

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MARVIN PETE WALKER, JR.,

Petitioner,

v.

RON DAVIS, Warden, California State  
Prison at San Quentin,

Respondent.

Case No. 94-cv-01997-PJH

**ORDER GRANTING PETITION IN  
PART AND DISPOSING OF ALL  
REMAINING CLAIMS**

**DEATH PENALTY CASE**

**I. INTRODUCTION**

Pursuant to the Court’s request, the parties have filed merits briefing on all remaining penalty phase claims including Claims 2A, 2E, 2F, 16, 19B(e), 19B(f), 19B(aa), 19B(cc), 21, and 22 in Petitioner’s Amended Petition for Writ Of Habeas Corpus. For the reasons set forth below, the Court orders as follows.

**II. BACKGROUND**

**A. Procedural Posture**

On November 20, 1979, an eight-count information was filed in Santa Clara County Superior Court. The information charged Petitioner with one count of first-degree murder, four counts of assault with intent to commit murder, two counts of robbery, and one count of auto theft.

On June 30, 1980, the trial of the guilt phase began. The jury acquitted Petitioner of one count of assault but convicted him of the other charges on August 4, 1980. On August 5, 1980, the penalty trial began. The jury sentenced Petitioner to death on August 12, 1980.

On automatic appeal to the California Supreme Court, Petitioner’s conviction was affirmed but his death sentence was reversed. On March 20, 1986, the California Supreme Court granted Respondent’s petition for rehearing. On December 27, 1988, the 1985 opinion was vacated and the judgment was affirmed in its entirety.

A petition for writ of certiorari to the United States Supreme Court was filed on June 12, 1989, and denied on March 19, 1990. On September 28, 1990, Petitioner filed a petition for writ

1 of habeas corpus in the California Supreme Court. That petition was denied on September 30,  
2 1992.

3 On January 28, 1993, Petitioner applied to the United States Supreme Court for a writ of  
4 certiorari to review certain constitutional claims. On March 8, 1993, the United States Supreme  
5 Court denied the petition for certiorari. This denial became final on April 2, 1993.

6 On May 20, 1997, Petitioner filed a petition for writ of habeas corpus with this Court. Dkt.  
7 84. The Court found that some of Petitioner's claims were not exhausted and ordered Petitioner to  
8 withdraw the petition filed on May 20, 1997. The Court ordered that equitable tolling would  
9 apply if Petitioner filed a state court petition for writ of habeas corpus, then a federal petition after  
10 the state had ruled.

11 The California Supreme Court ruled on Petitioner's June 5, 1998 petition for writ of habeas  
12 corpus on December 22, 2004.

13 On January 12, 2005, Petitioner filed an amended petition for writ of habeas corpus in this  
14 Court. Dkt. No. 130 ("Fed. Pet."). Respondent filed an answer on March 24, 2005. Dkt. 139  
15 "Resp. Answer"). No traverse was filed. After extended litigation and briefing, the Court  
16 disposed of several claims pursuant to a motion for summary judgment, Dkt. No. 161, granted  
17 Petitioner leave to depose his trial attorneys, Dkt. No. 176, and partially granted Petitioner's  
18 request for an evidentiary hearing, Dkt. No. 189. On March 31, 2011, the Court, Judge Armstrong  
19 presiding, partially granted the amended petition for writ of habeas corpus based on Petitioner's  
20 allegations of erroneous shackling. Dkt. No. 199. An appeal ensued and the Ninth Circuit  
21 reversed the Court's order. *See* Dkt. No. 213. The parties subsequently resumed briefing on the  
22 remaining groups of claims on April 18, 2014. Dkt. No. 220. The Court disposed of Petitioner's  
23 guilt phase claims, excluding his claim of insufficient evidence to support the jury's finding that  
24 Petitioner personally used a gun during the commission of one of the crimes, on April 28, 2016.  
25 Dkt. No. 245.

26 On March 31, 2017, Petitioner filed an opening brief on ineffective assistance of counsel  
27 during the penalty phase, several procedurally defaulted claims, and a claim of cumulative error.  
28 Dkt. No. 251 ("Pet. Br."). Respondent filed an opposition on June 29, 2017. Dkt. No. 255

1 (“Resp. Br.”). On August 14, 2017, Petitioner filed a reply, which included briefing on his guilt  
2 phase claim of insufficient evidence to support the jury’s finding that he personally used a gun  
3 during the commission of one of the crimes. Dkt. No. 256 (“Pet. Reply Br.”).

4 **B. Facts**

5 The following recitation of the factual background of the underlying crimes is based, in  
6 relevant part, on the California Supreme Court’s opinion disposing of Petitioner’s direct appeal.  
7 The state court’s factual findings are presumed to be correct pursuant to 28 U.S.C. § 2254. *See*  
8 *People v. Walker*, 47 Cal.3d 605 (1988).

9 In 1980, a jury in the Superior Court of Santa Clara County sentenced Petitioner to death  
10 following a conviction of first-degree murder, three counts of assault with intent to commit  
11 murder, two counts of robbery, and one count of auto theft.

12 Petitioner was tried in connection with two incidents, which occurred in August and  
13 September of 1979. The first incident occurred on August 6, 1979, when Petitioner and a second  
14 man<sup>1</sup> entered Dan’s Bottle Shop in San Jose in which the co-owner, Jerry Romero, and two  
15 employees, Joe Vasquez and Andy Zamora were present. Petitioner drew a handgun from his  
16 waistband before announcing a holdup and marched Romero, Vasquez, and Zamora into the  
17 shop’s back room. As they entered, Romero saw Petitioner hand the gun to his companion.  
18 Petitioner hit Romero across the forehead with a full wine bottle, and, as Romero fell to the floor,  
19 Petitioner struck him again over the head with a second full bottle of wine. Petitioner ordered  
20 Vasquez and Zamora to get on their knees. Three shots were then fired in rapid succession.  
21 Vasquez died of a .32 caliber gunshot wound, which entered his forehead and exited through the  
22 back of his head. Zamora was also shot in the head but survived. Romero was shot in the  
23 abdomen; the bullet ricocheted off his hip and traveled through several major organs, lodging in  
24 his chest.

25 The second incident occurred on September 5, 1979. The evidence showed Petitioner,  
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27 <sup>1</sup> The second man was Petitioner’s brother in law, Rupert Lee Harper. *See* Fed. Pet. at  
28 116-119. On November 9, 1982, Harper pled nolo contendere to second degree murder in the  
Bottle Shop case and was sentenced to fifteen-years-to-life in prison. *Id.*

1 wearing a ski mask, entered a medical building in San Jose and pointed a gun at 20-year-old Rose  
2 Olveda. Petitioner ripped open her blouse, touched her breasts, and began pistol-whipping her on  
3 the head, striking Olveda an estimated twelve times before she was able to momentarily break away  
4 and run for the door. Petitioner pulled her towards him and continued beating her, injuring her back  
5 and fracturing her neck. Olveda fell to the floor and pretended to be unconscious. Petitioner then  
6 shot her twice in the head. Olveda survived.

7 Following the assault on Olveda, law enforcement located her car parked near Petitioner's  
8 sister's residence, where Petitioner sometimes stayed. Officers also recovered, through an  
9 undercover operation, a .32 caliber semi-automatic pistol that was later identified as the gun used  
10 during the liquor store incident.

11 **C. Penalty Phase Evidence**

12 At the penalty phase, the prosecution and defense stipulated that the evidence from the  
13 guilt phase could be considered by the jury in the penalty phase. In addition, the prosecution  
14 presented testimony from two police officers that Petitioner made threats against an undercover  
15 police officer, Evan MacIvor ("MacIvor") and a deputy district attorney. The defense presented  
16 witnesses from Petitioner's family and church, including his mother, Emma Lou Walker  
17 ("Emma"), two of his sisters, a secretary from his church, and Petitioner's girlfriend, who testified  
18 that Petitioner had helped them with chores, financially, and emotionally, and that they wanted  
19 him to live. Petitioner's mother testified that Petitioner had grown up in a poor family with seven  
20 brothers and sisters. Petitioner also testified, claiming that he was innocent of the crimes and  
21 denying the alleged threats against MacIvor and the deputy district attorney.

22 **D. Petitioner's Proffered Mental Health Evidence<sup>2</sup>**

23 During his state and federal habeas proceedings, Petitioner submitted the declarations of  
24 several mental health experts. The Court will briefly summarize their proffered testimony.

25 **1. Dr. Dale G. Watson**

26 Dr. Dale G. Watson ("Dr. Watson") was a licensed psychologist who conducted a  
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28 <sup>2</sup> For ease of reference, the page numbers listed in each citation to Petitioner's exhibits reflect ECF document page numbers, not the page number in each exhibit.

1 comprehensive neuropsychological assessment of Petitioner on February 4, 1997 and February 11,  
2 1997. Dkt. 130-1 at 53 (Exh. I, Dr. Watson Decl.). Dr. Watson received his Ph.D. from U.C.  
3 Berkeley, served as a member on the panel of examiners for Contra Costa County Superior Courts,  
4 and had substantial experience in performing psycho-diagnostic tests with prisoners before  
5 examining Petitioner. *Id.* at 51-52.

6 Dr. Watson’s assessment included a clinical interview and administration of a battery of  
7 neuropsychological tests, totaling approximately ten hours of face-to-face contact with Petitioner,  
8 at San Quentin State Prison. Dkt. 130-1 at 53 (Exh. I, Dr. Watson Decl.). According to  
9 Dr. Watson’s declaration, “[t]he purpose of this evaluation was to determine if neuropsychological  
10 dysfunction or deficits were present and to specify the degree, nature, and effect of any such  
11 impairment.” *Id.* at 54.

12 Dr. Watson concluded Petitioner suffers from “a mild level of neuropsychological  
13 dysfunction.” Dkt. No. 130-1 at 60 (Exh. I, Dr. Watson Decl.). Factors contributing to  
14 Petitioner’s brain damage included an accident in which Petitioner was hit by a truck when he was  
15 nine years old, repeated blows to the head during beatings by his father, Marvin Pete Walker, Sr.<sup>3</sup>  
16 (“Marvin, Sr.”), a severe blow to the base of Petitioner’s skull, and chronic malnutrition. *Id.* at 57.  
17 Dr. Watson found that the “measure of the consistency of findings of brain impairment” fell  
18 “within the brain damaged range both with and without age and education adjustments.” *Id.* at 61.  
19 Dr. Watson opined that Petitioner’s brain damage also affected his ability to learn and succeed  
20 academically, noting that Petitioner “likely . . . has a long-standing learning disability that is the  
21 result of underlying brain dysfunction.” *Id.* at 67.

22 Dr. Watson also identified various other factors that may have contributed to the state of  
23 Petitioner’s mental health, including his stutter as a young child, the severe beatings he and his  
24 siblings suffered at the hands of their father, and his near-death experience after he and his brother  
25 contracted meningitis, which his brother did not survive. Dr. Watson also noted the murder of  
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27 <sup>3</sup> Given the various surnames in common among Petitioner’s proffered penalty phase  
28 witnesses, the Court will refer to some witnesses by their first name for ease of reference. The  
Court intends no disrespect by doing so.

1 Petitioner’s sister, Lena Doris Walker (“Lena”), whom Petitioner found “completely naked [and]  
2 bleeding profusely” at the feet of her estranged ex-husband, and the negative effects stemming from  
3 Emma’s relationship with James Ratliff (“Ratliff”), Petitioner’s chronic use of illegal substances,  
4 and an attempted sexual assault by a preacher when Petitioner was fifteen or sixteen years old.  
5 Dkt. 130-1 at 58 (Exh. I, Dr. Watson Decl.).

6 **2. Dr. Roderick W. Pettis**

7 Dr. Roderick W. Pettis (“Dr. Pettis”) was a licensed clinical physician who evaluated  
8 Petitioner’s social and psychiatric history to determine which factors affected his development,  
9 mental status, and psychological functioning. Dkt. 130-1 at 75 (Exh. J, Dr. Pettis Decl.).  
10 Dr. Pettis received his M.D. from Boston University, served as a consultant in the Massachusetts  
11 Department of Public Health, and had substantial experience as a psychiatrist in treating adult  
12 patients with a full range of mental disorders before examining Petitioner. *Id.* at 72-73. Like  
13 Dr. Watson, Dr. Pettis conducted a number of interviews of Petitioner at San Quentin State Prison.  
14 Dr. Pettis also consulted with Dr. Watson and reviewed documentary evidence concerning  
15 Petitioner’s education, employment, medical, psychological, and psychiatric history, as well as  
16 documentary evidence concerning members of Petitioner’s family. *Id.* at 74.

17 Dr. Pettis concluded that Petitioner suffered from various family life and community  
18 deficits and that Petitioner lacked the resources necessary to overcome those deficits. For  
19 example, Petitioner did not have “a positive relationship with a competent adult, skill at learning, a  
20 positive school experience, previous successful experience, social competence, [or] a high IQ  
21 score.” Dkt. No. 130-1 at 176 (Exh. J, Dr. Pettis Decl.). Dr. Pettis also examined some of the  
22 potential causes of Petitioner’s “long-standing” brain damage. *Id.* at 172. First, Petitioner  
23 suffered systematic and ritualized beatings by Marvin, Sr., “which at times constituted torture,  
24 affected every aspect of his development and life, including brain function, emotional responses,  
25 perception of the world around him, beliefs about himself, sense of personal integrity, and  
26 relationships with others.” *Id.* at 175. Second, Petitioner “did not receive basic essentials for  
27 normal development. When a child is born, the development of the central nervous system,  
28 including the brain, is not complete. . . . [Petitioner’s] [m]alnutrition, combined with his

1 prenatal exposure to alcohol, and brain trauma impaired his cognitive functioning.” *Id.* at 171.  
2 Third, Petitioner “experienced sym[p]toms that are characteristic for those who witness and  
3 survive overwhelming events that are outside the range of normal human experiences.” *Id.* at 139.  
4 Dr. Pettis also pointed to Petitioner’s “intrusive thoughts” about his sister’s murder, in which  
5 Petitioner could not get images “out of his mind of [his murdered sister] lying naked and covered  
6 in blood on the stairwell, dead.” *Id.* at 140.

