S. at 451 n.3 (an application for habeas corpus may be denied on the merits even if unexhausted in state court).

1  
2 Every person who, by willful perjury or subornation of perjury, procures the  
3 conviction and execution of any innocent person, is punishable by death or life  
4 imprisonment without possibility of parole. The penalty shall be determined  
5 pursuant to Sections 190.3 and 190.4.

6 Dickey, 35 Cal. 4th at 911.

7 To summarize the discussion in claims II(K) and VIII, the California Supreme Court  
8 considered and rejected on direct appeal the allegation that prosecutor Hahus improperly asked  
9 Buchanan whether he had been made aware of section 128, as follows:  
10

11 Defendant argues section 128 is not a meaningful deterrent to perjury. “Given the  
12 inevitable time lapse between potential conviction and execution, and the remote  
13 prospect of conclusive exonerating evidence being discovered after an execution,  
14 the chances of a successful prosecution under Penal Code section 128 in any case  
15 are so remote as to make the proffered evidence wholly irrelevant.”

16 We decline to second-guess the Legislature, which in enacting the section, clearly  
17 believed it would have a meaningful deterrent effect. Admittedly, the delay  
18 between conviction and execution has grown exponentially since section 128 was  
19 enacted in 1872. However, by 1997, when the Legislature amended and thereby  
20 reaffirmed the section, the notion of swift justice in capital cases was already a  
21 thing of the past. Moreover, with the advent of DNA testing, “the prospect of  
22 conclusive exonerating evidence being discovered after an execution” is, if  
23 anything, less “remote.” In any event, the stakes under section 128, “death or life  
24 imprisonment without possibility of parole,” are so high a potential perjurer may  
25 well decide it is not worth the risk, however small.

26 -----FOOTNOTE-----

27 n.11 The 1977 amendment added the phrase “or life imprisonment without  
28 possibility of parole,” as well as the second sentence. (Stats. 1977, ch. 316, § 3, p.  
1256, eff. Aug.11, 1977.)

-----END FOOTNOTE-----

29 Dickey, 35 Cal. 4th at 912.

30 For the reasons stated, the state supreme court could have found that considering the  
31 record as a whole, the alleged false testimony did not “falsely buttress” Buchanan’s credibility,  
32 such that there was no reasonable likelihood the noted alleged false testimony could have  
33 affected the judgment of the jury. Napue, 360 U.S. at 269; cf., Hayes, 399 F.3d at 986.  
34 Petitioner was not denied a fair trial because the evidence could be seen as proper.

1 (iv) False Evidence - Stokes Testimony of *Goldman's* Statements

2 Finally, petitioner largely revisits allegations in claim II(L), (alleging ineffective  
3 assistance of counsel), that detective Stokes testified falsely when he described Goldman's  
4 statements to him regarding the actions and conversations of RC and petitioner on the day of the  
5 murders including as to a knife used in the murders (RT 4397). (Doc. No. 116 at 31:1-9.) Here  
6 the allegations are framed as prosecutorial misconduct in presenting false evidence relating to  
7 following allegedly inconsistent testimony.

8 Goldman testified at the preliminary hearing that:

- 9
- 10 • She saw petitioner and RC leave the apartment right around the day of the  
11 Presidential election. (RT 4339-40.)
  - 12 • Before they left "[t]he only thing [petitioner] did was walk into the kitchen and he  
13 looked in the drawer. That's all he did." (RT 4343.)
  - 14 • She saw RC open the hallway closet, and "get a cord." (RT 4345.)
  - 15 • She saw that a cord on one of the venetian blinds in the apartment's bedroom, not  
16 the hallway closet, was gone. (RT 4347.)
  - 17 • She did not know how long [petitioner and RC] were gone. (RT 4349.)
  - 18 • When they returned, RC packed his bags and left. (RT 4350.)
  - 19 • Petitioner admitted to her that he was present when RC killed his grandmother  
20 and Louis Freiri, but that "Gail, I swear I had nothing to do with this." (RT 4357.)
  - 21 • Petitioner made the "general statement" that "he wasn't afraid of anyone saying  
22 anything about him, because if they did, they wouldn't do it again." (RT 4375.)
  - 23 • After petitioner found out RC and Caton had died, "he wasn't as depressed as he  
24 had been before." (RT 4378.)

25 At trial, the prosecutor elicited testimony from detective Stokes (see RT 4590-4616) that  
26 Goldman told him:

- 27
- 28 • She saw petitioner remove a knife from a drawer in the apartment kitchen before  
he and RC left the apartment on the night of the crimes. (RT 4602.)
  - Two days later petitioner "asked her to go into the bedroom with him, he want --  
he wanted to tell her something." (RT 4606.)
  - Buchanan followed them in (RT 4607) and petitioner stated "he had been  
involved in something bad." (RT 4606.)
  - "[Petitioner] had said that he would kill her if she or anyone else talked about  
what he had told them." (RT 4615.)
  - After the deaths of Ms. Caton and RC petitioner "became aggressive toward her  
and Buchanan, and made statements regarding the fact that if they revealed what  
he had told them that they would be hurt and killed, as would anyone else." (RT  
4616.)
  - Goldman told him about "a venetian blind that had been in the hall closet that was  
removed from the hall closet the night of the homicide, and that that venetian  
blind was - taken by [petitioner] ... into a bedroom and that the cord was removed

1 from that venetian blind and then the venetian blind was placed back inside the  
2 hall closet." (RT 4534.)

3 The state supreme court would not have been unreasonable in denying these allegations  
4 consistent with the discussion in claim II(L). Stokes's testimony could reasonably be seen as  
5 impeaching Goldman's preliminary hearing testimony, a non-hearsay purpose.

6 Petitioner's contention that Stokes coerced Goldman's statements lacks support in the  
7 record. Stokes denied that at the time of the interrogation he threatened to arrest Goldman if she  
8 would not talk with him. (RT 4595-97.) Goldman stated "Detective Stokes, I'm sorry, I lied to  
9 you. I'm sorry I lied to you. I want to tell you the whole truth right now." (Id.) The state  
10 supreme court reasonably could have found Goldman's statements to Stokes during the  
11 interrogation were voluntary.

12 Furthermore, it was not unreasonable for the state supreme court to find, under Napue,  
13 and for all the reasons stated above that foregoing alleged false testimony was in any event  
14 harmless rather than material error. 360 U.S. at 269; see also Dow, 729 F.3d at 1047 (a new trial  
15 is required if "the false testimony could ... in any reasonable likelihood have affected the  
16 judgment of the jury....").

17 Stokes's testimony could be seen as substantially cumulative of Buchanan's testimony.  
18 Cf., Ocampo, 649 F.3d at 1114 (inquiry into Confrontation Clause error considers whether  
19 errantly admitted evidence was cumulative). For example, Buchanan testified that on the night  
20 of the murders, he saw petitioner take the venetian blind out of the hall closet and go into the  
21 bedroom (RT 4665-66), and then exit the bedroom and return the venetian blind to the closet; he  
22 also saw a kitchen knife in the bedroom (RT 4706-07). See also Dickey, 35 Cal. 4th at 898.  
23 Buchanan testified that RC and petitioner returned later than night; bought drugs for the  
24 roommates with money they did not have earlier that evening; and petitioner disposed of some  
25 clothing by tossing it out of Buchanan's car. (RT 4682-85.)

26 Significantly, petitioner's admission of his role in the crimes to Goldman and Buchanan  
27 and discussion of events surrounding (RT 4352-79; 4606-08, 4687-94) were consistent in the  
28 record and not controverted by Stokes's testimony of Goldman's statements. Furthermore,

1 petitioner's admission was corroborated by Goldman's consistent testimony that RC and  
2 petitioner left the apartment together the night of the crimes and returned together later that  
3 evening whereupon RC acted strangely; (RT 4349-79); see also Dickey, 35 Cal. 4th at 898; and  
4 by petitioner's initial depression following the crimes (RT 4352-54, 4378). Goldman's  
5 testimony about petitioner being essentially fearless and aggressive also was not directly  
6 controverted by Stokes's testimony (RT 4398) or by Buchanan's testimony that petitioner "never  
7 threatened my life in my presence." (RT 4745.)

8         Petitioner, in this claim XIII also alleges that Stokes testified falsely during direct  
9 examination about certain of Goldman's statements contained in his investigative report. (Doc.  
10 No. 116 at 31, n.4; RT 4621-22.) However, it appears that Stokes corrected such misstatements  
11 during cross-examination. (Id.) The state supreme court reasonably could have found no  
12 reasonable likelihood these misstatements of Stokes, corrected on the record could have affected  
13 the jury's verdict. Tayborn, 251 F.3d at 1130. For these reasons, that court would not have been  
14 unreasonable in viewing such misstatements as mere inconsistency or failure of Stokes to  
15 recollect what was in his investigation reports, rather than false testimony. See Zuno-Arce, 44  
16 F.3d at 1423.

17         For the reasons stated, the state supreme court could have found that considering the  
18 record as a whole, the alleged false testimony did not "falsely buttress" Buchanan's credibility,  
19 such that there was no reasonable likelihood the noted alleged false testimony could have  
20 affected the judgment of the jury. Napue, 360 U.S. at 269; cf., Hayes, 399 F.3d at 986.  
21 Petitioner was not denied a fair trial for these same reasons.

22         **c.         Analysis of Failure to Disclose Allegations**

23         Petitioner alleges the prosecutor knowingly failed to disclose material evidence to which  
24 the defense was entitled.

25         (i)         Clearly Established Law – Failure to Disclose

26         The Supreme Court has held that if the state fails to disclose exculpatory evidence in  
27 violation of Brady v. Maryland, the conviction cannot stand if there is a reasonable probability  
28

1 that the evidence, considered cumulatively, would have produced a different result at trial. 373  
2 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (same). If a habeas petitioner  
3 establishes the “reasonable probability” of a different result, the error cannot subsequently be  
4 found harmless. *Id.* at 436. In *Brady*, the Supreme Court held that the suppression by the  
5 prosecution of evidence favorable to an accused violates due process where the evidence is  
6 material either to guilt or to punishment, irrespective of the good faith or bad faith of the  
7 prosecution. *Brady*, 373 U.S. at 87. There are three components to a *Brady* violation: i) the  
8 evidence at issue must be favorable to the accused either because it is exculpatory or because it is  
9 impeaching; ii) the evidence must have been suppressed by the State either willfully or  
10 inadvertently; and iii) prejudice must have ensued. *Banks v. Dretke*, 540 U.S. 668, 691 (2004);  
11 *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). “Such evidence is material if there is a  
12 reasonable probability that, had the evidence been disclosed to the defense, the result of the  
13 proceeding would have been different.” *Strickler*, 527 U.S. at 280, quoting *Bagley*, 473 U.S. at  
14 682. “[T]here is never a real *Brady* violation unless the nondisclosure was so serious that there is  
15 a reasonable probability that the suppressed evidence would have produced a different verdict.”  
16 *Strickler*, 527 U.S. at 281.

17 (ii) Analysis of Failure to Disclose Allegations

18 Petitioner alleges the prosecution failed to disclose to the defense legally discoverable  
19 evidence regarding inducements to and impeachment of witness Buchanan to which the defense  
20 was entitled, discussed below. (Doc. No. 51-1 ¶¶758-768; see also SHCP, Ex.’s G-K, M, N.)

21 As a preliminary matter, petitioner argues that pursuant to *United States v. Agurs*, 427  
22 U.S. 97, 112 (1976), the *Napue/Mooney* prejudice standard should apply when determining  
23 *Brady* materiality. However, the court conducts a cumulative *Brady/Napue* prejudice analysis,  
24 *post.* See *Kyle*, 514 U.S. at 434-37. *Agurs* is not authority otherwise.

25 Contacts between Prosecutor Hahus and Buchanan

26 Petitioner revisits the *Napue* allegations above that prosecutor Hahus failed to disclose  
27 the extent of his pre-trial contacts with Buchanan – that Hahus met with Buchanan twelve times,  
28

1 not the two times to which Buchanan testified. He also alleges that Hahus had spoken to  
2 Buchanan by phone at least once and that prosecution investigators had contacted Buchanan  
3 several times.

4 Petitioner again argues the failure to disclose these contacts made Buchanan's testimony  
5 appear credible, unrehearsed and not impaired by his admitted use of street drugs. He argues that  
6 in fact the higher (actual) number of meetings was necessary to prepare Buchanan's testimony.

7 However, for the same reasons noted in the above Napue discussion, the state supreme  
8 court could reasonably have rejected these allegations. In sum, the jury was aware of the facts  
9 relating to Buchanan's credibility including testimony and statements of Goldman. (See claim(s)  
10 II(E), II(P), XXVI, XXVIII.) The state supreme court concluded in these regards that:

11  
12 The jury knew Goldman and Buchanan were drug addicts, that they had been  
13 using drugs almost daily around the time of defendant's statements, and that  
14 Buchanan had used drugs the day before his testimony. It knew that, even though  
15 he had initially denied it, Buchanan was aware of the \$5,000 reward, that  
16 Buchanan had told others he wanted the reward for turning defendant in, and that  
17 he had then testified the reward was not the reason he had come forward. It knew  
18 room and board expenses incurred by Buchanan were to be deducted from the  
19 reward. [Citation] It knew Buchanan disliked defendant, and that he wanted  
20 revenge against defendant for tearing up a picture of his daughter.

21 Dickey, 35 Cal. 4th at 907 n.8. A fair-minded jurist could have concluded that these same facts  
22 would be related to the need to prepare Buchanan for trial. Also, the jury was instructed on  
23 weighing evidence going toward credibility, including that:

24 [In] determining the believability of [Buchanan] you may consider anything that  
25 has a tendency in reason to prove or disprove [his] truthfulness ...” [and] ...  
26 [e]vidence of the existence or nonexistence of any fact he testified to ...”

27 (CT 400.)

28 For the reasons stated the state supreme court could reasonably have found that had the  
29 prosecutor disclosed the full extent of contacts he and his office had with Buchanan, there would  
30 not have been a reasonable probability of a different outcome.

The Strickland-Buchanan Agreement

1           Petitioner alleges that prosecutor Hahus did not provide the defense with copies of the  
2 noted document memorializing the boarding house agreement between Buchanan and Strickland  
3 and bills thereunder. Such evidence, he claims would have impeached Buchanan’s credibility.  
4 He alleges that in response to a discovery request by Schultz for “[t]he benefits to be received  
5 from the reward, including total monetary and/or any other benefit” (CT 260), the prosecution  
6 failed to disclose information by “narrowly limit[ing] its response to the private \$5,000 reward.”  
7 (CT 288-89.) He alleges that in response to a further discovery request for related documents the  
8 prosecution “failed to disclose any documentary evidence of the agreement to use the reward to  
9 secure housing and food, the cost of same, the eleven or more documented cash loans, the  
10 regular invoicing of the amounts owed and debts incurred, and the ultimate discounts provided  
11 by the boardinghouse.” (Doc. No. 116 at 75:19-23, citing SHCP, Ex.’s G, H, I.)

12           The trial court in denying the motion for new trial and the state supreme court in denying  
13 these allegations on direct appeal each found the prosecution’s involvement in the Strickland-  
14 Buchanan agreement potentially impeaching. (See RT 1/17/92 at 16-17); Dickey, 35 Cal. 4th at  
15 910. Nevertheless, the state supreme court was not unreasonable in finding no prejudice, that  
16 there was “no reasonable likelihood the false impression created by Buchanan's testimony  
17 [relating to the Strickland room and board agreement] could have affected the judgment of the  
18 jury ... [T]he jury knew, through Buchanan's testimony and that of the defense investigator, of  
19 the agreement itself.” Dickey, 35 Cal. 4th at 910.

20           Any argument by petitioner that the agreement and bills thereunder constituted evidence  
21 of “conflicting claims from [Ms.] Strickland” and on that basis Brady evidence (see Doc. No. 51-  
22 ¶ 754) fails because the prosecution had no responsibility under the agreement for the reasons  
23 stated above. This was clear from prosecution investigator Martin’s memorialization of and  
24 report regarding the Strickland-Buchanan agreement (RT 5278-79; SHCP, Ex.’s G, H) and the  
25 related testimony of Martin (RT 5280, 5308), Strickland (RT 5323) and Hahus (RT 5405).  
26 Petitioner fails to demonstrate on the evidence how benefits from the noted private reward could  
27 exceed the total amount of that reward, \$5000, or that the prosecution provided any financial  
28

1 benefit as a result of the Buchanan-Strickland agreement. (See claim II(E).)

2 It appears that a copy of the document prepared by Martin memorializing the Strickland-  
3 Buchanan agreement was provided to defense counsel Schultz prior to trial and that the billings  
4 thereunder, sent to prosecution investigator Martin also were shown to the defense team. (RT  
5 5406.) The state supreme court would not have been unreasonable in finding Schultz’s statement  
6 that he “does not recall receiving copies of the bills or being apprised of their existence” (SHCP,  
7 Ex. B ¶6 at 353) not sufficient evidence otherwise. Significantly, petitioner has not established  
8 that Hahus was aware of any particulars of the Strickland-Buchanan relationship apart from the  
9 terms in the memorialized document relating to the private reward. (See e.g., RT 5403-07.)

