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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

EDWARD SANCHEZ, JR.,

Petitioner,

No. 2:01-cv-1694 LKK KJN P

vs.

ANTHONY LaMARQUE, et al.

Respondents.

FINDINGS & RECOMMENDATIONS

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Petitioner is a state prisoner proceeding with counsel in this habeas corpus action filed pursuant to 28 U.S.C. § 2254.<sup>1</sup> Petitioner challenges his 1997 conviction on charges of first degree murder with use of a firearm, committed while petitioner was an accomplice in the commission of robbery and commercial burglary (the burglary special circumstance was vacated on appeal). Plaintiff was sentenced to life without the possibility of parole, plus 18 years, 8 months. Petitioner raises twelve claims in his Third Amended Petition, filed April 14, 2006, in support of petitioner’s contention that his conviction violates the Constitution.

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<sup>1</sup> This action is referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), Local General Order No. 262, and E.D. Cal. L.R. (“Local Rule”) 302. This case was reassigned to the undersigned Magistrate Judge on February 9, 2010.



1 Sacramento County Superior Court. (LD 15.) The Superior Court denied the petition on  
2 procedural grounds and on the merits. (LD 15.) Petitioner then filed habeas petitions in the  
3 Court of Appeal and California Supreme Court. (LD 16, 17.) Those petitions were denied as  
4 well. (Id.)

5           7. On September 8, 2005, petitioner notified this court that the California  
6 Supreme Court had ruled on his state habeas petition. (Dkt. No. 38.) On September 16, 2005,  
7 petitioner moved for appointment of counsel. (Dkt. No. 39.) On September 28, 2005, this court  
8 lifted the stay of these proceedings and on October 27 denied petitioner's motion for appointment  
9 of counsel. (Dkt. Nos. 40, 44.)

10           8. On April 14, 2006, petitioner, now proceeding with counsel, filed a third  
11 amended petition herein. (Dkt. No. 58.) Respondent filed an answer on August 14, 2006. (Dkt.  
12 No. 63.) On February 8, 2007, petitioner filed a reply. (Dkt. No. 72.)

## 13 II. Facts<sup>2</sup>

14           Early on a January evening in 1994, a clerk was on duty at  
15 Day's Market with a co-worker. A teenage Latino entered the  
16 store, walked directly to the beer cooler, selected two 12-packs,  
17 then bolted out of the store. The co-worker ran after the shoplifter.  
18 As the clerk went to join in the chase, his co-worker came  
19 staggering back, holding his hand over his chest, and warned the  
20 clerk, "He's got a gun." The clerk ran out of the store and saw the  
21 shoplifter sitting in a car. Another person was getting into the car.  
22 This person turned and pointed a gun at the clerk. He heard a shot,  
23 at which point he fled back into the store. He discovered his co-  
24 worker had been shot, and summoned emergency personnel.  
25 While he waited for the police and the ambulance, he went outside  
26 and found the beer on the ground about 10 feet from the door. The  
co-worker died, a bullet having perforated his heart.

          The owner of the La Tiendita grocery was also working in  
his store on that evening. Two young Latinos came in and went  
directly to the beer cooler, selecting two 12-packs. They walked  
out the front door, one of them saying, "No money. We don't  
pay." The owner followed them outside, and saw them get into  
the back seat of a car. When he began to walk behind the car to see

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<sup>2</sup> The facts are taken from the opinion of the California Court of Appeal in People v. Sanchez, No. C026676 (September 29, 1999). (LD 12.)

1 the license plate, the front seat passenger stepped out of the car and  
2 fired a gun at him. The owner ducked behind a pillar. He later  
found a bullet near where he had been standing.

3 On the night of the shooting, the defendant's mother  
4 recalled the defendant came home with Gabriel Garcia, Joshua  
5 Ortega, and Eliazar Ibarrola. They had two 12-packs of beer. She  
6 told them that was too much beer for them to drink, so she took  
7 one and put it in the refrigerator in the kitchen. She went to her  
8 room, and they went into the garage to drink. On the day after the  
9 shooting, Garcia's older brother told the defendant's mother he had  
10 seen his brother in a videotape on television in connection with the  
11 Day's Market robbery/homicide. That afternoon, defendant called  
his mother and asked her to pick him up at a south area apartment.  
As they drove home, she repeated what the brother told her. The  
defendant kept saying, "All I can tell you, we're all in trouble." He  
mentioned Garcia had taken some beer and "shots were fired." He  
wondered aloud how "a little gun . . . a .22" could kill someone.  
The defendant packed some things and asked his mother to drive  
him to an apartment somewhere in the north part of the county.

12 The police arrested the defendant at an apartment in  
13 Roseville. He was hiding in the cabinets under the kitchen sink.  
After they took him into custody, he waived his Miranda privileges  
and gave a statement. (The jury saw a videotape of the statement  
and a transcripts of the videotape was an exhibit.)

14 During his statement, the defendant said he had been  
15 driving around with Garcia and co-defendants Ortega and Ibarrola.  
16 Garcia showed them a gun; the defendant did not know where he  
17 had obtained it, and thought it might have belonged to one of the  
18 other two in the car. The defendant announced he wanted to take  
19 someone's money. Garcia said he wanted beer. Garcia directed  
20 them to Day's Market. When Garcia and the defendant got out of  
21 the car, Garcia took off after two pedestrians, but apparently they  
22 did not have any money. Garcia handed him the gun. He told the  
23 defendant to go and steal some beer from the market. The  
24 defendant said he did not want any beer. Garcia went into the  
25 store. The defendant walked back to the car. Garcia came running  
26 out with the beer and jumped in the car. Someone was running  
after him. Garcia told the defendant to shoot. The defendant fired  
at the clerk as the four drove away. At the second store, co-  
defendant Ibarrola was reluctant to go in with Garcia because his  
family shopped there. He told the defendant to shoot only into the  
air. The defendant fired at the store's owner because he thought  
the latter was reaching for a gun. As they left, he handed the gun  
to co-defendant Ibarrola, who put it in the trunk through a hatch in  
the back seat. On the following morning, co-defendant Ibarrola's  
girlfriend called the defendant to tell him the police had arrested  
the other two. The defendant went with Garcia to the home of  
Garcia's cousin. Garcia then left with his brother; the defendant

1 thought Garcia was going to fly to Los Angeles or Mexico. He  
2 called his mother and asked her to pick him up. She later dropped  
3 him off at a friend's house. The defendant did not surrender after  
4 the shootings because "I knew I was gonna get really fucked."

4 (LD 12 at 3-5.)

5 [A] jury rejected the defendant's plea of legal insanity,<sup>3</sup>  
6 finding him guilty of first degree murder, attempted first degree  
7 murder, robbery, and burglary in connection with events at Day's  
8 Market, and attempted murder, robbery, and burglary for events at  
9 La Tiendita market. It sustained separate allegations that the Day's  
10 Market murder occurred during the commission of both a robbery  
11 and a burglary. (Pen. Code, §§ 187-189, 190.2, 211, 459, 664,  
12 12022.) The court imposed a determinate prison term and a  
13 consecutive indeterminate parole-ineligible life term.

10 (LD 12 at 1.)

## 11 ANALYSIS

### 12 I. Standards for a Writ of Habeas Corpus

13 An application for a writ of habeas corpus by a person in custody under a  
14 judgment of a state court can be granted only for violations of the Constitution or laws of the  
15 United States. 28 U.S.C. § 2254(a). A federal writ is not available for alleged error in the  
16 interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991);  
17 Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000).

18 Federal habeas corpus relief is not available for any claim decided on the merits in  
19 state court proceedings unless the state court's adjudication of the claim:

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

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

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25 <sup>3</sup> The insanity defense was tried along with the guilt phase. (LD 1, Volume 4 of the  
26 Clerk's Transcript ("CT 4") at 884-90.) Since all volumes of the Clerk's Transcript are identified  
as Lodged Document 1, citations to the Clerk's Transcript will be identified by "CT" and the  
corresponding transcript volume and page numbers.

1 28 U.S.C. § 2254(d).

2 Under section 2254(d)(1), a state court decision is “contrary to” clearly  
3 established United States Supreme Court precedents if it applies a rule that contradicts the  
4 governing law set forth in Supreme Court cases, or if it confronts a set of facts that are materially  
5 indistinguishable from a decision of the Supreme Court and nevertheless arrives at different  
6 result. Early v. Packer, 537 U.S. 3, 7 (2002) (citing Williams v. Taylor, 529 U.S. 362, 405-06  
7 (2000)).

8 Under the “unreasonable application” clause of section 2254(d)(1), a federal  
9 habeas court may grant the writ if the state court identifies the correct governing legal principle  
10 from the Supreme Court’s decisions, but unreasonably applies that principle to the facts of the  
11 prisoner’s case. Williams, 529 U.S. at 413. A federal habeas court “may not issue the writ  
12 simply because that court concludes in its independent judgment that the relevant state-court  
13 decision applied clearly established federal law erroneously or incorrectly. Rather, that  
14 application must also be unreasonable.” Id. at 412; see also Lockyer v. Andrade, 538 U.S. 63, 75  
15 (2003) (it is “not enough that a federal habeas court, in its independent review of the legal  
16 question, is left with a ‘firm conviction’ that the state court was ‘erroneous.’”) (internal citations  
17 omitted). “A state court’s determination that a claim lacks merit precludes federal habeas relief  
18 so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.”  
19 Harrington v. Richter, 131 S. Ct. 770, 786 (2011).

20 The court looks to the last reasoned state court decision as the basis for the state  
21 court judgment. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002). If there is no reasoned  
22 decision, “and the state court has denied relief, it may be presumed that the state court  
23 adjudicated the claim on the merits in the absence of any indication or state-law procedural  
24 principles to the contrary.” Harrington, 131 S. Ct. at 784-85. That presumption may be  
25 overcome by a showing that “there is reason to think some other explanation for the state court’s  
26 decision is more likely.” Id. at 785 (citing Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991)).