7 In addition, Dr. Pettis detailed Petitioner’s upbringing and his extended family’s history,  
8 including the family’s poverty, near-constant instability, cultural and community issues, and  
9 various forms of abuse suffered by Petitioner, his parents, and his siblings.

10 **E. Other Proffered Evidence**

11 Petitioner also provided the declarations of witnesses who were willing and ready to testify  
12 regarding Petitioner’s personal, cultural, and family background.

13 **1. Vernelle Walker Harper**

14 In her declaration, Vernelle Walker Harper (“Harper”), one of Petitioner’s sisters,  
15 described her family’s constant moves and her traumatic childhood. Dkt. No. 131 at 26-31 (Appx.  
16 A, Exh. 4, Harper Decl.). The Walker family lived in the housing projects in South Central Los  
17 Angeles when Petitioner was born. *Id.* at 25. They had moved twice by the time the youngest  
18 children, twin Ronald and Donald Walker (“Ronald” and “Donald,” respectively), were born. *Id.*  
19 at 26. After the twins’ first birthday, the family left for Tulare. The children moved with no  
20 advanced notice from their parents and no explanation as to why. *Id.* at 27. The Walker family  
21 continued moving from city to city over the years. *Id.* at 29-30.

22 Harper also described a chaotic childhood in which she and her siblings were often alone  
23 or otherwise unsupervised in their home with up to twenty children. The children inevitably got  
24 into trouble and were thereafter physically beaten by one or both of their parents. Dkt. No. 131 at  
25 31 (Appx. A, Exh. 4, Harper Decl.). Marvin, Sr. took out his anger on the children by using an  
26 electrical cord to “whip” each of them, regardless of each child’s personal blame. *Id.* at 29-30.  
27 When Petitioner’s parents fought, Petitioner “sometimes tried to go between them, but that only  
28 made [Marvin, Sr.] beat [Petitioner].” *Id.* at 30.

1 In 1969, Ronald died suddenly of meningitis. Dkt. No. 131 at 32 (Appx. A, Exh. 4, Harper  
2 Decl.). Ronald went to bed and was found dead the next morning. That same day, Petitioner also  
3 contracted meningitis and had to be hospitalized with a 107-degree fever. *Id.* Following Ronald’s  
4 death, Petitioner took it upon himself to care for his younger brother, Donald, who was having a  
5 difficult time with Ronald’s death. *Id.* In 1971, Petitioner’s father left the family. The family  
6 continued moving from one city to another, eventually returning to San Jose. *Id.* at 33.

7 That same year, Petitioner’s nineteen-year-old sister, Lena, left her husband, who was  
8 violent. Dkt. No. 131 at 34 (Appx. A, Exh. 4, Harper Decl.). By then, Marvin, Sr. had left the  
9 family and decided he was not returning. Petitioner, who was twelve years old, decided it was his  
10 job to protect his mother and sisters. *Id.* at 35. When Lena’s husband showed up at the Walker  
11 home and threatened to take the couple’s children, Petitioner grabbed the three children, including  
12 a newborn infant, and ran out the back door to a neighbor’s house to protect them. *Id.*

13 In early 1972, the children’s beloved maternal grandmother, to whom the children referred  
14 to as “Mamun,” passed away. Later that year, Lena was murdered by her estranged husband. Dkt.  
15 No. 131 at 36 (Appx. A, Exh. 4, Harper Decl.). Petitioner “had seen his dying sister lying naked  
16 and bleeding with her killer still holding the knife over her body, and he could not shake the sight.  
17 He saw his mother more devastated than ever, and he did not know what to do about it. He started  
18 following [his sisters] around whenever we left the house in his attempt to keep [them] from  
19 danger.” *Id.* In addition, the Walker family was unable to gain custody of Lena’s children.  
20 Petitioner blamed himself for Lena’s death and felt like he failed as the man in the family. *Id.*  
21 Meanwhile, Petitioner’s mother and siblings turned to alcohol and drugs for relief. *Id.* at 36-37.

22 In 1973, James Ratliff (“Ratliff”), who was seeing Emma, moved in with the family. Dkt.  
23 No. 131 at 37 (Appx. A, Exh. 4, Harper Decl.). Ratliff attempted to molest and sexually coerce  
24 Petitioner’s sisters. He also taught Petitioner’s brothers how to get more money back in change  
25 from a merchant than what they paid for an item. *Id.* According to Harper, Ratliff’s presence in  
26 the family home brought more turmoil between Petitioner’s mother and her children.

27 In addition to providing background information on Petitioner’s life, Harper, who testified  
28 at the penalty phase of Petitioner’s trial, noted that she would have testified in a completely

1 different manner had Petitioner’s counsel asked her questions about Petitioner’s home and family  
2 life. She also noted she would have provided counsel with a list of other witnesses to contact who  
3 could shed some light on Petitioner’s history and included a list. Dkt. No. 131 at 38-39 (Appx. A,  
4 Exh. 4, Harper Decl.).

5 **2. Marlene Walker Holland**

6 Marlene Walker Holland (“Holland”) is another of Petitioner’s sisters. Like Harper,  
7 Holland described her and Petitioner’s home life as “impossible to have a quiet minute or time to  
8 yourself” and noted that none of the children had any privacy. Dkt. No. 131 at 43 (Appx. A, Exh.  
9 5, Holland Decl.). Holland also shared details about the family members who lived with the  
10 Walker family at various times, including her aunt, uncle, and their children, noting that her aunt  
11 had a special needs daughter.

12 In addition, Holland described Marvin, Sr.’s practice of “whipp[ing]” his children over  
13 their minor infractions and those of other children in their home during the family’s frequent  
14 pinochle parties. Dkt. No. 131 at 45 (Appx. A, Exh. 5, Holland Decl.). According to Holland, the  
15 children tried to please their father, but could not avoid his beatings. Marvin, Sr. forced the  
16 children to line up and watch as he made each child bend down and grab his or her ankles and hit  
17 their behind multiple times with an extension cord, “braided switch,” or a belt. *Id.* at 46. Holland  
18 stated she believed Marvin, Sr. enjoyed hurting his children and described an occasion in which  
19 one of her brothers fell off the back of the family’s pickup truck, injuring himself, and her father  
20 physically beat him in response. *Id.* at 47. On another occasion, Lena argued with Marvin, Sr.  
21 about the way he treated the children and Petitioner’s father choked her “until she turned blue in  
22 the face [and Emma] . . . hit [Marvin, Sr.] on the back of his head with something and he blacked  
23 out.” *Id.* Despite the violence suffered by himself and his siblings, Petitioner continued to seek  
24 approval from his father even after he left the family.

25 Holland echoed Harper’s declaration in describing Ratliff’s sexually abusive behavior,  
26 alcoholism, and drug use. Holland added that she believed Ratliff may have “messed with [her]  
27 brothers as well.” Dkt. No. 131 at 50 (Appx. A, Exh. 5, Holland Decl.). She also recounted the  
28 deaths of Ronald and Lena, describing Petitioner as a “silent sufferer” who kept his feelings of

1 distraught to himself. *Id.* at 53. Nevertheless, Petitioner helped his family as much as he could.  
2 For example, one month prior to Petitioner’s arrest, Petitioner’s family had no food to eat and  
3 Petitioner made a trip to Tulare, California, to fish for food for his family. Petitioner returned with  
4 eight bags of fish. *Id.* at 49.

5 Holland’s declaration included a list of potential penalty phase witnesses she would have  
6 turned over to defense counsel if he had asked for her help.

7 **3. Johnny Keith Walker**

8 Johnny Keith Walker (“Johnny”) is Petitioner’s brother. In his declaration, Johnny  
9 detailed his childhood hardships and described Marvin, Sr.’s abusive behavior, the role of alcohol  
10 in his family’s violence problems, and the deaths of his siblings and his grandmother, Mamun.  
11 Dkt. No. 131 at 145-151 (Appx. A, Exh. 7, Johnny Decl.). Like his sisters, Johnny described the  
12 “Line-up Session[s],” in which Marvin, Sr. lined up the children for a “whipping.” He also  
13 described “Lay Down Session[s],” in which four or five of the children laid down side-by-side on  
14 the floor to be “whipped” at the same time. *Id.* at 146. If the children tried to protect themselves  
15 during the beatings, Marvin, Sr. hit them harder. *Id.* at 147. The children, including Petitioner,  
16 “learned quickly to never speak up for each other or to talk back during his whipping frenzy for  
17 fear of getting his special attention.” *Id.* Because Petitioner was the oldest son, he was often “in  
18 the line of fire more than anyone.” *Id.* Petitioner often tried to be the peacemaker in his family  
19 whenever there were any fights. On one occasion, one of Petitioner’s sisters threw an ashtray at  
20 Petitioner’s head after he tried to intervene while she fought with her husband. Petitioner’s head  
21 split open. *Id.* at 152.

22 Johnny recounted how Marvin, Sr. “beat up” Emma, sometimes giving Emma a black eye  
23 or bruising her face. Dkt. No. 131 at 147 (Appx. A, Exh. 7, Johnny Decl.). When police officers  
24 went to the home after Marvin Sr. and Emma’s disputes, the children were too afraid to say any  
25 negative things about their father to the police officers. *Id.* Emma also hit the children, often  
26 slapping them. Johnny recalled a specific instance in which Emma hit him with a metal pipe after  
27 he said “no” to one of her requests. *Id.* at 148.

28 In addition to detailing his immediate family’s issues, Johnny notes widespread alcohol

1 abuse within his extended family. Emma often drank hours at a time, especially after Lena’s  
2 death. Dkt. No. 131 at 148 (Appx. A, Exh. 7, Johnny Decl.). His father and sisters also drank  
3 heavily. Emma’s nephew, who was often around the Walker family home, got into “terrible,  
4 violent drunken fights” with his wife in front of the children. *Id.*

5 Johnny also discussed some of the issues which arose when Ratliff moved in with the  
6 family. According to Johnny, Ratliff tried to have sex with two of his sisters, leading the women  
7 to move out of the Walker home and into an apartment in a neighborhood that was “not in a good  
8 part of town.” Petitioner, at the time fourteen years old, moved in with his sisters to protect them.  
9 Ratliff was also a “petty criminal and con artist” who taught the children how to steal and commit  
10 residential burglaries, sometimes joining the children when they committed the various crimes.  
11 Dkt. No. 131 at 151 (Appx. A, Exh. 7, Johnny Decl.).

12 Johnny’s declaration included a list of several potential penalty phase witnesses he would  
13 have sent to counsel had counsel consulted with him.

14 **4. Shirley Anne Walker**

15 Shirley Anne Walker (“Shirley”) is one of Petitioner’s sisters. In her declaration, she  
16 summarized the family’s constant moves from Los Angeles, Tulare, Oakland, and San Jose. Dkt.  
17 No. 131 at 176-186 (Appx. A, Exh. 19, Shirley Decl.). Like other family members who provided  
18 a declaration, Shirley described Ronald’s death, Lena’s death, her grandmother Mamun’s death,  
19 Marvin, Sr.’s brutal beatings of his children, and the Walker children’s fear of Marvin, Sr. *Id.* at  
20 178-85.

21 According to Shirley, during beatings, Marvin, Sr. pulled the children and placed them at  
22 the back of the line for a second beating if they cried or let go of their toes. Shirley also alleged  
23 that the other adults present during their beatings laughed at the children and called them names.  
24 Shirley and her other siblings regularly asked Petitioner to do things that they knew would lead to  
25 a beating, such as cooking a fish belonging to their father or grabbing a peach from their father’s  
26 peach tree. Dkt. No. 131 at 179 (Appx. A, Exh. 19, Shirley Decl.). She also stated that they often  
27 went to bed hungry and had very few clothes to wear to school. *Id.* at 182. Their mother did not  
28 allow the children to get summer jobs because she did not want others to know she could not take

1 care of her children by herself. *Id.*

2 Following Lena’s murder, Shirley and her other siblings, with the exception of Petitioner,  
3 used drugs to ease their pain. Dkt. No. 131 at 185 (Appx. A, Exh. 19, Shirley Decl.). According  
4 to Shirley, losing Lena was like “losing a mother.” *Id.* at 184. Petitioner and Holland “had bad  
5 dreams for a long time after Lena was murdered,” and Petitioner, at the time twelve years old,  
6 blamed himself for Lena’s death. *Id.* at 185. Shirley also described Ratliff’s repeated attempts to  
7 molest her and her sisters while they slept, Ratliff’s “corrupt[ing]” influence on her brothers, and  
8 her own suicide attempt after Emma disbelieved Shirley’s allegations against Ratliff. *Id.* at 186.

9 Shirley also described some of Petitioner’s good character traits. First, described  
10 Petitioner’s devotion to protecting his family. Petitioner tried to get his family to stop using drugs,  
11 protected his sisters, and was the only child who had a job to make sure his mother had money.  
12 Dkt. No. 131 at 186 (Appx. A, Exh. 19, Shirley Decl.). Moreover, in Tulare, Petitioner spent time  
13 with mentally disabled children that two of his aunts looked after. *Id.* at 182. If any of the  
14 siblings made fun of the mentally disabled children, Petitioner scolded them and explained why  
15 they deserved to be loved as well. *Id.*

16 Shirley noted that counsel never asked her about other potential mitigation witnesses and  
17 listed several witnesses she would have referred counsel to if he had asked for her help.

18 **5. Debra Walker Jefferson**

19 Debra Walker Jefferson (“Jefferson”) is Petitioner’s sister. Dkt. No. 131 at 60 (Appx. A,  
20 Exh. 6, Jefferson Decl.). In her declaration, Jefferson described growing up in poverty, working  
21 on farms picking fruits and vegetables as a child, and the family’s various living situations. *Id.* at  
22 63.

