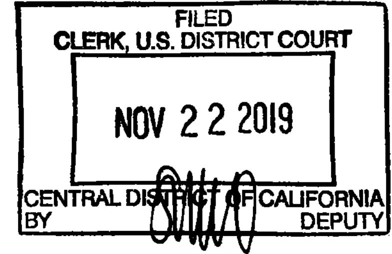

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARY ELLEN SAMUELS, Petitioner, v. JANEL ESPINOZA,* Warden of Central California Women's Facility, Respondent.	CASE NO. CV 10-3225 SJO **DEATH PENALTY CASE** ORDER DENYING IN PART AND GRANTING IN PART PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Mary Ellen Samuels was convicted of soliciting and conspiring in the murders of Robert Samuels, her husband, and James Bernstein, her husband's alleged killer. *People v. Samuels*, 36 Cal. 4th 96, 101 (2005). She was convicted of first degree murder as to Mr. Samuels and Mr. Bernstein. *Id.* The jury found true a multiple murder special circumstance allegation and a financial gain special circumstance allegation as to Mr. Samuels. *Id.* The jury returned a verdict of death. *Id.*

The California Supreme Court affirmed Petitioner's convictions and sentence on June 27, 2005. *Id.* Petitioner filed a state habeas petition on May 21,

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* Janel Espinoza is substituted for her predecessors as Warden of Central California Women's Facility, pursuant to Federal Rule of Civil Procedure 25(d).

2004, and the California Supreme Court denied it on March 10, 2010. (Cal. Case No. S124998.) She filed a Petition for Writ of Habeas Corpus in this Court on March 7, 2011. (Docket No. 23 ("Pet.").) Because the facts are set forth at length in the California Supreme Court's decision on direct appeal, they are repeated here only to the extent necessary for the discussion of Petitioner's claims.

DISCUSSION

JURY SELECTION CLAIMS

I. Claims 18 and 3E(1)

A. Claim 18

Before jury selection began, defense counsel requested to question jurors about their opinions on the death penalty individually, rather than in open court. (2 RT 220-21.) The trial court denied the request. (2 RT 221-22.) In Claim 18, Petitioner alleges that the denial violated his constitutional rights because "it resulted in an unreliable foreshortened voir dire process in which most prospective jurors were asked, in lockstep fashion, the constitutionally required questions pertinent to death qualifications." (Pet. at 168.) Petitioner alleges that the trial court's "evident satisfaction with repeated monosyllabic and unconsidered, parroted responses, coupled with its refusal to permit counsel to conduct meaningful direct, individual, and sequestered questioning," prevented counsel from learning adequately about the jurors' views on the death penalty and determining whether their views would disqualify them from service. (*Id.* at 169-70.)

There is no independent constitutional requirement that the defense be permitted to question jurors individually. *See Mu'Min v. Virginia*, 500 U.S. 415, 419, 425 (1991) (finding no constitutional violation where trial court denied defense motion for individual voir dire to inquire about the content of the publicity of which they were aware); *Neal v. United States*, 342 F.2d 730, 736 (9th Cir. 1965) ("Appellant also complains that as a matter of law the court 'should have

sequestered the jury' or should have examined on voir dire each juror separately or individually[.] We have carefully reviewed the voir dire examination of the impanelled jurors and are satisfied that it was so conducted as to result in the selection of a fair and impartial jury."). Petitioner makes no particularized showing in Claim 18 of any juror whose views on the death penalty were unclear and for whom the trial court denied additional questioning by defense counsel. The California Supreme Court's denial of the claim on direct appeal was reasonable. *Samuels*, 36 Cal. 4th at 110-11 ("[T]he trial court's voir dire was adequate. The trial court asked the appropriate death-qualifying questions . . . , lengthy juror questionnaires were completed, and both sides had the opportunity to question each prospective juror."). Claim 18 is DENIED.

B. Claim 3E(1)

In Claim 3E(1) (Pet. at 64-65 ¶¶ 200-205), Petitioner alleges that trial counsel was ineffective for failing to make a showing in support of the request for individual voir dire that jurors would have been "more open when not subjected to the type of peer pressure which attaches to collective questioning . . . ." (*Id.* at 64 (citing 2 RT 221).) The California Supreme Court may have reasonably rejected the claim on the basis that Petitioner failed to show prejudice from any deficient performance by counsel. The California Supreme Court may have reasoned that Petitioner failed to show that the trial court denied additional questioning by defense counsel for any juror whose views on the death penalty were unclear. Claim 3E(1) is DENIED.

II. Claim 19

In Claim 19, Petitioner alleges that the trial court should not have granted the prosecution's challenge for cause to prospective juror R. P. On direct appeal, the California Supreme Court held:

> In his juror questionnaire R[.] P. . . . [was] uncertain if he could set aside his own feelings regarding what the law ought to be and follow

> the law as set forth by the court. When asked how he would address a conflict between an instruction of law and his own belief or opinion, R[.] P. wrote, 'Certain beliefs I hold strongly. For those I would have to talk to him [the judge]. I may not be willing to bend.' . . . During oral voir dire, . . . [h]e initially stated he was willing to set aside his own views and follow the law. However, when asked further about putting aside his personal feelings and following the law as explained by the court, R[.] P. admitted that 'there's certain things that I wouldn't be willing to bend on. . . . I don't know if any of those things are going to come up in this case, but I just wanted to leave the door open just in case to say that some things might happen. Mostly this has to do with my religious beliefs.' Further, when the prosecutor asked if there were any situations where he would be unwilling to follow the court's instructions, R[.] P. stated, 'Yes. And I don't know of an example to bring up, but . . . maybe something might.' Based on our review of the record, we find no federal error in the trial court's excusing R[.] P. for cause. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

Samuels, 36 Cal. 4th at 111-12 (internal citation edited); (*see also* (1 CT Supp. 97)).

The state court's decision does not show an unreasonable application of *Witt*. *See Uttecht v. Brown*, 551 U.S. 1, 7 (2007) "([R]eviewing courts are to accord deference to the trial court. . . . [W]hen there is ambiguity in the prospective juror's statements, the trial court, aided as it undoubtedly is by its assessment of the venireman's demeanor, is entitled to resolve it in favor of the State." (internal quotation and alterations omitted)). Claim 19 is DENIED.

GUILT PHASE CLAIMS

I. Claim 1 as to Guilt Phase of Trial and Claim 12

In Claim 1, in relevant part, Petitioner challenges the admission of allegedly prejudicial bad character evidence at the guilt phase of trial. (Pet. at 20-50.) In Claim 12, Petitioner challenges the admission of autopsy photographs and other allegedly gruesome photographs of Mr. Samuels. (Pet. at 133-36.)

Regarding claims that the admission of evidence at the guilt phase of trial violated a federal habeas petitioner's right to due process, the Ninth Circuit has explained:

> The Supreme Court has made very few rulings regarding the admission of evidence [at the guilt phase of trial] as a violation of due process. Although the Court has been clear that a writ should be issued when constitutional errors have rendered the trial fundamentally unfair, *see Williams v. Taylor*, 529 U.S. 362, 375 (2000), it has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ. Absent such clearly established Federal law, we cannot conclude that the state court's ruling was an unreasonable application. Under the strict standards of AEDPA, we are therefore without power to issue the writ . . . .

Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) (internal quotation omitted; internal citation edited).

Because they lack support in clearly established federal law, Claim 1 as to the guilt phase of trial and Claim 12 are DENIED.

II. Claim 2

On habeas review, the California Supreme Court held that state Claim III, presented in Petitioner's federal Petition as Claim 2, was barred pursuant to *In re Dixon*, 41 Cal. 2d 756, 759 (1953). (Lodg. D5; *see also* Answer to Petition for Writ of Habeas Corpus, Docket No. 43 at 18 (asserting procedural bar as to Claim 2).)

California's *In re Dixon* procedural rule requires that all available claims be raised on appeal and not on habeas review. *In re Dixon*, 41 Cal. 2d at 759. A state procedural rule bars federal review when it is independent of federal law, firmly established, and regularly followed. *See Walker v. Martin*, 562 U.S. 307, 315-16 (2011); *see also Johnson v. Lee*, 136 S. Ct. 1802, 1806 (2016) ("California courts need not address procedural default before reaching the merits . . . . [T]he

appropriate order of analysis for each case remains within the state courts' discretion. Such discretion will often lead to seeming inconsistencies. But that superficial tension does not make a procedural bar inadequate." (internal quotation omitted)); *cf. Murray v. Carrier*, 477 U.S. 478, 490-91 (1986) (identifying legitimate state interests in rules requiring claims to be raised on direct appeal rather than postconviction review). A state court's application of its procedural bars is presumed correct unless "the state court's interpretation is clearly untenable and amounts to a subterfuge to avoid federal review . . . ." *Lopez v. Schriro*, 491 F.3d 1029, 1043 (9th Cir. 2007) (internal quotation omitted).

The United States Supreme Court has held that the *Dixon* rule is an independent and adequate state procedural bar. *Lee*, 136 S. Ct. at 1805 (holding that the *Dixon* bar was firmly established and regularly followed, at least as of June 10, 1999, when petitioner Lee filed her opening brief on direct appeal); (*see also* Lodg. B1 (filing of Petitioner's opening brief on direct appeal on November 7, 2002)). Petitioner does not allege in her federal Petition that appellate counsel was ineffective for failing to raise the claim, to show cause and prejudice to excuse the default. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991) ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.").

This Court's order for briefing was limited to the merits of Petitioner's claims, as opposed to any procedural bars. (Docket No. 63.) Should Petitioner wish to oppose the application of the procedural bar to Claim 2, Petitioner shall file a brief no later than 21 days from the date of this Order. Petitioner's brief and any response shall be governed by the page limits and schedule set forth below.

III. Claims 3D(1), 3D(6), 7, and 13

A. Background on Claim 7 and Analysis of Claim 3D(1)

In Claim 7, Petitioner alleges judicial bias in the trial court's evidentiary rulings in favor of the prosecution. (Pet. at 96-110.) On direct appeal, the California Supreme Court held the claim to be waived for lack of contemporaneous objection. *Samuels*, 36 Cal. 4th at 114. The contemporaneous objection bar is addressed below.

The California Supreme Court went on to deny the claim on the merits. In summary, the California Supreme Court held:

(a) the trial court did not bar the defense from introducing expert testimony regarding the handwriting of Petitioner's daughter, Nicole Moroianu ("Nicole");

(b) the trial court did not bar the defense from cross-examining Detective George Daley, the lead investigator in the deaths of Mr. Samuels and Mr. Bernstein, about any information on the investigation he gave to witnesses or suspects;

(c) any error by the trial court in requiring the defense to disclose its notes from an interview with witness John Krall, the brother of Nicole's friend, was harmless and did not show bias;

(d) defense counsel "spirited[ly]" cross-examined David Navarro, who testified that Mr. Bernstein made statements to him regarding Petitioner's involvement in Mr. Samuels' murder, and counsel asked Mr. Navarro about his immunity agreement, such that Petitioner failed to show prejudice or judicial bias from the trial court's ruling that counsel could not ask who determined the truthfulness of his testimony;

(e) the trial court properly allowed the prosecution to cross-examine defense witness Anna Davis about her use of cocaine, after she testified she saw others using cocaine;

(f) the trial court properly limited defense counsel's cross-examination of Heidi Dougall, who testified that Petitioner made statements to her that she wanted Mr. Samuels dead and had a plan for him to be killed, about Ms. Dougall's mental health and medical condition;

(g) any error by the trial court in admitting evidence of a $1,500 check from Petitioner's account without proper foundation was harmless and did not show bias;

(h) defense counsel withdrew his question to Nicole about statements she made during interviews with the defense investigator not because of any threats or intimidation by the trial judge, but strategically to avoid cross-examination of the investigator on her lack of note-taking;

(i) the trial court did not err, and any error was harmless, in allowing Detective Daley to testify that Nicole cited attorney-client privilege and refused to cooperate in providing information to the police about her sexual abuse by Mr. Samuels;

(j) Petitioner failed to show bias or harm from the trial court's exclusion of testimony from Jeffrey Weiss, an employee at the Subway restaurant Petitioner and Mr. Samuels owned and operated, that he heard Nicole shout at Mr. Samuels to keep his hands off her and not to touch her;

(k) Petitioner failed to show bias or harm from the trial court's admission of Mr. Bernstein's criminal file, admission of Detective Richardson's testimony that he located no arrests or criminal complaints by Petitioner against Mr. Samuels, and exclusion of a police report on Dean Groover, Petitioner's later fiancé; and

(l) the trial court properly admitted testimony from Mr. Samuels' divorce attorney that Mr. Samuels intended to seek a reduction in spousal support and permission to operate the Subway restaurant. *Id.* at 114-20.

In Claim 3D(1), Petitioner alleges ineffective assistance of counsel in failing to object to the alleged bias. (Pet. at 62 ¶ 198(1).) The California Supreme Court

may have reasonably rejected the claim on the basis that a motion alleging judicial bias would have been meritless or that Petitioner failed to show prejudice from counsel's failure to bring such motion. *See Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005) ("[T]rial counsel cannot have been ineffective for failing to raise a meritless objection."); *United States v. Molina*, 934 F.2d 1440, 1447 (9th Cir. 1991) (holding that because evidence was admissible, "the decision not to file a motion to suppress it was not prejudicial. . . . [I]t is not professionally unreasonable to decide not to file a motion so clearly lacking in merit."). Claim 3D(1) is DENIED.

B. Background on Claim 13 and Analysis of Claim 3D(6)

In Claim 13, Petitioner alleges that the prosecutor injected inadmissible, false, or misleading evidence without a good faith belief in the truth or admissibility of the evidence. (Pet. at 137-43.) First, Petitioner alleges that the prosecutor asked defense investigator Robert Birney, a former police officer, whether he had been suspended from duty without introducing any source for that information. (*Id.* at 138.) Mr. Birney testified that witness Paul Gaul admitted to him that he told Petitioner he knew she was not involved in Mr. Samuels' murder but he had to testify that she was to keep his plea agreement. (25 RT 3301-02.) Second, Petitioner alleges that the prosecutor "set up a situation in which Nicole was made to appear to be lying about checks written to Mr. Bernstein and then blocked the defense from rehabilitating her" by objecting to defense counsel asking Nicole whether she would submit to handwriting analysis to confirm her testimony. (Pet. at 140.) Third, Petitioner alleges the prosecution "successfully avoided allowing" Detective Daley "to be impeached by promising to clear up the subject matter" of his sharing of information about his investigation with witnesses or suspects "at a later time, only to fail to do so." (*Id.* at 141.) Fourth, Petitioner alleges the prosecutor "exceeded the scope of the direct examination, treating [Annette] Bunnin-Church as if she had been a character witness in order

to raise before the jury Petitioner's supposed lack of truth and veracity." (*Id.* at 142.) The California Supreme Court held the claim to be waived for lack of contemporaneous objection. *Samuels*, 36 Cal. 4th at 124.