10 Dismissal of Pending Felony and Misdemeanor Charges against Witness Buchanan

11 Petitioner revisits allegations raised in claim II(E) (ineffective assistance of counsel),  
12 recast here as a Brady claim that the prosecution failed to disclose an agreement to provide and  
13 provided assistance to Buchanan regarding separate felony and misdemeanor charges brought  
14 against him around the time of petitioner’s trial. (Doc. No. 51-1 ¶¶ 740-750; Doc. No. 116 at  
15 80:18-87:7; see also claim II(E).)

16 Petitioner argues the prosecution failed to disclose the dismissal of felony drug  
17 possession counts against Buchanan that arose after he was identified as a witness and prior to  
18 petitioner’s trial. (CT 584; SHCP, Ex.’s J, K.) He contends that on July 18, 1989, prior to his  
19 trial, “criminal complaint case number 017993-7 ... charging Buchanan with two felony drug  
20 possession counts, was dismissed.” (Doc. No. 51-1 ¶ 741; SHCP, Ex. J; see also Supp. CT 8-23,  
21 -24, 26-28, 37-39, 51-69.)

22 Petitioner argues the felony dismissals were part of a plea bargain connected to  
23 Buchanan’s testimony in petitioner’s proceeding (see RT 5341-58, 5370-79, 5391-94) and that  
24 this deal was meant not to be disclosed (RT 5384; SHCP, Ex. N). He further contends Buchanan  
25 told prosecutor Hahus of this deal prior to petitioner’s trial (RT 5380-94) and that Hahus did not  
26 believe Buchanan and was unaware of any such deal. (RT 5385-88).

27 Additionally, petitioner argues 1990 misdemeanor charges were dismissed after  
28

1 petitioner's trial by Hahus at least in part in return for Buchanan's testimony in petitioner's  
2 proceeding. (RT 5396-5403; see also SHCP, Ex. K; Supp. CT. 68-83.) Specifically, he contends  
3 that on April 17, 1991, after petitioner's conviction, Buchanan's criminal case M48975-7  
4 charging him with a misdemeanor possession of a controlled substance and hypodermic needle  
5 was dismissed "in the interests of justice." (RT 5396-99; see also Doc. No. 51-1 ¶ 741 and n.59,  
6 citing Supp. CT 68, 71, 77-78.)

7 The California Supreme Court considered and rejected these allegations on direct appeal,  
8 stating that:

9  
10 When Ken Hahus, the prosecutor in this case, first spoke to Buchanan after the  
11 case was reassigned to him, Buchanan had been released on his own recognizance  
12 (OR) in an unrelated narcotics case and had failed to appear. Barbara Dotta, the  
13 prosecutor in the narcotics case, had met with defense counsel in chambers, and  
14 after defense counsel had pointed out defects in the search warrant, defects which  
15 made it impossible to then proceed with the preliminary hearing, and which  
16 eventually resulted in dismissal of that case, Ms. Dotta had agreed to Buchanan's  
17 release on OR. However, Buchanan told Mr. Hahus he had been released OR in  
18 the narcotics case because he was a prime witness in this case, and that a reporter  
19 had been present when counsel met in chambers and reached the purported  
20 agreement, but that the reporter had been instructed not to report the agreement, in  
21 order to keep defense counsel in this case from learning of it. Mr. Hahus heatedly  
22 informed Buchanan no such agreement could have been made because he was the  
23 prosecutor in this case, that he would have had to authorize such an agreement,  
24 and he had not done so.

25 Mr. Hahus did not inform defense counsel of his conversation with Buchanan  
26 until shortly before the hearing on the motion for a new trial. The motion for new  
27 trial was based on other grounds. This contention was not added to the motion,  
28 and thus the trial court did not address it.

29 We conclude that while this information would have been favorable to defendant  
30 insofar as it tended to impeach Buchanan's credibility, it was not material because  
31 it would have added little to the cumulative impact of the other impeachment  
32 evidence.

33 The jury knew Buchanan was a drug addict, that he had been using drugs almost  
34 daily around the time of defendant's statements, and that he had used drugs the  
35 day before his testimony. They knew that, even though he had initially denied it,  
36 Buchanan was aware of the \$5,000 reward, that Buchanan had told others he  
37 wanted the reward for turning defendant in, and that he had then testified the  
38 reward was not the reason he had come forward. They knew room and board  
39 expenses incurred by Buchanan were to be deducted from the reward. [Citation]  
40 They knew Buchanan disliked defendant, and that he wanted revenge against  
41 defendant for tearing up a picture of his daughter.

42 It is not reasonably probable, we conclude, that whatever confidence the jury

1 placed in Buchanan's testimony would have been fatally undermined by knowing  
2 he had made a resoundingly unsuccessful effort to convince Mr. Hahus his  
3 testimony entitled him to, in Mr. Hahus's words, "get-out-of-jail-free cards."<sup>9</sup>

4 -----FOOTNOTE-----

5 n.9 Defendant contends his trial counsel was ineffective in failing to impeach  
6 Buchanan with the fact that the charges in the unrelated narcotics case had been  
7 dismissed. This information would have been of no impeachment value. After  
8 hearing the motion for a new trial, the trial court concluded the narcotics case  
9 "was dismissed because of its weakness months before Mr. Buchanan testified. So  
10 there was really no favor done to Mr. Buchanan, and there was no further hook on  
11 Mr. Buchanan at that time."

12 -----END FOOTNOTE-----

13 Dickey, 35 Cal. 4th at 908-09.

14 At the outset, the court does not reach respondent's contention that these allegations are  
15 unexhausted (Doc. No. 125 at 146:22-147:3) because these allegations are denied on the merits.<sup>16</sup>

16 This court is not persuaded the state supreme court's rejection of these allegations was  
17 unreasonable. The district attorneys who were involved in Buchanan's felony drug case denied  
18 any deal by stating charges were dropped because of problems with the search warrant. (RT  
19 5341-58, 5370-79, 5391-94.) The record reflects the felony case was dismissed by the  
20 prosecution on July 18, 1989 "due to evidentiary problems" (SHCP, Ex. N-1) and "lack of  
21 corpus delicti." (SHCP, Ex. J-2.)

22 Petitioner nonetheless argues such a deal to dismiss the felony charges existed, pointing  
23 to the time and effort he contends the district attorney's office devoted to the felony case (Supp.  
24 CT 24-25, 29-36, 40-50), and to the guilty plea to one (of three) counts by Buchanan's co-  
25 defendant in the felony case. (Supp. CT 24-25.) However, the state supreme court could  
26 reasonably have rejected such surmise by petitioner given the weight of the noted direct  
27 testimony. Notably, the trial court rejected the same allegation on motion for new trial, finding  
28 the felony case was dismissed for lack of evidence. (RT 1/17/92 at 18-19.)

As for the misdemeanor case, the record reflects the Fresno District Attorney's Office  
dismissed the case for "lack of corpus delicti" and "in the interest of justice." (SHCP, Ex. K-2.)

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<sup>16</sup> See n.10; see also Cone, 543 U.S. at 451 n.3 (an application for habeas corpus may be denied on the merits even if unexhausted in state court).

1 Prosecutor Hahus testified at the new trial motion that it was “hard to say” whether he dismissed  
2 the misdemeanor case in reward for Buchanan’s testimony in petitioner’s case. (RT 5402.)  
3 Even so, Hahus went on to testify that there was no agreement with Buchanan that the  
4 misdemeanor case would be dismissed; and that he never told Buchanan before the latter’s  
5 testimony that the case would be dismissed. (RT 5393-5403.) Petitioner has not demonstrated  
6 on the facts that Buchanan believed such an agreement to dismiss the misdemeanor charges  
7 existed at the time of his testimony. Cf., Giglio, 405 U.S. at 154-55 (evidence of pre-testimony  
8 agreement regarding future prosecution of key witness co-conspirator was relevant to credibility  
9 of that witness and failure to disclose such evidence was a Brady violation).

10 For the reasons stated, the state supreme court could reasonably have found that at the  
11 time Buchanan testified in petitioner’s proceeding no dismissal deal related to these felony and  
12 misdemeanor charges existed with the prosecution and Buchanan did not believe such a deal  
13 existed. That court could reasonably have given weight to the direct testimony in the record over  
14 petitioner’s surmise and found these allegations not to suggest a reasonable probability of a  
15 different result. Schultz’s statement that he was aware of the pending charges and dismissal  
16 prior to trial, but did not believe this information would be beneficial to the defense, (SHCP, Ex.  
17 B ¶ 7; see also RT 5436), does not suggest otherwise.

#### 18 *Buchanan’s Propensity for Lying*

19 Petitioner alleges that prosecutor Hahus failed to disclose, until just prior to the motion  
20 for new trial, his file notes regarding the above discussed alleged felony drug charge plea  
21 bargain. (Doc. No. 51-1 ¶¶ 758-768; Doc. No. 116 at 77:2-80:15; SHCP, Ex. N; see also RT  
22 5380-92.) Petitioner argues this failure to disclose these notes during pretrial discovery was  
23 prejudicial because this evidence was not otherwise in the record and without it the prosecutor  
24 was able to argue in closing that Buchanan testified truthfully. (RT 4969-72.)

25 However, for the same reasons discussed above the state supreme court reasonably could  
26 have found these notes by Hahus of his initial contact with Buchanan not to be materially  
27 exculpatory or impeaching. The trial court found Buchanan’s statement regarding the alleged  
28

1 deal was untrue. (RT 1/17/92 at 18-19.) Hahus believed Buchanan’s statement to be untrue (RT  
2 5388), and merely an attempt to parlay benefit in exchange for testimony. (RT 5431-36.)  
3 Furthermore, Hahus stated that he did not view Buchanan’s noted statement as a lie and did not  
4 see it as favorable to petitioner. (See id.) Instead, Hahus viewed the statement merely as a  
5 “flag” showing [Buchanan’s] “relative sophistication in dealing with district attorneys” (RT  
6 5384-88); that the statement simply showed Buchanan was “con-wise.” (RT 4970.)

7         Accordingly, the state supreme court would not have been unreasonable in finding that  
8 even if Hahus had produced notes of Buchanan’s initial contact with him there was no  
9 reasonable probability of a different result. As noted, the jury was aware of the facts relating to  
10 Buchanan’s credibility. The record before the jury included other substantial evidence relating to  
11 Buchanan’s credibility - including that he was an habitual drug user interested in the reward  
12 money and that he held a grudge against petitioner. The jury also was instructed on weighing  
13 evidence going toward credibility.

#### 14         Illegal Drug Activities

15         Petitioner alleges that prosecutor Hahus failed to disclose a deal with Buchanan not to  
16 prosecute the illegal drug activities to which Buchanan testified at trial. (Doc. No. 116 at 70:1-  
17 5.) Specifically, petitioner alleges the prosecution failed to pursue criminal charges against  
18 Buchanan even though he waived his Fifth Amendment right and admitted under oath at trial that  
19 he possessed, used and sold illegal drugs. (See Doc. No. 116 at 87:10-88:15.) Petitioner argues  
20 that there must have been an implicit agreement to this effect because no charges were ever filed.  
21 (Id.)

22         As a preliminary matter, the court does not reach respondent’s argument these allegations  
23 are unexhausted (Doc. No. 125 at 146:22-147:3) because the allegations are denied on the merits  
24 as discussed below.<sup>17</sup>

25         Petitioner has not made an evidentiary showing that there was an agreement not to  
26 prosecute, or that Buchanan believed there was one at the time Buchanan testified at petitioner’s

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27  
28 <sup>17</sup> See n.10; see also Cone, 543 U.S. at 451 n.3 (an application for habeas corpus may be denied on the merits even if unexhausted in state court).

1 trial. (RT 4737-42.) To the contrary, Buchanan testified prior to these drug related admissions  
2 that he was not told by Hahus expressly or implicitly that he (Buchanan) would not be  
3 prosecuted. (RT 4741-42, 4754-56.) Nor has Petitioner demonstrated that Buchanan's waiver of  
4 his right against self-incrimination was constitutionally infirm.

5 Even if there was such a deal, the state supreme court could reasonably have determined  
6 any failure to disclose it was not prejudicial. As discussed above, the jury was otherwise aware  
7 of Buchanan's drug related activities and presumable considered such in evaluating his  
8 credibility and testimony. Additionally, petitioner has not demonstrated that Buchanan's drug  
9 related admissions were inculcating of petitioner or that absent the admissions petitioner would  
10 have realized a different outcome in his proceeding.

11 Petitioner's further allegation that Hahus failed to disclose such a deal to post-trial  
12 defense counsel similarly fails. Petitioner contends that at the hearing on the new trial motion,  
13 seven months after trial ended, Hahus was obligated to advise Ms. Hart, who had replaced  
14 Schultz as counsel for petitioner, that no prosecution has been initiated regarding the noted  
15 admissions. But for the same reasons stated above, petitioner has not demonstrated such a deal  
16 existed or if it did that he was prejudiced by it.

17 (iii) Cumulative Effect of Napue and Brady Errors

18 Petitioner finally alleges that the state supreme court was unreasonable in finding no  
19 cumulative material violation under Napue and Brady. (See Doc. No. 116 at 28:4-99:7.)

20 "The Supreme Court has clearly established that the combined effect of multiple trial  
21 errors may give rise to a due process violation if it renders a trial fundamentally unfair, even  
22 where each error considered individually would not require reversal." Parle v. Runnels, 505  
23 F.3d 922, 928 (9th Cir. 2007), citing Donnelly, 416 U.S. at 643.

24 Although individual errors looked at separately may not rise to the level of reversible  
25 error, their cumulative effect may nevertheless be so prejudicial as to require reversal.  
26 Necochea, 986 F.2d at 1282 ("In reviewing for cumulative error, the court must review all  
27 errors preserved for appeal and all plain error."). However, the fact that errors have been  
28

1 committed during a trial does not mean that reversal is required. “[W]hile a defendant is entitled  
2 to a fair trial; [she] is not entitled to a perfect trial, for there are no perfect trials.” United States  
3 v. Payne, 944 F.2d 1458, 1477 (9th Cir. 1991).

4 Here, petitioner argues the state supreme court ignored facts that “(1) Buchanan was  
5 continuing to rely on the \$5,000 reward, not on earnings from property management and  
6 maintenance, to pay his debt to the landlady; (2) [Buchanan] was beholden to the state for nailing  
7 down the agreement that allowed him to obtain room and board on credit; (3) [Hahus] met with  
8 [Buchanan] at least a dozen times prior to the trial; and (4) [Buchanan] had no real concern about  
9 being prosecuted – let alone facing the death penalty – for perjury.” (Doc. No. 116 at 61:22-  
10 62:1.)

11 Petitioner argues that confidence in the verdict is undermined by: “1) the jury being  
12 deprived of knowing that Buchanan lied to the DA to gain personal advantage with respect to his  
13 willingness to testify in this case; 2) the DA’s arguments to the jury that Buchanan was honest  
14 and reliable; and 3) the propensity of most all juries to disregard the testimony of liars, as they  
15 are instructed they can do.” (Doc. No. 128 at 84:7-14.) He argues that absent these errors  
16 prosecutor Hahus would have had to present weaker theories, present less evidence, and refrain  
17 from making numerous arguments that vouched for Buchanan’s veracity. This, petitioner argues  
18 would have “fueled a withering cross-examination, destroying confidence in Buchanan’s story  
19 and raising a substantial implication that the DA had coached him during their dozen or more  
20 meetings.” (Id. at 83:14-18.)

21 Cumulative prejudice arising from concurrent Brady and Napue error is analyzed as  
22 follows:

23  
24 [W]e first consider the Napue violations collectively and ask whether there is  
25 “any reasonable likelihood that the false testimony could have affected the  
26 judgment of the jury.” If so, habeas relief must be granted. However, if the  
27 Napue errors are not material standing alone, we consider all of the Napue and  
28 Brady violations collectively and ask whether “there is a reasonable probability  
that, but for counsel’s unprofessional errors, the result of the proceeding would  
have been different.” At both stages, we must ask whether the defendant  
“received ... a trial resulting in a verdict worthy of confidence.

1 Jackson v. Brown, 513 F.3d 1057, 1076 (9th Cir. 2008).

2 As a preliminary matter, the court is unpersuaded by respondent's argument based upon  
3 Imbler v. Pachtman, that a claim under Brady can be analyzed under the Napue standard. See  
4 424 U.S. 409, 431 n.34 (1976). The Imbler court's holding relates to prosecutorial immunity in  
5 the context of Brady and Napue and does not support respondent's asserted standard of review  
6 for cumulative error under Napue and Brady.