23 Like her siblings, Jefferson alleged that her father “whipped” the Walker children “a lot”  
24 with belts and “switches.” Dkt. No. 131 at 60 (Appx. A, Exh. 6, Jefferson Decl.). Emma often  
25 slapped the Walker children in the mouth with an open hand. *Id.* at 60, 63. Jefferson also  
26 described the family’s living arrangements. The Walker family regularly had friends and extended  
27 family living with them in their small homes and apartments. The children shared bedrooms, bunk  
28 beds, or sometimes slept in the living room. *Id.* at 63-64. Jefferson recalled that, at one point, six

1 adults and twenty-four children lived in the Walker home. *Id.* at 65.

2 Jefferson also noted the deaths of Ronald, Lena, and the Walker children’s beloved  
3 grandmother, Mamun, and described the family’s devastation over their deaths. Dkt. No. 131 at  
4 67-68 (Appx. A, Exh. 6, Jefferson Decl.). The loss of Lena’s children in a custody battle shortly  
5 after Lena’s death also had “devastating and permanent” effects on the family. *Id.* at 69. The  
6 family, with the exception of Petitioner, began using drugs and alcohol to deal with its sense of  
7 pain. In addition, Jefferson echoed her siblings’ sentiment that Ratliff was a bad influence on her  
8 brothers, that he tried to molest each of the sisters, and that he was a drug user. *Id.* at 70.

9 Jefferson’s declaration included a list of potential penalty phase witnesses she would have  
10 given to defense counsel if he had asked for her help.

11 **6. Marvin Pete Walker, Sr.**

12 Marvin, Sr. is Petitioner’s father. In his declaration, he summarized his own difficult  
13 childhood and early adulthood, as well as his history with Emma and the children. Dkt. No. 131 at  
14 156-173 (Appx. A, Exh. 18, Marvin, Sr. Decl.). Marvin Sr. described the difficulty of dealing  
15 with Ronald’s death while Petitioner was sick and being turned away from hospitals. *Id.* at 171.  
16 He also described Lena’s murder, calling it “the worst thing that ever happened to [the] family.”  
17 *Id.* at 172.

18 With respect to Petitioner, Marvin, Sr. stated that he “would have told the jury about  
19 [Petitioner’s] childhood in Tulare, how hard [Petitioner] worked, how much [Petitioner] tried to  
20 please [Marvin, Sr.], how many hardships [Petitioner] had to overcome in his young life. . . [and]  
21 would have told them of the strength of [Petitioner’s] character, and the reasons why [Marvin, Sr.]  
22 love[s] [Petitioner], and why [Petitioner] deserves to live.” Dkt. No. 131 at 173 (Appx. A, Exh.  
23 18, Marvin, Sr. Decl.).

24 **7. Extended Family and Teachers**

25 Petitioner also submitted thirteen declarations by members of his extended family and his  
26 teachers and counselors.

27 Members of Petitioner’s extended family, including several of his cousins and one of his  
28 uncles, confirmed that Marvin, Sr. beat his children, with one cousin calling the beatings “brutal

1 abuse.” Dkt. No. 131 at 106 (Appx. A, Exh. 10, Annette Marie Montgomery Decl.); *see id.* at 114  
2 (Appx. A, Exh. 11, Derrick Palmer Decl.) (stating that the children were afraid of Marvin, Sr.,  
3 who beat the children during family pinochle parties); *id.* at 119 (Appx. A, Exh. 12, Dwight  
4 Palmer Decl.) (stating that the children were afraid of Marvin, Sr. and that his beatings left the  
5 children with welts and sometimes drew blood); *id.* at 124 (Appx. A, Exh. 13, Darryl Preston  
6 Decl.) (calling Marvin, Sr. an “expert child whipper”); *id.* at 141 (Appx. A, Exh. 16, Rev. George  
7 Walker Decl.) (stating that Marvin, Sr. beat his children and sometimes raised “quite a welt” on  
8 the children’s bodies). Several members of the family also supported the allegation that Marvin,  
9 Sr., along with other adults present in the household, taunted and insulted the children during  
10 Marvin, Sr.’s beatings. *See* Dkt. No. 131 at 21 (Appx. A, Exh. 3, Felicia L. Carter Decl.) (stating  
11 that Petitioner’s father and the other adults “insulted and demeaned” the children during parties);  
12 *id.* at 93 (Appx. A, Exh. 8, Blanche Davis Martin Decl.) (stating that the adults “sexually taunted”  
13 Petitioner and the other children during beatings by Petitioner’s father); *id.* at 104 (Appx. A, Exh.  
14 10, Annette Marie Montgomery Decl.) (stating that the children became “objects to humiliate”  
15 during Petitioner’s parents’ pinochle parties). In addition, Petitioner’s cousins and uncle all noted  
16 how difficult Ronald and Lena’s deaths were on the family and confirmed that much of  
17 Petitioner’s family turned to hard drugs to try to cope with the loss. Several members of the  
18 family also noted that special needs children were common in Petitioner’s extended family. *See*  
19 *id.* at 142 (Appx. A, Exh. 16, Rev. George W. Walker) (stating that mental health issues were  
20 common in his family and noting his own special needs daughter); *id.* at 93 (Appx. A, Exh. 8,  
21 Blanche Davis Martin Decl.) (listing special needs children in Petitioner’s extended family).  
22 Moreover, at least two of Petitioner’s cousins stated their belief that Petitioner and the other males  
23 in the family of the same generation were molested by one or more adult males in the family. *See*  
24 *id.* at 93 (Appx. A, Exh. 8, Blanche Davis Martin Decl.); *id.* at 20 (Appx. A, Exh. 3, Felicia L.  
25 Carter Decl.).

26           Some of Petitioner’s teachers and counselors noted in their declarations that Petitioner was  
27 trustworthy and followed directions during high school, although he had poor school attendance.  
28 Dkt. No. 131 at 7 (Appx. A, Exh. 1, Louis Baldock Decl.) (noting that Petitioner acted as teaching

1 assistant and that Petitioner displayed a “positive attitude and low-key personality”). According to  
2 one teacher, Petitioner was involved with the Black Student Union on his campus and participated  
3 in its discussions and projects, but was often quiet during class. Dkt. No. 131 at 13 (Appx. A.,  
4 Exh. 2, William Boone Decl.). The teachers and counselors also noted that, at the time Petitioner  
5 was enrolled in school, black students were at a disadvantage and had little to no help. Dkt. No.  
6 131 at 13 (Appx. A, Exh. 2, William Boone Decl.) (stating that “the average black student like  
7 [Petitioner] was twice diminished, first by being discouraged from joining into class discussion  
8 and activity, and then by being perceived as threatening because of his silence and non  
9 participation”); *id.* at 132 (Appx. A, Exh. 14, Robert Sweat Decl.) (stating that “[p]oor black  
10 students . . . seemed cheated out of human resources” due to their white teachers, who were  
11 “uninformed and motivated by fear and bias” against black students); *id.* at 135 (Appx. A, Exh.  
12 15, Beatrice A. Thomas Decl.) (stating that “[f]or students like [Petitioner], who arrive from  
13 elementary school without having been taught the fundamentals, one can predict without a doubt  
14 that the student will certainly fail. . . [w]ithout the resources available for that intervention,  
15 [Petitioner’s] fate was sealed”). They also acknowledged the Walker family’s noticeable poverty  
16 and the appearance that Petitioner had taken over the role of the adult male in the household.

17 Each of Petitioner’s relatives and Beatrice A. Thomas, one of Petitioner’s school  
18 counselors, provided a list of witnesses they would have referred defense counsel to if he had  
19 asked for their help.

### 20 III. DISCUSSION

#### 21 A. Standard of Review Under AEDPA

22 Pursuant to the Anti-terrorism and Effective Death Penalty Act (AEDPA), a district court  
23 may not grant a writ of habeas corpus with respect to any claim that was adjudicated on the merits  
24 in state court unless the state court’s adjudication of the claim: “(1) resulted in a decision that was  
25 contrary to, or involved an unreasonable application of, clearly established Federal law, as  
26 determined by the Supreme Court of the United States; or (2) resulted in a decision that was based  
27 on an unreasonable determination of the facts in light of the evidence presented in the State court  
28 proceeding.” 28 U.S.C. § 2254(d). In determining whether a petitioner is entitled to relief under

1 this provision, a federal court’s review “is [generally] limited to the record that was before the  
2 state court that adjudicated the claim on the merits.” *Cullen v. Pinholster*, 563 U.S. 170 (2011).

3 The “contrary to” and “unreasonable application” prongs of § 2254(d)(1) have separate and  
4 distinct meanings. *See Williams v. Taylor*, 529 U.S. 362, 404 (2000). A state court’s decision is  
5 “contrary to” clearly established U.S. Supreme Court law if that decision fails to apply the correct  
6 controlling authority or if it applies the controlling authority to a case involving facts materially  
7 indistinguishable from those in a controlling case, but nonetheless reaches a different result. *Id.* at  
8 412–13. A decision is an “unreasonable application” of U.S. Supreme Court law if “the state court  
9 identifies the correct governing legal principle . . . but unreasonably applies that principle to the  
10 facts of the prisoner’s case.” *Id.* at 413. Importantly, ““an unreasonable application of federal law  
11 is different from an incorrect application of federal law.”” *Harrington v. Richter*, 562 U.S. 86, 101  
12 (2011) (quoting *Williams*, 529 U.S. at 410). A state court’s determination that a claim lacks merit  
13 is not unreasonable “so long as ‘fairminded jurists could disagree’ on [its] correctness.” *Id.*  
14 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

15 Holdings of the U.S. Supreme Court at the time of the state court decision are the only  
16 definitive source of clearly established federal law under section 2254(d)(1). *See Williams*, 529  
17 U.S. at 412; *see also Lopez v. Smith*, — U.S. —, 135 S.Ct. 1, 4 (2014) (per curiam) (“AEDPA  
18 permits habeas relief only if a state court’s decision is ‘contrary to, or involved an unreasonable  
19 application of, clearly established Federal law’ as determined by this Court, not by the courts of  
20 appeals”). While a federal court may “look to circuit precedent to ascertain whether [the circuit]  
21 has already held that the particular point in issue is clearly established by Supreme Court  
22 precedent.” *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (per curiam), “[c]ircuit precedent cannot  
23 refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that  
24 [the Supreme] Court has not announced.” *Lopez*, 135 S.Ct. at 4 (internal quotation marks  
25 omitted).

26 To find, under § 2254(d)(2), that a state court’s decision was based on “an unreasonable  
27 determination of the facts,” a federal court “must be convinced that an appellate panel, applying  
28 the normal standards of appellate review, could not reasonably conclude that the finding is

1 supported by the record before the state court.” *Hurles v. Ryan*, 752 F.3d 768, 778 (9th Cir. 2014)  
 2 (internal quotation marks omitted), cert. denied, — U.S. —, 135 S.Ct. 710 (2014). In other words,  
 3 “a state-court factual determination is not unreasonable merely because the federal habeas court  
 4 would have reached a different conclusion in the first instance.” *Burt v. Titlow*, 571 U.S. 12, 18  
 5 (2013) (internal quotation marks omitted). That said, “where the state courts plainly  
 6 misapprehend or misstate the record in making their findings, and the misapprehension goes to a  
 7 material factual issue that is central to petitioner’s claim, that misapprehension can fatally  
 8 undermine the fact-finding process, rendering the resulting factual finding unreasonable.” *Taylor*  
 9 *v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004), abrogated on other grounds in *Murray v. Schriro*,  
 10 745 F.3d 984, 1000 (9th Cir. 2014).

11 Under AEDPA, a federal court reviews “the last reasoned state-court decision.”  
 12 *Castellanos v. Small*, 766 F.3d 1137, 1145 (9th Cir. 2014). In a case where “no state-court  
 13 decision furnishes a basis for the state court’s underlying reasoning,” a federal court’s “duty under  
 14 AEDPA is not absolved.” *Murray v. Schriro*, 745 F.3d at 996. Rather, “the habeas petitioner’s  
 15 burden still must be met by showing there was no reasonable basis for the state court to deny  
 16 relief.” *Richter*, 562 U.S. at 98. To determine whether a petitioner has met this burden, a federal  
 17 court must ask “what arguments or theories supported or, . . . could have supported, the state  
 18 court’s decision” and decide “whether it is possible fairminded jurists could disagree that those  
 19 arguments or theories are inconsistent with the holding in a prior decision of [the U.S. Supreme  
 20 Court].” *Id.* at 102. Thus, when a state court does not supply reasoning for its decision, a federal  
 21 court “must engage in an independent review of the record and ascertain whether the state court’s  
 22 decision was objectively unreasonable.” *Castellanos*, 766 F.3d at 1145 (internal quotation marks  
 23 omitted). Critically, independent review of the record “is not a de novo review of the  
 24 constitutional question,” but rather the only way a federal court can determine whether a silent  
 25 state court decision is objectively unreasonable. *Murray*, 745 F.3d at 997.

26 In the event that a federal court “determine[s], considering only the evidence before the  
 27 state court, that the adjudication of a claim on the merits resulted in a decision contrary to or  
 28 involving an unreasonable application of clearly established federal law, or that the state court’s

1 decision was based on an unreasonable determination of the facts,” the federal court evaluates the  
2 petitioner’s constitutional claim “de novo.” *Hurles*, 752 F.3d at 778. If constitutional error is  
3 found, however, habeas relief is warranted only if that error “had substantial and injurious effect  
4 or influence in determining the jury’s verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993).  
5 Under this standard, petitioners “may obtain plenary review of their constitutional claims, but they  
6 are not entitled to habeas relief based on trial error unless they can establish that it resulted in  
7 ‘actual prejudice.’” *Brecht*, 507 U.S. at 637.