In Claim 3D(6), Petitioner alleges ineffective assistance of counsel in failing to object and to request an admonition to those instances of alleged misconduct. (Pet. at 63 ¶ 198(6).) The California Supreme Court may have reasonably rejected the claims on the basis that Petitioner failed to show deficient performance or prejudice. The California Supreme Court reasonably concluded on direct appeal that: (a) "Birney's admission that there was an incident" similar to one described by the prosecutor outside the presence of the jury "that was investigated shows that there was some good faith basis for the prosecutor's asking whether he was suspended as a result of the investigation;" (b) the prosecutor committed no misconduct in objecting on relevance grounds to defense counsel's question about Nicole's willingness to submit to handwriting analysis and did not prevent the defense from introducing expert testimony; (c) "Detective Daley was recalled by the prosecution [and] . . . [d]efendant had the opportunity to thoroughly cross-examine" him; and (d) there was no reasonable likelihood that the jury construed any of the prosecutor's questions to Ms. Bunnin-Church "in an objectionable fashion," given her testimony "stating that she never had doubts about defendant's truthfulness . . . ." *Samuels*, 36 Cal. 4th at 114-15, 124-26. The court may have reasonably concluded on the same basis that counsel's objections or requests for admonitions would have been meritless or that Petitioner suffered no prejudice from their absence. *See Juan H.*, 408 F.3d at 1273; *Molina*, 934 F.2d at 1447. Claim 3D(6) is DENIED.

C. Contemporaneous Objection Bars as to Claims 7 and 13

Respondent has asserted contemporaneous objection procedural bars as to Claims 7 and 13. (Docket No. 43 at 18.) Where a petitioner "failed to object to [the alleged error] at trial, his forfeiture under California law constitutes a

procedural default." *Xiong v. Felker*, 681 F.3d 1067, 1075 (9th Cir. 2012); *see also Fairbank v. Ayers*, 650 F.3d 1243, 1256-57 (9th Cir. 2011) (holding that "the California Supreme Court applied an independent and adequate state procedural rule that bars federal review" based upon the lack of objection at trial); *Vansickel v. White*, 166 F.3d 953, 958 (9th Cir. 1999) (holding petitioner's claim was "procedurally barred by an adequate and independent state ground" through California's contemporaneous objection rule).

Because Petitioner cannot show cause and prejudice through the ineffective assistance of counsel to excuse the contemporaneous objection bar as to Claims 7 and 13, the Court would apply that bar to dismiss the claims. As noted above, however, the parties have not been given an opportunity to brief the application of procedural bars. Should Petitioner wish to oppose the application of the procedural bar to Claim 7 or 13, Petitioner shall file a brief no later than 21 days from the date of this Order. Petitioner's brief and any response shall be governed by the page limits and schedule set forth below.

IV. Claims 3D(2), 3D(3), 3D(4), and 3D(5)

The California Supreme Court reasonably rejected Petitioner's claims that trial counsel was ineffective:

• for failing to object to the admission of testimony from David Navarro about alleged hearsay statements by Mr. Bernstein regarding Petitioner's involvement in Mr. Samuels' murder. (*See* 13 RT 1646-47 (counsel's objection)); *Samuels*, 36 Cal. 4th at 120 (rejecting the State's argument that defense counsel had failed to object and citing authority that "the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented" (internal citation omitted)); (Pet. at 62 ¶ 198(2) (Claim 3D(2)));

• for failing to object to the admission of testimony from Detective Daley regarding alleged hearsay statements by Detective Birrer that Mike Silva had been

identified as involved in Mr. Samuels' murder and had since died. *See Samuels*, 36 Cal. 4th at 122-23 (holding that Detective Daley's testimony about Detective Birrer's statements "was not used to prove that Mike Silva killed Robert Samuels . . . [but] to explain Detective Daley's reasons for obtaining search warrants and contacting Mike Silva [after] . . . defense counsel asked . . . whether Silva was ever arrested for Robert Samuels's murder," and that defense counsel acknowledged raising whether Mr. Silva had died and successfully excluded details about how he died); (Pet. at 62 ¶ 198(3) (Claim 3D(3)));

• for failing to object "on constitutional grounds" to the admission of testimony from Mr. Samuels' divorce attorney, Elizabeth Kaufman, that Mr. Samuels told her he intended to go through with the divorce. (Pet. at 62-63 ¶ 198(4) (Claim 3D(4)); *see infra* § XIII (finding no constitutional error in admission of the testimony)); *see Juan H.*, 408 F.3d at 1273; *Wilson v. Henry*, 185 F.3d 986, 990 (9th Cir. 1999) ("To show prejudice under *Strickland* [*v. Washington*, 466 U.S. 668 (1984)] from failure to file a motion," petitioner must show, in part, that "had his counsel filed the motion, it is reasonable that the trial court would have granted it as meritorious"); *Molina*, 934 F.2d at 1447.

• for failing to object "on constitutional grounds" to Mr. Samuels' autopsy photographs. (Pet. at 63 ¶ 198(5) (Claim 3D(5)); *see supra* § I (finding no constitutional error in their admission)); *see Juan H.*, 408 F.3d at 1273; *Wilson*, 185 F.3d at 990; *Molina*, 934 F.2d at 1447.

Claims 3D(2), 3D(3), 3D(4), and 3D(5) are DENIED.

V. Claims 3E(2), 3E(3), 3E(6), 3E(7)

A. Claim 3E(2)

On direct examination, Petitioner answered affirmatively when asked if Detective Daley "suggest[ed]" other suspect(s) to her. (32 RT 4299.) The prosecution objected, and defense counsel argued that the testimony would impeach Detective Daley's prior testimony that (in counsel's words) "he never

talked to anyone about other suspects." (32 RT 4299-4300.) The court ruled that it was not inconsistent but that defense counsel "might have an opportunity" to question Detective Daley on the topic when the prosecution recalled him and after a hearing under California Evidence Code § 402. (33 RT 4305.) In Claim 3E(2), Petitioner claims trial counsel was ineffective for failing to do so. (Pet. at 66 ¶¶ 206-209.)

The California Supreme Court may have reasonably determined that Petitioner showed no prejudice from counsel's failure to question Detective Daley on whether he told Petitioner about other suspects. Defense counsel had already questioned Detective Daley on whether he had revealed suspects to others, including Anne Hambly, Arienne Williams, and Larry Martino. (8 RT 886-89.) Detective Daley said "[i]t's possible" he told Ms. Hambly about suspect(s) and he told Ms. Williams "that we had suspicions relative to who might have done it and that these suspicions were forwarded to us by a friend of Mary Ellen Samuels who gave us her name." (8 RT 886-87.) When asked, "You wouldn't tell him [Mr. Martino] who your suspects were, would you?" Detective Daley responded, "I may or may not have mentioned people involved." (8 RT 888-89.) When Daley was recalled, defense counsel asked him on cross-examination if he had discussed "specifics of this case and the investigation" with people outside the police department, and he said, "[o]n several occasions, yes." (38 RT 5101; *see also* 38 RT 5102-10.) The California Supreme Court may have reasoned that questioning Detective Daley further on the subject would not have impeached him to a degree showing a reasonable probability of a different outcome at trial. Claim 3E(2) is DENIED.