7 For the reasons discussed above, the state supreme court could reasonably have found no  
8 individual and cumulative prejudice under Napue and Brady. First, considering only the Napue  
9 allegations, that court could have found no reasonable likelihood that the false testimony could  
10 have affected the judgment of the jury. For the reasons stated above, the state supreme court  
11 could reasonably have rejected petitioner's allegations regarding the memorialization of the  
12 Strickland agreement; Stokes's testimony of Goldman's comments to him; and the court's notice  
13 of Penal Code section 128. Nor does it appear the alleged false testimony materially impacted  
14 the ability of the jury to evaluate Buchanan's credibility given the noted evidence that was  
15 otherwise before the jury.

16 Second, even when combined with the alleged Brady violations, there is no reasonable  
17 probability that the result of the proceeding would have been different. For the reasons stated  
18 above, the state supreme court could reasonably have rejected allegations regarding prejudicial  
19 undisclosed contacts between Buchanan and Hahus including relating to alleged lies by  
20 Buchanan; the Strickland agreement; dismissal of criminal charges; and illegal drug use by  
21 Buchanan. Cf., Horton v. Mayle, 408 F.3d 570, 578–79 (9th Cir. 2005) (holding that failing to  
22 disclose a leniency deal was material because the witness's testimony was "central to the  
23 prosecution's case" and "the deal would have provided powerful and unique impeachment  
24 evidence demonstrating that [the witness] had an interest in fabricating his testimony").

25 There was no cumulative error under Napue and Brady because there was no individual  
26 constitutional error. See Thompson, 86 F.3d at 1521. For the reasons stated, the state supreme  
27 court could reasonably have found the alleged Napue and Brady errors not sufficient to  
28

1 “undermine confidence in the outcome” of the trial. See Bagley, 473 U.S. at 682.

2 (iv) Conclusions

3 For the reasons stated, the state supreme court could reasonably have found petitioner  
4 failed to demonstrate prosecutorial misconduct under Brady and Napue.

5 Accordingly, the California Supreme Court’s rejection of this claim was not contrary to,  
6 or an unreasonable application of, clearly established federal law, or an unreasonable  
7 determination of the facts in light of the evidence presented in the state court proceeding. 28  
8 U.S.C. § 2254(d).

9 Claim XIII is denied.

10 3. Review of Claims XIV and XV

11 Petitioner alleges prosecutorial misconduct by failing to collect and preserve and/or  
12 making unavailable and destroying material potentially exculpatory evidence, denying his rights  
13 under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution.  
14 (Doc. No. 51-1 ¶¶ 769-825.)

15 **a. Clearly Established Law**

16 (i) Prosecutorial Misconduct

17 The clearly established law for prosecutorial misconduct is set out in claim XIII, ante.

18 (ii) Potentially Exculpatory Evidence

19 The failure of a state to preserve evidence “of which no more can be said than it could  
20 have been subjected to tests, the results of which might have exonerated the defendant,” is not a  
21 denial of due process of the law “unless a criminal defendant can show bad faith on the part of  
22 the police.” Youngblood, 488 U.S. at 57; Mitchell, 878 F.2d at 321.

23 Where the government fails to preserve evidence that is only potentially exculpatory, the  
24 right to due process is violated only if [the evidence] possesses “an exculpatory value that was  
25 apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be  
26 unable to obtain comparable evidence by other reasonably available means.” Trombetta, 467  
27 U.S. at 489. The defendant in Youngblood failed to establish a due process violation because  
28

1 the evidence was only “potentially useful” and the actions of the police could “at worst be  
2 described as negligent.” Youngblood, 488 U.S. at 58.

3 **b. Analysis of Claim XIV**

4 Petitioner alleges that the prosecution, in knowing bad faith failed to collect and preserve  
5 and/or destroyed material physical and biologic exculpatory evidence.

6 (i) State Court Direct and Collateral Review

7 The California Supreme Court summarily denied these allegations on the merits and  
8 denied certain allegations as procedurally barred, on habeas review. (Lod. Doc. No. 31.)

9 (ii) Failure to Collect and Preserve Physical Evidence

10 Petitioner alleges the state failed to collect and preserve material physical evidence at the  
11 crime scene and elsewhere.

12 Crime Scene Fingerprint Evidence

13 Petitioner argues that by virtue of the law enforcement’s bad faith failure to conduct a  
14 reasonable crime scene examination, no fingerprints from anyone were found at the crime scene  
15 notwithstanding the two victims and five witnesses known to have been in the home during the  
16 period from the murders until the police examination of the crime scene. (Doc. No. 116 at  
17 121:1-24; RT 4214-33.) He suggests that such fingerprint evidence would have been  
18 exculpatory.

19 Petitioner argues the police failed to collect and examine two disconnected telephones  
20 with blood on them (RT 4321, 4330-31) found placed together in the living room. (RT 4320-21;  
21 SSHCP, Ex. 9 at 322.) He surmises bad faith was involved because i) RC was known to have a  
22 fascination with telephones (RT 4320-22) and ii) detective Stokes believed more than one  
23 perpetrator was likely involved in the crimes. (RT 4628-29.) He cites Miller v. Vasquez and  
24 argues this alleged bad faith failure to collect and preserve potentially exculpatory evidence  
25 violated his due process rights. 868 F.2d 1116, 1120-21 (9th Cir. 1989) (Youngblood applies  
26 where the state in bad faith fails to collect potentially exculpatory evidence); (see also Doc. No.  
27 51-1- at 233:9-12).

1           However, the state supreme court reasonably could have rejected these allegations. The  
2 record reflects police “I” Bureau officers dusted the crime scene including all areas likely to  
3 yield usable latent prints; they simply did not find any usable prints to collect. (RT 4211-33; see  
4 also Doc. No. 125 at 149:15-17.) The venetian blinds and window coverings at the crime scene  
5 were checked and found not to be missing any cord. (RT 4326-28.) Petitioner has not shown the  
6 existence of potentially useful fingerprints or other physical evidence that law enforcement failed  
7 to recover from the crime scene in bad faith. See e.g., *United States v. Burdeau*, 168 F.3d 352,  
8 356-57 (9th Cir. 1999) (there are many reasons not to find usable prints).

9           The state supreme court reasonably could have found these allegations to be only  
10 speculative.

#### 11           Easy 8 Motel

12           Petitioner argues that by virtue of the law enforcement’s bad faith failure to examine the  
13 Fresno hotel room rented by RC shortly after the murders (RT 4420-34), potentially exculpatory  
14 evidence was lost including possible forensic evidence linking Buchanan to the crimes. (Doc.  
15 No. 116 at 123:6-124:15.) He points out that even though RC left his belongings including an  
16 empty prescription drug vial belonging to Buchanan at the Easy 8 Motel during his flight after  
17 the murders (RT 4541-42), the police did not search for Buchanan or investigate Buchanan’s  
18 potential involvement in the crimes. All this, he surmises, deprived him of potentially  
19 exculpating evidence.

20           But the state supreme court could have determined the police investigation of the room  
21 was reasonable. Petitioner infers from the prescription drug vial and the fact Buchanan had  
22 access to a car that Buchanan was in the room with RC. Yet the weight of the evidentiary record  
23 seems not to support such an inference. The desk clerk at the Easy 8 Motel, Mr. Yeon, testified  
24 at trial that RC registered alone; Yeon makes no mention of anyone accompanying RC while at  
25 the Motel. (RT 4420-34.) Yeon testified he was interviewed by detective Stokes shortly after  
26 RC departed the Motel and that the police collected RC’s registration card, entered his room and  
27 collected RC’s remaining belongings. (Id.) Detective Stokes’s testimony on these events  
28

1 tracked Yeon's; Stokes also testified that at the time, police were unfamiliar with Buchanan.  
2 (RT 4540-42.)

3         Additionally, petitioner's allegation that Buchanan was RC's accomplice in the crimes  
4 fails for the reasons discussed in claim II(B).

5         Accordingly, petitioner has not pointed to facts in the record reasonably suggesting  
6 potentially exculpatory evidence at the Easy 8 Motel that was not recovered by law enforcement  
7 in bad faith.

8             Harvard Avenue Apartment

9         Petitioner argues that law enforcement's bad faith failure to examine the Harvard Avenue  
10 apartment RC shared with petitioner and others until three months after the murders resulted in  
11 the loss of potentially exculpatory evidence. (Doc. No. 116 at 128:6-131:5.) He argues that  
12 although law enforcement almost immediately suspected RC and one or more accomplices in the  
13 murders, (RT 4628), no warrant was sought to search the apartment for crime scene property or  
14 evidence linked to the crimes, such as the bloody knife and the ligature found at the crime scene.

15         However, petitioner has not demonstrated on the evidentiary record that any such  
16 potentially exculpating property or evidence existed and was lost. He argues law enforcement  
17 may have allowed the venetian blind recovered by detective Stokes, from which only petitioner's  
18 fingerprint was lifted, to be contaminated. (See claims II(F), II(S).) He suggests this was  
19 because of detective Stokes's requested that landlord, Ms. Hays, handle the blind. (Id.) These  
20 same allegations were discussed above in claims II(F), II(S) and fail for the reasons stated  
21 therein. Notably, petitioner's own expert was unable to identify on the venetian blind any  
22 additional usable latent prints suitable for comparison. (Id.; see also Doc. No. 51-1 ¶ 786.)

23         Petitioner argues law enforcement similarly delayed several months investigating the  
24 ligature cord used in the murder of Freiri; that it was not until three months after the murders that  
25 Stokes returned to the then vacated and cleaned apartment to try and match the cord to a venetian  
26 blind. (RT 4514-30.) Petitioner argues that the venetian blind recovered by Stokes from Hays  
27 had no cord remaining and had been handled and possibly altered by Hays. (See Id.) Petitioner

1 argues that Stokes, without foundation, took and had analyzed cord samples from the other three  
2 blinds remaining in the apartment even though those blinds were not missing any cord.

3           However, as noted in claims II(F) and II(S), the jury was informed that the crime scene  
4 ligature was not a match for the samples taken by detective Stokes. For the reasons stated in  
5 claims II(F), II(S), the state supreme court could reasonably have rejected these same allegations  
6 couched here as prosecutorial error. Moreover, petitioner has not pointed to facts in the record  
7 suggesting Stokes or the prosecution intentionally delayed recovery of potentially exculpatory  
8 evidence or otherwise acted in bad faith in such regards. See Trombetta, 467 U.S. at 489.  
9 Instead it appears that Stokes's forensic investigation of the Harvard Avenue apartment took  
10 place once petitioner was identified by Buchanan as a suspect.

11           (iii) Failure to Collect and Preserve Biologic Evidence

12           Petitioner revisits allegation in claims II(B), II(C), II(D) above, here couched as claimed  
13 prosecutorial error. (Doc. No. 51-1 ¶¶ 807-813.) He complains of the prosecution's bad faith  
14 failure to collect and preserve crime scene biologic evidence. (Doc. No. 116 at 134:22-145:20.)  
15 Specifically, he argues fingernail scrapings, saliva, debris from a wound on Mr. Freiri's head,  
16 blood evidence and hair found at the crime scene were not properly preserved for analysis and  
17 that some of this evidence was lost at the state crime lab for up to 5 months. He notes in support  
18 that state criminologist Cortner testified at trial that most of blood evidence could not be  
19 analyzed. (RT 4567-69.)

20           However, the state supreme court reasonably could have rejected these allegations. As  
21 discussed in claims II(B), II(C), II(D), the biologic evidence recovered and analyzed by law  
22 enforcement was not inculcating of petitioner. This allowed Schultz to argue at trial the primary  
23 defense that RC was the sole perpetrator. (RT 4985-87.) Fingernail scrapings tested positive for  
24 the presence of blood, but that the samples were insufficient for further analysis, i.e., petitioner  
25 was not a match. A hair found on the hand of victim Freiri was not a match for petitioner;  
26 defense forensic expert Barnett's pre-trial analysis confirmed as much. Of the seven blood  
27 swabs taken, three tested positive for blood, but only two could be typed and those excluded  
28

1 petitioner as a possible source. Petitioner has not demonstrated that the blood swabs which  
2 returned inconclusive results and the unanalyzed wound debris recovered from the scalp of  
3 victim Freiri, were testable when collected.

4 Additionally, the state supreme court could reasonably have found any failure to preserve  
5 potentially useful biologic evidence resulted from mere negligence and as such not a violation of  
6 petitioner's constitutional rights. See e.g., *Youngblood*, 488 U.S. at 58 ("The failure of the police  
7 to refrigerate the clothing and to perform tests on the semen samples can at worst be described as  
8 negligent."). Petitioner has not pointed to facts in the state record suggesting Stokes or the  
9 prosecution intentionally failed to recover and preserve potentially exculpatory evidence or  
10 otherwise acted in bad faith in these regards. See *Trombetta*, 467 U.S. at 489.

11 It follows that the state supreme court reasonably could have found speculative  
12 petitioner's allegations that detective Stokes and state crime lab employees intentionally and in  
13 bad faith failed to refrigerate and preserve potentially exculpatory biologic evidence. See  
14 *Youngblood*, 488 U.S. at 53-58. Absent any constitutional error as to the individual pieces of  
15 biologic evidence, there is no cumulative error. *Kyles*, 514 U.S. at 434.

16 **c. Analysis of Claim XV**

17 Petitioner alleges that the prosecution and/or the state or federal government deported  
18 material witness, Ruben Flores, in order to make him unavailable at petitioner's trial, violating  
19 petitioner's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United  
20 States Constitution. (Doc. No. 51-1 ¶¶ 816-825.)

21 (i) State Court Direct and Collateral Review

22 The California Supreme Court, on habeas review summarily denied these allegations on  
23 the merits and denied certain allegations as procedurally barred. (Lod. Doc. No. 31.)

24 (ii) Deportation of Witness Ruben Flores

25 Petitioner alleges that the state through its subdivision, the prosecution, orchestrated  
26 Flores's deportation by transferring him to Immigration and Naturalization Service ("INS")  
27 custody in order to make him unavailable at petitioner's trial. (Doc. No. 128 at 113:4-9.)

1 Petitioner cites *People v. Valencia* and argues that this state action violated due process because  
2 he was denied a fair trial. 218 Cal. App. 3d 808, 826-27 (Cal. Ct. App. 1990) (defendant made  
3 sufficient showing anticipated testimony of deported witness was arguably material and  
4 favorable to the defense).

5 Petitioner argues that Flores, who was the roommate of testifying witness Miguel  
6 Sandoval, was a material and favorable witness for the defense and possibly a suspect in the  
7 murders. It appears Flores was a drug dealer from whom RC may have purchased drug in the  
8 months leading up to the murders (Doc. No. 105 at 69:22-23), and that Flores may have been  
9 with RC on the morning of the murders. (Id.; see also SSHCP, Ex. 11 at 347.) Additionally, it  
10 was from Flores that RC allegedly stole the car he used to flee Fresno for San Jose shortly after  
11 the murders and to whom RC allegedly stated that “he had just killed a woman and [ ] needed the  
12 car to get away from Fresno.” (RT 4801.)

13 Based thereon, petitioner argues that Flores had “material information regarding RC’s  
14 drug use, drug addiction, drug purchases [including Flores’ alleged statement to RC in the  
15 months before the murders that Flores could sell large quantities of drugs], behavior in the  
16 months prior to the crimes, and flight from the crimes.” (Doc. No. 116 at 232:1-3.) Petitioner  
17 argues that Flores was a possible suspect in the murders because Flores falsely denied knowing  
18 RC when questioned by the police; it was from Flores that RC allegedly stole [witness  
19 Sandoval’s] car; and Flores denied recollection of his activities around the time of the murders.  
20 (Doc. No. 116 at 232:5-14; Doc. No. 105 at 69:22-23.)

21 The record reflects that Flores was arrested in Fresno on December 27, 1988, shortly after  
22 the murders, on two felony drug counts and placed in jail to await trial. See Fresno County Case  
23 No. 025824-4. Detective Stokes interviewed him in jail in this case. (See RT 4584-87.) Flores  
24 was convicted on the drug counts and sent to prison where he remained until April 1990 when he  
25 was paroled, transferred to INS custody and deported prior to petitioner’s trial. (See Doc. 51-1 ¶  
26 823; Doc. No. 105 at 69:22-23.)

27 The state supreme court could reasonably have found that the prosecution in petitioner’s  
28

1 matter was uninvolved in the decision to deport Flores. The power to deport lies with the federal  
2 government. See *United States v. Valenzuela-Bernal*, 458 U.S. 858, 876 (1982), citing Article I,  
3 § 8, cl. 4, (Congress shall have the power “To establish an uniform Rule of Naturalization”);  
4 *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (“The responsibility for regulating the relationship  
5 between the United States and our alien visitors has been committed to the political branches of  
6 the Federal Government”).