8 **B. Penalty Phase Ineffective Assistance of Counsel Claims**

9 The clearly established federal law applicable to this claim is set out in *Strickland v.*  
10 *Washington*, 466 U.S. 668 (1984). In *Strickland*, the U.S. Supreme Court held that ineffective  
11 assistance of counsel is cognizable as a denial of the Sixth Amendment right to counsel, which  
12 guarantees not only assistance, but effective assistance, of counsel. *Strickland*, 466 U.S. at 686.  
13 To prevail on an ineffective assistance of counsel claim, a petitioner must establish that: (1) his  
14 counsel’s performance was deficient, i.e., that it fell below an “objective standard of  
15 reasonableness” under prevailing professional norms; and (2) he was prejudiced by counsel’s  
16 deficient performance, i.e., that “there is a reasonable probability that, but for counsel’s  
17 unprofessional errors, the result of the proceeding would have been different.” *Id.* at 688-94. “A  
18 reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at  
19 694. Ultimately, a petitioner must overcome the “strong presumption that counsel’s conduct falls  
20 within the wide range of reasonable professional assistance” and “might be considered sound trial  
21 strategy” under the circumstances. *Id.* at 689 (internal quotation marks omitted). “In assessing  
22 adequacy of representation, ‘[the Court] is required not simply to give the attorneys the benefit of  
23 the doubt, but to affirmatively entertain the range of possible reasons [defense] counsel may have  
24 had for proceeding as he did.’” *Gallegos v. Ryan*, 820 F.3d 1013, 1030 (9th Cir. 2016) (citing  
25 *Pinholster*, 563 U.S. 170).

26 A “doubly” deferential standard of review is appropriate in analyzing ineffective assistance  
27 of counsel claims under AEDPA because “[t]he standards created by *Strickland* and § 2254(d) are  
28 both highly deferential.” *Richter*, 562 U.S. at 105 (internal quotation marks omitted). When

1 section 2254(d) applies, “the question is not whether counsel’s actions were reasonable. The  
2 question is whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential  
3 standard.” *Id.*

4 **1. Claim 2A**

5 Petitioner asserts in Claim 2A that defense counsel was ineffective at the penalty phase of  
6 trial. *See* Fed. Pet. at 28-35. Specifically, Petitioner argues defense counsel failed to investigate  
7 and introduce available vital evidence of Petitioner’s childhood abuse and poverty, his mental  
8 deficiencies due to brain damage, and Petitioner’s “educational, psychological, medical,  
9 institutional, cultural and social history and background. . . .” Pet. Br. at 28. Respondent  
10 concedes that at least some of defense counsel’s conduct fell below an objective standard of  
11 reasonableness, but argues that Petitioner has failed to show prejudice. Resp. Br. at 27. Claim 2A  
12 was denied by the California Supreme Court in a summary opinion.

13 **a. Counsel’s Failure to Investigate: Background Evidence**

14 As noted, Petitioner points to several alleged deficiencies in counsel’s performance during  
15 the penalty phase. First, Petitioner notes that defense counsel, who had not tried a capital case  
16 before appearing on Petitioner’s case, had “no assistant, clerk, secretary or anyone else in the  
17 courtroom to help during trial.” Fed. Pet. at 196. While not dispositive as to ineffectiveness, the  
18 Court agrees that counsel’s inexperience and lack of help contextualize his subsequent failure to  
19 prepare for the penalty phase of trial.

20 Petitioner next points to defense counsel’s failure to begin preparing for the penalty phase  
21 until after the guilt phase had already concluded, leaving counsel with only one day to prepare.  
22 RT 3099, 3115; Pet. Br. at 197. “[W]hen it comes to the penalty phase of a capital trial, ‘it is  
23 imperative that all relevant mitigation information be unearthed for consideration.’” *Douglas v.*  
24 *Woodford*, 316 F.3d 1079, 1088 (9th Cir. 2003) (quoting *Caro v. Calderon*, 165 F.3d 1223, 1227  
25 (9th Cir. 1999)). While defense counsel is not required to uncover every piece of mitigation under  
26 the sun, “counsel has a duty to make reasonable investigations or to make a reasonable decision  
27 that makes particular investigations unnecessary.” *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)  
28 (quoting *Strickland*, 466 U.S. at 690-91). In the past, the Supreme Court has held that a limited

1 weeklong penalty phase investigation—seven times as long as counsel’s investigation here—was  
2 deficient. *See Williams v. Taylor*, 529 U.S. 362, 395 (2000). Accordingly, the Court agrees that  
3 counsel’s failure to give himself more than one day for penalty phase investigation cannot be  
4 characterized as a reasonable trial tactic.

5 Even assuming a reasonable investigation could have been conducted within one day,  
6 however, counsel appears to have conducted no meaningful investigation after the guilt phase  
7 concluded. Counsel failed to take any steps required for a cursory investigation, let alone an  
8 adequate one. For example, there is no evidence counsel hired an investigator to carry out any  
9 penalty phase investigation or otherwise interviewed Petitioner’s family, teachers, counselors,  
10 psychiatrists, psychologists or anyone else who may have examined or spent significant time with  
11 him during his childhood or adulthood. *See* Dkt. 85 at 22 (cousin Felicia Carter); Dkt. 85 at 39  
12 (sister Vernelle W. Harper); Dkt. 85 at 153 (brother Johnny K. Walker); Dkt. 85 at 88 (cousin  
13 John Lewis); Dkt. 85 at 96 (cousin Blanche D. Martin); Dkt. 85 at 111 (cousin Annette M.  
14 Montgomery); Dkt. 85 at 127 (cousin Darryl Preston); Dkt. 85 at 186 (sister Shirley A. Walker);  
15 Dkt. 85 at 15 (high school teacher William Boone); Dkt. 85 at 9 (high school teacher Louis  
16 Baldock); Dkt. 85 at 137 (high school counselor Beatrice A. Thomas). Each of Petitioner’s  
17 proffered witnesses was willing to testify and it is clear that most, if not all, of Petitioner’s  
18 proffered testimony in support of this claim would have been admissible and favorable to him.  
19 Counsel’s failure to contact witnesses is even more egregious when considering that counsel  
20 appears to have ignored investigative leads provided to him by Petitioner’s family: when  
21 Petitioner’s mother and brother visited defense counsel in his office to offer him a list of potential  
22 witnesses who could testify on behalf of Petitioner, counsel rejected the list and told them he had  
23 everything he needed. Dkt. 133-1 at 94; Dkt. 133-2 at 1. Had counsel conducted even a cursory  
24 investigation, he would have undoubtedly encountered “the presence of certain elements in  
25 [Petitioner’s] background, such as a family history of alcoholism, abuse, and emotional problems,  
26 [which would have] trigge[ed] a duty to conduct further inquiry.” *Earp v. Ornoski*, 431 F.3d  
27 1158, 1175-76 (9th Cir. 2005); *see Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995)  
28 (finding ineffective assistance where counsel did not prepare for the penalty phase in any

1 significant way despite the availability of strong mitigating evidence). Thus, Petitioner has shown  
2 counsel’s near-total failure to investigate even after the guilt phase fell below reasonable  
3 professional standards.

4 Petitioner also argues defense counsel was ineffective in selecting and preparing the  
5 penalty phase witnesses he did present at Petitioner’s penalty phase trial. According to Petitioner,  
6 defense counsel chose witnesses on the morning of the first day of the penalty phase by choosing  
7 from the members of Petitioner’s friends and family who happened to be in attendance to watch  
8 the proceedings. Fed. Pet. at 29. Counsel also allegedly recruited his penalty phase witnesses  
9 without explaining the function of the penalty phase, the purpose of their testimony, or the range  
10 of permissible evidence. *Id.* The record supports these assertions and Respondent concedes that  
11 defense counsel’s conduct in doing so was constitutionally ineffective.

12 The Court once again agrees with the parties. “[T]he failure to prepare a witness  
13 adequately can render a penalty phase presentation deficient.” *Hamilton v. Ayers*, 583 F.3d 1100,  
14 1121 (9th Cir. 2009); *see also Williams v. Filson*, 908 F.3d 546, 566 (9th Cir. 2018) (finding  
15 counsel ineffective when he “failed not only to elicit relevant information, but also to prepare the  
16 family members and friends who testified at the sentencing hearing”). Petitioner’s proffered  
17 evidence shows that counsel “prepared” his penalty phase witnesses only by telling them to plead  
18 for Petitioner’s life and try to cry, if possible. *See* Dkt. 131 at 71 (Petitioner’s sister, Jefferson,  
19 stating that “[i]n the few minutes that [Petitioner’s] lawyer spent with me before I took the witness  
20 stand, he told me to beg for my brother’s life and to cry if I could”); *see* Dkt. 131 at 56  
21 (Petitioner’s sister Marlene, stating that “[a] few minutes before [Petitioner’s] penalty trial began,  
22 his lawyer took my mother, my sister [Jefferson], [Petitioner’s] girlfriend Denise Jackson, and me  
23 into the corridor of the courthouse next to the elevators. . . . Without explaining anything, he told  
24 us that he was going to call us to the witness stand to plead for [Petitioner’s] life. He never asked  
25 us anything about [Petitioner] and our family. . . . Before that meeting, [Petitioner’s] attorney had  
26 never spoken to me”). Counsel did not interview each witness to determine potential penalty  
27 phase questions, explain the mitigating factors, or identify the permissible scope of evidence at the  
28 penalty phase. Given the undisputed evidence that Petitioner’s penalty phase witnesses were

1 willing to testify to substantial classic mitigating evidence,<sup>4</sup> the Court can find no reasonable  
2 strategic basis for counsel’s failure to prepare his penalty phase witnesses.

3 In addition, counsel’s examination of his penalty phase witnesses similarly fell below  
4 reasonable professional standards. Without the benefit of a reasonable investigation, counsel  
5 could not develop a reasonable strategy for the penalty phase. *Correll v. Ryan*, 539 F.3d at 949  
6 (“An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all”). Counsel’s  
7 failure to elicit the substantial mitigating evidence despite its availability from several of his  
8 penalty phase witnesses has no reasonable strategic basis.

9 Based on the various deficiencies described above, the Court concludes Petitioner has  
10 shown counsel’s penalty phase investigation and presentation regarding Petitioner’s background  
11 fell below an objective standard of reasonableness. *See Rompilla v. Beard*, 545 U.S. 374, 390-93  
12 (2005) (finding of ineffective assistance of counsel where counsel failed to discover and present  
13 evidence that defendant was raised in a slum, was physically abused by his parents and witnessed  
14 his father’s abuse of his mother, did not complete his high school education, had no indoor  
15 plumbing, and had mental health issues); *Williams*, 529 U.S. at 369, 370 (finding of ineffective  
16 assistance of counsel where counsel failed to investigate and present evidence that defendant had  
17 been abused and neglected during his childhood, and that he was “borderline mentally retarded,  
18 had suffered repeated head injuries, and might have mental impairments organic in origin”); *Karis*  
19 *v. Calderon*, 283 F.3d 1117, 1139 (9th Cir. 2002) (finding of ineffective assistance of counsel  
20 where counsel failed to present evidence of defendant’s frequent “vicious[] beat[ings]” by  
21 stepfather and mother).

22 **b. Counsel’s Failure to Investigate: Mental Health Evidence**

23 Additionally, Petitioner argues counsel was ineffective in failing to consult with mental  
24 health experts regarding Petitioner’s psychological and medical history despite Petitioner’s brain  
25 damage. *See Fed. Pet.* at 29. Respondent argues that while Petitioner’s mental health issues may  
26 have been obvious to Dr. Pettis during his examination of Petitioner, “[i]t does not follow . . . that

27 \_\_\_\_\_  
28 <sup>4</sup> The Court will examine the proffered evidence in more detail when it considers whether  
Petitioner has shown prejudice.

1 diagnoses made upon 1997 testing on a death row inmate . . . would have been obvious 18 years  
2 earlier.” *See* Resp. Br. at 29.

3 “[W]here counsel is on notice that his client may be mentally impaired, counsel’s failure to  
4 investigate his client’s mental condition as a mitigating factor in a penalty phase hearing, without  
5 a supporting strategic reason, constitutes deficient performance.” *Hendricks v. Calderon*, 70 F.3d  
6 at 1043.

7 According to Petitioner’s proffered evidence, Petitioner suffered from brain damage, which  
8 affected Petitioner’s “cognitive functioning.” *See* Dkt. No. 130-1 (Exh. J, Dr. Pettis Decl.).  
9 According to Petitioner, the brain damage was “evident in [his] ‘speech impediment, and his  
10 behavior.’ . . . [and] alone should have put [defense counsel] on notice to investigate [Petitioner’s]  
11 cognitive functioning.” Pet. Reply Br. at 6. As noted, Petitioner has also submitted evidence that  
12 he was subjected to serious emotional and physical abuse throughout his life and “had learning  
13 disabilities,” *see* Dkt. No. 130-1 at 166 (Exh. J, Dr. Pettis Decl.). It appears that, had counsel  
14 conducted a competent investigation, these factors may have led counsel to engage mental health  
15 experts to examine the source of Petitioner’s educational difficulties and the psychological effects  
16 of Petitioner’s abuse. However, while Dr. Pettis and Dr. Watson described Petitioner’s mental  
17 impediments as “long-standing,” *see* Dkt. No. 130-1 (Exh. J, Dr. Pettis Decl.) at 165, *id.* at 60  
18 (Exh. I, Dr. Watson Decl.), Petitioner does not point to anything in the trial record or in counsel’s  
19 possession that would have certainly placed counsel on notice that Petitioner had any mental  
20 impairment. Petitioner has therefore not shown the state court’s denial of this portion of his claim  
21 was objectively unreasonable. *See Richter*, 562 U.S. at 101 (“The pivotal question is whether the  
22 state court’s application of the *Strickland* standard was unreasonable. This is different from  
23 asking whether defense counsel’s performance fell below *Strickland*’s standard”); 28 U.S.C.  
24 § 2254(d).