B. Claim 3E(3)

In Claim 3E(3), Petitioner faults trial counsel for failing to investigate and present evidence that: (a) as of November 1988, Mr. Samuels wanted to reconcile with Petitioner, contrary to prosecution evidence that he wanted to move forward

with their divorce (Pet. at 66-67 ¶ 211 (citing Ex. 11, letter from Mr. Samuels to Petitioner)); and (b) no order had been entered removing Petitioner as the representative of Mr. Samuels' estate, meaning Susan Conroy, Mr. Samuels' sister, lacked standing to waive his attorney-client privilege at trial for his divorce attorney to testify. (*Id.* (citing Ex. 13).)

As to Mr. Samuels' desire to reconcile with Petitioner, the California Supreme Court may have reasonably found no deficient performance by counsel. The court may have reasoned that counsel made a strategic decision not to present the evidence in the exhibit Petitioner cites. *See Harrington v. Richter*, 562 U.S. 86, 105 (2011) ("The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard."). Presenting evidence that Mr. Samuels wanted to reconcile could have made Petitioner's situation even less sympathetic to the jury, and the letter contains details that could have been unflattering to Petitioner. (*See* Ex. 11 ("I want to be a good husband to you, but I can't do that when you . . . have your secret weekends with other people whom I don't know. . . . Unless, I take you somewhere for a week-end – you only stop over for a few hours and then your [sic] off and out with other people.").)

As to the representative of Mr. Samuels' estate, the record shows that defense counsel was following the developments and asserting Petitioner's interests. The prosecutor told the trial court that Ms. Conroy was Mr. Samuels' personal representative, and Ms. Conroy so testified. (30 RT 3923 (prosecutor's statement about Ms. Conroy, "The personal representative of Mr. Samuels is present in court."), 3927 ("The Court: . . . You indicated that somebody is a representative of the estate. [¶] Ms. Maurizi [the prosecutor]: Yes, Susan Conroy."), 3928 (Ms. Conroy's testimony that she was "the legally appointed administrator of the estate of Robert Samuels").) Defense counsel asked Ms. Conroy on cross-examination, "[I]sn't there a hearing set for the 12th of May, tomorrow, to determine whether you will continue to hold the position that you

hold any further than tomorrow?" (30 RT 3928.) Ms. Conroy said that was correct. (*Id.*) Later, on May 17, defense counsel argued to the court in another context:

> I would urge the court to find that at this point in time, and I have the probate file here, Mary Ellen Samuels is the administrator or the personal representative of the estate and she has the right to waive the privilege at that time. [¶] The fact she has been surpassed by another person at this point in time should not prevent her from waiving the privilege . . . .

(33 RT 4331.) The California Supreme Court may have reasonably concluded on the basis of the record that Petitioner failed to show deficient performance by counsel in Claim 3E(3). Claim 3E(3) is DENIED.

C. Claim 3E(6)

In Claim 3E(6), Petitioner alleges that had trial counsel properly cross-examined Paul Gaul and Darrell Edwards, who together admitted killing Mr. Bernstein, counsel could have presented evidence of their drug use sufficient to negate any specific intent and "preclude the giving of the damaging 'lying in wait' jury instruction . . . ." (Pet. at 69; *see also id.* at 69-70 ¶¶ 219-222.) Petitioner alleges that counsel should have provided the jury with "evidence upon which to reject the lying-in-wait special circumstance, instead of all but conceding it. Having failed to negate the issue of lying in wait, the court gave CALJIC 8.25, the lying-in-wait instruction, and the jury so found on evidence that could have been, and should have been, challenged." (*Id.* at 70 (citing 5 CT 1232).)

CALJIC 8.25 instructed the jury on a lying in wait theory of first degree murder. (5 CT 1232.) The prosecution did not allege, and the jury did not find true, a lying in wait special circumstance. (*Cf.* 38 RT 5114-15.) Counsel could not have been ineffective in failing to challenge a special circumstance that was not alleged.

To the extent Petitioner alleges that counsel was ineffective for failing to challenge adequately a lying in wait theory of first degree murder, the California Supreme Court may have reasonably found a lack of prejudice. Mr. Gaul and Mr. Edwards provided detailed testimony at trial regarding their intoxication, plan, and intentions on the day of Mr. Bernstein's murder. (*See, e.g.*, 17 RT 2154-56 (Mr. Gaul's testimony that on the day of Mr. Bernstein's murder, he and Mr. Edwards drank from 9:00 AM until 5:00 PM or 6:00 PM, consuming 30 or 40 drinks, and Mr. Gaul continued drinking before meeting Mr. Bernstein); 17 RT 2156-57 (Mr. Gaul's testimony that he planned with Mr. Edwards that Mr. Edwards would be able to break Mr. Bernstein's neck after they took him to a place near Frazier Park by telling him they "knew some drug dealers up there and that we would . . . rip them off"); 22 RT 2906-07, 2911 (Mr. Edwards' testimony that on the day of Mr. Bernstein's murder, he drank all day from 10:00 AM until he and Mr. Gaul left with Mr. Bernstein around 9:00 PM, including at least three or four beers between 6:00 PM and 9:00 PM); 22 RT 2907-10 (Mr. Edwards' testimony that before Mr. Bernstein's murder, Mr. Edwards and Mr. Gaul discussed a plan that they would tell Mr. Bernstein they were going to buy drugs from a place around Castaic, that "[f]rom a side distance of the driver's seat" Mr. Gaul would hit Mr. Bernstein in the throat as hard as he could to "knock the wind out of him," and that they would leave his body in an area near Frazier Park).) The court may have seen no reasonable probability of a different outcome at trial had counsel shown additional evidence of intoxication.

Claim 3E(6) is DENIED.

D. Claim 3E(7)

In Claim 3E(7), Petitioner faults trial counsel for raising no objection to testimony from Ms. Conroy about Frank Samuels, the brother of Ms. Conroy and

Robert Samuels. (Pet. at 70-71 ¶¶ 223-225.) Petitioner alleges that the questions and answers:

> portrayed Frank Samuels as having been medicated, disabled, and unemployable. They characterized the Samuels family as having been a close knit family, whose mother and father had both passed away. They portrayed Robert Samuels as having been a caring individual, who, despite the fact that Frank Samuels was the elder of the two brothers, had sought to take care of him and put him to work in his Subway store. (39 RT 5197-98.)

(Pet. at 71 (internal citation edited).) The California Supreme Court may have reasonably held that Petitioner failed to show prejudice or deficient performance by counsel, as the testimony was limited and counsel may have reasoned that an objection would have drawn the jury's attention to it. *Cf. Kennedy v. Lockyer*, 379 F.3d 1041, 1056 n.19 (9th Cir. 2004) ("It is likely that counsel concluded that an objection to [the] testimony . . . would have made matters worse by calling further attention to the prejudicial disclosure."). Claim 3E(7) is DENIED.