7 Here, petitioner has not demonstrated that the INS was aware of petitioner’s case or  
8 Flores’s alleged involvement in it, distinguishing this case from *Valenzuela-Bernal*. See 458  
9 U.S. at 864 (“When the government doesn’t know what a witness will say, it doesn’t act in bad  
10 faith by deporting him.”); see also *United States v. Leal-DelCarmen*, 697 F.3d 964, 970 (9th Cir.  
11 2012), citing *United States v. Dring*, 930 F.2d 687, 694 (9th Cir. 1991) (same).

12 Furthermore, in order to show denial of due process by deportation of an alien witness, a  
13 defendant must make a plausible explanation how such testimony would have assisted his  
14 defense. *Valenzuela-Bernal*, 458 U.S. at 873. In this case, the state supreme court reasonably  
15 could have found that petitioner did not demonstrate Flores was a material and non-cumulative  
16 defense witness in this case. RC’s drug use and behavior around the time of the murders was  
17 otherwise reflected in the trial record. Flores apparently had a learning disability that limited his  
18 complete recollection of what RC said to him at the time of the car theft. (RT 4586.) Petitioner  
19 concedes that Sandoval was called by the defense and testified to the alleged car theft and  
20 statements made by RC as related to him by Flores shortly after the car theft. (Doc. No. 51-1 ¶  
21 823.)

22 The Sixth Amendment does not guarantee criminal defendants the right to compel the  
23 attendance of any and all witnesses. Rules 17(b) of the Federal Rules of Criminal Procedure  
24 requires the Government to subpoena witnesses on behalf of indigent defendants, but only “upon  
25 a satisfactory showing ... that the presence of the witness is necessary to an adequate defense.”  
26 *Valenzuela-Bernal*, 458 U.S. at 867.

27 Here, Flores’s anticipated testimony could reasonably have been seen by the state  
28

1 supreme court as cumulative of Sandoval’s trial testimony regarding events and statements  
2 related by Flores to Sandoval. That the defense team apparently chose not to interview Flores  
3 prior to his deportation could reasonably suggest as much. Deportation of a witness is not  
4 sufficient to establish a violation of the Compulsory Process Clause of the Sixth Amendment or  
5 the Due Process Clause of the Fifth Amendment absent some showing that evidence lost would  
6 be both material and favorable to the defense, in ways not merely cumulative to the testimony of  
7 available witnesses. Valenzuela–Bernal, 458 U.S. at 872–873; cf., Leal-DelCarmen, 697 F.3d at  
8 969 (“The government undermined [defendant’s] opportunity to present a complete defense by  
9 deporting a witness it knew could give exculpatory evidence.”). Petitioner appears not to have  
10 made such a showing.

11 Additionally, petitioner’s speculation that Flores was an alternative suspect in the  
12 murders is not alone a basis to find him a material and favorable witness. (See claims II(B),  
13 II(C).) Petitioner does not appear to point to any direct evidence linking Flores to the crimes.  
14 The state supreme court could reasonably have rejected any suggestion that merely because  
15 Flores was an alleged source of drugs for RC, an alleged drug addict, and may have been seen  
16 with RC around the time of the murders, Flores was involved in the murders themselves.

17 For the same reasons, petitioner has not shown prejudice from the deportation of Flores.  
18 “As in other cases concerning the loss of material evidence, sanctions will be warranted for  
19 deportation of alien witnesses only if there is a reasonable likelihood that the testimony could  
20 have affected the judgment of the trier of fact.” Valenzuela-Bernal, 458 U.S. at 873-74, citing  
21 Giglio, 405 U.S. at 154.

22 **d. Conclusions**

23 Accordingly, for the reasons stated, a fair-minded jurist could have found that petitioner  
24 failed to establish prosecutorial misconduct by failure to collect and preserve and/or making  
25 unavailable and destroying material potentially exculpatory evidence including as to the  
26 deportation of Flores.

27 It does not appear that the California Supreme Court’s rejection of these claims was  
28

1 contrary to, or an unreasonable application of, clearly established federal law, as determined by  
2 the Supreme Court, or that the state court’s ruling was based on an unreasonable determination  
3 of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. §  
4 2254(d).

5 Claims XIV and XV are denied.

6 4. Review of Claims XVI, XVIII and XIX

7 Petitioner alleges that the prosecution requested and argued an improperly modified  
8 CALJIC 8.80 instruction, dispensing with the required actus reus and concurrence of act and  
9 intent, violating his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S.  
10 Constitution. (Doc. No. 51-1 ¶¶ 826-833, 839-849.)

11 **a. Clearly Established Law**

12 (i) Instructional Error

13 The clearly established law for instructional error is set out in claim XII, ante.

14 (ii) Prosecutorial Misconduct

15 The clearly established law for prosecutorial misconduct is set out in claim XIII, ante.

16 **b. Analysis of Claims XVI, XVIII and XIX**

17 Petitioner argues that the prosecutor’s modified version of CALJIC 8.80 improperly  
18 omitted a component for “actus reus” in aid of the commission of first degree felony murder with  
19 special circumstances, and omitted concurrence of actus reus and intent to kill as to each of the  
20 murders.

21 (i) State Court Direct and Collateral Review

22 The California Supreme Court summarily denied these allegations on the merits and  
23 denied the allegations as procedurally barred, on habeas review. (Lod. Doc. No. 10.)

24 Furthermore, as stated in claim XII, that court rejected on direct appeal petitioner’s  
25 underlying allegation that the modified instruction was an incorrect statement of California law.  
26 The state supreme court rejected on direct appeal petitioner’s argument that under then  
27 applicable Penal Code § 190.2(b), the prosecution was required to prove not only that he aided or  
28

1 abetted the burglaries and robberies, but also that he “assisted in the killings themselves.”  
2 Dickey, 35 Cal. 4th at 900-03.

3 That court reasoned that petitioner was guilty of first degree murder as an aider or abettor  
4 of felony murder robbery and felony murder burglary; and that his reliance upon Anderson was  
5 misplaced because the Anderson court did not consider the issue of whether the “actus reus of a  
6 special circumstance requires that a defendant aid or abet the actual killing, not just the  
7 underlying felony.” See 43 Cal. 3d at 1141-45. That court also found petitioner’s actus reus  
8 argument to fail when re-framed as an instructional claim. Dickey, 35 Cal. 4th at 903.

9 (ii) Actus Reus

10 Petitioner revisits allegations underlying claim XII, that the trial court committed error by  
11 giving the modified CALJIC 8.80 instruction. Here, he argues that the prosecutor committed  
12 misconduct by requesting and arguing the modified CALJIC 8.80 instruction. Petitioner again  
13 argues that the modified CALJIC 8.80 given by the trial court as set out in claim XII, cannot be  
14 harmonized with then applicable Penal Code section 190.2(b) under which Petitioner was  
15 charged and convicted, and that the prosecutor requested the errant instruction because he lacked  
16 proof of the charged special circumstances. Specifically, petitioner argues that the charged  
17 special circumstances required “some act by petitioner in aid of the killing(s) to which the  
18 special circumstance related.” (Doc. No. 116 at 259:22-260:2, citing Sanders, 51 Cal. 3d at 517.)

19 However, for the reasons stated in the discussion of claim XII, ante, the state supreme  
20 court could reasonably have determined the modified CALJIC 8.80 given at trial was a correct  
21 statement of then prevailing California law and in any event not a basis for federal relief. See  
22 Estelle, 502 U.S. at 71 (any error in the state court’s determination of whether state law  
23 supported an instruction in this case cannot form the basis for federal habeas relief). Petitioner’s  
24 re-argument that the charged special circumstances required “some act by petitioner in aid of the  
25 killing(s) to which the special circumstance related” (Doc. No. 116 at 259:23-24) remains  
26 unsupported by then prevailing state law. (See claim XII.) That being the case, the jury could  
27 reasonably have found true the five special circumstances based on the noted prosecution theory  
28

1 that petitioner aided and abetted felony murder robbery and burglary and that according to  
2 Buchanan's testimony petitioner formed a spontaneous unspoken intent to kill following his  
3 discovery of victim Freiri.

4 (iii) Concurrence of Act and Intent

5 Petitioner alleges the prosecutor improperly argued that a concurrence of act (actus reus)  
6 and intent was not required for the Caton and Freiri murders. (Doc. No. 116 at 266:23-27, citing  
7 CT 395, CALJIC 3.31; see also CT 426, CALJIC 8.81.3.) He contends the prosecutor Hahus  
8 improperly argued that the multiple murder special circumstance did not require a pre-existing  
9 intent to kill both victims, as follows:

10  
11 The special circumstance, the killing of Marie, or the killing of Louis, as a special  
12 circumstance killing can only be found true if the defendant -- this man --  
13 intended to kill. Now, he can be guilty and the evidence shows that he is -- of the  
14 first degree murder, simply because Marie and Louis died and were killed during  
the burglary of their home. But you can't find the special circumstance true unless  
you find that not only were they killed, but that he intended to kill. That is, that he  
had in his mind the intent, the desire that one or both of them die.

15 (RT 4979-80.)

16  
17 Now, the evidence of the intent, his intent, is there from Gene Buchanan's relating  
18 to you his statement in the bedroom at Harvard, that when he came out of Marie's  
19 bedroom from the commotion that he heard and he says he saw what looked like  
20 Louis, the old man, slumped over and dead, he said or thought -- it makes no  
difference, because intention is a state of mind "If you kill one you might as well  
kill the other." That's an intention that someone die. Marie Caton died 11 days  
later.

21 (Id.)

22 The California Supreme Court rejected allegations that petitioner did not intend to kill the  
23 victims, stating that:

24  
25 The cord found around Mr. Freiri's neck came from the venetian blind in  
26 defendant's apartment, and defendant was responsible for bringing it to Mrs.  
27 Caton's house. Defendant was also responsible for bringing the knife used to stab  
28 Mrs. Caton and Mr. Freiri. Defendant knew his intended victims were elderly and  
that Mr. Freiri was partially paralyzed, and so he could not have believed he and  
Cullumber, both younger men, needed the knife to commit the robberies.  
Therefore, defendant intended to kill, and not just rob, Mrs. Caton and Mr. Freiri.

1 Moreover, defendant knew he could not escape justice if Mr. Freiri were left  
2 alive. Defendant had gained entry by saying he needed to use the phone because  
3 Cullumber was going to jail. Even if Mr. Freiri did not recognize defendant, he  
4 must have known Cullumber, who was an almost daily visitor to his  
5 grandmother's home. Mr. Freiri would have led the police to Cullumber, and  
6 Cullumber would have led them to defendant.

7 Dickey, 35 Cal. 4th at 904.

8 Petitioner argues he was denied a fair trial because there was no evidence of his  
9 concurring intent to kill and an act in aid of the actual killing of Freiri and Caton; the case  
10 against him was generally weak; and the prosecutor's noted argument was improper. See  
11 Donnelly, 416 U.S. at 643 (conviction violates due process where prosecutor's improper remark  
12 infected the trial with unfairness); see also Hein v. Sullivan, 601 F.3d 897, 912 (9th Cir. 2010)  
13 (same).

14 However, the state supreme court was not unreasonable in rejecting petitioner's  
15 allegation of an absence of concurring act and intent in the murders of Caton and Freiri. For the  
16 reasons it stated, that court could reasonably have discounted prosecutor Hahus's statements that  
17 "[w]e don't know if, when they went in there, they went in there to kill", that "[t]here's no  
18 evidence of that at all." (See RT 4975; cf. Dickey, 35 Cal. 4th at 904) ("While the prosecution  
19 did not rely upon it, there was ample evidence defendant formed the intent to kill Mr. Freiri  
20 before he discovered his body.")

21 Especially so in that petitioner fails to demonstrate on the record that victim Freiri was  
22 dead at the time of petitioner's unspoken thought "[i]f you kill one you might as well kill the  
23 other." (RT 4980.) The state supreme court would not have been unreasonable in concluding, as  
24 Hahus suggested during the motion for new trial, that petitioner upon discovering Freiri  
25 approached him and strangled him with the cord, acting on his unexpressed intent to kill. (See  
26 e.g., CT 602:6-12.)

27 Moreover, the jurors received instructions on concurrence of act and intent. The jurors  
28 were instructed that in order to find the multiple murder special circumstance true, they must find  
"petitioner harbored a specific intent to kill for each victim; that each charged special  
circumstance required there existed in petitioner's mind a "union or joint operation of act or

1 conduct and a certain specific intent”; that “[u]nless such specific intent exists, the crime to  
2 which it relates is not committed.” (CT 424-425; CALJIC Nos. 3.31, 8.80 8.81.17, 8.83.1; RT  
3 5010-11, 5021-25.) The jurors were instructed that they must follow the law given to them by  
4 the court (RT 5007), even if counsel’s arguments conflicted therewith (RT 5007), and that the  
5 arguments of counsel were not evidence (RT 5008). The jury was also instructed to read the  
6 court’s instructions as a whole and in light of the other instructions. (CALJIC No. 1.01; RT  
7 5007-08.)

8 (iv) Prejudice

9 Even if there was such prosecutorial misconduct, the state supreme court could  
10 reasonably have found petitioner did not suffer prejudice. The record could reasonably suggest  
11 petitioner intended to kill each victim before that victim died. Given the court’s noted  
12 instructions, any errant argument by Hahus did not deny petitioner a fair trial. A fair-minded  
13 jurist could conclude that petitioner has not demonstrated substantial and injurious effect on the  
14 verdict. *Brecht*, 507 U.S. at 637; see also *Boyde*, 494 U.S. at 384-85 (arguments of counsel, like  
15 the instructions of the court, must be judged in the context in which they are made; errant  
16 argument is less likely to render a trial unfair than errant instructions); *Weeks*, 528 U.S. at 234  
17 (jurors are presumed to follow the court’s instructions notwithstanding errant argument by  
18 counsel).

19 For the reasons stated above and in claim XII, the modified CALJIC 8.80 instruction was  
20 not incorrect under then controlling state law. The state supreme court’s rejection of petitioner’s  
21 Anderson allegation did not expand the reach of then effective Penal Code section 190.2(b) as  
22 applied to petitioner. Furthermore, the jury was properly instructed on, and the trial record  
23 supported concurrence of act and intent. Absent any state error, the state supreme court was not  
24 unreasonable in finding no constitutional error, i.e., error that “so infected the entire trial that the  
25 resulting conviction violate[d] due process.” *Cupp*, 414 U.S. at 147.

26 Accordingly, a fair-minded jurist could reasonably have found that had the prosecutor  
27 requested and argued the noted standard CALJIC 8.80 instruction (see claim XII), there would  
28

1 not have been a reasonable probability the jury’s special circumstances verdict would have been  
2 different. See e.g., Clark, 450 F.3d at 916 (habeas relief may be granted only if the instructional  
3 error “had a substantial and injurious effect or influence in determining the jury's verdict.”).

4 For the same reasons, petitioner’s allegation of cumulative error arising from the  
5 prosecutor’s requesting and arguing the modified CALJIC 8.80 instruction fails as there is no  
6 individual error. Kyles, 514 U.S. at 434. At bottom, petitioner has not demonstrated any error  
7 that “so infected the entire trial that the resulting conviction violate[d] due process.” Cupp, 414  
8 U.S. at 147.

9 (v) Conclusions

10 For the reasons stated, a fair-minded jurist could have found that petitioner failed to  
11 establish prosecutorial misconduct by requesting and arguing the modified CALJIC 8.80 so as to  
12 omit both “actus reus” in aid of the commission of first degree felony murder with special  
13 circumstances, and concurrence of actus reus and intent to kill as to each of the murders of Freiri  
14 and Caton.

15 It does not appear that the California Supreme Court’s rejection of these claims was  
16 contrary to, or an unreasonable application of, clearly established federal law, as determined by  
17 the Supreme Court, or that the state court’s ruling was based on an unreasonable determination  
18 of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. §  
19 2254(d).

20 Claims XVI, XVIII and XIX are denied.

21 5. Review of Claim XVII

22 Petitioner alleges that the prosecutor, in his closing arguments improperly vouched for  
23 the veracity of prosecution witness Buchanan, violating petitioner’s rights under Fifth, Sixth,  
24 Eighth and Fourteenth Amendments of the U.S. Constitution. (Doc. No. 51-1 ¶¶ 834-838.)

25 **a. Clearly Established Law**

26 (i) Prosecutorial Misconduct

27 The clearly established law for prosecutorial misconduct is set out in claim XIII, ante.  
28

1 Thereunder, the standard of review for claims of prosecutorial misconduct is a “narrow one of  
2 due process”; the federal habeas court must determine whether the alleged instances of  
3 misconduct “so infected the trial with unfairness as to make the resulting conviction a denial of  
4 due process.” Donnelly, 416 U.S. at 643.