25 **c. Prejudice**

26 The Court now turns to the issue of prejudice. As noted, to establish prejudice, Petitioner  
27 must demonstrate a reasonable probability that, but for defense counsel’s deficiency, he would not  
28 have been sentenced to death. *See Wiggins*, 539 U.S. at 534-538. “In assessing prejudice, [the

1 Court must] reweigh the evidence in aggravation against the totality of available mitigating  
2 evidence.” *Id.* at 534.

3 Respondent argues that Petitioner has not shown the state court’s denial of his claim was  
4 unreasonable for purposes of § 2254(d) because the aggravating evidence was “overwhelming,”  
5 *People v. Walker*, 47 Cal.3d at 640, and the state court reasonably could have concluded there was  
6 no reasonable probability that the proffered evidence would have influenced the jury’s death  
7 verdict. Resp. Br. at 30-31. Specifically, Respondent points to the evidence that Petitioner  
8 “murder[ed] one person and assault[ed] two others in execution-style shootings of unarmed and  
9 unresisting victims, two of whom were teenagers. One month later [Petitioner] viciously pistol-  
10 whipped a young woman and shot her twice in the head in order to facilitate his escape with her  
11 \$11 and her car.” Resp. Br. at 31 (quoting *People v. Walker*, 47 Cal.3d at 640). Respondent also  
12 points to the threats allegedly made by Petitioner against MacIvor and a deputy district attorney .

13 The Court first notes that the California Supreme Court noted the “overwhelming” nature  
14 of the aggravating evidence before it had the opportunity to consider Petitioner’s proffered  
15 mitigating evidence. In comparison to the evidence offered by counsel on Petitioner’s behalf  
16 during the penalty phase—which “consisted of the fact that he was [nineteen] years old at the time  
17 of the offenses, had no prior criminal record, had done yard work for a church secretary in the  
18 past, gave a friend rides to work, provided financial and emotional support to his mother and  
19 sister, and was loved by them and his girlfriend,” *Walker v. Martel*, 709 F.3d 925, 931 (9th Cir.  
20 2013), the aggravating evidence was indeed “overwhelming.” However, Petitioner has since  
21 proffered substantial mitigating evidence and the state court’s previous finding is no longer  
22 relevant.

23 Next, Respondent argues that Petitioner’s case is analogous to *Woodford v. Visciotti*, 537  
24 U.S. 19 (2002). In *Visciotti*, the prosecution presented evidence, during the penalty phase, that  
25 petitioner Visciotti, who had been convicted of a “cold-blooded execution-style killing of one  
26 victim and attempted execution-style killing of another, both during the course of a preplanned  
27 armed robbery,” *id.* at 26, had previously stabbed a man and “a pregnant woman as she lay in bed  
28 trying to protect her unborn baby.” *Id.* On federal habeas, Visciotti claimed that counsel was

1 ineffective in failing to investigate and discover evidence that he was born with club feet and that  
2 he was berated, lacking in self-esteem, frequently moving as a child, and potentially suffered from  
3 a seizure disorder. *Id.* The Supreme Court found that the aggravating evidence was “devastating”  
4 in comparison to Visciotti’s mitigating evidence. Based on AEDPA deference, the Court held that  
5 Petitioner failed to show the state court’s conclusion that Petitioner was not prejudiced by  
6 counsel’s deficient conduct was unreasonable. *Id.*

7 While the underlying offenses in *Visciotti* are similar to the offenses in Petitioner’s case,  
8 however, the proffered mitigating evidence in each case is significantly different. In *Visciotti*, the  
9 Supreme Court emphasized the relative weakness of the proffered mitigating evidence. In  
10 contrast, Petitioner’s proffered evidence cannot reasonably be characterized as weak. Petitioner  
11 endured not only being berated by his family, moving frequently, and lacking in self-esteem at  
12 school—the three mitigating circumstances identified by the Supreme Court in *Visciotti*—but also,  
13 as will be discussed in more detail below, suffered from extreme poverty, hunger, violence, family  
14 deaths, and other serious hardships.

15 *Williams v. Taylor*, 529 U.S. 362 (2000), is instructive.<sup>5</sup> In *Williams*, the Supreme Court  
16 held that petitioner Williams, who had been convicted of robbery and capital murder, was  
17 prejudiced by his attorney’s ineffective conduct during the penalty phase. Williams’ attorney did  
18 not begin preparing for the penalty phase until a week before the trial and “failed to conduct an  
19 investigation that would have uncovered extensive records graphically describing Williams’  
20 nightmarish childhood.” *Id.* at 395. During his state habeas proceedings, Williams proffered  
21 evidence that he was severely and repeatedly beaten by his father, that his parents were  
22 imprisoned, and that he was subsequently placed in an abusive foster home. His attorney also  
23 failed to uncover evidence of Williams’ borderline mental retardation and prison records reflecting  
24 favorably on the defendant’s conduct while incarcerated.

25 Like Respondent argues in the case at hand, the state in *Williams* argued that Williams

26 \_\_\_\_\_  
27 <sup>5</sup> While the Supreme Court in *Williams* did not apply AEDPA deference in making its  
28 ruling, *Williams* was clearly established Supreme Court precedent for purposes of *Strickland*  
analysis as to prejudice at the time the California Supreme Court denied Petitioner’s claim on state  
habeas in 2004.

1 failed to show prejudice because the evidence would not rebut or outweigh the facts of the case or  
2 Williams' lengthy history of violence and crime. The prosecution had introduced Williams' prior  
3 convictions for armed robbery, burglary, and grand larceny and presented evidence that Williams  
4 had confessed to two auto thefts and two separate violent assaults on elderly victims. In one  
5 assault, Williams started a fire outside an elderly man's house before attacking and robbing him.  
6 In the other, Williams brutally attacked an elderly woman, leaving her in a vegetative state.  
7 Finally, Williams started a fire in the jail while he was being held for trial. *Williams*, 529 U.S. at  
8 368-69. Despite the considerable aggravating evidence, the Supreme Court rejected the state's  
9 contention that Williams did not show prejudice and found that the compelling mitigating  
10 evidence may have influenced the jury's appraisal of the defendant's moral culpability "even if it  
11 does not undermine or rebut the prosecution's death-eligibility case." *Id.* at 398. Given the  
12 compelling nature of the mitigating evidence, the Court concluded that Williams had been  
13 prejudiced by his attorney's deficient conduct. *Id.*

14           Petitioner's case is analogous to *Williams*. Here, Petitioner has submitted considerable  
15 mitigating evidence, including evidence comparable to that which was found compelling by the  
16 Supreme Court. For example, Petitioner attended school in visibly-worn clothing, was visibly  
17 malnourished, and wore shoes so worn down that his feet were visible through holes in his soles.  
18 Petitioner witnessed Marvin, Sr.'s beatings of Emma and was himself regularly beaten by Marvin,  
19 Sr., who used belts and cords and sometimes drew blood. The ritualized beatings by Marvin, Sr.  
20 often involved psychological abuse as well. Petitioner and his siblings were "whipped" more if  
21 they cried, tried to protect their bottoms, or tried to defend each other. When other adults were  
22 present during the beatings, they taunted and made fun of the children as the beatings were carried  
23 out. In addition, Petitioner was beaten by Emma, who suffered from severe mood swings, with  
24 her hand or a metal pipe. Despite the potential consequences of doing so, Petitioner often tried to  
25 stop Marvin, Sr. from beating Emma and the children. Petitioner was often singled out for  
26 beatings by Marvin, Sr. for disobeying his rule that the children were not allowed to take peaches  
27 from the yard's peach tree or cook any fish from Marvin, Sr.'s freezer, but Petitioner continued to  
28 feed his siblings the food.

1           Petitioner’s childhood also involved severe illness and traumatic family deaths. For  
2           example, Petitioner survived meningitis at a young age after he and his younger sibling, Donald,  
3           contracted the disease. Petitioner went into a coma and, upon waking several days later, was  
4           informed that Donald did not survive. Marvin, Sr. left the family shortly thereafter, forcing  
5           Petitioner, who was then a young child, to take over the role of “protecting” his family. A few  
6           years later, Petitioner witnessed the gruesome scene of the murder of his sister, Lena, after her  
7           estranged husband stabbed her and left her to die, naked and bleeding, at a neighbor’s door.  
8           Lena’s death, in turn, led Petitioner’s mother and siblings to begin abusing alcohol and other drugs  
9           while Petitioner, who was only twelve years old, tried to remain “strong,” Pet. Br. at 71.  
10          Petitioner tried to help his family, eventually dropping out of school to work and support them.

11          Following Ratliff’s arrival in the Walker home, Petitioner also became a protector for his  
12          sisters against Ratliff’s sexual abuse. Two of Petitioner’s sisters moved to an apartment in a  
13          dangerous part of town, and Petitioner eventually moved in with them in order to take care of  
14          them. Another sister attempted suicide after she accused Ratliff of sexual abuse and Emma  
15          accused her of lying. Ratliff also had a negative effect on the Walker brothers. Ratliff used  
16          Petitioner and his brothers during his scams and, according to several of Petitioner’s proffered  
17          witnesses, taught the children how to be criminals. Ratliff was also a drug user. Despite the  
18          turmoil in Petitioner’s family life, Petitioner’s attempts to care for his family continued into  
19          Petitioner’s young adulthood. As noted by his family members during their penalty phase  
20          testimony, Petitioner often lent them money. Shortly before the crimes, Petitioner’s family did not  
21          have food to eat. Petitioner took an expedition to Tulare, California, to fish for food, bringing  
22          back several bags of fish for them.

23          Finally, while Petitioner has not met his burden pursuant to § 2254(d) of showing that the  
24          state court could not reasonably conclude that counsel did not have adequate notice of Petitioner’s  
25          brain damage and mental impairments, there is at least some evidence that, had counsel conducted  
26          a reasonable investigation, he would have discovered that Petitioner suffered from “long-standing”  
27          brain damage which affected Petitioner’s “cognitive functioning.” See Dkt. No. 130-1 (Exh. J, Dr.  
28          Pettis Decl.). Petitioner’s proffered mental health evidence also shows that the systematic

1 ritualized beatings by Petitioner’s father, “which at times constituted torture, affected every aspect  
2 of his development and life, including brain function, emotional responses, perception of the  
3 world around him, beliefs about himself, sense of personal integrity, and relationships with  
4 others.” *Id.* at 175.

5 Accordingly, Petitioner’s proffered mitigating evidence was at least as considerable and  
6 compelling, if not more, as the proffered evidence in *Williams*. Had counsel performed an  
7 adequate investigation, the proffered evidence would have given the jury insight into Petitioner’s  
8 “nightmarish childhood,” *Williams*, 529 U.S. at 395, the various tragedies which plagued  
9 Petitioner and his family throughout his youth and into his early adulthood, and Petitioner’s  
10 devotion to his family. “[C]ounsel’s duty is not discharged merely by presenting some limited  
11 evidence. Rather, a penalty phase ineffective assistance claim depends on the magnitude of the  
12 discrepancy between what counsel did investigate and present and what counsel could have  
13 investigated and presented.” *Hamilton v. Ayers*, 583 F.3d 1100, 1135-36 (9th Cir. 2009). The  
14 evidence introduced during Petitioner’s penalty phase of trial, summarized by the Ninth Circuit as  
15 consisting of “the fact that he was [nineteen] years old at the time of the offenses, had no prior  
16 criminal record, had done yard work for a church secretary in the past, gave a friend rides to work,  
17 provided financial and emotional support to his mother and sister, and was loved by them and his  
18 girlfriend,” *Walker v. Martel*, 709 F.3d 925, 931, simply did not compare in quality and quantity  
19 to Petitioner’s proffered evidence. Moreover, counsel’s failure to adequately prepare for the  
20 penalty phase left jurors with the impression that, apart from living in poverty, Petitioner’s  
21 childhood was ordinary and supportive, an impression that Petitioner’s proffered evidence shows  
22 to be markedly false. But for counsel’s ineffectiveness, the jurors “would have learned that  
23 [Petitioner] had precisely ‘the kind of troubled history [the Supreme Court] has[s] declared  
24 relevant to assessing a defendant’s moral culpability.’” *Williams v. Filson*, 908 F.3d at 569  
25 (quoting *Wiggins*, 539 U.S. at 535).

26 The proffered evidence would have also allowed counsel to more effectively emphasize the  
27 importance of Petitioner’s youth as a statutorily-defined mitigating factor. As noted by the  
28 Supreme Court in *Roper v. Simmons*, “[t]he reality that juveniles still struggle to define their

1 identity means it is less supportable to conclude that even a heinous crime committed by a juvenile  
2 is evidence of irretrievably depraved character.” *Roper v. Simmons*, 543 U.S. 551, 570 (2005).  
3 Petitioner was only nineteen years old at the time of the crimes and by then had “witness[ed] and  
4 survive[d] overwhelming events that are outside the range of normal human experiences.” Dkt.  
5 No. 130-1 (Exh. J, Dr. Pettis Decl.) at 139. Thus, even if the proffered evidence would not  
6 necessarily rebut the aggravating nature of Petitioner’s crimes, the proffered evidence would have  
7 provided the jury with a different understanding of Petitioner’s life and character. Such a  
8 deepened understanding may well have influenced at least one juror’s appraisal of Petitioner’s  
9 moral culpability. *See Williams*, 529 U.S. at 398; *see also Wiggins*, 539 U.S. at 538.

10 Respondent also argues Petitioner has not shown prejudice because some of Petitioner’s  
11 proffered evidence would have opened the door to other unfavorable evidence. For example,  
12 Respondent argues the proffered testimony by Jefferson—who testified at Petitioner’s penalty  
13 phase—would have opened the door to the introduction of Jefferson’s statements to an  
14 investigator that Petitioner told her about his sex life, burglaries, and that he had once been  
15 charged with rape. Respondent makes similar arguments regarding evidence that Ratliff was in  
16 Petitioner’s car during Petitioner’s sale of the gun used in the crimes and notes that Petitioner’s  
17 proffered evidence regarding his kindness to special needs children would have been double-edged  
18 because Vasquez, the only victim who died during the commission of the underlying crimes, also  
19 had special needs. Respondent’s argument is unpersuasive. Even if some of the proffered  
20 evidence could have been interpreted in a negative light, the bulk of the evidence would have been  
21 favorable to Petitioner and would have significantly strengthened Petitioner’s penalty phase  
22 presentation. Moreover, given the substantial nature of Petitioner’s proffered evidence, the Court  
23 concludes Respondent has simply not shown that the aggravating evidence was so considerable  
24 that a death penalty verdict was inevitable.