1           Where the state court reaches a decision on the merits but provides no reasoning  
2 to support its conclusion, the federal court conducts an independent review of the record.  
3 “Independent review of the record is not de novo review of the constitutional issue, but rather,  
4 the only method by which we can determine whether a silent state court decision is objectively  
5 unreasonable.” Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). Where no reasoned  
6 decision is available, the habeas petitioner has the burden of “showing there was no reasonable  
7 basis for the state court to deny relief.” Harrington, 131 S. Ct. at 784. “[A] habeas court must  
8 determine what arguments or theories supported or, . . . could have supported, the state court’s  
9 decision; and then it must ask whether it is possible fairminded jurists could disagree that those  
10 arguments or theories are inconsistent with the holding in a prior decision of this Court.” Id. at  
11 786.

## 12 II. Petitioner’s Claims

### 13 A. Alleged Ineffective Assistance of Trial Counsel

14           Petitioner alleges ineffective assistance of counsel for: (1) failing to adequately  
15 raise the issue of juror misconduct in a new trial motion (Ground One); (2) failing to  
16 appropriately argue the insanity defense (Ground Two); (3) failing to ask the trial court to  
17 admonish the jury regarding statements made by the prosecutor and an expert witness (Ground  
18 Three); (4) failing to adequately investigate and present mental defenses (Ground Eleven); and  
19 (5) failing to present and argue evidence that a third party admitted the shooting (Ground  
20 Twelve). (Dkt. No. 58, attachment 12.) For the reasons discussed below, the undersigned  
21 recommends petitioner’s claims of ineffective assistance of counsel be denied.

#### 22 1. Legal Standards

23           The Sixth Amendment guarantees the effective assistance of counsel. The United  
24 States Supreme Court set forth the test for demonstrating ineffective assistance of counsel in  
25 Strickland v. Washington, 466 U.S. 668 (1984). To support a claim of ineffective assistance of  
26 counsel, a petitioner must first show that, considering all the circumstances, counsel’s

1 performance fell below an objective standard of reasonableness. Id. at 687-88. After a petitioner  
2 identifies the acts or omissions that are alleged not to have been the result of reasonable  
3 professional judgment, the court must determine whether, in light of all the circumstances, the  
4 identified acts or omissions were outside the wide range of professionally competent assistance.  
5 Id. at 690; Wiggins v. Smith, 539 U.S. 510, 521 (2003). Second, a petitioner must establish that  
6 he was prejudiced by counsel’s deficient performance. Strickland, 466 U.S. at 693-94. Prejudice  
7 is found where “there is a reasonable probability that, but for counsel’s unprofessional errors, the  
8 result of the proceeding would have been different.” Id. at 694. A reasonable probability is “a  
9 probability sufficient to undermine confidence in the outcome.” Id. See also Williams, 529 U.S.  
10 at 391-92; Laboa v. Calderon, 224 F.3d 972, 981 (9th Cir. 2000).

11 The Supreme Court has emphasized the importance of giving deference to trial  
12 counsel’s decisions, especially in the AEDPA context:

13 In Strickland we said that “[j]udicial scrutiny of a counsel’s  
14 performance must be highly deferential” and that “every effort  
15 [must] be made to eliminate the distorting effects of hindsight, to  
16 reconstruct the circumstances of counsel’s challenged conduct, and  
17 to evaluate the conduct from counsel’s perspective at the time.”  
18 466 U.S. at 689. Thus, even when a court is presented with an  
19 ineffective-assistance claim not subject to § 2254(d)(1) deference,  
20 a [petitioner] must overcome the “presumption that, under the  
21 circumstances, the challenged action ‘might be considered sound  
22 trial strategy.’”

19 For [petitioner] to succeed, however, he must do more than show  
20 that he would have satisfied Strickland’s test if his claim were  
21 being analyzed in the first instance, because under § 2254(d)(1), it  
22 is not enough to convince a federal habeas court that, in its  
23 independent judgment, the state-court decision applied Strickland  
24 incorrectly. Rather, he must show that the [state]Court of Appeals  
25 applied Strickland to the facts of his case in an objectively  
26 unreasonable manner.

23 Bell v. Cone, 535 U.S. 685, 698-99 (2002) (internal citations omitted).

24 2. Failure to Adequately Raise Juror Misconduct Issues (Ground One)

25 Petitioner first argues his trial counsel failed to adequately raise issues of juror  
26 misconduct during the hearing on his motion for a new trial. (Dkt. No. 58, attachment 12 at 1-2.)

1 Petitioner bases his claim on the following facts. After the verdict was rendered, Juror Number  
2 12 (“Juror H”) contacted defense counsel. (CT 4 at 905.) According to a declaration Juror H  
3 submitted in connection with the defendant’s motion for a new trial, Juror H felt that things that  
4 occurred during deliberations led to an unfair verdict regarding petitioner’s sanity. (Id. at 907.)  
5 She expressed concern that “[d]uring the whole of the deliberation on the insanity question there  
6 it seemed that the most important issue was not whether or not Mr. Sanchez was insane, but if he  
7 was found to be insane, he would be back on the street very soon.” (Id.) As explained by Juror  
8 H:

9 This was finally verbalized on the last day of deliberation. Even  
10 though the jurors knew that it was improper to discuss this issue, it  
11 was more important that Mr. Sanchez remain in jail for a long  
12 period of time. [S]omehow during the deliberations, it became  
13 [the] opinion of the jury that if he was found insane he would be on  
the streets in five years. I changed my vote from not guilty because  
he is “insane” to “sane” because I believed that he would be on the  
streets within five years. I found out later that this is not  
necessarily true.

14 (Id.) Juror H raised one additional issue regarding the jury’s conduct:

15 Lastly, it was my understanding that the jury was not supposed to  
16 deliberate except when we were all in the jury room. One of the  
17 jurors was deliberating at home and prepared a chart that was  
18 shown to other members during the deliberations. It was used to  
prove I was violating the law by not voting that Mr. Sanchez was  
sane.

19 (Id. at 907-08.)

20 Trial counsel incorporated this declaration of Juror H in petitioner’s motion for a  
21 new trial, where he argued in pertinent part:

22 3) Prior to trial a defense Motion in Limine was granted  
23 wherein it was ordered that the People were not permitted to place  
24 before the jury the fact that Drs. Schafer and Leek were appointed  
25 by the court. The defendant made the motion because it was felt  
26 that the probative value of the evidence was outweighed by its  
(sic) prejudicial effect.

4) When Dr. Schafer testified one of the first questions  
asked by the People violated the court’s order in Limine. The

1 defense objected and the objection was sustained.

2 5) When Dr. Leek testified, he testified that he was  
3 “..appointed by the court. . .”. The People did not inform him of  
4 the court’s order nor instruct him to not volunteer the information.

5 6) Shortly after the trial concluded, my office was contacted  
6 by Juror Number “12”. She expressed some serious reservations  
7 about the deliberations and the verdicts . . . See her declaration  
8 attached as Exhibit “A” . . .

9 7) Her concerns were many, but there were three which . . .  
10 rise to the level that would require a new trial. The First concern is  
11 that one of the jurors prepared charts outside the jury deliberations  
12 which were then used to persuade some jurors to vote against  
13 finding the defendant insane at the time of the commission of the  
14 crime. The Second concern is the allegation that if the defendant  
15 was found to be insane, he would be out of custody within five  
16 years. The Third concern is the violation of the Motion in Limine  
17 as outlined above. It is interesting to note that with reference to  
18 Dr. Schafer, even though there was no answer to the question that  
19 was put to him about appointment, the effect of asking the question  
20 was that in the minds of the jurors the sustained objection was  
21 irrelevant. They got the message. Dr. Schafer was “Court  
22 Appointed”.

23 (Id. at 904-05.)

24  
25 Petitioner contends that trial counsel erred by failing to raise the issues of juror  
26 misconduct at the argument on the motion for new trial. (See RT at 1395-1402.<sup>4</sup>) Argument on  
the motion for a new trial was very brief. The court first asked the district attorney for his  
position. (RT 1395.) The district attorney stated: (1) the court could not consider the juror’s  
declaration based on California Evidence Code § 1150’s limitation on admissible evidence  
regarding jury deliberations; (2) the declaration did not demonstrate misconduct; and (3) during  
deliberations Juror H had been separately questioned by the court and had told the judge she  
“was okay with the verdict.” (RT 1395.) The trial judge then asked petitioner’s trial attorney for  
his position on section 1150. (RT 1396.) In a rather confusing explanation, the trial attorney

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25 <sup>4</sup> All volumes of the Record of Transcript were lodged as document 9. Hereafter,  
26 citations to the Record of Transcript will be identified by “RT” and the corresponding transcript  
page number.

1 essentially stated that Juror H’s declaration showed the effect of the prosecutorial misconduct at  
2 trial. (Id.) He never mentioned the other two arguments raised in his written motion: (1) that the  
3 jury considered a chart prepared by a juror outside the jury room; and (2) that the jury based its  
4 verdict on the misunderstanding that if petitioner was found insane, he would be out of custody  
5 within five years. In fact, petitioner’s trial counsel stated: “And at this point in time when we’re  
6 dealing with prosecutorial misconduct, not misconduct of the jury . . . .” (RT 1396.)

7 Respondent argues that trial counsel made a tactical choice to focus on the alleged  
8 prosecutorial misconduct, which was a better argument. (Dkt. No. 63 at 19-21.) He goes on to  
9 argue that the juror misconduct arguments would not have succeeded in any event because they  
10 were based on Juror H’s declaration which was “largely inadmissible” under Evidence Code  
11 §1150. (Id.)