5 (ii) Improper Vouching

6 “Improper vouching typically occurs in two situations: (1) the prosecutor places the  
7 prestige of the government behind a witness by expressing his or her personal belief in the  
8 veracity of the witness, or (2) the prosecutor indicates that information not presented to the jury  
9 supports the witness’s testimony.” Hermanek, 289 F.3d 1076, 1098 (9th Cir. 2002); see also  
10 McKoy, 771 F.2d at 1210-11 (“The rule that a prosecutor may not express his personal opinion of  
11 the defendant's guilt or his belief in the credibility of witnesses is firmly established.”).

12 **b. Analysis of Claim XVII**

13 Petitioner alleges prosecutor Hahus vouched for Buchanan during the prosecution closing  
14 argument, as follows:

15 MR. HAHUS:

16 Do you think that Gene Buchanan would lie for \$5,000? Maybe. Do you think  
17 Gene Bucanan would lie to send a man to prison? I don’t think so.

18 MR. SCHULTZ:

19 Objection, your Honor. Personal opinion.

20 THE COURT:

21 Sustained.

22 MR. HAHUS:

23 Strike that. Would the Court like to give an admonition.

24 THE COURT:

25 That’s an improper argument, ladies and gentlemen, Mr. Hahus has stated his  
26 personal opinion. You are to ignore that statement, please.

27 (RT 4971.)

28 (i) State Court Direct and Collateral Review

The California Supreme Court considered and summarily rejected these allegations on  
the merits, on habeas review. (Lod. Doc. No. 10.)

1 That same court considered and rejected the same allegations on direct appeal, stating  
2 that:

3  
4 Defendant contends the prosecutor committed prejudicial misconduct by vouching for the credibility of Gene Buchanan.

5 A prosecutor is prohibited from vouching for the credibility of witnesses or  
6 otherwise bolstering the veracity of their testimony by referring to evidence  
7 outside the record ... However, so long as a prosecutor's assurances regarding the  
8 apparent honesty or reliability of prosecution witnesses are based on the 'facts of  
[the] record and the inferences reasonably drawn therefrom, rather than any  
purported personal knowledge or belief,' her comments cannot be characterized  
as improper vouching. [Citations]

9 The conduct defendant complains of occurred as the prosecutor, in his argument  
10 to the jury, acknowledged and sought to dispel any doubts they may have had  
11 regarding Buchanan's credibility. "He's a drug addict, street-wise, and he's con-  
12 wise and he doesn't work .... [¶] ... But that doesn't mean that the truth cannot  
13 come out of the mouth of a drug addict. It can come out of the mouth of a priest. No priests lived at  
14 that Harvard address, only drug addicts. This murder was committed in hell. We  
don't have angels for witnesses, we've people that live in hell. [¶] But do you  
think Gene Buchanan would lie for \$5,000? Maybe. Do you think Gene Buchanan  
would lie to send a man to prison? I don't think so."

15 We need not decide whether the prosecutor's comment amounted to improper  
16 vouching because defense counsel objected to the comment, the objection was  
17 sustained, and the court admonished the jury: "That's an improper argument,  
ladies and gentlemen, [the prosecutor] has stated his personal opinion. You are to  
ignore that statement, please." We presume the jury heeded the admonition and  
that any error was cured. [Citations]

18 Dickey, 35 Cal. 4th at 913-14.

19 (ii) Vouching

20 Petitioner argues that Hahus stated his personal opinion regarding Buchanan's  
21 truthfulness. But petitioner does not demonstrate Hahus's comments lacked a basis in the record.  
22 In this regard, the state supreme court would not have been unreasonable in finding that Hahus's  
23 noted comments could have been based on and directed to evidence that was then before the  
24 jury. For example, the jury was aware that Buchanan knew of Penal Code section 128 and that it  
25 was a crime to testify falsely in this capital case and that the penalty for doing so included death.  
26 (RT 4764-65; see also claims II(K) and VIII.)

27 Notably the state supreme court, on direct appeal appears not to have determined whether  
28

1 Hahus's statements were improper vouching. See Dickey, 35 Cal. 4th at 913-14; (see also Doc.  
2 No. 125 at 163 n.54). Nonetheless, the allegation was summarily denied as a habeas claim and  
3 thus adjudicated. (Lod. Doc. No. 10.)

4 (iii) Harmless Error

5 Even if Hahus did vouch for Buchanan, the state supreme court reasonably could have  
6 found the error did not have a "substantial and injurious" effect on the jury's verdict. Brecht,  
7 507 U.S. at 620. Schultz successfully objected to Hahus's comments; Hahus moved to strike;  
8 and the trial court issued an admonition that the jury ignore Hahus's comment. (Doc. No. 51-1 ¶  
9 837; RT 4971.)

10 Petitioner nonetheless contends the trial court admonition was insufficient. He argues  
11 prejudice is implicit from the record because at the end of the day, the jury believed Buchanan's  
12 (vouched for) testimony of petitioner's unexpressed thought that "if you kill one you might as  
13 well kill them both" (RT 4689); petitioner's removal of cord from a venetian blind (RT 4665-  
14 66); petitioner's use of a knife to cut the cord that was similar to a knife found at the crime scene  
15 (RT 4707); and petitioner's planning the crimes with RC (RT 4689).

16 But a fair-minded jurist could have found petitioner's argument for implicit prejudice to  
17 be mere surmise. Here again, the jury presumptively followed the trial court's admonition and  
18 the jury instructions that argument is not evidence and that they were to follow the law as given  
19 by the court even where counsel argued otherwise.

20 Petitioner otherwise has not demonstrated on the record that by virtue of Hahus's noted  
21 comment, he was denied a fair trial. See Bagley, 473 U.S. at 682 (the prosecutorial misconduct  
22 must be "of sufficient significance to result in the denial of the defendant's right to a fair trial.")).  
23 The jurors had before them noted substantive evidence regarding Buchanan's credibility. The  
24 jury instructions informed jurors how credibility determinations were to be made in relation to  
25 such evidence.

26 A fair-minded jurist could have concluded that Hahus's statement amounted to nothing  
27 more than ordinary error. See Agurs, 427 U.S. at 108 (ordinary trial errors by a prosecutor do not  
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1 suffice to show a due process violation; the misconduct must be significant enough to deny the  
2 defendant a fair trial).

3 It does not appear that the California Supreme Court’s rejection of this claim was  
4 contrary to, or an unreasonable application of, clearly established federal law, as determined by  
5 the Supreme Court, or that the state court’s ruling was based on an unreasonable determination  
6 of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. §  
7 2254(d).

8 Claim XVII is denied.

9 **D. Ineffective Assistance of Post-Conviction Counsel Claims**

10 1. Clearly Established Law

11 The applicable legal standard for ineffectiveness of post-conviction counsel is the  
12 Strickland standard set out in claim II, ante. See *Smith v. Robbins*, 528 U.S. 259, 285 (2002)  
13 (Strickland provides the proper standard for evaluating a claim that appellate counsel was  
14 ineffective); see also *Miller v. Keeney*, 882 F.2d 1428, 1433–34 (9th Cir. 1989) (same); *Hurles v.*  
15 *Ryan*, 752 F.3d 768, 785 (9th Cir. 2014) (same).

16 2. Review of Claim XXII

17 Petitioner alleges that post-trial counsel, Ms. Hart, who replaced Schultz after petitioner’s  
18 sentencing was herself ineffective by failing to adequately investigate and present evidence at the  
19 motion for new trial, violating his rights under the Fifth, Sixth, Eighth, and Fourteenth  
20 Amendments of the United States Constitution. (Doc. No. 51-1 ¶¶ 871-884.)

21 **a. State Court Direct and Collateral Review**

22 The California Supreme Court summarily denied these allegations on the merits and on  
23 procedural grounds, on habeas review. (Lod. Doc. No. 31.)

24 **b. Analysis of claim XXII**

25 Petitioner alleges that Hart failed to adequately investigate guilt phase defenses and  
26 thereupon “present necessary evidence at the hearing on the motion for new trial” (Doc. No. 116  
27 at 400:6-7), including new trial theories (id. at 400-06).

1 The record reflects that Hart raised eight claims in the motion for new trial (CT 525-91)  
2 including alleged insufficiency of the evidence relating both to credibility of Goldman and  
3 Buchanan and alleged third party culpability. (CT 532-565.)

4 (i) Right to Post-Trial Counsel and Exhaustion

5 As a preliminary matter, respondent contends there is no clearly established Supreme  
6 Court law that petitioner has a right to counsel on motion for new trial; and that petitioner's  
7 allegations in this regard are unexhausted.

8 However, the right to counsel provided under the Sixth Amendment adheres at all critical  
9 stages of a criminal proceeding. *Marshall v. Rodgers*, 133 S. Ct. 1446, 1449 (2013), quoting  
10 *Iowa v. Tovar*, 541 U. S. 77, 80–81 (2004). The Ninth Circuit has held that in California, a  
11 motion for new trial is a critical stage of prosecution. See *Menefield v. Borg*, 881 F.2d 696, 699  
12 (9th Cir. 1989); see also *Robinson v. Ignacio*, 360 F.3d 1044, 1057 (9th Cir. 2004).

13 Respondent's cited case law is not authority otherwise. Cf., *Rothgery v. Gillespie*  
14 *County, Texas*, 554 U.S. 191, 213 (2008) ("Our holding is narrow ... reaffirm[ing] that  
15 [arraignment] trigger[s] attachment of the Sixth Amendment right to counsel."); *Coleman*, 501  
16 U.S. at 756-57 (no right to counsel to pursue appeal in state habeas).

17 Additionally, the court does not reach respondent's argument that these allegations are  
18 unexhausted because the allegations lack merit for the reasons that follow.<sup>18</sup>

19 (ii) Prosecution Theory and Third Party Accomplices

20 Petitioner alleges that Hart inadequately developed and presented i) Schultz's failure to  
21 challenge the prosecution theory including the timeline of the murders; ii) whether RC had an  
22 accomplice; and iii) an alternative accomplice defense. (See Doc. No. 51-1 ¶ 877.) Petitioner  
23 argues that Hart merely relied upon the information contained in Schultz's defense file. (Doc.  
24 No. 51-1 ¶ 876.)

25 However, petitioner concedes that Hart discovered and presented previously undisclosed  
26 evidence impeaching witness Buchanan and that Hart retained an investigator to look into

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27  
28 <sup>18</sup> See n.10; see also *Cone*, 543 U.S. at 451 n.3 (an application for habeas corpus may be denied on the merits even if unexhausted in state court).

1 possible jury misconduct. (Doc. No. 51-1 ¶ 874.) The record reflects that Hart argued on the  
2 motion for new trial specifically how and why the testimony of Goldman and Buchanan should  
3 be seen as inconsistent and not credible. (See claims II (B), II(C), II(E), II(K), II(L), II(P), VIII,  
4 XIII, XXI; see also RT 5189-5454, 5507-5528, 5549-69; CT 531-576.) Furthermore, the record  
5 suggests that Hart did investigate possible third party accomplices. (See claims II(B), II(C),  
6 II(E), II(K), II(L), II(P), VIII, XIII, XXI.)

7         Petitioner argues at some length that Hart failed to develop Schultz’s alleged failure to  
8 pursue accomplice theory against deported witness Flores. Especially so, petitioner contends in  
9 that Hart represented Flores in his separate felony drug proceeding (Fresno County Case No.  
10 025824-4) wherein Flores was convicted, served part of his sentence and was then deported.

11         However, petitioner does not explain how and why Hart’s noted representation of Flores  
12 in the criminal matter reasonably suggests Hart was deficient on petitioner’s motion for new  
13 trial. Shortly after the murders, Flores was arrested on felony drug charges, convicted,  
14 imprisoned, paroled and deported. The state supreme court could reasonably have found that  
15 petitioner has not demonstrated on the record that Hart was objectively unreasonable by failing  
16 to link Flores to the crimes charged against petitioner. (See claims II(C), XV.)

17         For the reasons discussed in claim XV, the state supreme court could reasonably have  
18 found that the prosecution was uninvolved in the decision to deport Flores. Petitioner has not  
19 demonstrated that Flores’s separate criminal proceeding and Hart’s representation of him in it  
20 suggests otherwise, or that the INS was aware of petitioner’s case or Flores’s alleged  
21 involvement in it. Petitioner suggests Flores could have testified to RC’s drug use and behavior  
22 around the time of the murders. But as discussed in claim XV, such was otherwise reflected in  
23 Sandoval’s testimony and thus not alone a basis to find Flores a material, non-cumulative and  
24 favorable witness. Furthermore, for the reasons discussed above and in claim XV, petitioner’s  
25 suggestion that Flores was an alternative suspect in the murders is not supported in the record at  
26 a level greater than surmise.

27         For the reasons stated, the state supreme court would not have been unreasonable in  
28

1 concluding that Hart reasonably investigated the motion for new trial and was tactically  
2 motivated in her presentation of evidence regarding prosecution theory and third party  
3 accomplice defenses. See e.g., Robbins, 528 U.S. at 288 (counsel free to reasonably focus on  
4 what she believed to be the strongest claims).

5 (iii) 1989 Taped Defense Interviews of Goldman

6 Petitioner alleges Hart failed to develop and present evidence of two 1989 tape recorded  
7 interviews of Goldman by a defense investigator. He alleges these tapes contain the following  
8 information impeaching Goldman: her “vocal tone, inflections, demeanor, candor, clarity, and  
9 sincerity” (Doc. No. 116 at 403:12-13); her statements that RC and petitioner did not return to  
10 the apartment together on the purported night of the crimes (Doc. No. 116 at 401:10-21); and her  
11 statement that petitioner left the apartment the next day (id.).

12 However, the trial record shows that Schultz, at the preliminary hearing, considered and  
13 confronted Goldman with the noted 1989 tape recorded statements and gave her the opportunity  
14 to explain. (RT 4384-87.) Goldman’s taped statement that RC returned to the apartment alone  
15 on the night of the crimes could reasonably be seen as equivocal given that RC apparently made  
16 two trips from the apartment on the evening of the crimes (see RT 4385); Goldman later testified  
17 that she did not remember telling the investigator who recorded the interview that “[RC] and  
18 [petitioner] did not come back to the house together after they had left” (RT 4388); and Goldman  
19 later testified that she saw RC and petitioner return to the apartment together “later on when they  
20 came back into the house and [RC] got --- or started packing his clothes” (RT 4393). The state  
21 supreme court reasonably could have viewed Goldman’s taped statement as suggesting that after  
22 the crimes RC left the apartment alone and not (as petitioner asserts) that after the crimes RC  
23 arrived back at the apartment without petitioner.

24 Moreover, Goldman’s taped statement that petitioner left the apartment the day after the  
25 crime could reasonably be seen as inculpatory (consciousness of guilt) and as cumulative of the  
26 other noted evidence impeaching Goldman – such that there reasonably could have been a  
27 tactical motivation in not presenting the statement. Additionally, the inconsistencies between  
28

1 Goldman's preliminary hearing transcript and her statements to Stokes and any impeachment  
2 value therefrom were already in the record, as was witness testimony that Goldman had a  
3 reputation for lying. (RT 4592-96, 4783-84, 4789-91.)

4 Petitioner's argument here, that the taped content "provided a far greater picture of the  
5 nature of Gail Goldman and her interests" (Doc. No. 116 at 401:2-3), does not identify any taped  
6 content not cumulative of impeaching information already in the record.

7 Hart could reasonably have determined not to present additional material from the tapes.  
8 Especially so as Hart appears not to have included a declaration explaining the reasons for her  
9 actions - giving rise to a presumption she acted strategically and not deficiently.

10 Finally, petitioner's speculation that demeanor evidence in the tape recording should have  
11 been presented to the jury (by playing the tapes), is unpersuasive. Any such evidence of vocal  
12 inflection and delivery, reflecting on Goldman's mental state, could have suggested to the jury a  
13 basis to discount her allegedly favorable recorded statements. For example, if she sounded  
14 altered by drugs. Furthermore, the state supreme court could reasonably have determined any  
15 such demeanor evidence from the tape recordings would have added little to Goldman's noted  
16 preliminary hearing testimony.

17 In sum, petitioner does not point to taped content, contained in the state record, favorable  
18 to petitioner and non-cumulative, which Schultz and Hart failed to present in state court.

19 For the reasons stated, a fair-minded jurist could have found any decision by counsel not  
20 to further pursue the taped defense interviews of Goldman by investigator Martin to be tactical  
21 absent any declaration or statement from counsel otherwise. Hart, for her part could reasonably  
22 have focused on what she believed to be the strongest claims. Robbins, 528 U.S. at 288.

23 (iv) Surveillance of Goldman

24 Petitioner alleges that Hart was deficient by not developing and arguing the contents of a  
25 June 1989 report detailing defense investigator surveillance of Goldman. (Doc. No. 116 at  
26 404:5-407:27.)