25 Based on the aforementioned, the Court concludes that counsel’s failure to investigate  
26 Petitioner’s background and failure to prepare the few witnesses he presented during the penalty  
27 phase amounted to deeply ineffective assistance of counsel. Counsel’s near-total failure to  
28 investigate and prepare for the penalty phase deprived Petitioner of a fair penalty phase trial whose

1 result was reliable. *Strickland*, 466 U.S. at 687. Moreover, “[t]he [state court’s] decision that  
2 [Petitioner] was not prejudiced by his counsel’s failure to conduct a thorough—or even cursory—  
3 investigation is unreasonable. The . . . [c]ourt either did not consider or unreasonably discounted  
4 the [proffered] mitigation evidence.” *Porter v. McCollum*, 558 U.S. 30, 42 (2009); *see Strickland*,  
5 466 U.S. at 687. Petitioner has met his burden pursuant to § 2254(d).

6 Accordingly, Claim 2A<sup>6</sup> will be **PARTIALLY GRANTED**.

7 **2. Ineffective Assistance of Counsel Claim 2E**

8 In Claim 2E, Petitioner argues counsel was constitutionally ineffective when he conducted  
9 a “rambling and unfocused” direct examination of Petitioner during the penalty phase of his trial.  
10 *See* Fed. Pet. at 33. Specifically, Petitioner argues counsel was ineffective because he failed to  
11 elicit testimony about Petitioner’s childhood, his family’s poverty, and other mitigating evidence  
12 that would have placed Petitioner’s crimes into context. Pet. Br. at 60. Petitioner also faults  
13 counsel for eliciting a statement from Petitioner that he had been unjustly convicted. Fed. Pet. at  
14 33. Respondent argues Petitioner has not shown counsel’s examination was ineffective or that  
15 Petitioner was prejudiced. Resp. Br. at 15-16.

16 To the extent Petitioner’s proffered evidence shows that counsel examined Petitioner  
17 without having conducted any background investigation or preparing an informed penalty phase  
18 strategy, Petitioner has shown that counsel’s conduct fell below reasonable standards of  
19 competence. “An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all.”  
20 *Correll v. Ryan*, 539 F.3d at 949; *see Strickland*, 466 U.S. at 690-91 (“[S]trategic choices made  
21 after less than complete investigation are reasonable precisely to the extent that reasonable  
22 professional judgments support the limitations on investigation”). Petitioner has also shown  
23

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24 <sup>6</sup> Petitioner argues the Court must also consider Claim 2B, that counsel was ineffective in  
25 failing to object to the prosecution’s introduction of the alleged threats made by Petitioner against  
26 MacIvor and a deputy district attorney, insofar as counsel’s failure to investigate the aggravating  
27 evidence affected Petitioner’s penalty phase presentation. Pet. Br. at 61. The Court denied Claim  
28 2B on February 2, 2010, after finding that Petitioner had not shown prejudice as a result of the  
admission of the aggravating evidence. Dkt. No. 189 at 9-11. As such, even assuming arguendo  
that counsel was ineffective in failing to investigate the circumstances of the alleged threats,  
Petitioner has not shown counsel’s failure to specifically rebut the aggravating evidence was  
prejudicial.

1 prejudice. As noted in the preceding section, defense counsel’s failure to perform any meaningful  
2 penalty phase investigation led to counsel’s failure to discover compelling mitigating evidence  
3 about Petitioner’s “nightmarish childhood,” his family’s extreme hardships, and his devotion to  
4 caring for his family. Counsel’s failure to ask Petitioner any questions about his life therefore  
5 deprived Petitioner of the opportunity to introduce evidence that “might have influenced the jury’s  
6 appraisal” of his culpability. *See Williams v. Taylor*, 529 U.S. at 398. Given counsel’s undisputed  
7 egregious failure to conduct any meaningful penalty phase preparation and the substantial  
8 mitigating evidence available at the time of Petitioner’s trial, the state court’s denial of this portion  
9 of Petitioner’s claim was contrary to and an unreasonable application of Supreme Court precedent.  
10 *See* 28 U.S.C. § 2254(d)(1); *see also Strickland*, 466 U.S. at 687; *Wiggins*, 539 U.S. at 538.  
11 Accordingly, the above-identified portion of Claim 2E will be **GRANTED**.

12 To the extent Petitioner argues that counsel’s examination of Petitioner was deficient  
13 because it led to Petitioner’s testimony that he was unjustly convicted, the Court concludes  
14 Petitioner has not shown the state court’s denial of that portion of his claim was unreasonable.  
15 Petitioner’s testimony allowed him to plead for his own life and tell the jury that he wanted to live,  
16 RT 3249-50, and Petitioner’s proclamation that he was unjustly convicted was consistent with  
17 Petitioner’s insistence that he did not commit the crimes. In sum, reasonable minds could differ as  
18 to whether Petitioner has shown he was prejudiced by counsel’s deficient direct examination  
19 insofar as it led to Petitioner’s testimony that he was unjustly convicted. *See Richter*, 562 U.S. at  
20 101; 28 U.S.C. § 2254(d). This portion of Claim 2E will be **DENIED**.

21 **3. Ineffective Assistance of Counsel Claim 2F**

22 In Claim 2F, Petitioner argues that counsel was constitutionally ineffective when he  
23 “delivered a rambling and unfocused penalty summation,” pointing to various alleged errors. *See*  
24 Fed. Pet. at 33. The California Supreme Court denied this claim in a summary opinion.

25 The right to effective assistance of counsel extends to closing arguments. *See Bell v. Cone*,  
26 535 U.S. 685 (2002). Counsel, however, has wide latitude in deciding how to represent a client,  
27 and “deference to counsel’s tactical decisions in his closing presentation is particularly important  
28 because of the broad range of legitimate defense strategy at that stage.” *Yarborough v. Gentry*,

1 540 U.S. 1, 6 (2003). A reviewing court must therefore observe high deference during review of  
2 an attorney’s closing argument, and doubly so when review is conducted through the lens of  
3 AEDPA. *Id.*

4 Petitioner first argues that counsel was ineffective when he “repeatedly told the jury that  
5 the law was against [Petitioner] on the critical question of balancing aggravating and mitigating  
6 factors.” Pet. Br. at 42-43, 63. Specifically, Petitioner contends that counsel misstated the law as  
7 to the application and role of aggravating and mitigating factors when he told the jury that “if you  
8 find that you’ve got one, two, three, four, five, six, seven, eight on the death penalty, then they  
9 automatically throw away life imprisonment without possibility of parole and give [Petitioner] the  
10 death sentence.” RT at 3316-17. Respondent does not dispute that counsel misstated the law but  
11 asserts the state court reasonably could have concluded that there was no prejudice because it was  
12 unlikely that the jurors interpreted counsel’s statements as concessions. Resp. Br. at 19-20. The  
13 Court agrees with the parties that there was no reasonable strategic basis to counsel’s outright  
14 misstatements of the law. *See People v. Walker*, 47 Cal.3d at 643 (noting that “weighing” of the  
15 aggravating and mitigating factors should not reflect a mechanical counting of factors on each side  
16 because jurors may assign whatever moral or sympathetic value to each factor). The Court will  
17 consider Respondent’s contention that Petitioner has not shown prejudice in conjunction with the  
18 other errors alleged within Claim 2F.

19 Petitioner also argues that counsel was ineffective when counsel suggested there were  
20 numerous rationales to impose the death penalty, including that the death penalty would prevent  
21 Petitioner from killing again, would be the “popular” thing to do, and would satisfy the jury’s  
22 sense of vengeance. Pet. Br. at 45-46. Respondent argues the record clearly shows that counsel  
23 was arguing against the jury’s reliance on the three rationales. Resp. Br. at 21. The Court has  
24 reviewed the record and agrees with Respondent that it appears counsel was attempting to  
25 persuade the jury against relying on future killings, popularity, or vengeance to impose the death  
26 penalty, telling the jurors that Petitioner was “a human being, that he has done things to help  
27 others, that he has been worthwhile in his activities, [and] that he is a person of worth.” RT 3290-  
28 91. While counsel’s delivery was not ideal, given the considerable deference to counsel’s strategic

1 decisions mandated by *Strickland* and AEDPA, the Court concludes Petitioner has not shown no  
2 reasonable jurist could find that counsel’s conduct fell “within the wide range of reasonable  
3 professional assistance” and “might be considered sound trial strategy” under the circumstances.  
4 *Strickland*, 466 U.S. at 689.

5 Petitioner further argues counsel was ineffective when he disclaimed the existence of  
6 powerful mitigating evidence during his closing argument. Specifically, Petitioner points to a  
7 series of statements by counsel, including his statement that Petitioner’s crimes were “cruel,  
8 they’re vicious acts [and] . . . were unjustified,” RT 3287; that Petitioner “ha[d]n’t done anything  
9 in his life” because he did not maintain employment, his family was on welfare, he glared at  
10 people, and had not done anything “worthwhile,” RT 3317; and that the jury may have expected  
11 Petitioner’s family to testify that Petitioner had done “all kinds of good for people” or that  
12 Petitioner was “a saint,” but Petitioner was “not a saint.” RT 3318; *see* Pet. Br. at 43-44.  
13 Respondent asserts that counsel’s statements indicate that he was attempting to “maintain the trust  
14 of the jury, and such an attempt does not fall below professional norms.” Resp. Br. at 20 (citing  
15 *Florida v. Nixon*, 543 U.S. 175, 192 (2004) and *Hoffner v. Bradshaw*, 622 F. 3d 487, 501-03 (6th  
16 Cir. 2010)). Some courts, including the Supreme Court, have upheld guilt and penalty judgments  
17 in which defense counsel, during closing arguments, recognized the horror of the crimes or  
18 referred to a defendant in less-than-positive terms during closing argument. *See Hoffner*, 622 F.3d  
19 *at 501*; *see also Smith v. Spisak*, 558 U.S. 139 (2010); *see Florida v. Nixon*, 543 U.S. at 192.  
20 Here, Petitioner had just been found guilty of the execution-style shootings of three individuals,  
21 including the murder of Vasquez, and counsel may reasonably have determined that he needed to  
22 build rapport with the jury in an effort to save Petitioner. Accordingly, given the considerable  
23 deference to counsel’s strategic decisions mandated by *Strickland* and AEDPA, Petitioner has not  
24 shown that no reasonable jurist could find that counsel’s challenged conduct was reasonable under  
25 the circumstances. *See Strickland*, 466 U.S. at 689.

26 In addition, Petitioner argues the aforementioned statements by counsel collectively  
27 formed a constitutionally-ineffective closing argument. Pet. Reply Br. at 67-68. Respondent  
28 contends that counsel’s argument, while not the most articulate, reflected reasonable strategic

1 considerations, such as a desire to focus on his argument that the jury should not use the alleged  
2 pretrial threats against the prosecutor and MacIvor in aggravation and on his general plea for  
3 mercy. Resp. Br. at 17-18. Again, based on the evidence introduced during trial and the penalty  
4 phase, the Court finds that counsel’s overall argument—not including the misstatements of the law  
5 identified above— appeared to reflect reasonable strategic considerations. For example, counsel  
6 attempted to discredit the prosecution’s allegations that Petitioner threatened MacIvor and a  
7 deputy district attorney by noting that the tape recordings related to the alleged threats to MacIvor  
8 had been destroyed and that neither incident had been taken seriously enough by law enforcement  
9 to file a police report on the incident. RT 3293. To the extent Petitioner challenges counsel’s  
10 argument based only on the evidence presented during his trial and penalty phase proceedings, the  
11 Court concludes Petitioner has failed to show no reasonable jurist could find that counsel’s  
12 conduct was reasonable under the circumstances. *See Strickland*, 466 U.S. at 689.

13 Accordingly, the above-mentioned portions of Claim 2F will be **DENIED**.

14 The Court must also consider, however, whether counsel’s failure to prepare for the  
15 penalty phase affected counsel’s closing argument. Pet. Reply Br. at 8. To the extent Petitioner  
16 argues that counsel’s penalty phase arguments were ineffective because counsel failed to  
17 reasonably prepare for his penalty phase presentation, the Court concludes that counsel’s decisions  
18 during penalty phase closing arguments, which were ultimately a result of counsel’s undisputed  
19 failure to uncover and present any of the available and compelling mitigating evidence, fell below  
20 objective standards of reasonableness. As noted, “strategic choices made after less than complete  
21 investigation are reasonable precisely to the extent that reasonable professional judgments support  
22 the limitations on investigation.” *Strickland*, 466 U.S. at 690-91; *see Correll v. Ryan*, 539 F.3d at  
23 949 (“An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all”).  
24 Counsel’s conduct reflected a near-complete failure to conduct *any* investigation, let alone a  
25 reasonable one.

26 The Court also concludes that Petitioner has shown he was prejudiced by counsel’s failure  
27 to argue the available mitigating evidence during penalty phase. As noted in the Court’s  
28 discussion of Claim 2A, counsel’s deficiencies left the jury with an inaccurate portrait of

1 Petitioner’s life as fairly ordinary and, further, deprived the jury of seeing Petitioner’s deep  
2 devotion to his family despite the horrors of his life. Had counsel introduced evidence of  
3 Petitioner’s “nightmarish childhood,” *Williams*, 529 U.S. at 395, and referred to the compelling  
4 mitigating evidence in his closing argument, the Court has no doubt there was a “reasonable  
5 probability that at least one juror would have struck a different balance.” *Wiggins*, 539 U.S. at  
6 537. In addition, counsel’s misstatement of the role and application of the aggravating and  
7 mitigating factors compounded counsel’s failure to introduce any meaningful mitigating evidence  
8 on Petitioner’s behalf. Even if the jurors did not take counsel’s statements as “concessions,”  
9 counsel’s misstatement highlighted counsel’s view that there were various aggravating factors in  
10 Petitioner’s case while wholly failing to present a compelling case in mitigation. Taken as a  
11 whole, a competent closing argument incorporating the proffered mitigating evidence “‘might well  
12 have influenced the jury’s appraisal’ of [Petitioner’s] culpability.” *Wiggins*, 539 U.S. at 538.