12 This alleged ineffective assistance of counsel claim was raised in petitioner’s  
13 2001 habeas petition filed with the California Supreme Court. (LD 14 at 24-30.) The California  
14 Supreme Court denied the petition in a one-line, unexplained order.<sup>5</sup> (LD 14.) To determine  
15 whether a silent state court decision is objectively reasonable, this court must independently  
16 review the record. Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000).

17 Whether or not counsel acted reasonably is difficult to determine. On the one  
18 hand, this court must presume reasonableness. The Supreme Court recently noted that, “[t]here  
19 is a ‘strong presumption’ that counsel’s attention to certain issues to the exclusion of others  
20 reflects trial tactics rather than ‘sheer neglect.’” Harrington, 131 S. Ct. at 790 (quoting

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21  
22 <sup>5</sup> Petitioner raised the claim again in his second state habeas petition, which was brought  
23 before the superior court, the court of appeal, and the California Supreme Court. The superior  
24 court denied the claim as untimely, among other grounds. (LD 15.) The appellate and supreme  
25 courts denied this second petition in one-line orders. (LD 16, 17.) The California Supreme  
26 Court original “postcard” denial of the petition is considered to be on the merits. See Harrington,  
131 S. Ct. at 784; Gaston v. Palmer, 417 F.3d 1030, 1038 (9th Cir. 2005) (“We construe  
‘postcard’ denials . . . to be decisions on the merits.”), modified on other grounds 447 F.3d 1165  
(9th Cir. 2006). Petitioner’s subsequent attempts to raise this claim before the California courts  
does not create a procedural default issue here, and respondent does not argue one.

1 Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (per curiam)). On the other hand, the fact that trial  
2 counsel raised the jury misconduct issues in his brief indicates he may have erred when he failed  
3 to raise them in argument and, according to the Court of Appeal, waived them.<sup>6</sup> (LD 12 at 21-  
4 22.) The record does not show that counsel considered his options and made a reasonable,  
5 strategic decision. See Strickland, 466 U.S. at 69.

6 In any event, whether or not the state court reasonably concluded counsel's  
7 conduct was reasonable or unreasonable, petitioner has not shown the state court's conclusion  
8 that he suffered no prejudice was unreasonable. Petitioner was only prejudiced by counsel's  
9 conduct if, had counsel preserved the jury misconduct claims, petitioner would have succeeded  
10 on those claims before the state court. As set out below, an analysis of each of those jury  
11 misconduct claims shows no reasonable probability of success on the merits.

12 a. Jurors' Consideration of Petitioner's Sentence if Found Insane

13 The first issue is the jurors' consideration of petitioner's possible sentence if they  
14 found him insane. As petitioner points out, the jury was instructed not to consider what might  
15 happen to petitioner should he be found insane.<sup>7</sup>

16 In considering the juror misconduct claims, the court is constrained by laws of  
17 evidence limiting consideration of jurors' thought processes. Under California Evidence Code §  
18 1150:

19 (a) Upon an inquiry as to the validity of a verdict, any otherwise

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20  
21 <sup>6</sup> The Court of Appeal recognized that there may be an ineffective assistance of counsel  
22 claim based on defense counsel's failure to argue the jury misconduct issues. (LD 12 at 22 n.5.)  
23 However, the court refused to consider any ineffective assistance of counsel issue because it  
24 "may reasonably be ascribed to factors which are outside the record" and therefore were not an  
25 appropriate consideration on appeal. (Id.)

26 <sup>7</sup> The instructions first informed the jury what generally happens upon a finding of  
insanity and then informed jurors: "What happens to the Defendant under these laws is not to be  
considered by you in determining whether the Defendant was sane or not at the time he  
committed his crime. . . . If upon consideration of the evidence you believe the Defendant was  
insane . . ., you must assume that those officials . . . will not release this Defendant unless he can  
be safely returned into society." (RT 1342-43.)

1 admissible evidence may be received as to statements made, or  
2 conduct, conditions, or events occurring, either within or without  
3 the jury room, of such a character as is likely to have influenced the  
4 verdict improperly. No evidence is admissible to show the effect of  
such statement, conduct, condition, or event upon a juror either in  
influencing him to assent to or dissent from the verdict or  
concerning the mental processes by which it was determined.

5 (b) Nothing in this code affects the law relating to the competence  
6 of a juror to give evidence to impeach or support a verdict.

7 Based on section 1150(a), the California courts would not have considered Juror  
8 H's statements about the effects of the jurors' discussion of petitioner's possible sentence should  
9 he be found insane. However, it appears that section 1150(a) would allow consideration of Juror  
10 H's statement that jurors discussed petitioner's possible sentence, particularly because jurors had  
11 been specifically instructed not to discuss that issue. See In re Stankewitz, 40 Cal. 3d 391, 397  
12 (1985) ("Among the overt acts that are admissible and to which jurors are competent to testify  
13 are statements. Section 1150, subdivision (a), expressly allows proof of 'statements made ...  
14 either within or without the jury room ....'"); People v. Perez, 4 Cal. App. 4th 893, 908 (1992)  
15 ("[E]vidence of a jury's explicit or implicit agreement to violate a court's instruction does not  
16 touch upon the juror's subjective reasoning processes, since, as in Stankewitz, such agreement in  
17 and of itself constitutes misconduct."). It appears, then, that under California law petitioner  
18 could have shown the jurors' consideration of petitioner's possible sentence amounted to  
19 misconduct. The next question is whether that misconduct prejudiced petitioner. Perez, 4 Cal.  
20 App. 4th at 906.

21 After reviewing the testimony at trial regarding petitioner's mental health and  
22 mental state at the time of the crimes, this court concludes that any jury misconduct did not  
23 prejudice petitioner under California law. To make the determination regarding petitioner's  
24 insanity defense, the jury was instructed as follows:

25 If you find the Defendant guilty of any of the crimes  
26 charged, you must then determine whether he was legally sane or  
legally insane at the time of the commission of the crime.

1           You may consider evidence of his mental condition before,  
2 during, and after the time of the commission of the crime as  
3 tending to show the defendant's mental condition at the time the  
4 crime was committed.

5           Mental illness and mental abnormality in whatever form  
6 either may appear, are not necessarily the same as legal insanity.

7           A person may be mentally ill or mentally abnormal and yet  
8 not be legally insane.

9           A person is legally insane when by reason of mental disease  
10 or mental defect he was incapable of knowing or understanding the  
11 nature and quality of his act, or incapable of distinguishing  
12 between right from wrong at the time of the commission of the  
13 crime.

14           The Defendant has the burden of proving his legal insanity  
15 at the time of the commission of the crime by a preponderance of  
16 the evidence.

17           Preponderance of the evidence means evidence that has  
18 more convincing force than the greater probability of truth than  
19 that opposed to it.

20           If the evidence is so evenly balanced that you are unable to  
21 find that the evidence on either side of an issue preponderates, your  
22 finding on that issue must be against the party who had the burden  
23 of proving it.

24 (RT 1341:21 - 42:20.)

25           Each side at trial presented the testimony of two mental health professionals  
26 regarding petitioner's mental state. In addition, both sides called the psychiatrist who had been  
treating petitioner while he was incarcerated in juvenile hall. Their testimony showed that  
petitioner had been diagnosed with bipolar disorder and brain damage. When he was thirteen  
years old, petitioner was in a car accident that may have caused the brain damage. During his  
stay in juvenile hall and at a group home prior to the crimes, petitioner was medicated and  
generally behaved better. When petitioner left the group home less than a week before the  
crimes, he was not taking his medication. The experts agreed that at the time of the crimes  
petitioner would have been suffering some withdrawal symptoms and/or some recurrence of his  
bipolar disorder. They disagreed about the effect those possible issues would have had on his

1 mental state.

2           The juvenile hall psychiatrist Dr. Diamond testified first for the defense. He had  
3 treated petitioner for approximately one year when petitioner was detained at the Sacramento  
4 County Juvenile Hall. (RT 618, 626.) He testified to the medications petitioner took for bipolar  
5 disorder. (RT 627-28.) When he was medicated, petitioner seemed less depressed and less  
6 distressed. (RT 636.) On cross-examination, Dr. Diamond testified petitioner still had problems  
7 with other inmates even when he was medicated. (RT 640.)

8           Next to testify was defense neuropsychologist Dr. Edwards. (RT 757.) Dr.  
9 Edwards reviewed many records of petitioner's educational and social background, medical  
10 records, and records from the institutions, including a group home, where petitioner lived. (RT  
11 768.) Dr. Edwards testified extensively regarding petitioner's brain dysfunction, that he felt was  
12 possibly the result of a head injury from an automobile accident petitioner suffered when he was  
13 thirteen. (RT 787-88.) Petitioner had a borderline retarded IQ and memory deficits. (RT 776,  
14 779.) Dr. Edwards testified that he felt the shooting was impulsive and unplanned. (RT 815.)  
15 He concluded that he considered petitioner insane at the time of the shootings because "he really  
16 did not know the nature of the act, nor that it was wrong when he fired the gun backward." (RT  
17 816, 873.) He continued: "I think that if he had been medicated, that this incident that he's  
18 charged with probably would not have occurred." (RT 866.) Dr. Edwards did admit on cross-  
19 examination that he based his opinion on the facts petitioner told him, and related to the police  
20 during an interview three days after the crime, regarding petitioner's history and what occurred  
21 on the day of the crimes. (RT 822, 874.) According to petitioner's version of the events, which  
22 he related to Dr. Edwards, someone handed him a gun and told him to shoot, then petitioner shot  
23 over his shoulder without looking. (RT 874.)