27 Defense counsel Schultz apparently had a defense investigator live with Goldman at her  
28

1 “flop house residence” for two weeks. (Id.) Petitioner argues the report shows Goldman’s  
2 significant substance abuse; fondness for Buchanan; lying and pimping – all of which serves to  
3 impeach her credibility and according to petitioner should have been presented in state court by  
4 Schultz and Hart. (Id.)

5 Nonetheless, the state supreme court would have been reasonable in concluding that  
6 petitioner has not demonstrated on the record why and how the information in the report was  
7 non-cumulative and material. The jury presumably was aware of such matters from the noted  
8 evidence. (See e.g., RT 4382-93, 4590-99, 4676-82, 4704-05, 4716-17, 4737-42, 4757, 4777-85,  
9 4809-25, 4849-57.) Schultz for his part received daily reports of the surveillance from the  
10 investigator. (Doc. No. 116 at 404:11-13.) Schultz’s decision not to present seemingly  
11 cumulative evidence at trial and Hart’s decision not to develop it on motion for new trial could  
12 reasonably be seen as tactical. Schultz seems not to have provided a declaration otherwise.

13 The state supreme court could reasonably have rejected this allegation.

14 (v) Prosecutorial Favors to Buchanan

15 Finally, petitioner alleges Hart was ineffective by failing to develop and present evidence  
16 that in consideration of his testimony against petitioner, the prosecution declined to investigate  
17 and charge Buchanan for his numerous criminal admissions under oath at petitioner’s trial.  
18 (Doc. No. 116 at 406:19-26.) He alleges these favors likely were significant and suggest  
19 Buchanan’s testimony was unreliable.

20 But the state supreme court reasonably could have found unpersuasive these allegations  
21 of an implicit “no prosecution” agreement between Buchanan and Hahus for the same reasons  
22 discussed in claim XIII. Petitioner has not made an evidentiary showing that there was an  
23 agreement not to prosecute, or that Buchanan believed there was one, at the time Buchanan  
24 testified at petitioner’s trial. The trial record reflects Buchanan testified prior to his drug related  
25 admissions (RT 4741-56) that “[he] was not told [by Hahus that he] would not be prosecuted.”  
26 (RT 4741.) Petitioner has not demonstrated on the record that was before the state supreme court  
27 that Buchanan’s waiver of his right against self-incrimination was constitutionally infirm.

1 Even if there was such a “no prosecution” deal, the state supreme court could reasonably  
2 have determined any failure by Hart to develop and present it was not prejudicial. The jury was  
3 otherwise aware of Buchanan’s drug related activities and presumable considered such in  
4 evaluating his credibility and testimony. Additionally, petitioner has not demonstrated that  
5 Buchanan’s drug related admissions were inculcating of petitioner. Rather these admissions tend  
6 to negatively impact Buchanan’s credibility cumulatively of other noted evidence in the record.

7 Significantly, petitioner does not identify facts in the record that Hart allegedly failed to  
8 develop relative to his alleged implicit deal with the prosecution. A fair-minded jurist could  
9 have found petitioner has not demonstrated an implicit “no prosecution” deal with the  
10 prosecution existed, or if it did that he could show prejudice, i.e., facts in the record which Hart  
11 could and should have proffered on the new trial motion suggesting a reasonable probability of a  
12 different outcome.

13 (vi) Conclusions

14 Accordingly, for the reasons stated, a fair-minded jurist could have found that petitioner  
15 failed to establish post-conviction counsel Hart was ineffective by failing to adequately  
16 investigate and present evidence on motion for new trial.

17 It does not appear that the California Supreme Court’s rejection of this claim was  
18 contrary to, or an unreasonable application of, clearly established federal law, as determined by  
19 the Supreme Court, or that the state court’s ruling was based on an unreasonable determination  
20 of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. §  
21 2254(d).

22 Claim XXII is denied.

23 3. Review of claim XXIII

24 Petitioner alleges that his appointed appellate counsel, Mr. Haworth, was ineffective by  
25 failing to adequately present claims on direct appeal, violating his rights under the Fifth, Sixth,  
26 Eighth, and Fourteenth Amendments of the United States Constitution. (Doc. No. 51-1 ¶¶ 885-  
27 891.)

1           **a.       State Court Direct and Collateral Review**

2           Petitioner raised this same claim in his second petition for writ of habeas corpus in the  
3 California Supreme Court, which that court summarily denied on the merits and on procedural  
4 grounds. (Lod. Doc. No. 31.)

5           **b.       Analysis of claim XXIII**

6           Petitioner alleges that appellate counsel, Mr. Haworth, who was appointed by the  
7 California Supreme Court on May 22, 1996, see *People v. Dickey* (Colin R.), Case No. S025519,  
8 “inadequately presented and argued issues and failed to recognize and raise several valid  
9 constitutional issues apparent from the record, or apparent on reasonable investigation ...  
10 [s]pecifically ... the claims and issues raised herein.” (Doc. No. 51-1 ¶ 889; see also Doc. No.  
11 116 at 409:4-13.) That is, petitioner alleges Haworth was ineffective to the extent this court  
12 determines his guilt phase claims were not adequately presented on appeal. He alleges that  
13 absent Haworth’s deficient conduct there is a reasonable probability petitioner would have  
14 prevailed on appeal. (*Id.*); see also *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (defendant entitled  
15 to effective assistance on first appeal as of right).

16           This claim fails to the extent each claim now before the court, having been adjudicated in  
17 state court, is denied on the merits under the § 2254(d) standard for reasons stated, ante and post.

18           Petitioner has not otherwise demonstrated that Haworth was deficient on direct appeal.  
19 The record reflects that Haworth filed a 340 page opening brief on August 31, 2001 raising 35  
20 claims. (See *Appellant’s Opening Brief lodged Aug. 31, 2001 in People v. Dickey* (Colin R.),  
21 Case No. S025519.) He also filed a 93 page reply brief (see *Appellant’s Reply Brief lodged*  
22 *October 16, 2002 in Dickey*, Case No. S025519), and a 47 page petition for rehearing (see  
23 *Appellant’s Petition for Rehearing lodged June 10, 2005 in Dickey*, Case No. S025519).

24           On May 23, 2005, the California Supreme Court denied the appeal in lengthy merits  
25 opinion. *Dickey*, 35 Cal. 4th 884. Therein the state supreme court noted Haworth’s failure to  
26 file certain claims in habeas rather than on appeal, *id.* at 926, and his raising claims on appeal  
27 that had consistently been rejected by that court, *id.* at 931.

1 In any event, claim XXIII fails to the extent each claim now before this court, having  
2 been adjudicated in state court, is denied on the merits under the § 2254(d) standard for reasons  
3 stated. It follows that petitioner has not demonstrated prejudice under the Strickland standard as  
4 to such claims.

5 Additionally, petitioner has not demonstrated Haworth was prejudicially deficient as to  
6 any claims and allegations not raised on direct appeal. It is settled that appellate counsel has no  
7 constitutional obligation to raise every non-frivolous issue, even if requested by the appellant.  
8 *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (holding that an attorney need not advance every  
9 colorable argument on appeal); see also *Mirzayance*, 556 U.S. at 127 (“Counsel also is not  
10 required to have a tactical reason—above and beyond a reasonable appraisal of a claim’s dismal  
11 prospects for success—for recommending that a weak claim be dropped altogether.”).

12 Petitioner has not demonstrated on the record that Haworth was deficient in claim  
13 selection. The habeas declaration of Haworth stops short of explaining his reasons for raising  
14 and not raising claims on appeal (see SHCP, Ex. C ¶¶ 1-3), other than to state that Schultz’s trial  
15 file did not contain work product in support of certain claims. The Supreme Court has  
16 recognized that “since time beyond memory” experienced advocates “have emphasized the  
17 importance of winnowing out weaker arguments on appeal and focusing on one central issue if  
18 possible, or at most on a few key issues.” *Barnes*, 463 U.S. at 751-52; cf. *Banks v. Reynolds*, 54  
19 F.3d 1508, 1515 (10th Cir. 1995) (failure to raise a “dead-bang winner” - an issue obvious from  
20 the record which would have resulted in reversal - is ineffective).

21 Even if Haworth was deficient as to any claims and allegations not raised on direct  
22 appeal, petitioner has not demonstrated prejudice. Petitioner has not shown any unrepresented  
23 non-frivolous issue that was stronger than issues Haworth did present on appeal. See *Morrison*  
24 *v. Estelle*, 981 F.2d 425, 429 (9th Cir. 1992) (appellate counsel not ineffective where argument  
25 would lose); see also *Robbins*, 528 U.S. at 288 (same). The appropriate inquiry is not whether  
26 raising a particular issue on appeal would have been frivolous, but whether raising it would have  
27 led to a reasonable probability of reversal. *Miller*, 882 F.2d at 1435 (Strickland provides the  
28

1 proper standard for evaluating a claim that appellate counsel was ineffective). Where a  
2 petitioner had only a remote chance of obtaining reversal based upon an issue, neither of the  
3 Strickland prongs is satisfied. *Id.* Petitioner has not carried this burden.

4 Accordingly, for the reasons stated, a fair-minded jurist could have found that petitioner  
5 failed to establish that appointed appellate counsel Haworth was ineffective by failing to  
6 adequately present claims on direct appeal.

7 It does not appear that the California Supreme Court’s rejection of this claim was  
8 contrary to, or an unreasonable application of, clearly established federal law, as determined by  
9 the Supreme Court, or that the state court’s ruling was based on an unreasonable determination  
10 of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. §  
11 2254(d).

12 Claim XXIII is denied.

13 **E. Claim of Insufficient Evidence**

14 1. Clearly Established Law

15 A federal habeas court reviews challenges to the sufficiency of the evidence by  
16 determining whether in “viewing the evidence in a light most favorable to the prosecution, any  
17 rational trier of fact could have found the essential elements of the crime beyond a reasonable  
18 doubt.” *Lewis v. Jeffers*, 497 U.S. 764, 781 (1990). “A reviewing court must consider all of the  
19 evidence admitted by the trial court, regardless whether that evidence was admitted erroneously.”  
20 *McDaniel v. Brown*, 558 U.S. 120, 131 (2010) (same).

21 Sufficiency of the evidence claims raised in § 2254 proceedings must be measured with  
22 reference to substantive requirements as defined by state law. *Jackson v. Virginia*, 443 U.S. 307,  
23 324 n.16 (1979). Evidence is sufficient under the due process clause where “after viewing the  
24 evidence in the light most favorable to the prosecution, any rational trier of fact could have found  
25 the essential elements of the crime beyond a reasonable doubt.” *Jackson*, 443 U.S. at 319; see  
26 also *Payne v. Borg*, 982 F.2d 335, 338 (9th Cir. 1992) (same).

27 In cases where the evidence is unclear or would support conflicting inferences, the  
28

1 federal court “must presume -- even if it does not affirmatively appear in the record -- that the  
2 trier of fact resolved any such conflict in favor of the prosecution, and must defer to that  
3 resolution.” Jackson, 443 U.S. at 326. To prevail here, Petitioner must show “that the  
4 prosecution’s case against him “was so lacking that the trial court should have entered a  
5 judgment of acquittal.” McDaniel, 558 U.S. at 131.

6 AEDPA adds another layer of deference over the already deferential Jackson standard.  
7 Under AEDPA, the federal court may not grant a habeas petition unless it finds that the state  
8 court unreasonably applied the principles underlying the Jackson standard when reviewing the  
9 petitioner’s claim. See Juan H. v. Allen, 408 F.3d 1262, 1275 n.12 (9th Cir. 2005) (recognizing  
10 that “unreasonable application” standard applies to insufficient evidence claim); Jones v. Wood,  
11 114 F.3d 1002, 1013 (9th Cir. 1997) (same).

12 2. Review of Claim XXVI

13 Petitioner alleges that the evidence before the jury was insufficient to allow it to find  
14 every element charged beyond a reasonable doubt, violating his rights under the Fifth, Sixth,  
15 Eighth, and Fourteenth Amendments of the United States Constitution. (Doc. No. 51-1 ¶¶ 981-  
16 989.)

17 **a. State Court Direct and Collateral Review**

18 Petitioner raised and the state supreme court rejected this same claim on direct appeal.  
19 Dickey, 35 Cal. 4th at 900-03.

20 The California Supreme Court also summarily denied these allegations on the merits and  
21 on procedural grounds, on habeas review. (Lod. Doc. No. 31.)

22 **b. Analysis of claim XXVI**

23 Petitioner alleges there was insufficient evidence that he aided and abetted the killings, or  
24 that he harbored a specific intent to kill either victim. As noted, petitioner was tried on two  
25 counts of murder; two felony murder special circumstances (robbery-murder and burglary-  
26 murder) and a multiple murder special circumstance; robbery; and larceny. (See CT 227-31,  
27 303-07.)

1 (i) Sufficiency of the Evidence

2 Petitioner revisits allegations in claims XII, XVIII and XIX, this time arguing that the  
3 evidence was insufficient to prove beyond a reasonable doubt that:

4  
5 (a) Petitioner aided and abetted the killing itself, not just the underlying felony;  
6 and (b) that Petitioner harbored the specific intent to kill or to aid in a killing with  
regard to each victim prior to or contemporaneously with the killings. [Citation]

7 (Doc. No. 51-1 ¶ 985.) Petitioner contends there was “no evidence whatsoever that [he]  
8 participated in the killing of Ms. Caton or her boarder, Mr. Freiri, in any way, or that petitioner  
9 even knew RC was committing or expected RC to commit the murders. The only piece of  
10 evidence to which the prosecution repeatedly referred, was the oral admission petitioner  
11 allegedly made to Gene Buchanan – an admitted drug-addict whose credibility was questionable  
12 – that when he later saw the body of Mr. Freiri slumped over, he thought to himself, if you kill  
13 one you might as well kill them both.” (Id. ¶¶ 986-987.)

14 At the time of his trial, Penal Code section 190.2, former subdivision (b), under which  
15 petitioner was charged, stated:

16  
17 Every person whether or not the actual killer found guilty of intentionally aiding,  
18 abetting ... or assisting any actor in the commission of murder in the first degree  
19 shall suffer death or confinement in state prison for a term of life without the  
20 possibility of parole, in any case in which one or more of the special  
circumstances enumerated in [specified paragraphs covering, among others, the  
crimes of burglary and robbery] of subdivision (a) of this section has been  
charged and specially found under Section 190.4 to be true.

21 Penal Code § 190.2(b) (eff. Nov. 8, 1978).

22 A person “aids and abets the commission of a crime when he or she, acting with (1)  
23 knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of  
24 committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids,  
25 promotes, encourages or instigates, the commission of the crime.” *People v. Beeman*, 35 Cal. 3d  
26 547, 561 (1984); (see CT 412, CALJIC 3.01).

27 The California Supreme Court considered and rejected this claim on direct appeal, stating  
28

1 that:

2  
3 a) Sufficiency of the evidence as to aiding or abetting

4 Defendant contends the evidence was insufficient to support the felony-murder  
5 special-circumstance findings. Defendant does not contend the evidence was  
6 insufficient to prove he planned and participated in the burglaries and robberies;  
7 he concedes it was sufficient. Rather, defendant contends the prosecution was  
8 required to prove, not only that he aided or abetted the burglaries and robberies,  
9 but also that he “assisted in the killings themselves.”

10 Defendant relies upon the language we italicize in section 190.2, former  
11 subdivision (b). “Every person whether or not the actual killer found guilty of  
12 intentionally aiding, abetting ... or assisting any actor in the commission of  
13 murder in the first degree shall suffer death or confinement in state prison for a  
14 term of life without the possibility of parole, in any case in which one or more of  
15 the special circumstances enumerated in [specified paragraphs covering, among  
16 others, the crimes of burglary and robbery] of subdivision (a) of this section has  
17 been charged and specially found under Section 190.4 to be true.” (§ 190.2,  
18 former subd. (b), added by initiative measure Prop. 7, § 6, approved by the  
19 electorate Nov. 7, 1978; see now § 190.2, subd. (c).)

20 Section 190.2, former subdivision (b) is not helpful to defendant because, under  
21 the felony-murder doctrine, he was found guilty of aiding or abetting first degree  
22 murders. All persons aiding or abetting the commission of burglary or robbery are  
23 guilty of first degree murder when one of them kills while acting in furtherance of  
24 the common design. (§ 189; [Citation].)

25 Defendant also relies on *People v. Anderson* (1987) 43 Cal.3d 1104 [Citation]  
26 (*Anderson*), to support his argument that the “actus reus of a special circumstance  
27 requires that a defendant aid or abet the actual killing, not just the underlying  
28 felony.” In particular, defendant relies upon the following statement in *Anderson*:  
29 “[G]iven a realistic reading the statutory requirement that the aider and abetter  
30 intentionally aid, abet, counsel, command, induce, solicit, request, or assist any  
31 acts in the commission of first degree murder—even when applied to felony  
32 murder—is not ambiguous: the aider and abetter must intentionally aid in a  
33 killing.” (*Anderson*, at p. 1145 [Citation].)