13 Accordingly, Petitioner has shown the California Supreme Court’s denial of Claim 2F,  
14 insofar as Petitioner alleges ineffective assistance during closing arguments as a result of counsel’s  
15 misstatements and failure to perform a reasonable mitigation investigation, was contrary to and an  
16 unreasonable application of Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1); *see also*  
17 *Strickland*, 466 U.S. at 687; *Wiggins*, 539 U.S. at 538. This portion of Claim 2F will be  
18 **GRANTED.**

19 **C. Procedurally Defaulted Claims**

20 On October 14, 2005, the Court dismissed six of Petitioner’s claims as procedurally  
21 defaulted. *See* Dkt. No. 147 at 11-12. The Court now considers whether Petitioner has  
22 established cause and prejudice for each claim’s procedural default.

23 **1. Standard of Review**

24 The United States Supreme Court has erected various barriers to the federal judiciary’s  
25 review of the merits of claims that state prisoners previously presented to the federal courts for  
26 resolution, failed to raise in their first federal habeas petitions, or failed properly to present to the  
27 state courts. Unless a habeas petitioner shows cause and prejudice, therefore, a court may not  
28 reach the merits of procedurally defaulted claims in which the petitioner failed to follow

1 applicable state procedural rules in raising the claims. *See Sawyer v. Whitley*, 505 U.S. 333, 338  
2 (1992) (citations omitted); *Farmer v. McDaniel*, 98 F.3d 1548, 1560 (9th Cir. 1996).

3 The cause standard requires the petitioner to show that ““some objective factor external to  
4 the defense impeded counsel’s efforts”” to construct or raise the claim. *McClesky v. Zant*, 499  
5 U.S. 467, 493 (1991) (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). A petitioner may  
6 show cause by establishing constitutionally ineffective assistance of counsel. *See McCleskey*, 499  
7 U.S. at 494; *Carrier*, 477 U.S. at 486-88. To serve as “cause,” however, the claim of ineffective  
8 assistance of counsel must have been presented as an independent claim to the state courts. *See*  
9 *Murray v. Carrier*, 477 U.S. 478, 489 (1986). A procedurally defaulted ineffective assistance of  
10 counsel claim is not cause to excuse the default of another habeas claim unless the petitioner can  
11 satisfy the cause and prejudice standard with respect to the ineffective assistance of counsel claim  
12 itself. *See Edwards v. Carpenter*, 529 U.S. 446, 451-51 (2002); *Cockett v. Ray*, 333 F.3d 938, 943  
13 (9th Cir. 2003).

14 To establish good cause on the ground of ineffective assistance of counsel, a petitioner  
15 must show that (1) counsel made errors so serious that counsel was not functioning as the counsel  
16 guaranteed the defendant by the Sixth Amendment, and (2) the deficient performance prejudiced  
17 the defense. *Loveland v. Hatcher*, 231 F.3d 640, 644 (9th Cir. 2000) (quoting *Strickland*, 466 U.S.  
18 at 687). Counsel’s ineffectiveness must be reviewed “de novo.” *Visciotti v. Martel*, 862 F.3d 749,  
19 769 (9th Cir. 2016). Petitioner also must show actual prejudice resulting from the errors of which  
20 he complains. *See McCleskey*, 499 U.S. at 494; *United States v. Frady*, 456 U.S. 152, 168 (1982).  
21 Petitioner bears the burden of showing, not merely that errors at his trial created a possibility of  
22 prejudice, but that they “worked to his *actual* and substantial disadvantage, infecting his entire  
23 trial with error of constitutional dimensions.” *Frady*, 456 U.S. at 170. To ascertain the level to  
24 which such errors taint the constitutional sufficiency of the trial, they must be evaluated in the  
25 total context of the events at trial. *See Paradis v. Arave*, 130 F.3d 385, 393 (9th Cir. 1997) (citing  
26 *Frady*, 456 U.S. at 169).

27 **2. Claims 16, 19B(e), 19B(f), 19B(aa), & 19B(cc)**

28 In Claim 16, Petitioner argued it was unconstitutional for a penalty phase jury to consider

1 the failure to express remorse by a defendant who maintains his innocence. *See Fed. Pet.* at 90.  
2 Specifically, Petitioner argues that the penalty phase jury’s consideration of his lack of remorse,  
3 following an argument to that effect by the prosecutor during penalty phase closing argument,  
4 resulted in a death sentence obtained in violation of the Fifth, Sixth, Eighth, and Fourteenth  
5 Amendments to the Constitution. *See Fed. Pet.* at 90. Petitioner also challenged the prosecutor’s  
6 argument, that Petitioner’s failure to express remorse was an aggravating factor, in Claim 19B(f).  
7 *See Fed. Pet.* at 97.

8 Petitioner alleged three other procedurally defaulted instances of prosecutorial misconduct  
9 during penalty phase closing argument. In Claim 19B(e), Petitioner argued the prosecutor  
10 committed misconduct when he told the jury that the absence of mitigating factors should be  
11 considered in aggravation. *See Fed. Pet.* at 97. In Claim 19B(aa), Petitioner averred the  
12 prosecutor committed misconduct when he made an unsolicited comment about the California  
13 Supreme Court’s “liberal” leaning. *See Fed. Pet.* at 97. Finally, in Claim 19B(cc), Petitioner  
14 argued the prosecutor committed misconduct when he expressed his personal opinion that  
15 Petitioner should be sentenced to death. *See Fed. Pet.* at 97.

16 Petitioner argues he has shown cause and prejudice as to each claim because counsel’s  
17 failure to object to each error amounted to ineffective assistance of counsel. *Pet. Br.* at 78; *see*  
18 *Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991) (“Attorney error that constitutes ineffective  
19 assistance of counsel is cause” for procedural default). Respondent disagrees and further argues  
20 that Petitioner is not entitled to assert his claims of ineffective assistance of counsel as “cause” for  
21 his default because he never presented them as independent claims during his state habeas  
22 proceedings. *Resp. Br.* at 40.

23 Consequently, the Court must consider, as a threshold matter, whether Petitioner’s claims  
24 of ineffective assistance of counsel for failure to object are themselves procedurally defaulted and  
25 therefore not suitable to serve as “cause” for purposes of excusing Petitioner’s default. As noted,  
26 to serve as cause for a procedurally defaulted claim, a claim of ineffective assistance of counsel  
27 must have been presented as an independent claim to the state courts. *Murray v. Carrier*, 477 U.S.  
28 at 489. Petitioner does not dispute that he did not raise independent ineffective assistance of

1 counsel claims for counsel’s failure to object to the various errors asserted in his procedurally  
2 defaulted claims. Instead, Petitioner argues the state court was nevertheless able to consider  
3 counsel’s conduct when it considered Petitioner’s claims of prosecutorial misconduct on appeal.  
4 *See Reply Br.* at 24.

5 Review of the state court’s opinion on direct appeal quickly contradicts Petitioner’s  
6 argument. The state court mentions counsel’s conduct only to note that counsel failed to object,  
7 but does not otherwise consider counsel’s performance. *See People v. Walker*, 47 Cal.3d at 630,  
8 643-45, & 650-51. Moreover, where a petitioner has presented a claim “in such a manner that the  
9 state court could not, consistent with its own procedural rules, have entertained it . . . it could  
10 hardly be said that, as comity and federalism require, the State had been given a ‘fair “opportunity  
11 to pass upon [his claim].”” *Edwards v. Carpenter*, 529 U.S. at 453 (citations omitted). Because  
12 the ineffective assistance of counsel claims are unexhausted, they may not form the basis of  
13 Petitioner’s assertion of “cause” for procedural default as to Claims 16, 19B(e), 19B(f), 19B(aa),  
14 or 19B(cc).

15 Accordingly, as Petitioner has not shown cause for his procedural default nor demonstrated  
16 that his case satisfies another exception to procedural default, *see Coleman*, 501 U.S. at 750,  
17 Claims 16, 19B(e), 19B(f), 19B(aa), and 19B(cc) are not reviewable in this Court. The claims will  
18 remain **DISMISSED**.<sup>7</sup>

### 19 3. Guilt Phase Sufficiency of Evidence: Claim 21

20 In Claim 21, Petitioner argues his conviction and sentence were obtained in violation of the  
21 Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution insofar as the  
22 jury found that Petitioner personally used a dangerous and deadly weapon, for which the evidence  
23 was insufficient to support such a finding beyond a reasonable doubt. *See Fed. Pet.* at 101. The  
24 California Supreme Court denied this claim on the merits and on procedural grounds after  
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26 <sup>7</sup> To the extent Petitioner asserts he should be allowed to return to state court to exhaust his  
27 claims of ineffective assistance of counsel for failure to object to the errors alleged in Claims 16,  
28 19B(e), 19B(f), 19B(aa), and 19B(cc), *see Pet. Reply Br.* at 25, Petitioner’s request is **DENIED**.  
Petitioner failed to allege cause, potential merit, and the absence of dilatory tactics as required by  
*Rhines v. Weber*, 544 U.S. 269 (2005). Moreover, to the extent such claims allege penalty phase  
error, they will be moot.

1 Petitioner failed to raise the claim on direct appeal. *See* Exh. 62. Petitioner argues his default  
2 should be excused because he has shown cause and prejudice due to ineffective assistance of  
3 appellate counsel.

4 As set out in *Pollard v. White*, 119 F.3d 1430 (9th Cir. 1997), the “Due Process Clause  
5 guarantees a criminal defendant effective assistance of counsel on his first appeal as of right.” *Id.*  
6 at 1435; *see also Douglas v. California*, 372 U.S. 353, 356–57 (1963). Demonstrating ineffective  
7 assistance of counsel under *Strickland* is sufficient to demonstrate “cause” for a Petitioner’s  
8 procedural default. However, while ineffective assistance of counsel is cause for procedural  
9 default, “[a]ttorney error short of ineffective assistance of counsel does not constitute cause.”  
10 *Vansickel v. White*, 166 F.3d 953, 958 (9th Cir. 1999). “[A]ppellate counsel’s failure to raise  
11 issues on direct appeal does not constitute ineffective assistance when [the] appeal would not have  
12 provided grounds for reversal.” *See Wildman v. Johnson*, 261 F.3d 832, 840 (9th Cir. 2001).

13 The Court must determine whether Petitioner has shown appellate counsel was ineffective  
14 by examining first whether Claim 21 would have been meritorious. *Wildman v. Johnson*, 261 F.3d  
15 at 840 (“[Petitioner] cannot sustain his claim for ineffective assistance of appellate counsel [when]  
16 the issues he raises are without merit”). The Due Process Clause “protects the accused against  
17 conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the  
18 crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970). Consequently, where  
19 a petitioner alleges the evidence in support of his state conviction cannot be fairly characterized as  
20 sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt, the petitioner  
21 has stated a constitutional claim, *Jackson v. Virginia*, 443 U.S. 307, 321-24 (1979), which, if  
22 proven, entitles him to federal habeas relief. For purposes of determining such claim, the relevant  
23 inquiry is whether, “after viewing the evidence in the light most favorable to the prosecution, any  
24 rational trier of fact could have found the essential elements of the crime beyond a reasonable  
25 doubt.” *Id.* at 319. Where the record supports conflicting inferences, a federal habeas court must  
26 presume the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to  
27 that resolution. *Id.* at 326. Only if no rational trier of fact could have found proof of guilt beyond  
28 a reasonable doubt, may the writ be granted. *Id.* at 324.

1 Here, while the state court did not consider this claim on direct appeal, it made factual  
2 findings as to whether Petitioner was the shooter during the Bottle Shop incident. Its findings are  
3 instructive:

4 It is undisputed that defendant was armed with the handgun upon initiating  
5 the robbery of the liquor store. After defendant personally removed the money from  
6 the cash register his accomplice stated, “Come on. We got the money. Let’s get  
7 out.” Defendant replied, “*No. We’re not going to leave any witnesses.*” (Italics  
8 added.) Defendant marched the victims back into the rear of the store at gunpoint.  
9 He handed the gun to his partner, then twice struck Romero across the head with two  
10 full bottles of wine. When Romero pretended to be dead, defendant removed  
11 Romero’s wallet from his back pocket, felt his back and said, “*We don’t have to*  
12 *worry about this guy any more.*” (Italics added.)

13 Neither of the surviving victims directly observed defendant regain  
14 possession of the gun or fire the ensuing volley of shots. However, Romero testified  
15 that defendant’s companion, who “had a very boyish look to his face,” remained  
16 passive throughout the incident and at no time exhibited any threatening or violent  
17 behavior. Romero observed *defendant walk over to Zamora and Vasquez* and order  
18 the boys to their knees. As the victims pleaded for their lives three shots were fired  
19 off in rapid succession; *Vasquez and Zamora were each shot through the front of the*  
20 *head.* The execution-style shooting clearly evinces an intent to kill. The nature and  
21 location of the wounds, together with Romero’s testimony, strongly supports an  
22 inference that defendant momentarily handed the gun to his companion so he could  
23 hit Romero over the head with the wine bottles, then took his gun back, stood in front  
24 of his victims and fired the shots.