VI. Claim 3F

A. Claim 3F(1)

In Claim 3F(1), Petitioner faults trial counsel's opening statement and closing argument for failing to provide a "road map" for the jury, a "theme or version of the facts that the jury could employ when exposed to the testimony of the various witnesses." (Pet. at 72-73.) Petitioner contends that counsel failed to present the jury with any defense theory of the case. (*Id.* at 73.) She adds that in his opening statement, counsel promised to "show [the jury] beyond any doubt who is in fact responsible for the killing of Bob Samuels and for the killing of James Bernstein," but failed to do so by the conclusion of trial. (7 RT 726; *see* Pet. at 72.) Petitioner alleges that trial counsel lacked any "reasoned belief" that his promise would be fulfilled. (Pet. at 72.)

The California Supreme Court may have reasonably concluded that Petitioner failed to show deficient performance by counsel.

In his opening statement, defense counsel argued that Detective Daley made Petitioner a suspect after his investigation had been unsuccessful for more than a year and after Petitioner declined his romantic advances. (7 RT 718-20.) After being unable to collect evidence against her by other means, counsel argued, "the detective and the former district attorney make a deal with the devil and the deal is as follows: We are going to give immunity to certain people so that they will implicate Mary Ellen Samuels." (7 RT 721.) Counsel also told the jury they would hear evidence of Mr. Samuels' abuse of Petitioner and Nicole (7 RT 725-26), discussed below in Claim 3F(2). As set forth below, that evidence provided an independent motive for Mr. Bernstein and/or another third party to have killed Mr. Samuels.

In his closing statement, defense counsel spent considerable time attacking the credibility of the prosecution witnesses (*see* 41 RT 5432-88; 42 RT 5494-5510, 5514-20), including Detective Daley. (*See* 41 RT 5478-88 (arguing that Detective Daley lied, had significant memory problems, conducted a deeply flawed investigation, and admitted that he told Petitioner his wife worked as a flight attendant and may have told her his wife was away for a period of time).) Counsel argued the believability of the evidence of abuse. (*See* 42 RT 5520-22, 5532.) At the conclusion of his argument, counsel told the jury:

> [T]he prosecution in this case wants you to legitimize the unholy alliance between Detective Daley, Mr. Jenkins [the prior prosecutor in Petitioner's case, who requested immunity and other benefits for witnesses (*see, e.g.*, 10 RT 1135, 1147-48; 17 RT 2203-06; 26 RT 3389; *cf.* 41 RT 5450)] and the witnesses who testified in this case and convict Mary Ellen Samuels based on that testimony. . . . Ladies and gentleman, I'm going to ask you to send a message. [¶] I'm going to ask you to send a message to George Daley who is here. I'm going to ask you to send a message to the Los Angeles Police

> Department and to the District Attorney's Office. [¶] And that message is that based on the evidence presented in this case, that you will not stand nor tolerate for you being asked to bring in a guilty verdict in this case. [¶] I want you to tell the prosecution and Detective Daley that you do not believe the truth of their allegations and that you believe the defense.

(42 RT 5537, 5541.) The California Supreme Court may have reasoned that counsel's arguments adequately provided a "road map" for the jury to follow.

Regarding his statement that he would show the jurors the identities of the true killer(s), counsel said in his closing argument:

> I heard [from the prosecutor (*see* 41 RT 5415-16)] that I had made certain representations and promises to you in my original opening statement. [¶] So I went back and read the original opening statement because I wanted to see where I told you in that statement that David Navarro or some big drug dealer was going to kill Jim Bernstein. [¶] And having read it, ladies and gentlemen, and I'm sure you will recall, I never made those promises to you. But thanks to the honest testimony of Darryl Ray Edwards, we know who the drug dealers were who killed Jim Bernstein, who had a motive to kill Jim Bernstein, and they were none other than Anne Hambly and Paul Gaul.

(42 RT 5513.) Even if counsel intentionally or unintentionally left vague the identity of Mr. Samuels' killer, the California Supreme Court may have reasonably determined that counsel's strategy and performance were constitutionally adequate. *See Richter*, 562 U.S. at 105 ("Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. . . . It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence. . . . The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." (internal quotations and citations omitted)). Claim 3F(1) is DENIED.

B. Claim 3F(2)

In Claim 3F(2), Petitioner alleges that trial counsel was ineffective for introducing evidence that Mr. Samuels had abused Nicole and Petitioner. (Pet. at 73-75.) Petitioner argues that the evidence of abuse provided an "alternate motive" for Petitioner to have killed Mr. Samuels. (*Id.* at 73.)

The California Supreme Court may have reasonably held that Petitioner failed to show deficient performance by counsel. The evidence provided an independent motive for Mr. Bernstein and/or another third party to have killed Mr. Samuels, without any solicitation or involvement by Petitioner. (*Cf.* 41 RT 5415-16 (prosecutor's statement in closing argument that this was the defense's theory of Mr. Samuels' murder based on trial counsel's questions during trial).) Trial counsel introduced evidence from Nicole that when Mr. Bernstein asked her if Mr. Samuels had sexually abused her, he "said that he hoped that he wouldn't do anything like that to me because if he did, he'd kill the son of a bitch." (29 RT 3896-97.) Defense counsel also introduced evidence from Petitioner that she said "probably loud[ly]" at a bar that she "wished the son of a bitch was dead," referring to her husband; that a man at the bar approached her and she told him she was "married to a child molester;" that the man cursed, responded that "there are people like that," and said he knew someone who "could take care of a situation like that;" and that when the man called her "a couple days later" when she was with Mr. Bernstein, she "explained" to Mr. Bernstein "how all of a sudden I remembered who [the man] was." (32 RT 4268-72.) Trial counsel presented that evidence to the jury in one sequence of questions, and in the same sequence asked Petitioner whether she ever suggested, requested, or offered money to Mr. Bernstein to kill Mr. Samuels. (32 RT 4268-73.) Trial counsel's questions suggested that Mr. Bernstein and/or the man at the bar could have been independently motivated by the abuse to kill Mr. Samuels. The California

Supreme Court may have reasoned that trial counsel's presentation of the evidence was constitutionally adequate. Claim 3F(2) is DENIED.

VIII. Claim 3H

In Claim 3H, Petitioner alleges that trial counsel was ineffective for presenting evidence damaging to the defense. (Pet. at 76-79.)

A. Claim 3H(1) as to the Guilt Phase of Trial

The California Supreme Court may have reasonably rejected for lack of prejudice Petitioner's claim regarding Anne Hambly's ongoing fear of Petitioner. (Pet. at 77 ¶¶ 249-251.) Petitioner alleges she "was prejudiced by this testimony as it made the jury believe Petitioner was more likely to commit the murders charged as to the guilt phase . . . ." (*Id.*) Defense counsel challenged Ms. Hambly's overall credibility in detail in closing argument. (*See* 42 RT 5495-5514, 5524.) The California Supreme Court may have reasoned that the jury was likely either to accept Ms. Hambly's testimony along with her purported fear of Petitioner or to reject it entirely. The California Supreme Court may have reasonably found on that basis no prejudice at the guilt phase of trial. Claim 3H(1) as to the guilt phase of trial is DENIED.