34 Defendant's reliance on *Anderson* is unfounded. It is axiomatic a decision does  
35 not stand for a proposition not considered by the court. [Citation] The proposition  
36 advanced by defendant—for a felony—murder special circumstance, the aiding or  
37 abetting has to relate to the act of killing itself, rather than just the underlying  
38 felony was not considered by the court in *Anderson*.

39 The question we considered in *Anderson*—reconsidered, actually—was “whether  
40 and under what circumstances intent to kill is an element of the felony—murder  
41 special circumstance.” (*Anderson*, supra, 43 Cal.3d at p. 1141 [Citation].)

42 *Anderson* overruled *Carlos v. Superior Court* (1983) 35 Cal.3d 131 [Citation]  
43 (*Carlos*). “In *Carlos* ..., we held that intent to kill was an element of the felony-  
44 murder special circumstance whether or not the defendant was the actual killer.”  
45 (*Anderson*, supra, 43 Cal.3d at p. 1139 [Citation].) In *Anderson*, we concluded  
46 “the broad holding of *Carlos* that intent to kill is an element of the felony-murder  
47  
48

1 special circumstance cannot stand, and that the following narrow holding must be  
2 put in its place: intent to kill is not an element of the felony-murder special  
3 circumstance; but when the defendant is an aider and abetter rather than the actual  
4 killer, intent must be proved before the trier of fact can find the special  
5 circumstance to be true.” (Id. at pp. 1138–1139, 240 Cal.Rptr. 585, 742 P.2d  
6 1306.)

7 The premise of the decision in Carlos, the Anderson court explained, “was our  
8 determination that section 190.2[subdivision] (a)(17) is ambiguous. As shown  
9 above, on further reflection we now believe that premise was mistaken: given a  
10 fair reading, section 190.2[subdivision] (a)(17) provides that intent is not an  
11 element of the felony-murder special circumstance.” (Anderson, supra, 43 Cal.3d  
12 at p. 1143 [Citation].)

13 According to Anderson, Carlos's mistaken premise rested on two bases.  
14 (Anderson, supra, 43 Cal.3d at pp. 1143–1145 [Citation].) The statement relied  
15 upon by defendant appears in the context of Anderson's reexamination of the  
16 second of the two bases.

17 “The second basis of our analysis in Carlos was our belief that unless section  
18 190.2(a)(17) were read to require intent to kill, the meaning and function of  
19 section 190.2(b) would be hard to determine: ‘In the first place, paragraph 17,  
20 alone of the listed paragraphs, already contains language equating the liability of  
21 principal and accomplice. In addition, the requirement that the accomplice  
22 “intentionally” aid in the commission of a murder is inherently ambiguous when  
23 applied to a felony murder, for it could mean either that the accomplice must  
24 intentionally aid in a killing, or that he need only intentionally aid the commission  
25 of the underlying felony.’ [”] ([Carlos, supra,] 35 Cal.3d at p. 142 [197 Cal.Rptr.  
26 79, 672 P.2d 862].)

27 “On reexamination we now find this basis, too, to be lacking. First, section  
28 190.2(a)(17) does not treat the liability of the murderer and his aider and abetter,  
but rather the liability of the perpetrator of the underlying felony and his aider and  
abetter. Thus, the statutory provision does nothing more than declare that both the  
perpetrator of the underlying felony and his aider and abetter are felony  
murderers. Section 190.2(b) then declares that the felony-murder aider and abetter  
is eligible for the death penalty if intent to kill is proved. Second, given a realistic  
reading the statutory requirement that the aider and abetter intentionally aid, abet,  
counsel, command, induce, solicit, request, or assist any acts in the commission of  
first degree murder even when applied to felony murder is not ambiguous: the  
aider and abetter must intentionally aid in a killing.” (Anderson, supra, 43 Cal.3d  
at pp. 1144–1145, 240 Cal.Rptr. 585, 742 P.2d 1306.)

In the paragraph immediately following the statement upon which defendant  
relies we reiterated the issue we were actually resolving in Anderson. “Thus, in  
Carlos we mistook the first and crucial step in our analysis by determining that  
section 190.2(a)(17) is ambiguous: given a fair reading in conjunction with  
section 190.2(b), the provision can realistically be read only to require intent to  
kill for the aider and abetter but not for the actual killer.” (Anderson, supra, 43  
Cal.3d at p. 1145, 240 Cal.Rptr. 585, 742 P.2d 1306.)<sup>7</sup>

Finally, defendant recasts this argument as an instructional claim. He contends the  
trial court prejudicially erred by failing to instruct the jury he had to have aided or  
abetted the actual killings, not just the underlying felonies. For the reasons stated,  
this contention lacks merit.

1 b) Sufficiency of the evidence as to intent

2 Defendant contends the evidence was insufficient to prove he had the requisite  
3 intent to kill his victims.

4 In reviewing the sufficiency of the evidence for a special circumstance, as for a  
5 conviction, we ask whether, after viewing the evidence in the light most favorable  
6 to the prosecution, any rational trier of fact could have found the essential  
7 elements of the allegation beyond a reasonable doubt. [Citation]

8 As proof of defendant's intent to kill, the prosecution relied on his confession to  
9 Buchanan that, upon seeing the apparently lifeless body of Mr. Freiri, defendant  
10 thought to himself, "If you kill one you might as well kill them both."

11 Defendant contends his statement to Buchanan is susceptible to the interpretation,  
12 not that he intended to kill the victims, but that he realized the penalty provided  
13 by law would be the same whether both or only one of them were killed. While  
14 that is true, defendant did not urge the less damning interpretation below. At trial,  
15 he denied having made the statement to Buchanan at all, and claimed to have had  
16 nothing to do with these crimes. More to the point, although the language used by  
17 defendant was susceptible to more than one reasonable interpretation, the  
18 interpretation urged by the prosecution, that defendant intended to kill his victims,  
19 was certainly one reasonable jurors could reach.

20 In the alternative, and assuming arguendo the evidence of his intent to kill was  
21 sufficient with regard to Mrs. Caton, defendant contends it was insufficient as to  
22 Mr. Freiri. The statement the prosecution relies upon, defendant points out,  
23 concerned a thought—"If you kill one you might as well kill them both"—that  
24 occurred to defendant after he discovered Mr. Freiri had apparently been killed by  
25 Cullumber. "The very basis for the thought was the assumption that Mr. Freiri  
26 was dead.... If one thinks that a person is dead, there can be no intent to kill that  
27 person."

28 However, Buchanan's testimony as to defendant[']s statement did not occur in a  
vacuum. While the prosecution did not rely upon it, there was ample evidence  
defendant formed the intent to kill Mr. Freiri before he discovered his body.  
[Citation]

Under the evidence, the jury was entitled to reach the following conclusions: The  
cord found around Mr. Freiri's neck came from the venetian blind in defendant[']s  
apartment, and defendant was responsible for bringing it to Mrs. Caton's house.  
Defendant was also responsible for bringing the knife used to stab Mrs. Caton and  
Mr. Freiri. Defendant knew his intended victims were elderly and that Mr. Freiri  
was partially paralyzed, and so he could not have believed he and Cullumber,  
both younger men, needed the knife to commit the robberies. Therefore,  
defendant intended to kill, and not just rob, Mrs. Caton and Mr. Freiri. Moreover,  
defendant knew he could not escape justice if Mr. Freiri were left alive.  
Defendant had gained entry by saying he needed to use the phone because  
Cullumber was going to jail. Even if Mr. Freiri did not recognize defendant, he  
must have known Cullumber, who was an almost daily visitor to his  
grandmother's home. Mr. Freiri would have led the police to Cullumber, and  
Cullumber would have led them to defendant.

c) Instruction on concurrence of act and specific intent

1 Defendant contends the trial court prejudicially erred by failing to instruct the jury  
2 that, for purposes of the special circumstances, he had to possess the intent to kill  
3 concurrently with his aiding or abetting the actual killings. This contention lacks  
4 merit because it rests on the premise we earlier rejected, that the prosecution was  
5 required to prove not only that defendant aided or abetted the burglaries and  
6 robberies, but also that he aided or abetted the actual killings. [Citation]

7 The jury was properly instructed on concurrence of act and intent with regard to  
8 the special circumstances. [Citation] In accordance with CALJIC No. 3.31, the  
9 jury was instructed that, with regard to each of the crimes charged in the  
10 information, “there must exist a union or joint operation of act or conduct and a  
11 certain specific intent in the mind of the perpetrator. Unless such specific intent  
12 exists, the crime to which it relates is not committed. [¶] The specific intent  
13 required is included in the definition of the crimes charged. [¶] All of the special  
14 circumstances allegations require an intent to kill.”

15 Dickey, 35 Cal. 4th at 900-05.

16 For these reasons and those discussed in claims XII, XVIII and XIX, the state supreme  
17 court could reasonably have rejected this claim. In sum, Buchanan testified that on the night of  
18 the murders he overheard RC and petitioner whispering about going to get money from some  
19 place, a task for which they armed themselves even though the victims were old and infirmed.  
20 (RT 4138-42, 4239-42, 4662-63, 4733.) At that time neither RC nor petitioner had any money.  
21 (RT 4348-52.) Goldman and Buchanan observed RC and petitioner preparing for the crimes.  
22 Goldman (RT 4534) and Buchanan (RT 4663-65) saw petitioner take the venetian blind from the  
23 closet to the bedroom where RC was waiting (RT 4534, 4663-65); petitioner returned the blind to  
24 the closet after the cord was removed. (RT 4534-37, 4666.) Petitioner’s fingerprint was found  
25 on the blind from which cord used in the crimes was removed. (RT 4573.)

26 Buchanan saw a knife on the bed in the bedroom just before RC and petitioner left the  
27 apartment. (RT 4706-07.) Buchanan saw RC and petitioner leave the apartment together that  
28 night. (RT 4674-75.) Goldman identified a knife at the murder scene as identical to one in the  
apartment kitchen; (RT 4396-97); she had seen petitioner looking through the kitchen drawer  
where the knife was kept. (RT 4343-44.) Both Buchanan and Goldman testified that petitioner  
and RC returned to the apartment together about two hours later (RT 4337-49, 4662-76), with  
\$700 they did not have earlier that evening (RT 4361, 4675-76), and spent some of this money  
on drugs. (RT 4348, 4352, 4675-77.) Buchanan testified that while driving RC to the Easy 8

1 Motel hours after the crimes, petitioner disposed of clothing, apparently evidence from the  
2 murders. (RT 4684-85.)

3 Furthermore, Buchanan (RT 4980) and Goldman (RT 4357-62) testified to petitioner's  
4 admission that he participated in the crimes with RC.

5 Prosecutor Hahus argued petitioner's intent, his noted unspoken thought during the  
6 crimes:

7  
8 Now, the evidence of the intent, his intent, is there from Gene Buchanan's relating  
9 to you his statement in the bedroom at Harvard, that when he came out of Marie's  
10 bedroom from the commotion that he heard and he says he saw what looked like  
11 Louis, the old man, slumped over and dead, he said or  
12 thought -- it makes no difference, because intention is a state of mind "If you kill  
13 one you might as well kill the other." That's an intention that someone die. Marie  
14 Caton died 11 days later.

15 (RT 4980.)

16 Petitioner points out that prosecutor Hahus conceded in argument that:

17  
18 There's evidence that they had weapons but that could have been to help in the  
19 burglary and the robberies. The mental state was to aid and abet in taking the  
20 property, the burglary or the robbery.

21 (RT 4975.) Petitioner argues an absence of evidence of his intent to kill prior to finding Freiri  
22 dead. He notes in this regard Hahus's argument that "[w]e don't know if, when they went in  
23 there, they went in there to kill. There's no evidence of that at all." (RT 4975.) However, this  
24 argument was not evidence. While the record suggests that RC and petitioner intended to tie up  
25 the victims and steal money known to be in the house (RT 4689-90), an objectively reasonable  
26 juror could have found beyond a reasonable doubt what the state supreme court itself surmised,  
27 that RC and petitioner armed themselves before going to the crime scene with the intent to kill  
28 Caton and Freiri leaving no witnesses.

29 A reasonable juror could have concluded weapons were unnecessary in the absence of  
30 intent to kill. Victim Caton was in her seventies; victim Freiri was partially paralyzed, wore a  
31 leg brace and used a cane to get around. (RT 4138-42, 4239-42.) Both victims presumably

1 knew the perpetrators and could have identified them to the authorities. During the crimes, RC  
2 assaulted Mr. Freiri leaving him apparently dead (RT 4691) and then “went berserk” and  
3 assaulted Ms. Caton. (RT 4360-61.)

4 The evidentiary record otherwise could reasonably support a plan to kill the victims. The  
5 murders appear callous and brutal and were committed with the cord and knife brought to the  
6 crime scene by petitioner and RC. (See e.g., SSHCP, Ex.’s 9-11.) The lack of proximity  
7 between the victims could reasonably suggest some significant amount of time and cooperation  
8 between perpetrators was involved. There is no suggestion in the record that petitioner tried to  
9 intervene in the assaults or aid the victims; for example Goldman testified that petitioner did  
10 nothing as RC assaulted his grandmother. (RT 4359-61.)

11 Additionally, the record suggests that RC may have been in contact with petitioner after  
12 RC left the Harvard Avenue apartment following the crimes; possibly suggesting the two were  
13 involved in the murders. (RT 4841-43.) After the crimes, petitioner was initially emotional and  
14 depressed about his confessed involvement, but petitioner’s mood improved when he learned all  
15 of the victims and RC were dead. (RT 4378.) Even so, petitioner apparently threatened  
16 Goldman should she reveal his admitted role in the crimes. (RT 4375-77, 4616.)

17 Conflicting inferences must be resolved in favor of the prosecution. Jackson, 443 U.S. at  
18 326. The state supreme court could reasonably have found the jury was properly instructed on  
19 applying law to the noted facts in the record, including requirements that petitioner have a  
20 specific intent to kill each of the two victims (CT 395, 425-430; RT 5010-25); that in order to  
21 find the charged special circumstances true, there must have existed a “union or joint operation  
22 of act or conduct and a certain specific intent” in petitioner’s mind (RT 5010-11); that the jury  
23 instructions were to be considered as a whole and in light of each other (CALJIC No. 1.01; RT  
24 5007-08); that jurors must follow the law as given by the court (RT 5007); that if anything  
25 concerning the law stated by the attorneys in their arguments conflicted with the law stated by  
26 the court, the jury must follow the law stated by the court (id.); and that counsel’s argument is  
27 not evidence. (RT 5008.)

1 It follows that petitioner’s further argument that “[he] is entitled to correct application of  
2 state law by the state courts” could reasonably be rejected. (Doc. No. 116 at 411:13-16); cf.  
3 Hicks v. Oklahoma, 447 U.S. 343, 346 (1980) (defendant denied due process where jury abused  
4 state law sentencing discretion); Wasko v. Vasquez, 820 F.2d 1090, 1091 n.2 (9th Cir. 1987)  
5 (defendant may be deprived of liberty only to the extent authorized by state statute). For the  
6 reasons discussed above, the state supreme court was not unreasonable in finding no state law  
7 error. Even if there was state law error, that alone would not support federal habeas relief.  
8 Estelle, 502 U.S. at 71-72.

9 Here, a fair-minded jurist could have concluded beyond a reasonable doubt that  
10 petitioner’s conviction was supported by the evidence admitted at trial with conflicting  
11 inferences resolved in favor of the prosecution. Brown, 558 U.S. at 133 (a federal habeas court  
12 can only set aside a state-court decision if the state court’s application of clearly established  
13 federal law is objectively unreasonable).

14 For the stated reasons, the California Supreme Court reasonably rejected petitioner’s  
15 constitutional challenge to the sufficiency of the evidence. See 28 U.S.C. § 2254(d).

16 It does not appear that the California Supreme Court’s rejection of this claim was  
17 contrary to, or an unreasonable application of, clearly established federal law, as determined by  
18 the Supreme Court, or that the state court’s ruling was based on an unreasonable determination  
19 of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. §  
20 2254(d).

21 Claim XXVI is denied.

22 **F. Claim of Actual Innocence**

23 1. Clearly Established Law

24 The showing required for a free standing claim of actual innocence, i.e., a claim  
25 irrespective of constitutional error at trial or sentencing, is “extraordinarily high” and must be  
26 “truly persuasive.” Herrera v. Collins, 506 U.S. 390, 417, (1993). To carry this burden  
27 Petitioner must affirmatively prove he is innocent. See Carriger v. Stewart, 132 F.3d 463, 476-  
28

1 77 (9th Cir. 1997).