25 Defendant used the same handgun several weeks later to rob and twice shoot  
26 victim Rose Olveda in the head; the jury concluded from such evidence that he had  
27 assaulted her with intent to commit murder. Subsequent to the commission of these  
28 offenses defendant remained in possession of the handgun, admitted ownership of it  
when he sold it to undercover Officer MacIvor, and told the officer it “had done a  
murder.” The jury found that defendant had personally used the gun in connection  
with the murder of Vasquez, the robbery of Olveda, and the assaults with intent to  
commit murder upon Romero, Zamora and Olveda.

In short, the undisputed evidence overwhelmingly establishes that defendant  
personally shot all of his victims and intended to murder each of them, succeeding  
in one case. The verdicts and personal gun-use enhancements found true under each  
count establish that the jury so found; no contrary evidence whatsoever was  
presented.

*People v. Walker*, 47 Cal. 3d at 632-33 (emphasis in original). In addition, one witness testified  
that he overheard Petitioner talking about his involvement in a robbery and stating that “some  
punk got in the way,” during the robbery, so he “took him out of the game.” *Id.* at 620.

1           Petitioner repeatedly argues that he could not be found to have shot Zamora and Vasquez  
2 because no witness explicitly identified Petitioner as the shooter. It is well-established, however,  
3 that “[c]ircumstantial evidence and inferences drawn from it may be sufficient to sustain a  
4 conviction.” *Payne v. Borg*, 982 F.2d 335, 341 (9th Cir. 1992), as amended on denial of reh’g  
5 (Mar. 3, 1993) (citing *United States v. Lewis*, 787 F.2d 1318, 1323 (9th Cir.1986)). Based on the  
6 Court’s independent review of the record and the deference dictated by *Jackson v. Virginia*, the  
7 Court concludes the various pieces of evidence outlined above support a finding by the state court  
8 that Petitioner failed to show “no rational trier of fact could have found proof of guilt beyond a  
9 reasonable doubt.” *Jackson v. Virginia*, 443 U.S. at 324. The Court would find Claim 21  
10 unmeritorious.

11           Accordingly, Petitioner has not shown that he was prejudiced by appellate counsel’s failure  
12 to raise Claim 21 on direct appeal. Nor has Petitioner demonstrated or argued that his case  
13 satisfies the fundamental miscarriage of justice exception to default. *See Coleman*, 501 U.S. at  
14 750. Petitioner’s procedural default with respect to Claim 21 is not reviewable in this Court and  
15 must remain **DISMISSED**. In any case, the Court would deny Petitioner’s claim on the merits.

16           **D. Cumulative Error Claim 22**

17           In Claim 22, Petitioner argues the cumulative effect of the errors identified in his petition,  
18 taken as a whole, “resulted in an unfair trial and an unreliable fact-finding process.” *See Fed. Pet.*  
19 *at 103.*

20           In some cases, although no single trial error is sufficiently prejudicial to warrant reversal,  
21 the cumulative effect of several errors may have a “‘substantial and injurious effect’ on the jury’s  
22 verdict” so that a petitioner’s conviction must be overturned. *See Alcala v. Woodford*, 334 F.3d  
23 862, 893-95 (9th Cir. 2003) (reversing conviction where multiple constitutional errors hindered  
24 defendant’s efforts to challenge every important element of proof offered by prosecution); *United*  
25 *States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) (prejudice resulting from cumulative effect  
26 of improper vouching by prosecutor, improper comment by prosecutor about defense counsel, and  
27 improper admission of evidence previously ruled inadmissible required reversal even though each  
28 error evaluated alone might not have warranted reversal).

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**1. Guilt Phase Error**

The Court identified only one constitutional error during Petitioner’s guilt phase proceedings: Claim 2C. In Claim 2C, Petitioner alleged that counsel was constitutionally ineffective in failing to object to Petitioner’s shackling, via knee brace, during trial. *See* Dkt. No. 199. As a result, the Court granted Petitioner habeas relief on Claim 2C. In reversing the Court’s order granting Petitioner relief, however, the Ninth Circuit noted that the restraint was “relatively unobtrusive” and was portrayed to the jury as a “more-or-less routine custody measure.” *Walker v. Martel*, 709 F.3d at 942. The Ninth Circuit also noted that Petitioner had been convicted on “robust” evidence and it was not reasonably likely that the guilt phase outcome would have been different but for the use of the leg brace. *Id.*

Because the Ninth Circuit has already determined that Petitioner failed to meet his burden of showing prejudice, and Petitioner does not make any new arguments as to prejudice, the Court concludes that Petitioner has not shown the state court’s denial of his guilt phase cumulative error claim was unreasonable. *See Richter*, 562 U.S. at 101.

**2. Penalty Phase**

In contrast, the Court has identified several errors during Petitioner’s penalty phase of trial. In addition to the shackling error alleged in Claim 2C, which continued into the penalty phase, the Court identified two errors of ineffective assistance of counsel as alleged in Claim 2A and the above-identified portions of Claims 2E and 2F. As discussed in detail above, Petitioner has shown the errors alleged in Claim 2A and certain portions of Claims 2E and 2F were prejudicial to him and that the state court’s denial of those claims constituted unreasonable determinations of facts or an unreasonable application of federal law. *See ante* at 23-26 & 31-32.

Based on counsel’s egregious ineffective assistance of counsel during every facet of the penalty phase, the Court has no doubt that Petitioner has established cumulative prejudice. Due to counsel’s ineffective conduct, Petitioner’s penalty phase presentation consisted of the testimony of several unprepared witnesses and did not include the available and compelling mitigating evidence regarding Petitioner’s physical, verbal, and psychological abuse, the deaths of Petitioner’s siblings, his near-death experience, his family’s extreme poverty, his unreliable parents, and

1 Petitioner’s mental health issues. Petitioner’s direct examination did not give him the opportunity  
2 to tell jurors about the most compelling details of his life. Moreover, counsel’s penalty phase  
3 closing argument was severely limited and included an affirmative misstatement of the role and  
4 weight of aggravating and mitigating factors. “[P]rejudice resulting from ineffective assistance of  
5 counsel must be ‘considered collectively,’” especially when “the different pieces of mitigating  
6 evidence fit into an internally coherent and compelling narrative whole.” *Doe v. Ayers*, 782 F.3d  
7 425, 460, n.62 (9th Cir. 2015) (citing *Kyles v. Whitley*, 514 U.S. 419, 436 (1995)). Here, each of  
8 counsel’s errors related to his near-total failure to conduct any meaningful penalty phase  
9 investigation and uncover the considerable trove of compelling mitigating evidence was, alone,  
10 enough to prejudice Petitioner. Together, these errors amount to a veritable failure to make any  
11 mitigation presentation.

12 In addition to counsel’s deficiencies in investigating, presenting, and arguing a competent  
13 case in mitigation, however, counsel was also ineffective when he failed to object to Petitioner’s  
14 unnecessary shackling. As noted in the Court’s prior order granting relief on Claim 2C,

15 The appearance of the offender during the penalty phase in shackles . . .  
16 almost inevitably implies to a jury, as a matter of common sense, that court  
17 authorities consider the offender a danger to the community—often a statutory  
18 aggravator and nearly always a relevant factor in jury decisionmaking, even where  
19 the State does not specifically argue the point. It also almost inevitably affects the  
20 jury’s perception of the character of the defendant. . . . And it thereby inevitably  
undermines the jury’s ability to weigh accurately all relevant considerations—  
considerations that are often unquantifiable and elusive—when it determines  
whether a defendant deserves death. In these ways, the use of shackles can be a  
thumb [on] death’s side of the scale.

21 *Deck v. Missouri*, 544 U.S. 622, 633 (2005) (internal citations and quotations marks omitted); Dkt.  
22 No. 199 at 21. Indeed, in Petitioner’s case, at least one juror had the impression that the shackles  
23 were “like a short lead on a vicious dog.” Dkt. No. 195. Another juror assumed that Petitioner  
24 was shackled “because he had threatened a district attorney.” Dkt. No. 199 at 22. However, the  
25 Ninth Circuit determined that Petitioner failed to show the state court could not reasonably  
26 determine that Petitioner was not prejudiced by the shackling during his penalty phase of trial  
27 “given the caliber of the mitigation” evidence presented by counsel. *Walker v. Martel*, 709 F.3d at  
28 944.

1           Given the Court’s finding that counsel was ineffective throughout Petitioner’s penalty  
2 phase proceedings, including in presenting mitigating evidence, the Ninth Circuit’s reasoning is no  
3 longer applicable. Most importantly, Petitioner has shown there was considerable and compelling  
4 mitigating evidence available at the time of his trial. As noted, Petitioner’s penalty phase jury was  
5 forced to weigh multiple execution-style shootings, the death of a special needs victim, and  
6 alleged threats against members of law enforcement against scant mitigating evidence that  
7 Petitioner “was [nineteen] years old at the time of the offenses, had no prior criminal record, had  
8 done yard work for a church secretary in the past, gave a friend rides to work, provided financial  
9 and emotional support to his mother and sister, and was loved by them and his girlfriend.” *Walker*  
10 *v. Martel*, 709 F.3d at 931. Had counsel conducted a reasonable investigation, however, the jury  
11 would have been able to hear classic mitigation evidence, including the graphic details of  
12 Petitioner’s “nightmarish childhood,” *Williams*, 529 U.S. at 363, which was replete with poverty,  
13 violence, illness, and death; Petitioner’s continued deep devotion to his family even to his own  
14 detriment; and Petitioner’s “long-standing” brain damage, which affected his cognitive  
15 functioning, Docket No. 130-1 (Exh. J, Dr. Pettis Decl.) at 172. Moreover, because of counsel’s  
16 failures to investigate, introduce the proffered evidence, competently examine Petitioner, and  
17 construct a competent closing argument using the proffered evidence, the prosecutor was easily  
18 able to dismiss Petitioner’s scant mitigating evidence and argue to the jury that “the only possible  
19 verdict in the case of this particular defendant is the death penalty.” RT 3284. Cumulatively, each  
20 of counsel’s errors led to a penalty phase presentation with no meaningful showing of mitigating  
21 circumstances. Additionally, counsel’s failure to object to Petitioner’s unnecessary shackling  
22 effectively bolstered the prosecution’s argument that Petitioner was violent and dangerous. *See*  
23 RT 3273-3310. Given that the prosecution’s case in aggravation consisted mostly of evidence of  
24 future dangerousness, that at least some of the jurors perceived Petitioner’s shackling as a  
25 reflection of his dangerousness, and that counsel did not make any meaningful showing as to  
26 mitigating circumstances, the shackling may very well have placed a “thumb [on] death’s side of  
27 the scale.” *Deck v. Missouri*, 544 U.S. at 633.

28           In sum, based on the significant disparity between the penalty phase trial Petitioner had

1 and that which he could have had but for counsel’s ineffective conduct, the Court concludes  
2 Petitioner has shown there was a reasonable likelihood that, but for counsel’s ineffectiveness as  
3 identified above, his mitigating evidence may have influenced the jury’s appraisal of the  
4 defendant’s moral culpability. *Williams*, 529 U.S. at 368-69. While not dispositive, the Court also  
5 notes that, despite counsel’s egregious failure to effectively advocate for Petitioner’s life, the jury  
6 nevertheless deliberated for “over ten hours over a period of three days” during Petitioner’s  
7 penalty phase, suggesting that the jury ““did not find the case to be clear-cut.”” Dkt. No. 199 at 22  
8 (quoting *Rhoden v. Rowland*, 172 F.3d 633, 636 (9th Cir. 1999)).

9 Petitioner has therefore sufficiently shown that the various errors had a ““substantial and  
10 injurious effect’ on the jury’s [death] verdict.” *Alcala v. Woodford*, 334 F.3d at 893-95.  
11 Moreover, these errors ““so infected the trial with unfairness as to make the resulting conviction a  
12 denial of due process.”” *Thomas v. Hubbard*, 273 F.3d 1164, 1181 (9th Cir. 2001) (overruled on  
13 other grounds in *Payton v. Woodford*, 299 F.3d 815 (9th Cir. 2002). For the reasons outlined  
14 above, Petitioner has also shown the state court’s rejection of this claim resulted in a decision that  
15 was contrary to, or involved an unreasonable application of, clearly established federal law. 28  
16 U.S.C. § 2254(d); *Richter*, 562 U.S. at 88.

17 The portion of Claim 22 alleging cumulative error during the penalty phase will be  
18 **GRANTED**.

19 **IV. DISPOSITION**

20 There Court hereby ORDERS as follows:

- 21 (1) The petition for writ of habeas corpus is **GRANTED** on the basis of the above-  
22 identified portions of Petitioner’s ineffective assistance of counsel claims, Claims 2A,  
23 2E, and 2F, as well as Petitioner’s penalty phase cumulative error claim, Claim 22.  
24 (2) To the extent indicated in this Order, the remaining portions of Claims 2A, 2E, and 2F  
25 are **DENIED**. To the extent each claim alleges penalty phase error, they are also  
26 **MOOT**. The guilt phase portion of Claim 22 is also **DENIED**.  
27 (3) Claims 16, 19B(e), 19B(f), 19B(aa), 19B(cc), and 21 are procedurally defaulted and,  
28 based on Petitioner’s failure to show cause and prejudice, remain dismissed. To the

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extent that Claims 16, 19B(e), 19B(f), 19B(aa), and 19B(cc) allege penalty phase errors, they are also **MOOT**. In addition, the Court would deny Claim 21 on the merits.

(4) Petitioner’s request that the Court stay his proceedings to allow him to return to state court to exhaust his claims of ineffective assistance of counsel for failure to object to the errors alleged in Claims 16, 19B(e), 19B(f), 19B(aa), and 19B(cc) is **DENIED**.

(5) In view of the Court’s grant of the petition, Petitioner is entitled to a new penalty phase trial. Within 120 days of the entry of judgment, the state shall commence proceedings to retry Petitioner’s penalty phase in accordance with California law and the United States Constitution.

With the issuance of this order, the petition is fully adjudicated. The clerk shall enter judgment and close the file.

**IT IS SO ORDERED.**

Dated: December 14, 2018

  
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PHYLLIS J. HAMILTON  
United States District Judge