B. Claim 3H(2)

The California Supreme Court may have rejected for lack of deficient performance Petitioner's allegations that:

> [t]rial counsel was ineffective in eliciting inadmissible hearsay testimony that Petitioner was a thief and had stolen from her husband. When Annette Church was recalled by the defense, she was asked about a conversation she had had with Detective Daley in the hallway of the courthouse. The subject matter of this conversation was the instant case. Trial counsel asked Ms. Church to tell the jury about Detective Daley's statement to her that he knew Petitioner better than she did. Ms. Church then testified that Detective Daley told her that she really did not know Petitioner very well as Petitioner had 'robbed her own Subway store twice and was pocketing money from her

> husband.' (39 RT 5240.) Trial counsel then asked Ms. Church to recount to the jury Detective Daley's comments about the 'cheesecake' photographs that had been taken by Petitioner. (*Id.*)

(Pet. at 77-78 (internal citations edited); *see infra* § IIIC (Penalty Phase Claims) (discussing "cheesecake" photographs).) The California Supreme Court may have reasoned that trial counsel's questions were designed to support the theory of the defense that Detective Daley was improperly biased against Petitioner after she rejected his romantic advances. Claim 3H(2) is DENIED.

IX. Claim 3I

The California Supreme Court reasonably rejected Petitioner's claim that defense counsel conceded in closing argument the truth of the financial gain special circumstance allegation as to Mr. Samuels. (Pet. at 79.) Defense counsel argued:

> The other problem with the People's theory is that they want you to conclude that Mary Ellen Samuels knew things that even they can't prove she knew. . . . They want you to believe that she knew that there was a line of credit with an insurance policy attached to it. [¶] We submit she did, ladies and gentlemen. But in her own testimony, which I submit to you is credible, she said she wasn't certain how much the line of credit life insurance policy would be good for. [¶] I believe the evidence was 50,000. I believe the evidence was $63,000 due and owing [on the line of credit]. But this is the only factor that the People haven [sic] proven she knew about.

(41 RT 5429-30; *cf.* 35 RT 4561.) The California Supreme Court may have reasonably concluded that trial counsel did not make a concession of the financial gain special circumstance and did not provide ineffective assistance. Rather, he addressed a portion of Petitioner's own testimony and attempted to limit its significance, by arguing that she did not know the amount of the policy and, by implication, would not have solicited her husband's murder to receive it. (*See* 33 RT 4337 (Petitioner's testimony that she found out about the policy and its amount

1 from Mr. Samuels' insurance agent and "thought he had been mistaken"); *cf.* 40
2 RT 5328 (setting forth financial gain special circumstance requirement that "the
3 defendant believed the death of the victim would result in the desired financial
4 gain").) Claim 3I is DENIED.

5 **X. Claim 5**

6 **A. Background and Allegations**

7 Petitioner was represented by James Robelen from the time of her
8 investigation through her preliminary hearing. (Pet. Ex. 1 ¶ 2; *cf.* 29 RT 3805-07.)
9 While Mr. Robelen represented her, he began representing Mr. Bernstein on an
10 unrelated matter. (26 RT 3433-34; 29 RT 3788, 3805-07; Ex. 1 ¶ 3.) During
11 Petitioner's trial, Mr. Robelen testified at a hearing outside the presence of the jury
12 that on two occasions, Mr. Bernstein told him that he hired two people, Mr.
13 Navarro and his friend, to kill Mr. Samuels and he paid them in cocaine. (29 RT
14 3788, 3800, 3802.) Mr. Robelen testified that Mr. Bernstein told him that Mr.
15 Samuels had raped Nicole and her friend and that Mr. Samuels was interfering
16 with his relationship with Nicole. (29 RT 3803.) Petitioner's trial counsel made
17 an offer of proof, and Mr. Robelen later signed a declaration, that Mr. Bernstein
18 told Mr. Robelen that Petitioner was not involved in the plan to murder or the
19 actual murder of Mr. Samuels. (29 RT 3773-74 (defense counsel's offer of proof
20 that Mr. Robelen would testify "that Bernstein told him Mary Ellen knew nothing
21 about the fact he had arranged this; he will testify Bernstein never asked Mary
22 Ellen for money; Bernstein said that he did what he did for the purposes that I've
23 brought forth and did not do so for money, was not asked to do it by my client for
24 money as alleged by the People"); Ex. 1 ¶ 4 (declaration of Mr. Robelen that "Mr.
25 Bernstein told me that he had become infatuated with Nicole Samuels, the
26 daughter of Mary Ellen Samuels. He further related that, to ingratiate himself with
27 Nicole Samuels, he arranged to have Robert Samuels murdered and that Mary
28

Ellen Samuels was not involved in either the plan for this murder or the actual murder.”).)

Mr. Robelen testified that his secretary and a man who drove Mr. Bernstein to his office were present during the meeting. (26 RT 3440-42; 29 RT 3789-92, 3796; *see also* Ex. 1 ¶ 4.) The driver was present when Mr. Bernstein made the statements about Mr. Samuels' murder, and Mr. Robelen's secretary was generally “in and out,” he said. (29 RT 3790, 3795-96.) Mr. Robelen testified that he wrote down Mr. Bernstein's statements. (29 RT 3797, 3803-05.) The court asked him:

> Did you feel the conversation that Jim Bernstein had with you regarding his statements, that there was an attorney-client relationship existing between you and Mr. Bernstein?
>
> [A.] The truth of the matter is, your honor, I didn't know at the time. But I didn't divulge it for fear that there might have been one. And before I got to the point where I could research it sufficiently to satisfy myself, I was off the case. And other things that happened in my life which caused me to eliminate the sort of research it any further.

(29 RT 3810; *see also* 29 RT 3805-06.) As for witnesses to Mr. Bernstein's statements, Mr. Robelen did not know or recall the identity of the driver. (26 RT 3440-41; 29 RT 3792-93, 3800.) Mr. Robelen was later convicted of killing the secretary present at the meeting. (29 RT 3811.)

Petitioner alleges in Claim 5 that:

> [d]ue to a conflct of interest in this dual representation, Mr. Robelen failed to disclose and preserve the admission that James Bernstein had made to him and failed to pursue the theory that Mr. Bernstein had acted on his own in killing Mr. Samuels. Mr. Bernstein himself was then killed, at which time the compelling evidence of Mr. Bernstein's sole culpability was no longer available. [¶] Mr. Robelen also murdered one of the other witnesses to Mr. Bernstein's

> exoneration of Petitioner and failed to identify and document the name and location of the sole surviving witness.

(Pet. at 89; *see also id.* at 90-93.)

B. Analysis

Petitioner's conflict of interest claim lacks support in clearly established federal law. The Ninth Circuit has "held that a state court's rejection of a conflict claim not stemming from concurrent representation is neither contrary to, nor an unreasonable application of, established federal law as determined by the United States Supreme Court." *Rowland v. Chappell*, 876 F.3d 1174, 1192 (9th Cir. 2017) (discussing *Foote v. Del Papa*, 492 F.3d 1026, 1029 (9th Cir. 2007); *Earp v. Ornoski*, 431 F.3d 1158, 1184 (9th Cir. 2005)). Petitioner's allegations do not show a concurrent representation during the time her constitutional right to counsel had attached.