2 In Schlup, the Supreme Court reached actual innocence as a gateway claim to  
3 consideration of otherwise barred Constitutional claims. “If a habeas petitioner ... presents  
4 evidence of innocence so strong that a court cannot have confidence in the outcome of the trial  
5 unless the court is also satisfied that the trial was free of non-harmless constitutional error, the  
6 petitioner should be allowed to pass through the gateway and argue the merits of his underlying  
7 claims.” Schlup, 513 U.S. at 316. The Schlup court held that the proper standard is that a  
8 procedurally defaulted petitioner must show that a constitutional violation has probably resulted  
9 in the conviction of one who is actually innocent. 513 U.S. at 326. That is, “[t]he petitioner  
10 must show that it is more likely than not that no reasonable juror would have convicted him in  
11 the light of the new evidence.” 513 U.S. at 327.

12 It follows that petitioner’s burden is to demonstrate that more likely than not, any  
13 reasonable juror would have reasonable doubt. House v. Bell, 547 U.S. 518, 538 (2006). See  
14 Sawyer v. Whitley, 505 U.S. 333, 346 (1992) (holding that in order to prove actual innocence,  
15 petitioner must show fair probability that rational trier of fact would have entertained reasonable  
16 doubt regarding the existence of facts which are prerequisites under state or federal law for  
17 imposition of the death penalty).

18 2. Review of Claim XXVIII

19 Petitioner alleges that he is actually innocent of capital murder such that his conviction,  
20 sentence and confinement are unlawful and in violation of his rights under the Fifth, Sixth,  
21 Eighth, and Fourteenth Amendments of the United States Constitution. (Doc. No. 51-1 ¶¶ 995-  
22 1005.)

23 **a. State Court Direct and Collateral Review**

24 The California Supreme Court, on habeas review summarily denied these allegations on  
25 the merits and on procedural grounds. (Lod. Doc. No. 31.)

26 **b. Analysis of claim XXVIII**

27 Petitioner alleges his actual innocence is supported by incorporation of all his above  
28

1 claims and allegations including noted arguments that the prosecution's timeline was  
2 unsupported by the forensic evidence; the physical evidence does not connect petitioner to the  
3 crime; key witness testimony against petitioner at trial was false; RC was the actual killer;  
4 significant evidence suggests third party culpability; and the prosecution engaged in a pattern of  
5 misconduct which skewed the evidence and the fact-finding process.

6 Petitioner further supports this claim by arguing that respondent has conceded the  
7 following facts are undisputed:

- 8
- 9 1. The biologic evidence collected from the crime scene did not match petitioner.
- 10 2. The single hair on victim Freiri's hand did not match petitioner.
- 11 3. Law enforcement did not collect any usable fingerprints from the crime scene  
12 that matched petitioner.
- 13 4. Until Buchanan came forward to implicate petitioner, over three months after  
14 the crimes, police had closed the case, concluding that RC, alone, was responsible  
15 for the murders.
- 16 5. Law enforcement collected petitioner's fingerprint from a venetian blind away  
17 from the scene of the crime.
- 18 6. There were additional prints on the venetian blind from an unknown source.
- 19 7. The case against petitioner rested on the testimony of Gail Goldman and Gene  
20 Buchanan.
- 21 8. Goldman was under the influence of narcotics at times she made her noted  
22 observations.
- 23 9. Based on Buchanan's agreement to testify, and his expected receipt of the  
24 reward money, the Fresno DA arranged for room and board to be provided for  
25 Buchanan on a long-term deferred basis.
- 26 10. The DA or his investigators met with or conversed with Buchanan on more  
27 than a dozen occasions prior to his trial testimony.
- 28 11. Buchanan falsely testified that that he never spoke with anyone from the DA's  
office, except the DA "a couple of times."
12. Buchanan told the DA that a deal had been worked out in chambers by the  
lawyers, including a deputy district attorney and a public defender, to dismiss a  
pending case against him for drug possession, but that no record of the deal was  
made so that the defense attorney in the Dickey case would not find out about it.  
Buchanan told the DA that he wasn't worried about his pending case "[b]ecause  
I'm a prime witness in the Dickey case."

1 13. The DA did not turn over to the defense notes from his file regarding this  
2 telephone conversation.

3 14. The DA personally asked a judge to dismiss pending charges against  
4 Buchanan after petitioner's trial concluded. These charges were dismissed.

5 (Doc. No. 116 at 412:5-413:24.)

6 Respondent counters by arguing there is no clearly established Supreme Court law  
7 recognizing a free standing actual innocence claim for habeas relief. See e.g., *House*, 547 U.S. at  
8 554 (declining to resolve open question of whether free standing actual innocence claims are  
9 available on habeas review); *Herrera*, 506 U.S. at 400 (claimed actual innocence based on newly  
10 discovered evidence is not a basis for federal habeas relief absent an independent constitutional  
11 violation in the underlying state criminal proceeding); *Saddler v. Evans*, 2011 WL 9150943, \*8  
12 (S.D. Cal. Dec. 20, 2011) (“In the absence of Supreme Court authority establishing the  
13 cognoscibility of a free standing actual innocence claim on federal habeas review, the California  
14 Supreme Court’s rejection of Saddler’s claim cannot be contrary to, or involve an unreasonable  
15 application of, clearly established Supreme Court authority.”).

16 Here, the state supreme court reasonably could have rejected petitioner’s actual  
17 innocence claim as a gateway claim to the extent his noted guilt phase claims all fail on the  
18 merits. Notably, petitioner has not demonstrated insufficiency of the evidence, i.e., it is not  
19 likely any reasonable juror would have reasonable doubt that the essential elements of the  
20 criminal counts could have been found beyond a reasonable doubt. (See claim XXVI.) His  
21 allegations that false evidence was presented, evidence was suppressed and destroyed and a third  
22 party was involved in the crimes are not sufficiently supported in the evidentiary record at a level  
23 greater than harmless error. (See claims II(B), II(C), II(S), XIII.)

24 No facts or discrepancies in the testimony and physical evidence establish or compel the  
25 conclusion that Buchanan, by virtue of his alleged substance addiction, inducements including in  
26 other criminal matters, or otherwise, was motivated to and did testify falsely or inaccurately.  
27 (See claims II(E), XIII and XVII.) No facts or discrepancies in the testimony and physical  
28 evidence establish or compel the conclusion that Goldman, by virtue of her alleged substance

1 addiction, was motivated to and did testify falsely or inaccurately. (See claims II(L), XXI.) Nor  
2 does the noted physical evidence controvert petitioner's admission to Buchanan and Goldman  
3 that he participated in the crimes and the consistent testimony of Buchanan and Goldman  
4 inculcating petitioner. (See claims II(B), II(C), II(L), II(S), XIII, XIV, XXI, and XXVI.)

5 Accordingly, for the reasons stated, a fair-minded jurist could have found that petitioner  
6 failed to establish his actual innocence sufficient to pass through the Schlup gateway and that  
7 even if he had his record guilt phase claims fail on the merits for the reasons stated. (See e.g.,  
8 Smith, 510 F.3d at 1139-40 (9th Cir. 2007) (no actual innocence where petitioner failed to show  
9 that it was more likely than not that no reasonable juror would convict him of the relevant  
10 crime).

11 It does not appear that the California Supreme Court's rejection of this claim was  
12 contrary to, or an unreasonable application of, clearly established federal law, as determined by  
13 the Supreme Court, or that the state court's ruling was based on an unreasonable determination  
14 of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. §  
15 2254(d).

16 Claim XXVIII is denied.

### 17 **VIII. REQUEST FOR FACTUAL DEVELOPMENT**

18 On April 16, 2014, petitioner filed in conjunction with his merits brief a motion for  
19 development of facts relating to claims II(B), II(C), II(F), II(G), II(H), II(S), II(T), II(V), XIII,  
20 XIV, XV and XXIV.<sup>19</sup> (See Doc. Nos. 116, 128.)

#### 21 **A. Legal Standard**

22 As noted, § 2254(d), as amended by AEDPA, provides:

23  
24 An application for a writ of habeas corpus on behalf of a person in custody  
25 pursuant to the judgment of a State court shall not be granted with respect to any  
claim that was adjudicated on the merits in State court proceedings unless the  
adjudication of the claim--

26 (1) resulted in a decision that was contrary to, or involved an unreasonable  
27 application of, clearly established Federal law, as determined by the

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28 <sup>19</sup> Petitioner does not appear to argue for factual development of claims XIII and XV.

1 Supreme Court of the United States; or

2 (2) resulted in a decision that was based on an unreasonable determination  
3 of the facts in light of the evidence presented in the State court proceeding.

4 28 U.S.C. § 2254(d).

5 In *Pinholster*, the Supreme Court held that “review under § 2254(d)(1) is limited to the  
6 record that was before the state court that adjudicated the claim on the merits,” and thus  
7 “evidence introduced in federal court has no bearing on § 2254(d)(1) review.” 563 U.S. at 181,  
8 185. Although the central holding of *Pinholster* pertained to § 2254(d)(1), the Supreme Court  
9 observed that “§ 2254(d)(2) includes the language ‘in light of the evidence presented in the State  
10 court proceeding,’” providing “additional clarity” that review under § 2254(d)(2) is also limited  
11 to the record before the state court. *Id.* at 185 n.7. Therefore, for claims that were adjudicated  
12 on the merits in state court, a petitioner can only rely on the record that was before the state court  
13 to satisfy the requirements of § 2254(d).

14 A petitioner who seeks to expand the record without a hearing must meet the same  
15 requirements as a petitioner seeking to obtain an evidentiary hearing under 28 U.S.C. §  
16 2254(e)(2). See e.g., *Holland v. Jackson*, 542 U.S. 649, 653 (2004) (finding that the restrictions  
17 of § 2254(e)(2) “apply a fortiori when a prisoner seeks relief based on new evidence without an  
18 evidentiary hearing”); *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) (district court not required  
19 to hold evidentiary hearing where state record refutes petitioner’s allegations); *Colegrove v.*  
20 *Hoshino*, No. 13-CV-00096-BLF, 2014 WL 4421393, at \*2 (N.D. Cal. Sept. 5, 2014) (petitioner  
21 who seeks to expand the record without a hearing must meet the same requirements as a  
22 petitioner seeking to obtain an evidentiary hearing under 28 U.S.C. § 2254(e)(2)).

23 Accordingly, where a state court denies the claim on the merits, an expanded record  
24 cannot be considered in determining whether the state court’s decision was objectively  
25 unreasonable. *Rogovich v. Ryan*, 694 F.3d 1094, 1096-97 (9th Cir. 2012), citing *Pinholster*, 563  
26 U.S. at 180).

27 **B. Analysis of Motion for Factual Development**

1 Petitioner seeks the following factual development:

- 2 1. Twenty-five requests for admission (pursuant to Rule 6 of the Rules Governing §  
3 2254 Cases In the United States District Courts, and Rule 36 of the Federal Rules  
4 of Civil Procedure) relating to allegations that the state failed to collect, destroyed  
5 and/or failed to preserve material exculpatory evidence. (Doc. No. 116 at 150:13-  
6 156:15).
- 7 2. Seventeen requests for admission (pursuant to Rule 6 of the Rules Governing §  
8 2254 Cases In the United States District Courts, and Rule 36 of the Federal Rules  
9 of Civil Procedure) relating to allegations that Schultz was ineffective regarding  
10 the venetian blind evidence. (Doc. No. 116 at 174:23-177:3.)
- 11 3. Thirteen requests for admission (pursuant to Rule 6 of the Rules Governing § 2254  
12 Cases In the United States District Courts, and Rule 36 of the Federal Rules of  
13 Civil Procedure) relating to allegations that Schultz was ineffective regarding  
14 exculpatory evidence and expert testimony. (Doc. No. 116 at 200:12-202:3.)
- 15 4. One request for admission (pursuant to Rule 6 of the Rules Governing § 2254  
16 Cases In the United States District Courts, and Rule 36 of the Federal Rules of  
17 Civil Procedure) relating to allegations that Schultz was ineffective regarding  
18 prosecutor's guilt phase closing argument. (Doc. No. 116 at 211:14-16.)
- 19 5. Sixteen requests for admission (pursuant to Rule 6 of the Rules Governing § 2254  
20 Cases In the United States District Courts, and Rule 36 of the Federal Rules of  
21 Civil Procedure) relating to allegations that Schultz was ineffective regarding  
22 prosecutor's guilt phase closing argument. (Doc. No. 116 at 225:6-226:28.)
- 23 6. Eighteen facts to which petitioner states he can attest relating to allegations that  
24 Schultz was ineffective regarding petitioner's testimony at trial.<sup>20</sup> (Doc. No. 116  
25 at 312:17-316:8.)
- 26 7. One request for admission (pursuant to Rule 6 of the Rules Governing § 2254

27  
28 <sup>20</sup> See Rule 7 of the Rules Governing § 2254 Cases In the United States District Courts (affidavits may be submitted and considered as part of the record).

1 Cases In the United States District Courts, and Rule 36 of the Federal Rules of  
2 Civil Procedure) relating to allegations that Schultz was ineffective regarding the  
3 testimony of Maxine Hansen at trial. (Doc. No. 116 at 331:20-23.)

4 8. Oral deposition and document production (pursuant to Rule 6 of the Rules  
5 Governing § 2254 Cases In the United States District Courts and Federal Rules of  
6 Civil Procedure, Rules 30 and 34) by custodians of the noted crime scene  
7 evidence. (Doc. No. 116 at 156:18-157:14.)

8 9. Four requests for admission (pursuant to Rule 6 of the Rules Governing § 2254  
9 Cases In the United States District Courts, and Rule 36 of the Federal Rules of  
10 Civil Procedure) relating to allegations that conditions of confinement violated  
11 petitioner’s constitutional rights. (Doc. No. 128 at 174:7-15.)

12 However, all the above requests relate to factual development of claims that were  
13 adjudicated on the merits in the state court. These claims do not survive 28 U.S.C. § 2254(d)  
14 analysis for reasons discussed above. See Richter, 562 U.S. at 99 (“[w]hen a federal claim has  
15 been presented to a state court and the state court has denied relief, it may be presumed that the  
16 state court adjudicated the claim on the merits in the absence of any indication or state-law  
17 procedural principles to the contrary.”).

18 As noted, “review under [§] 2254(d) is limited to the record that was before the state  
19 court that adjudicated the claim on the merits.” Pinholster, 563 U.S. at 181; accord Stokely v.  
20 Ryan, 659 F.3d 802, 809 (9th Cir. 2011) (same). To this extent, new evidence in federal court  
21 simply cannot assist petitioner.

22 Petitioner may claim that he is entitled to a hearing under 28 U.S.C. § 2254(e)(2).  
23 However, Pinholster suggests otherwise. “Section 2254(e)(2) continues to have force where [§]  
24 2254(d)(1) does not bar federal habeas relief.” Id. at 185. Analysis of the claims under §  
25 2254(d) must precede the granting of an evidentiary hearing under § 2254(e)(2). Id. Thus, only  
26 if a petitioner overcomes § 2254(d) can the court consider a hearing under § 2254(e)(2). As  
27 Justice Breyer stated: “If the federal habeas court finds that the state-court decision fails [§

1 2254](d)'s test or if [§ 2254](d) does not apply), then an [§ 2254](e) hearing may be needed.” Id.  
2 at 205 (Breyer, J., concurring in part and dissenting in part).

3 As discussed above, § 2254(d) applies to claims II(B), II(C), II(F), II(G), II(H), II(S),  
4 II(T), II(V), XIII, XIV, XV and XXIV since they were adjudicated on the merits. Petitioner has  
5 not overcome § 2254(d) with respect to these claims.

6 For the reasons stated, petitioner’s motion for factual development of claims II(B), II(C),  
7 II(F), II(G), II(H), II(S), II(T), II(V), XIII, XIV, XV and XXIV shall be denied.

8 **IX. ORDER**

9 Accordingly, for the reasons stated, it is HEREBY ORDERED that:

- 10 1. Petitioner motion to strike respondent’s second amended answer (Doc. No. 128)  
11 is DENIED.
- 12 2. Petitioner’s motion for factual development for claims II(B), II(C), II(F), II(G),  
13 II(H), II(S), II(T), II(V), XIII, XIV, XV and XXIV (Doc. Nos. 116, 128) is  
14 DENIED.
- 15 3. Record based guilt phase claims I, II (portions), IV, VIII, XII (portions), XIII,  
16 XIV, XV, XVI, XVII, XVIII, XIX, XXI, XXII, XXIII, XXIV, XXVI, and  
17 XXVIII (Doc. No. 51-1) are DENIED.
- 18 4. The court sets a case management conference for February 17, 2017 at 10:00  
19 a.m. in Department 9, before U.S. Magistrate Judge Stanley A. Boone.
- 20 5. The Clerk of the Court is directed to substitute RON DAVIS, Warden of San  
21 Quentin State Prison, as the Respondent warden in this action.
- 22 6. The Clerk of the Court is directed that this case shall remain open.

23 IT IS SO ORDERED.

24 Dated: January 13, 2017

25   
26 SENIOR DISTRICT JUDGE