24           The final defense mental health expert was psychiatrist Dr. Bittle. Dr. Bittle  
25 testified about tests showing abnormalities in petitioner's brain. (RT 1011, 1013, 1019-20.) He  
26 opined that these abnormalities could cause impulsivity and aggression. (RT 1015.) In addition,

1 Dr. Bittle testified that there is a high medical probability petitioner had bipolar disorder. (RT  
2 1024-25.) When petitioner suddenly stopped taking his medications, he likely felt extremely  
3 restless and out-of-control. (RT 1041.) Petitioner had also told officers he had not slept for  
4 many days. Dr. Bittle testified that sleep deprivation can bring on hallucinations. (RT 1045.)  
5 Dr. Bittle concluded that, on the day of the crimes, petitioner was “borderline psychotic” and  
6 “behaviorally and cognitively out of control.” (RT 1047.) Therefore, Dr. Bittle felt petitioner did  
7 not then understand right from wrong and could not control his actions. (RT 1047.) Like Dr.  
8 Edwards, Dr. Bittle admitted his opinion was based on petitioner’s report that he impulsively  
9 fired the gun over his shoulder without looking. (RT 1098-1100.) When confronted with the  
10 testimony of an eye witnesses/victim that petitioner pointed and shot the gun while facing him,  
11 Dr. Bittle admitted that this description made petitioner’s actions less impulsive. (Id.) However,  
12 he also testified that someone who is insane can do something intentional. (RT 1122.)

13           The prosecution’s case focused largely on the events on the day of and the day  
14 after the crimes as reported by eyewitnesses and by petitioner’s mother. The prosecutor’s first  
15 expert was Dr. Schaffer a psychiatrist. (RT 1179.) Dr. Schaffer testified briefly and concluded  
16 that his review of the records showed petitioner could distinguish right from wrong and  
17 understood the nature of his actions on the day of the crime. (RT 1188, 1190-93.) Dr. Schaffer  
18 was followed by psychologist Dr. Leek. (RT 1207.) Dr. Leek examined petitioner twice in mid-  
19 1985. (RT 1209-10.) Dr. Leek recited the following facts based on his review of the records  
20 and examinations of petitioner: Petitioner suffered some brain damage from the automobile  
21 accident when he was thirteen. (RT 1212.) Upon petitioner’s release from the group home,  
22 petitioner spent about two weeks at home, during which time he “was characterized as being  
23 angry, mad, and irritable, and wanting to rob someone.” (Id.) On the day of the crimes,  
24 petitioner and his friends conducted two beer runs. (Id.) During the first beer run, petitioner shot  
25 one person. (Id.) Petitioner’s actions appeared “calculated” because, as reported by a witness, he  
26 was standing by the car, turned to face the witness, and shot at him. (RT 1214.) During the

1 second beer run, petitioner shot up in the air because the store owner was a friend of one of  
2 petitioner's friends. (Id.) Immediately after the crimes, petitioner "attempted to escape  
3 detection. He asked his mother to drive him some place else and hid out for a couple of days, all  
4 of which indicated the capacity to form intention, to act on it, to know that he was doing  
5 something he wasn't supposed to be doing, and attempting to cover his behavior." (RT 1213.)

6 Dr. Leek concluded that petitioner's primary diagnosis would be antisocial  
7 personality and that petitioner was sane and knew what he was doing on the day of the crimes.  
8 (Id.) Dr. Leek further testified that nothing in the materials he examined indicated that petitioner  
9 was out of touch with reality on the day of the crimes. (RT 1216.) Dr. Leek testified that it was  
10 not good practice to consider only the reporting of the defendant, rather than also considering the  
11 reporting of eyewitnesses, when determining the facts. (RT 1225.)

12 Two eyewitnesses testified. The first was Kishor Patel, the clerk at Day's Market,  
13 the site of the first robbery and the murder. Mr. Patel testified that he ran outside after his co-  
14 worker, the murder victim, came back into the store and told him "He's got a gun." (RT 328.)  
15 As he exited the store, he saw the person who had taken beer from the store in the front seat of a  
16 car and another "guy" bending down to back into the back seat of the car. (RT 330, 331, 347.)  
17 That guy was facing him, pointed a gun at him and then fired at least two shots as Mr. Patel  
18 turned to run back into the store. (RT 333, 335, 349.)

19 The second eyewitness testified about the robbery and shooting at La Tiendita.  
20 Victor Barajas, the owner of the market, testified that two teenage Hispanic men took two  
21 twelve-packs of beer out of his store. (RT 363-64.) He followed them outside. (RT 365.) The  
22 two men got into the back seat of a car. (RT 366.) Mr. Barajas walked around to the back of the  
23 car to see the license plate. (Id.) He then saw someone in the front passenger seat step partly out  
24 of the car and point a gun at him. (RT 366-67, 368.) He heard a shot and ran behind a pillar in  
25 front of the store. (RT 367.) He found a bullet near the door to his store about a foot from where  
26 he had been standing. (RT 370.)

1           Finally, it is important to note that petitioner’s mother Cynthia Portillo also  
2 testified. (RT 581.) She testified that petitioner’s behavior changed dramatically after the  
3 automobile accident. (RT 589-91.) She did admit on cross-examination that the car he was in  
4 during the accident had been stolen. (RT 704–05.) Petitioner seemed better, calmer after he had  
5 been at the group home for a while and was regularly taking medication. (RT 595-600.) When  
6 he was released from the group home in January 1994, the home did not send medication for  
7 him. (RT 602.) After several days at home, petitioner was sleeping less, was restless, and was  
8 not eating. (RT 602, 604.) On the day after the crimes, petitioner called Ms. Portillo to pick him  
9 up from an apartment complex. (RT 682.) When she told him someone had seen one of  
10 petitioner’s friend’s picture on television in a report on the murder and beer theft, petitioner told  
11 her ““We’re all in trouble.” (RT 682, 730.) When they got home, petitioner told her, ““Mom,  
12 just take me somewhere.” (RT 682.) She then drove him to the Citrus Heights area and dropped  
13 him off. (RT 682.) Ms. Portillo testified she did not recall telling officers that petitioner told  
14 her ““somebody took some beer and somebody died,”” and ““It was just a little gun it was just a  
15 .22. How can a little gun kill someone?”” (RT 733-34, 735.) Officer Barton later testified at  
16 trial that when he interviewed Ms. Portillo on January 27, 1994, she told him petitioner made  
17 both statements. (RT 1154-57.) In addition, Ms. Portillo said she asked petitioner who had fired  
18 the gun and he told her ““It doesn’t matter, we’re all in trouble.” (RT 1156.)

19           The testimony adduced at trial reasonably supports a conclusion that any jury  
20 misconduct regarding the rejection of the insanity defense did not affect the verdict. Petitioner’s  
21 participation in the events on the day of the crimes and his recognition of their wrongfulness the  
22 following day certainly support a jury finding that petitioner was not insane on the day of the  
23 crimes. Petitioner has not shown a reasonable probability he would have succeeded on this jury  
24 misconduct claim had counsel preserved it for appeal.

25 ///

26 ///



1           Petitioner cites the following passages from the trial transcript to support his  
2 argument that his counsel gave up the issue of specific intent:

3                   Well, how can you talk about specific intent which is a  
4 mental process without looking at his mental disabilities, his lack  
5 of sleep for a week plus, his bipolar and neurological problems,  
6 and this abrupt discontinuation of his medical treatment and these  
7 subsequent states that he found himself in? Because that is very  
8 relevant to the issue of his specific intent.

9                   What, if any, specific intent did he form to qualify him for  
10 the felony murder theory?

11                   Now, I am going to leave that more specifically to my client  
12 or my colleague, Mr. Swartz, to get into.

13 (RT 1259.)

14           He also points to the prosecutor's statement that he understood the defense to be  
15 leaving the mental state issues for the prosecution to argue:

16                   So the approach you need to take is, and the approach I  
17 want to take is, first look at his conduct in light of the law, and you  
18 determine what, if anything, he's guilty of.

19                   Once you do that, if you find him to be guilty of one or  
20 more charges, then you move onto the additional question of, was  
21 he legally sane or insane at the time he committed these offenses?

22                   So with that in mind, Mr. Castro didn't cover that, he left it  
23 to me, as he told you. We need to cover the charges a little bit.

24 (RT 1290.)

25           With respect to petitioner's argument that defense counsel told the jury he lacked  
26 the ability to argue the mental health issues, petitioner cites the following statements of defense  
27 counsel during his discussion of Dr. Bittle's description of brain trauma resulting from an  
28 impact:

29                   Temporal lobes, the types of – what happens to verbal  
30 memory, visual ideas, sequences, difficulty in identifying memory  
31 problems, I don't know what this is, but maybe our Doctor on the  
32 panel will be able to tell us.

1 I find that interesting because it's something again, when  
2 you're trying to discuss things and understand them, sometimes  
3 resorting to things that speak for themselves is very helpful.

4 You know, it's obvious that there's some kind of damage in  
5 there. And it's – probably our technology is not at a level where it  
6 can be definitive, but it can give us some real strong suggestions.

7 (RT 1283-84.) Defense counsel similarly professed a lack of understanding about technical  
8 medical issues after summarizing the testimony of several of the experts regarding petitioner's  
9 brain damage:

10 So unfortunately I do not have the skill or the background  
11 to handle the medical technical stuff very well, so I will leave that  
12 to you. I think that any contribution I would make to that would be  
13 more confusing than instructive.

14 ...

15 And there's also a consensus of opinion that he, among his  
16 professionals, that he's brain damaged. But the question is, how  
17 much did this affect his ability to act in a rational manner? That is  
18 the decision that you have to make.

19 And I can't be of any further assistance to you, because as I  
20 said, I am just – that goes way beyond my depth.

21 (RT 1287-88.)