"Under the Sixth Amendment, '*where a constitutional right to counsel exists*, there is a correlative right to representation that is free from conflicts of interest.'" *Rowland*, 876 F.3d at 1191 (quoting *Wood v. Georgia*, 450 U.S. 261, 271 (1981) (internal alteration and ellipsis omitted; emphasis added)). The Sixth Amendment right to counsel "'does not attach until a prosecution is commenced.'" *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 198 (2008) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991); internal citations omitted). The United States Supreme Court has, "for purposes of the right to counsel, pegged commencement to the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* (internal quotations omitted). Because a felony complaint for an order holding Petitioner to answer was filed only after Mr. Bernstein's death, Mr. Robelen's representation of Petitioner and Mr. Bernstein was not concurrent. (*See* 3 CT 590-95 (alleging that Petitioner committed the murder of Mr. Bernstein in Felony Complaint [for] Order Holding to Answer); 29 RT 3805-06 (Mr. Robelen's

testimony that Mr. Bernstein made the statements "long before anything occurred in the way of an arrest or anything of that nature").)

Because it lacks support in clearly established federal law, Claim 5 is DENIED.

XI. Claim 4 and Claim 6 as to Evidence of Third Party Culpability

In Claim 4, Petitioner faults trial counsel for failing to present alleged evidence that a third party, James Nowlin, committed Mr. Samuels' murder. (Pet. at 82-88.) Petitioner alleges that Mr. Nowlin, a reserve police officer:

> had a history of violent and outrageously disturbing behavior towards himself and others. Before Robert Samuels' death, Nowlin learned that his estranged wife had dated, and had been intimate with, Robert Samuels. Later, he told his girlfriend, Christine Merrick, that he knew of the relationship, and shortly before Samuels' death, he told Merrick that he was about to do a very bad thing for which he could go to jail for a long time. He later asked Merrick to vouch for his whereabouts at the time of Samuels' murder. Nowlin was originally a suspect in the police investigation, and was never officially 'cleared.'

(Brief in Support of Claims Asserted in Petition for Habeas Corpus on Behalf of Mary Ellen Samuels, Docket No. 69 ("Opening Br.") at 31; *see also*, *e.g.*, 3 CT 745-56 (Los Angeles Police Department investigation report discussing Mr. Nowlin).)

The California Supreme Court may have reasoned that Petitioner failed to establish deficient performance by counsel. "There is a strong presumption that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect." *Richter*, 562 U.S. at 109 (internal quotations omitted). The record shows that Petitioner's counsel attempted to investigate Mr. Nowlin's potential culpability by requesting his law enforcement personnel file. (*See infra* Claim 8; *see also* 2 RT 97-101 (defense counsel's argument that request under *Pitchess v. Superior Court*, 11 Cal. 3d 531 (1974) could uncover evidence to support third party culpability of James Nowlin); 3 CT 722 (defense counsel's

1 *Pitchess* request as to Mr. Nowlin stating, "This defendant may claim that James
2 Nowlin, an officer or former reserve officer of the Costa Mesa Police Department,
3 is the person who murdered or caused to have murdered Robert Samuels").)
4 During the trial, defense counsel continued considering whether to present
5 evidence about Mr. Nowlin and attempted to present some evidence in that regard.
6 (*See* 8 RT 873 ("Now I hadn't really at this point in time decided or changed my
7 mind. I still don't think I'm going to present evidence of Jim Nolan [sic]
8 committed the crime."); 8 RT 868-73 (seeking to question Detective Daley about
9 whether James Nowlin was a suspect); 33 RT 4303-05 (same); 38 RT 5103
10 (eliciting testimony from Detective Daley that he told a friend of Mr. Samuels
11 information about James Nowlin when updating her on the investigation).) In the
12 absence of any other evidence regarding trial counsel's actions or reasoning, the
13 California Supreme Court may have reasonably applied the presumption that
14 defense counsel made a strategic decision not to pursue further any evidence
15 regarding Mr. Nowlin's potential culpability. Claim 4 is DENIED.
16 In Claim 6, Petitioner faults trial counsel for failing to present evidence
17 from Mr. Robelen "to testify that James Bernstein had confessed to the murder of
18 Robert Samuels and had exonerated Petitioner in that confession." (Pet. at 94.)
19 As noted above, by the time of Petitioner's trial, Mr. Robelen had been convicted
20 of the homicide of his secretary, with whom he was in a romantic relationship.
21 (*See id.* at 88.) Petitioner acknowledges a note in defense counsel Philip Nameth's
22 file, authored by co-counsel Justin Groshan, stating counsel's decision not to call
23 Mr. Robelen as a witness in part because his testimony "would hurt more tha[n]
24 help . . . ." (*Id.* at 95 (citing Ex. 5 (so stating as to the guilt phase and explaining
25 in the context of the penalty phase decision that it "could hurt more tha[n] he
26 could help, because of his own conviction")).) The California Supreme Court may
27 have reasonably concluded that trial counsel made a sound decision not to present
28 testimony from Mr. Robelen in light of his conviction of an offense with similarity

to Petitioner's own charge. (*Cf.* 29 RT 3812.) The California Supreme Court may have also reasonably determined that Petitioner failed to present evidence to show that trial counsel was ineffective in not "investigating and determining the identity of the sole remaining witness to Mr. Bernstein's exoneration of Petitioner, the person present at the meeting where the conversation occurred," as he further alleges. (Pet. at 95; *cf.* Petitioner's Reply to Respondent's Opposition to Petitioner's Merits Brief, Docket No. 78, at 21 (acknowledging that "[b]y the time that the trial was conducted, . . . there was no way to identify the independent witness," without suggesting any means by which the alleged witness could have been identified previously).)

Claim 6 is DENIED.

XII. Claim 8

In Claim 8, Petitioner challenges the trial court's denial of his *Pitchess* requests for discovery of the personnel records of Detective Daley and Mr. Nowlin. (Pet. at 110-16.) The trial court reviewed Detective Daley's file and attached it to the record under seal. *Samuels*, 36 Cal. 4th at 110.

Petitioner makes no preliminary showing that either personnel file contains evidence material to his defense. As a result, he fails to show a due process violation from the denial of the discovery. *See Harrison v. Lockyer*, 316 F.3d 1063, 1066 (9th Cir. 2003) (finding no due process violation where defendant was denied access to all documents in the arresting officer's personnel file, because the defendant failed to make "a preliminary showing that [the] police personnel file contain[ed] evidence material to his defense," even while noting that "[w]e are not instructed on how a defendant in a criminal case will know, or be able to make, a preliminary showing that a police personnel file contains evidence material to his defense"). Claim 8 is, therefore, DENIED.

XIII. Claims 9, 10, and 11

In Claim 9, Petitioner challenges the admission of hearsay testimony from witnesses David Navarro, Rennie Goldberg, and Matthew Raue about statements Mr. Bernstein made to them. (Pet. at 58-63.) David Navarro testified that Mr. Bernstein said about Mr. Samuels' death that "[h]e had done it and Mike [Silva] had helped him. And that [Ms. Samuels] had paid him." *Samuels*, 36 Cal. 4th at 120. Rennie Goldberg testified that in April 1989, Mr. Bernstein told him that he was being solicited by Petitioner and Nicole to have Mr. Samuels murdered "and that he was considering doing so (even though Samuels had already been killed in December 1988)." *Id.* at 121; (*see* Pet. at 117). Matthew Raue testified that in the spring of 1989, Mr. Bernstein said he was approached by Petitioner and Nicole to help murder Mr. Samuels. *Samuels*, 36 Cal. 4th at 121; (*see* Pet. at 117).