22 Petitioner raised this claim in his appeal. The California Court of Appeal  
23 addressed it on the merits. (LD 12 at 16-19.) The Court of Appeal pointed out that, rather than  
24 conceding petitioner's sanity or abandoning the issue of specific intent, defense counsel:

25 focused on the nuances of how the defendant could act  
26 intentionally but be legally insane, and in his rebuttal argument he  
continued to focus on the theme that the defendant was legally  
insane under the combination of circumstances present on the night  
of the crime. Defense counsel could do no more with the cards  
dealt. As for the disavowals of proficiency with which appellate  
counsel would tar defense counsel, these are no more than  
commonplace efforts to inculcate a sense of camaraderie with the  
lay jury regarding the psychiatric jargon so that jurors would side  
with the insanity defense, as well as a strategic emphasis of the  
complexities to push the jurors toward accepting his argument  
without delving too deeply into the experts' actual testimony. In

1 short, nothing about defense counsel’s final argument fell below  
2 professional standards.

3 (Id. at 18-19.)

4 The statements upon which petitioner focuses are taken out of context. Petitioner  
5 focuses on statements made by counsel in his initial closing argument and ignores his counsel’s  
6 arguments in rebuttal.<sup>8</sup> Almost the entire defense rebuttal argument was that petitioner was not  
7 sane at the time of the shootings. (RT 1316-27.) Petitioner has not shown that the Court of  
8 Appeal ruling that counsel acted reasonably is an unreasonable construction of Strickland or an  
9 unreasonable application of the facts. Accordingly, petitioner’s Ground Two should fail as well.

10 4. Failure to Request Admonishment (Ground Three)

11 Petitioner next argues his trial counsel should have asked the trial judge to  
12 admonish the jury not to consider statements made by the prosecutor and an expert witness that  
13 the prosecutor’s mental health experts were “court appointed.” (Dkt. No. 58, attachment 12 at  
14 10.) In her declaration, Juror H observed that “[t]he mental[] health professionals were in sharp  
15 disagreement whether Mr. Sanchez was insane a[t] the time of the shootings. Drs[.] Bittle and  
16 Edwards testified that he was insane and Drs[.] Schafer and Leek testified that he was not  
17 insane.” (CT 4 at 907.) Juror H noted that “it was the near unanimous opinion” of the jurors that  
18 psychiatrists Schafer and Leek “were credible because the[y] were ‘court appointed’” and  
19 therefore “had no[] ax to grind and were to be believed,” while psychiatrists Bittle and Edwards  
20 “were not appointed by the court so they were not credible” and therefore their “evidence was  
21 ignored.” (Id.)

22 The California Court of Appeal addressed this claim in discussing petitioner’s  
23 wavier of his prosecutorial misconduct argument:

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25 <sup>8</sup> Because petitioner’s sanity was at issue, the defense made the first closing argument,  
26 followed by the prosecution argument and the defense rebuttal.

1 At the hearing on the [new trial] motion, . . . [t]he prosecutor  
2 argued that any prejudicial effect could have been eliminated by an  
3 admonition. Defense counsel asserted his misgivings for failing to  
4 request an admonition, because he had believed at the time of the  
cited misconduct that it was better not to call further attention to  
this inadmissible matter. He felt in hindsight this amounted to  
ineffective assistance of counsel.

5 (LD 12 at 20.)

6 In a footnote, the Court went on to address that ineffective assistance of counsel  
7 claim:

8 We reject appellate counsel’s effort to rest a claim of ineffective  
9 assistance on defense counsel’s hindsight remorse. As even the  
10 trial court recognized, refraining from requesting an admonition  
11 was a reasonable tactical decision at that point in the trial to try to  
minimize the impact of this evidence. A defendant is guaranteed  
reasonable tactical choices, not guaranteed outcomes. As a result,  
this conduct cannot support a claim of ineffective assistance.

12 (LD 12 at 20 n.4 (internal citation omitted).)

13 The decision of the Court of Appeal was not an unreasonable application of  
14 Strickland. First, petitioner has not shown his counsel’s conduct was unreasonable. Defense  
15 counsel himself said he consciously decided not to seek an admonition to avoid bringing  
16 attention to the issue. (LD 12 at 20.) The fact that defense counsel later second-guessed this  
17 decision is not relevant; the inquiry is whether the decision was objectively unreasonable.

18 After an adverse verdict at trial even the most experienced counsel  
19 may find it difficult to resist asking whether a different strategy  
20 might have been better, and, in the course of that reflection, to  
21 magnify their own responsibility for an unfavorable outcome.  
Strickland, however, calls for an inquiry into the objective  
reasonableness of counsel’s performance, not counsel’s subjective  
state of mind. 466 U.S. at 688.

22 Harrington, 131 S. Ct. at 790. Further, petitioner has not shown prejudice. Juror H’s declaration  
23 may not be considered because it involves neither extraneous information, an outside influence,  
24 or a mistake on the verdict form. Fed. R. Evid. 606(b). Even if the jury been admonished,  
25 petitioner has not shown the result would have been any different. As discussed above, the  
26 record reasonably supports a finding that petitioner was sane and, for the same reasons, supports

1 a finding that petitioner acted with specific intent. Therefore, Ground Three should be denied.

2 5. Failure to Investigate and Present Mental Defenses and to Present Evidence of  
3 Third Party Confession (Grounds Eleven and Twelve)

4 Petitioner argues his trial counsel rendered ineffective assistance when he failed to  
5 investigate and present evidence to support a mental defense and when he failed to seek to  
6 introduce a tape recording in which a third party confessed to the shooting. (Dkt. No. 58,  
7 attachment 12 at 19, 20; Dkt. No. 72 at 51-63.) Respondent briefly makes a procedural default  
8 argument that he then dismisses because he feels he must show California’s timeliness rule is  
9 “consistent.” (Dkt. No. 63 at 36.) Whether or not respondent is correct that he bears the burden  
10 of showing consistency of the California rule, it appears that respondent has waived the  
11 procedural default argument. See Trest v. Cain, 522 U.S. 87, 89 (1997) (procedural default is not  
12 jurisdictional and may be waived); Franklin v. Johnson, 290 F.3d 1223, 1230, 1233 (9th Cir.  
13 2002). In any event, because petitioner does not succeed on the merits of these claims, the court  
14 need not reach any procedural default arguments. See Lambrix v. Singletary, 520 U.S. 518, 525  
15 (1997) (a district court may address the merits without reaching procedural issues where the  
16 interests of judicial economy are best served by doing so); Franklin v. Johnson, 290 F.3d 1223,  
17 1232 (9th Cir. 2002) (“Procedural bar issues are not infrequently more complex than the merits  
18 issues presented by the appeal, so it may well make sense in some instances to proceed to the  
19 merits if the result will be the same.”).

20 Petitioner makes few arguments relevant to these claims. The petition contains a  
21 very brief description of Grounds Eleven and Twelve. (Dkt. No. 58 at 19, 20.) Petitioner’s  
22 Reply to the Answer focuses primarily on trial counsel’s closing arguments and an overview of  
23 the mental health evidence presented at trial. (Dkt. No. 72 at 51-63.) Petitioner does not argue  
24 just what trial counsel should have done. Instead, he primarily bases his argument on his  
25 assertion that trial counsel erred with respect to the mental health defenses by pointing to a  
26 couple places in the record in which counsel admits to the court that he did not have the

1 experience to present adequately the mental health case. First, counsel admitted to the trial court  
2 that he did not have the ability to adequately “present or defend an insanity/mental defense type  
3 case.”<sup>9</sup> Second, during the presentation of medical testimony at the suppression hearing, the trial  
4 judge pointed out to defense counsel that his expert witness had already explained a certain type  
5 of test. Defense counsel replied: “I think the Court has greater experience at this than I do, and  
6 basically, I am going from the script that I have worked up to help me get through it because I am  
7 technically not real good at the psychology and psychiatry of this issue.” (RT 166.) The trial  
8 judge responded, “I don’t think this is the time for your education, Mr. Castro.” (RT 166.)  
9 Finally, apparently the trial court held a Marsden hearing after the verdict. While petitioner cites  
10 to the transcript of that hearing, the transcript is sealed and this court does not appear to have a  
11 copy of the sealed transcript. (RT 1393 - reporter’s note in transcript states: “(Pgs. 1393-1394)/  
12 sealed/ nothing omitted.”) For purposes of analyzing these claims, the court will accept  
13 petitioner’s representation that during the brief Marsden hearing, petitioner requested another  
14 attorney based on his trial attorney’s “inexperience in handling a sanity defense.” Petitioner  
15 made the request after the verdict because counsel “had ‘never handled an insanity case and was  
16 supposedly taking night classes on insanity cases while representing’ Petitioner,” and defense  
17 counsel “did not deny those assertions, but thought it was too late to make a difference.” (Dkt.  
18 No. 72 at 62.)

19           Petitioner raised these claims in his second state habeas petition before the  
20 superior court, court of appeal, and California Supreme Court. (LD 15 at 3; LD 16 at consecutive  
21 pp. 5-6; LD 17 at consec. pp. 5-6.) The superior court’s opinion on the merits of these claims is  
22 the last reasoned opinion of the state court. See Ylst v. Nunnemaker, 501 U.S. 797, 803-04  
23 (1991). Petitioner has not shown that the state court’s opinion was an unreasonable construction  
24 of the law or an unreasonable application of the facts. Petitioner has not shown what counsel

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25           <sup>9</sup> While petitioner quotes this in his petition, it is not clear where in the record it  
26 occurred.

1 should have done to better support the mental health defenses. This court’s review of the record  
2 shows extensive testimony and more than adequate questioning of both petitioner’s experts and  
3 the prosecution experts. Petitioner’s conclusory allegations of unreasonable conduct on his trial  
4 counsel’s part are insufficient to carry his burden under Strickland. Accordingly, Grounds  
5 Eleven and Twelve should be denied.

6 B. Alleged Juror Misconduct (Ground Four)

7 Petitioner argues that the facts discussed above in his first ineffective assistance of  
8 counsel claim show juror misconduct that violated his rights to due process. (Dkt. No. 58,  
9 attachment 12 at 11.) Petitioner raised the jury misconduct issue on direct appeal to the  
10 California Court of Appeal (LD 12) and in his Petition for Review in the California Supreme  
11 Court (LD 13). The California Court of Appeal decision was the last reasoned opinion, and it is  
12 presumed that the California Supreme Court rejected petitioner’s claim for the reasons addressed  
13 therein. Ylst, 501 U.S. at 803-04. The Court of Appeal denied the claim on the ground that  
14 petitioner’s trial counsel failed to preserve it by failing to raise it in argument on the new trial  
15 motion. (LD 12 at 22.) Respondent argues that petitioner has procedurally defaulted this claim.  
16 This court need not reach the procedural default issue because, as discussed above, petitioner  
17 cannot prevail on the merits of his juror misconduct claims. Accordingly, this claim also should  
18 be denied.

19 C. Alleged Prosecutorial Misconduct (Ground Five)

20 Petitioner argues that the prosecutor committed misconduct when he told the jury  
21 that petitioner’s mental health experts were “court appointed.” (Dkt. No. 58, attachment 12 at  
22 12.) As described above with respect to Ground Three, any misconduct in the introduction of  
23 this information did not prejudice petitioner. Moreover, the prosecutor’s conduct was harmless  
24 because petitioner’s own trial expert also referred to the state’s experts as having been “court-  
25 appointed.” (RT 768.) Therefore, Ground Five should be denied.

26 ///

1           D. Admission of Gang Evidence (Ground Six)

2           Petitioner next argues the trial court erred when it permitted evidence of  
3 petitioner's affiliation with a criminal street gang. (Dkt. No. 58, attachment 12 at 13-14.) The  
4 trial court granted petitioner's pre-trial motion to bar gang evidence. (RT 10-11.) During the  
5 course of trial, the prosecutor asked the court to reconsider. Petitioner argues the trial judge  
6 agreed to allow the gang evidence based on defense witness Dr. Edwards' one, unsolicited  
7 statement that mentioned petitioner's gang affiliation. (Dkt. No. 58, attachment 12 at 13-14.)  
8 Because the state court's decision was not unreasonable, this court recommends denial of Ground  
9 6 for the reasons set forth below.

10           Petitioner raised this issue on appeal. It was addressed, and rejected, by the Court  
11 of Appeal as follows:

12           At the outset of trial, the superior court rejected the  
13 prosecution's theory for admission of evidence of the defendant's  
14 gang affiliation - the choice of Day's Market was its location in  
15 rival gang territory - because it found this marginally probative (in  
16 the absence of any other evidence of the gang-related nature of the  
17 offenses) in light of the potential for prejudice. It agreed to  
18 reconsider the matter as the case developed. During the course of  
19 the defense case, the prosecutor asked the court to reconsider its  
20 ruling based on the tenor of defense counsel's examination. The  
21 prosecutor asserted the defense appeared to be developing a theory  
22 that the defendant became a juvenile delinquent as a result of the  
23 1990 car accident, so the gang evidence was now relevant to rebut  
24 this theory by providing an alternative basis for the defendant's  
25 behavior. The court deferred ruling on the matter until it had the  
26 opportunity to observe the progress of the defense.

          During the subsequent examination of a psychiatric expert,  
defense counsel asked him to relate the defendant's history. In the  
course of his narrative answer, the expert described the  
deterioration in the defendant's behavior after the accident to the  
point where his mother "found him to be uncontrollable. [¶] He  
was involved in gang activities and was not coming home, not  
being obedient . . . and she asked the Probation Department to take  
charge of him, and that's when he was put in a group home . . . [¶]  
At that group home, he was a behavior problem . . . [¶] After he  
got on the medication, he seemed to be improving. He was still a  
problem . . . but the number of infractions went down and the types  
of infractions . . . seemed to . . . become more benign . . ."

1 During a conference in chambers, the superior court  
2 decided this tangential reference to the defendant's gang  
3 membership opened the subject for further questioning by the  
4 prosecutor, even though defense counsel asserted he had not  
5 moved to strike the testimony based on the sensible tactic of not  
6 wishing to draw further attention to it. The court thus allowed the  
7 prosecutor to ask the expert if the defendant's gang affiliation  
8 could have been a basis for the deterioration in the defendant's  
9 behavior, and if the defendant's record showed involvement in  
10 gang activity before the car accident (both of which the expert  
11 conceded). The prosecutor also introduced rebuttal evidence from  
12 members of the police department's street-gang unit, who testified  
13 to the gang membership of the defendant and other occupants of  
14 the car, and from psychiatric experts who believed his commission  
15 of the offenses in the company of fellow gang members was an  
16 indication of purposeful antisocial behavior rather than  
17 irrationality. The prosecutor cited this testimony in his final  
18 argument, asserting the offenses were not unusual behavior for  
19 gang members (and thus not evidence of the defendant's insanity)  
20 and the defendant's association with gangs preceded his accident.

21 The defendant claims this evidence was not materially  
22 probative on any contested issue at trial, and thus the superior court  
23 should have continued to exclude it as prejudicial. However, in  
24 arguing this was reversible error, the defendant acknowledges this  
25 evidence was used to challenge the defense's claim of legal  
26 insanity which rested in part on brain injuries from the 1990  
accident. The defendant does not provide any cogent reason to  
show the two theories articulated by the prosecutor in closing  
argument are invalid use of gang evidence. We thus find the  
superior court did not abuse its discretion in admitting this  
evidence.

18 (LD 12 at 9-11.)

19 "The admission of 'other acts' evidence will violate due process only when there  
20 are no permissible inferences the jury may draw from the evidence." Windham v. Merkle, 163  
21 F.3d 1092, 1103 (9th Cir. 1998) (emphasis in original) (internal quotations and citations  
22 omitted). See also Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991) (same). Here, the  
23 prosecutor argued that he should be permitted to use gang evidence to rebut the defense argument  
24 that the automobile accident caused petitioner's anti-social behavior. (RT 759-63.) The  
25 argument that petitioner's mental problems and criminal behavior were a direct result of the  
26 automobile accident was a key part of the insanity defense. Evidence that petitioner was

1 involved in gang activity, including prior to his motor vehicle accident, was relevant to rebut the  
2 defense case. Petitioner has not shown there were no permissible inferences the jury could draw  
3 from the gang evidence. It was not unreasonable for the state court to find the evidence  
4 admissible. See United States v. Abel, 469 U.S. 45, 49 (1984) (deciding that gang membership  
5 was “sufficiently probative of ... possible bias ... to warrant its admission into evidence”); United  
6 States v. Santiago, 46 F.3d 885, 889 (9th Cir. 1995) (recognizing that gang evidence is  
7 admissible as proof of motive); Nguyen v. Runnels, No. C03-0689CRB, 2003 WL 22939239, \*6  
8 (N.D. Cal. Dec. 5, 2003) (evidence of gang affiliation admitted at petitioner’s murder trial did not  
9 violate due process because the jury could draw a permissible inference from the evidence with  
10 respect to motive and intent); see also Aguilar v. Alexander, 125 F.3d 815, 820 (9th Cir. 1997)  
11 (in a murder prosecution, evidence of petitioner’s involvement in drug dealing was properly  
12 admitted as relevant to his motive in connection with the killing). The Court of Appeal decision  
13 on this issue was not contrary to or an unreasonable application of federal law. Accordingly,  
14 petitioner is not entitled to relief on Ground Six in his petition.

15 E. Robbery Jury Instructions (Grounds Seven and Eight) and Sufficiency of the Evidence  
16 (Ground Ten)

17 In Grounds Seven and Eight, petitioner contends the jury was not adequately  
18 instructed on the elements of robbery, and that the trial court erred when it refused to give a  
19 lesser included offense instruction. (Dkt. No. 58, attachment 12 at 15, 16.) In Ground Ten,  
20 petitioner argues the evidence introduced at trial was insufficient to prove: (1) he intended to aid  
21 and abet a robbery; or (2) the special circumstance that the robbery was accomplished by force or  
22 fear. (Dkt. No. 58, attachment 12 at 18.) Because petitioner has not established the decision of  
23 the California Court of Appeal was contrary to, or an unreasonable application of, federal law, or  
24 an unreasonable construction of the facts, Grounds Seven, Eight, and Ten should be denied.

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1 The California Court of Appeal ruled on these issues as follows:

2 As we have related above, the clerk of the Day's Market  
3 testified that as he went outside, the defendant was still standing on  
4 the sidewalk and was just getting into the car when he began  
5 shooting at him. The purloined 12-packs were on the sidewalk  
6 about 10 feet from the door. According to defendant's custodial  
7 statement, Garcia told him to shoot as he jumped in the car; the  
8 defendant fired backward as they were driving away. He was  
9 completely unaware when Garcia had dropped the beer, noticing  
10 only once they were in the car that "he didn't have no damn beer in  
11 his hands." Later, as the interviewer confirmed the defendant's  
12 account, the defendant speculated Garcia dropped the beer as he  
13 was coming out of the store.

14 In People v. Cooper (1991) 53 Cal.3d 1158, the Supreme  
15 Court held that derivative liability for a robbery could be premised  
16 on assistance or encouragement at any point during the escape to a  
17 place of temporary safety with the stolen goods. (Id. at p. 1161.)  
18 Although not presented by the facts in Cooper, the court took pains  
19 to circumscribe this derivative liability, stating the robbery  
20 continued during the escape only so long as the direct perpetrator  
21 continued to transport the stolen goods. (Id. at p. 1170.)

22 The defendant relies on Cooper to make three different  
23 arguments. He first claims the evidence is insufficient to show that  
24 during his escape Garcia still had the stolen beer in his possession  
25 when the defendant provided the force necessary to elevate  
26 Garcia's theft into a robbery. He then claims that under a plausible  
interpretation of the facts, Garcia dropped the stolen beer in the  
course of his escape before the defendant fired the shot, thus the  
superior court should have charged the jury with his proposed  
instructions on the lesser-included offense of theft.

We reject the claim of insufficient evidence out of hand. No  
eyewitness of the fatal shooting testified at trial. The jury was not  
required to accept the defendant's self-serving custodial statement,  
which suffered both internal inconsistencies and inconsistencies  
with the surviving clerk's account. Even if we accept the relevance  
of Cooper's holding, a reasonable jury could conclude, based on  
the location of the beer ten feet from the store's entry, that the  
defendant had fired at the first clerk before Garcia dropped the  
beer.

More importantly, the superior court correctly relied on  
Pham in finding Cooper inapposite. (Estes is not instructive, as  
defendant Estes was still in possession of the stolen goods when he  
made a show of force (147 Cal.App.3d at pp. 27-28)). Defendant  
Pham had dropped the stolen property just before the owner  
grabbed him and defendant Pham began to resist forcibly. (15  
Cal.App.4th at p. 64.) The court held it was not essential for

1 defendant Pham to be in actual possession of the stolen goods  
2 when making a show of force if the show of force prevents the  
3 owner from regaining possession of items in near proximity. (Id. at  
4 pp. 66-67.) In the present case, the escape with the beer, the  
5 dropping of the beer, and the shooting at the hotly pursuing owner  
6 of the beer all occurred contemporaneously, thus Pham renders the  
exact coordination of the dropping and the shooting irrelevant,  
because it was a robbery nevertheless. The efforts to parse the  
events into a series of frozen instances to pursue a less-culpable  
state of mind for the defendant's wanton misconduct is not well  
taken. (Estes, supra, 147 Cal.App.3d at p. 28.)

7 (LD 12 at 11-13 (footnote omitted).)

8 1. Jury Instructions

9 Petitioner's claims relative to the jury instructions are: (a) that the jury  
10 instructions did not inform the jury of the applicable force requirement because the jury could  
11 have found the property was abandoned before any force was used; and (b) that the trial judge  
12 erred in refusing to give a lesser included offense instruction. (Dkt. No. 58, attachment 12 at 15,  
13 16.)

14 A state court's determination that a requested jury instruction is not allowed under  
15 state law cannot form the basis for federal habeas relief. Estelle v. McGuire, 502 U.S. 62, 71-72  
16 (1991). See also Menendez v. Terhune, 422 F.3d 1012, 1029 (9th Cir. 2005) (same).

17 Accordingly, the decision of the California Court of Appeal that petitioner had no right under  
18 state law to a jury instruction is binding on this court. See Waddington v. Sarausad, 555 U.S.  
19 179, 129 S. Ct. 823, 832 n.5 (2009) ("we have repeatedly held that 'it is not the province of a  
20 federal habeas court to reexamine state-court determinations on state-law questions'") (quoting  
21 Estelle, 502 U.S. at 67-68); Bradshaw v. Richey, 546 U.S. 74, 76 (2005) "a state court's  
22 interpretation of state law . . . binds a federal court sitting in federal habeas").

23 Similarly, petitioner does not have a federal constitutional right to an instruction  
24 on a lesser included offense. See Windham v. Merkle, 163 F.3d 1092, 1106 (9th Cir. 1998)  
25 ("[T]he failure of a state trial court to instruct on lesser included offenses in a non-capital case  
26 does not present a federal constitutional question."); Solis v. Garcia, 219 F.3d 922, 929 (9th Cir.

1 2000) (habeas relief for failure to instruct on lesser included offense in non-capital case barred by  
2 Teague v. Lane, 489 U.S. 28 (1989), because it would require the application of a new  
3 constitutional rule). Petitioner makes an argument that due process requires a state court to  
4 provide adequate jury instructions on a defendant’s theory of defense. (Dkt. No. 72-1 at 38.) It  
5 is true that the Ninth Circuit Court of Appeals in Solis recognized this might be an exception to  
6 the general rule barring federal court consideration of a state court’s refusal to instruct on a lesser  
7 included offense. Solis, 219 F.3d at 929. However, even if petitioner does possess that right, the  
8 state court’s conclusion that state law did not require and the evidence did not warrant such an  
9 instruction was not objectively unreasonable. The California Court of Appeal explained that  
10 under California law the rapid series of events surrounding the shooting amounted to a robbery  
11 regardless of precisely when Garcia dropped the beer. (LD 12 at 13.) Due process does not  
12 require an instruction that is not supported by state law in this circumstance.

13           Thus, petitioner can only succeed on a jury instruction challenge if he can show  
14 the alleged error “so infect[ed] the entire trial that the resulting conviction violates the  
15 defendant’s right to due process.” Hines v. Enomoto, 658 F.2d 667, 672 (9th Cir. 1981) (citing  
16 Quigg v. Crist, 616 F.2d 1107 (9th Cir. 1980)); see also Prantil v. California, 843 F.2d 314, 317  
17 (9th Cir. 1988).

18           Petitioner has cited no authority for the proposition that his due process rights  
19 were somehow violated by the trial court’s refusal to give an instruction regarding aiding and  
20 abetting or a lesser included offense instruction. As the Court of Appeal pointed out, the jury  
21 was not required to accept petitioner’s construction of the facts presented at trial, which are based  
22 largely on his own self-serving statements. Accordingly, the state court’s rejection of petitioner’s  
23 claim was not contrary to, or an unreasonable application of, clearly established federal law. See  
24 Brewer v. Hall, 378 F.3d 952, 955 (9th Cir. 2004) (“If no Supreme Court precedent creates  
25 clearly established federal law relating to the legal issue the habeas petitioner raised in state  
26 court, the state court’s decision cannot be contrary to or an unreasonable application of clearly

1 established federal law”).

2           2. Alleged Insufficiency of the Evidence

3           The Due Process Clause of the Fourteenth Amendment “protects the accused  
4 against conviction except upon proof beyond a reasonable doubt of every fact necessary to  
5 constitute the crime with which he is charged.” In re Winship, 397 U.S. 358, 364 (1970). There  
6 is sufficient evidence to support a conviction if, “after viewing the evidence in the light most  
7 favorable to the prosecution, any rational trier of fact could have found the essential elements of  
8 the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319 (1979). “[T]he  
9 dispositive question under Jackson is ‘whether the record evidence could reasonably support a  
10 finding of guilt beyond a reasonable doubt.’” Chein v. Shumsky, 373 F.3d 978, 982 (9th Cir.  
11 2004) (quoting Jackson, 443 U.S. at 318). “A petitioner for a federal writ of habeas corpus faces  
12 a heavy burden when challenging the sufficiency of the evidence used to obtain a state conviction  
13 on federal due process grounds.” Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005). In  
14 order to grant the writ, the federal habeas court must find that the decision of the state court  
15 reflected an objectively unreasonable application of Jackson and Winship to the facts of the case.  
16 Id. at 1275 & n.13.

17           Viewing the evidence in the light most favorable to the verdict, the undersigned  
18 concludes that there was sufficient evidence introduced at petitioner’s trial from which a rational  
19 trier of fact could have found beyond a reasonable doubt that petitioner intended to aid and abet a  
20 robbery and that the robbery was accomplished by force or fear. The evidence, as summarized by  
21 the Court of Appeal and set forth above, fully supports the jury’s finding that petitioner intended  
22 to aid the robbery and intended to use force to do so. The state courts’ denial of habeas relief  
23 with respect to petitioner’s insufficient evidence claim is not an objectively unreasonable  
24 application of Jackson and Winship to the facts of the case. Accordingly, petitioner is not  
25 entitled to federal habeas relief with respect to Ground Ten.

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1 F. Alleged Miranda Violation (Ground Nine)

2 Petitioner argues the introduction of statements given to law enforcement officers  
3 violated his rights under Miranda v. Arizona, 384 U.S. 436 (1966), because he did not  
4 voluntarily, knowingly, and intelligently waive his Miranda rights. (Dkt. No. 58, attachment 12  
5 at 17.) As described below, the state court’s rejection of this claim was not error.

6 The Court of Appeal considered and rejected this claim as follows:

7 At the outset of the defendant’s interrogation, he and the  
8 detective had the following exchange:

9 “But I can’t talk to you at all unless we do the next thing. So the  
10 next thing is . . . the advising of your rights . . . You do have the  
11 right to remain silent. Anything you say can and will be used  
12 against you in a court of law. You have the right to talk to an  
13 attorney and have an attorney present before and during  
14 questioning. If you cannot afford an attorney, one will be appointed  
15 free of charge to represent you before and during questioning, if  
16 you desire. Do you understand those rights?

17 “[DEFENDANT]: Uh-huh.

18 “[DETECTIVE]: Okay. . . . So you do understand your rights?

19 “[DEFENDANT]: Yeah.

20 “[DETECTIVE]: Okay. Having your rights in mind, do you wish to  
21 waive them and to talk to me?

22 “[DEFENDANT]: **What do you mean?**

23 “[DETECTIVE]: Well, in other words, these -- the rights I just  
24 explained to you, uh, ‘You have the right to remain silent.’ That  
25 means that you don’t have to talk to me if you don’t --

26 “[DEFENDANT]: I’ll talk to you.

“[DETECTIVE]: -- want to. You want to talk to me? Okay.  
Without an attorney?

“[DEFENDANT]: I don’t have an attorney.

“[DETECTIVE]: My . . . I know you don’t have an attorney right  
now.

“[DEFENDANT]: It don’t matter to me.

“[DETECTIVE]: Okay. Well, so you want to talk now?

“[DEFENDANT]: [No audible response]

“[DETECTIVE]: Okay. . . . I have to ask you to say ‘yes’ if you  
want to talk, --

“[DEFENDANT]: Yeah.

(Emphasis supplied.)

24 At the hearing on the defendant’s motion to suppress the  
25 custodial statement which followed, he stipulated that in three  
26 previous arrests, police officers had advised him of his rights under  
Miranda. The record showed he was just shy of 17 years old at the  
time of the offenses; he nonetheless had six prior arrests and had

1 been on juvenile probation since the age of 13. The defendant  
2 presented testimony from three psychiatric witnesses who had  
3 examined him. We need not relate the substance of this testimony,  
4 as the superior court found in its ruling on the motion that “[t]he  
5 record before me now discloses the uncontroverted evidence that  
6 Mr. Sanchez suffers from some organic brain disorder, possibly  
7 secondary to [an] automobile accident, or additionally some bipolar  
8 disorder . . . which may be hereditary or subject to [sic] . . .  
9 substance abuse or the like; but in any event, he has demonstrable  
10 evidence of some brain dysfunction.” The defendant also  
11 presented testimony from his mother and a house mate that he had  
12 suffered brain injuries in a 1990 accident (at the age of 13) while a  
13 passenger in a stolen car fleeing from the police, that his behavior  
14 and functioning deteriorated thereafter, that he seemed much better  
15 when under medication at a group home, that when he came home  
16 10 days before the shootings the group home did not send his  
17 medications, and that he had stopped eating and sleeping days  
18 before his interrogation.

19 Although the defendant acknowledges Miranda and its  
20 progeny do not require an explicit waiver, in an exercise of  
21 formalism he focuses on the response we emphasized in the above  
22 passage as conclusive evidence he neither expressly nor by  
23 implication waived his privileges under Miranda. We disagree. The  
24 context of the question indicates the defendant was well aware of  
25 his Miranda privileges, and was merely uncertain about what the  
26 detective had asked; once he realized the detective wanted him to  
consent to questioning, he expressed no reluctance whatsoever. In  
the context of Miranda, actions speak louder than words.

1 In the alternative, the defendant argues the evidence shows  
2 he lacked capacity to make a knowing and intelligent waiver of his  
3 Miranda privileges. In assessing the record, we defer to the  
4 superior court’s express and implied resolutions of disputed facts,  
5 including credibility. The superior court, taking into account the  
6 mental impediments of the defendant and his lack of sleep, found  
7 the defendant had been in the same position several times  
8 previously and was well aware both that the detective was an  
9 adverse party (“[i]ndeed, he always had the feeling the police were  
10 out to get him”) and that any statement could have adverse results.  
11 We concur with the trial court; nothing in the record shows as a  
12 matter of law that the defendant’s level of cognitive functioning  
13 was so diminished at the time of his interview that he was unable  
14 to protect his self-interest. Rather, he already had years of  
15 experience with the police, his statement and his mother’s  
16 testimony demonstrated he was keenly aware of the seriousness of  
17 his situation, and he had taken measures to avoid capture. We thus  
18 reject this argument. (People v. Lara (1967) 67 Cal.2d 365,  
19 377-378, 383, 385-87 [age and cognitive ability are among factors  
20 to consider but not determinative; courts have found valid waiver  
21 with mental age as young as 7; thus, criminally experienced

1 18-year-old with IQ of 65-71 had capacity to waive Miranda  
2 protections].)

3 (LD 12 at 5-8 (some internal citations omitted).)

4 In Miranda, the United States Supreme Court held that “[t]he prosecution may not  
5 use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the  
6 defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege  
7 against self-incrimination.” 384 U.S. at 444. To this end, custodial interrogation must be  
8 preceded by advice to the potential defendant that he or she has the right to consult with a lawyer,  
9 the right to remain silent and that anything stated can be used in evidence against him or her. Id.  
10 at 473-74. These procedural requirements are designed “to protect people against the coercive  
11 nature of custodial interrogations.” DeWeaver v. Runnels, 556 F.3d 995, 1000 (9th Cir. 2009).  
12 Once Miranda warnings have been given, if a suspect makes a clear and unambiguous statement  
13 invoking his constitutional rights, “all questioning must cease.” Smith v. Illinois 469 U.S. 91,  
14 98 (1984). See also Miranda, 384 U.S. at 473-74; Michigan v. Mosley, 423 U.S. 96, 100 (1975);  
15 DeWeaver, 556 F.3d at 1001.

16 A defendant may waive his Miranda rights, provided the waiver is “voluntary in  
17 the sense that it was the product of a free and deliberate choice rather than intimidation, coercion,  
18 or deception,” and “made with a full awareness of both the nature of the right being abandoned  
19 and the consequences of the decision to abandon it.” Moran v. Burbine, 475 U.S. 412, 421  
20 (1986). However, an express waiver of Miranda rights is not necessary. Berghuis v. Thompkins,  
21 130 S. Ct. 2250, 2261 (2010); North Carolina v. Butler, 441 U.S. 369, 373 (1979); United States  
22 v. Younger, 398 F.3d 1179, 1185 (9th Cir. 2005) (“In soliciting a waiver of Miranda rights,  
23 police officers need not use a waiver form nor ask explicitly whether a defendant intends to  
24 waive his or her rights.”). A valid waiver of rights may be implied under the circumstances  
25 presented in the particular case. Specifically, “a suspect may impliedly waive the rights by  
26 answering an officer’s questions after receiving Miranda warnings.” United States v. Rodriguez,

1 518 F.3d 1072, 1080 (9th Cir. 2008) (quoting United States v. Rodriguez-Preciado, 399 F.3d  
2 1118, 1127, amended, 416 F.3d 939 (9th Cir. 2005)). See also Butler, 441 U.S. at 369-73  
3 (waiver of Miranda rights can be inferred “from the actions and words of the person  
4 interrogated”).

5           Petitioner argues the decisions of the trial court and Court of Appeal were based  
6 on an unreasonable determination of the facts. After reviewing the transcript of the suppression  
7 hearing and the transcript of petitioner’s interview with Officer Overton, this court concludes the  
8 state courts’ determinations were not unreasonable. (RT 1-275; LD 3 at 59-121.) Drs. Diamond,  
9 Edwards, and Bittle testified at the suppression hearing regarding petitioner’s mental health  
10 problems, intellectual capabilities, and brain injury and the likely impacts of the withdrawal of  
11 petitioner’s medications and his lack of sleep. (RT 17-59; 138–211; 224-70.) In addition,  
12 petitioner’s mother testified about his behavior after the automobile accident and around the time  
13 of the crimes. (RT 81-132.) Josette Venegas, who lived with petitioner’s family, testified about  
14 petitioner’s behavior when he came back from the group home. (RT 59-81.) The trial judge  
15 found petitioner knowingly and voluntarily waived his Miranda rights. (RT 271-75.) As  
16 described above, the Court of Appeal held petitioner’s question “What do you mean?” was not  
17 necessarily an indication he did not understand his Miranda rights and a number of factors  
18 showed petitioner’s mental functioning was not so low that he could not understand his rights.

19           Petitioner waived his Miranda rights at the commencement of the interrogation  
20 when, after receiving the appropriate warnings and being told that the officers wanted to talk to  
21 him about the events surrounding the crimes, petitioner agreed to answer the officer’s questions.  
22 See Berghuis, 130 S. Ct. at 2261 (noting that a waiver of Miranda rights may be implied through  
23 the defendant’s silence, along with an understanding of those rights and a course of conduct  
24 indicating waiver) (citing Butler, 441 U.S. at 373). When asked if he understood his rights,  
25 petitioner replied that he did. (LD 12 at 6.) The state courts appropriately considered the  
26 evidence put on by petitioner at the suppression hearing, but also petitioner’s experience with the

1 police and understanding of the seriousness of his actions as evidenced by statements made to his  
2 mother after the crimes and his attempts to evade arrest. In Fare v. Michael C., 442 U.S. 707,  
3 725 (1979), the Court held that determining whether Miranda rights have been waived “includes  
4 evaluation of the juvenile’s age, experience, education, background, and intelligence, and into  
5 whether he has the capacity to understand the warnings given him, the nature of his Fifth  
6 Amendment rights, and the consequences of waiving those rights.” In Fare, as here, the Court  
7 recognized that an older juvenile with “considerable experience with the police” could very well  
8 knowingly waive his rights. Id. at 726. There is nothing in the responses given by petitioner to  
9 the officers’ Miranda warning or otherwise to indicate that he did not understand his  
10 constitutional rights as explained to him or that he wished to invoke his rights to counsel and to  
11 remain silent. Further, petitioner appeared to understand all of the officers’ questions and his  
12 answers were coherent and intelligible, notwithstanding his mental problems and lack of sleep.  
13 Petitioner’s claim that he did not knowingly and voluntarily waive his Miranda rights should be  
14 denied.

#### 15 CONCLUSION

16 For the foregoing reasons, IT IS HEREBY RECOMMENDED that petitioner’s  
17 application for a writ of habeas corpus be denied.

18 These findings and recommendations are submitted to the United States District  
19 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-  
20 one days after being served with these findings and recommendations, any party may file written  
21 objections with the court and serve a copy on all parties. Such a document should be captioned  
22 “Objections to Magistrate Judge’s Findings and Recommendations.” If petitioner files  
23 objections, he shall also address whether a certificate of appealability should issue and, if so, why  
24 and as to which issues. A certificate of appealability may issue under 28 U.S.C. § 2253 “only if  
25 the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C.  
26 § 2253(c)(3). Any response to the objections shall be filed and served within fourteen days after

1 service of the objections. The parties are advised that failure to file objections within the  
2 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951  
3 F.2d 1153 (9th Cir. 1991).

4 DATED: March 18, 2011

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6   
7 KENDALL J. NEWMAN  
8 UNITED STATES MAGISTRATE JUDGE

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