In Claim 10, Petitioner challenges the admission of hearsay testimony from Detective Daley regarding alleged hearsay statements by Detective Birrer that Mike Silva had been identified as involved in Mr. Samuels' murder and had since died. (Pet. at 123-27.)

In Claim 11, Petitioner challenges the admission of hearsay testimony from Elizabeth Kaufman and Susan Conroy about statements Mr. Samuels made to them concerning his intentions in his pending divorce. (*Id.* at 128-33.)

Petitioner alleges that the admission of the hearsay testimony "rendered the trial fundamentally unfair and violated Petitioner's Sixth Amendment right to confrontation and the Fourteenth Amendment right to due process." (*Id.* at 120; *see also* Opening Br. at 67.)

The United States Supreme Court held in *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004) that the Confrontation Clause does not apply to nontestimonial statements. *See Davis v. Washington*, 547 U.S. 813, 821 (2006) ("In *Crawford*, we held that [the Confrontation Clause] bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and

1 the defendant had had a prior opportunity for cross-examination." A critical
2 portion of this holding . . . is the phrase 'testimonial statements.' Only statements
3 of this sort cause the declarant to be a 'witness' within the meaning of the
4 Confrontation Clause." (internal citation omitted)). The out-of-court statements at
5 issue here are nontestimonial. *See id.* at 822. Petitioner's Confrontation Clause
6 claims lack support in clearly established federal law.

7 Petitioner's due process claims fail on the same ground. The Ninth Circuit
8 has applied its holding in *Holley*, 568 F.3d at 1101 ("The Supreme Court . . . has
9 not yet made a clear ruling that admission of irrelevant or overtly prejudicial
10 evidence constitutes a due process violation sufficient to warrant issuance of the
11 writ."), to a challenge to the admission of hearsay testimony at the guilt phase of
12 trial. *Zapien v. Davis*, 849 F.3d 787, 794 (9th Cir. 2015) (discussing admission of
13 "multi-level hearsay"). Because they lack support in clearly established federal
14 law, Claims 9, 10, and 11 are DENIED.

15 **XIV. Claims 14, 3D(7), and 3E(5)**

16 **A. Claim 14**

17 In Claim 14, Petitioner alleges prosecutorial misconduct and trial court error
18 in the admission of evidence surrounding Petitioner's polygraph examination.
19 (Pet. at 144-47.) On direct examination, the prosecutor elicited testimony from
20 Detective Daley that he "kept asking" Petitioner for certain information to assist
21 his investigation in the two weeks following Mr. Samuels' death. (7 RT 784-86.)
22 On cross-examination, the defense sought to present testimony that Petitioner
23 cooperated with the investigation by taking a polygraph examination. (8 RT 856.)
24 The prosecutor objected and argued, among other things, that if the evidence were
25 admitted, it would open the door to evidence of statements Petitioner made to third
26 parties about how to pass a polygraph exam. (8 RT 857-58.) The defense asked to
27 review the polygraph results before stipulating to their admission. (8 RT 864-65.)
28 The court then instructed the jury to disregard defense counsel's question

regarding the polygraph exam. (8 RT 866.)

Later, during her examination of Marsha Hutchison, Petitioner's former friend, the prosecutor elicited testimony that Petitioner told Ms. Hutchison a person could pass a polygraph exam by taking a certain drug, being a pathological liar, or telling the truth. (11 RT 1392; *cf.* 11 RT 1363.) The trial court admitted the testimony after ruling that Petitioner could not introduce evidence from Ms. Hutchison that Petitioner offered to take a polygraph exam, asked Ms. Hutchison to accompany her to take it, told Ms. Hutchison she had nothing to do with Mr. Samuels' murder, or was told she passed the exam. (11 RT 1370, 1387-90.) Petitioner alleges that in so ruling, the trial court prohibited her from introducing evidence in support of her defense and permitted the prosecutor to introduce misleading, related evidence. (Pet. at 147.)

The California Supreme Court held on direct appeal that the claim "lacks merit since polygraph evidence, absent a stipulation by all parties, is not admissible." *Samuels*, 36 Cal. 4th at 128 (citing Cal. Penal Code § 351.1). The court held that there was no misconduct in the prosecution's presentation of evidence of Petitioner's alleged statement to Ms. Hutchison and that the trial court properly admitted the evidence "on the basis that it demonstrated defendant's consciousness of guilt." *Id.* (noting, in any event, that any misconduct was harmless).

Petitioner's claims regarding the trial court's rulings lack support in clearly established federal law. First, as discussed above, no clearly established federal law provides a basis for finding a due process violation at the guilt phase of trial from the admission of evidence that is prejudicial or inadmissible under state law. *See Holley*, 568 F.3d at 1101. Second, Petitioner's claim that the exclusion of her proffered evidence denied her the ability to present a defense is foreclosed by *United States v. Scheffer*, 523 U.S. 303, 305, 309 (1998) (holding that military rule of evidence making polygraph evidence inadmissible did not unconstitutionally

abridge defendant's right to present a defense). California Evidence Code § 351.1(a) explicitly barred evidence of "*any reference* to an offer to take . . . or taking of a polygraph examination" absent a stipulation by the parties, and Petitioner presents no clearly established federal law to show that the statute unconstitutionally infringed her right to present a defense. Cal. Evid. Code § 351.1(a) (emphasis added).

The California Supreme Court also reasonably rejected Petitioner's claim of prosecutorial misconduct. At most, the prosecutor elicited testimony in violation of the state evidentiary code and selectively took issue with the admission of polygraph-related evidence. The California Supreme Court reasonably determined that Petitioner failed to show a constitutional violation in the prosecutor's conduct.

Claim 14 is DENIED.

B. Claims 3D(7) and 3E(5)

In Claim 3D(7), Petitioner alleges that counsel was ineffective in failing to object "on constitutional grounds" to Ms. Hutchison's testimony. (Pet. at 63 ¶ 198(7).) The California Supreme Court may have reasonably denied the claim on the ground that the objection would have been meritless. (*See supra* § XIV(A)); *Juan H.*, 408 F.3d at 1273; *Wilson*, 185 F.3d at 990; *Molina*, 934 F.2d at 1447.

In Claim 3E(5), Petitioner alleges with respect to the polygraph exam results that trial counsel's "lack of preparation and failure to perfect Petitioner's rights resulted in the court ordering that testimony regarding Petitioner's having willingly submitted to numerous polygraph examinations and the exonerating polygraph test results would be inadmissible . . . ." (Pet. at 68-69 ¶¶ 216-218 (citing 11 RT 1363-92).)

First, Petitioner misstates the trial court's ruling. The court held that it would allow the introduction of the statements it took to be evidence of consciousness of guilt, discussed above, and that it would give "an instruction at

the end of this trial *if the stipulation regarding the admission of the polygraph examination is not arrived at*." (11 RT 1369-70 (emphasis added); *see also* 11 RT 1371-72 ("If there is not a stipulation, I will draft a jury instruction that says, 'I would not let them talk about what the results of the test are. You are not to speculate,' but much finer legalese than that.").) Thus, the court left open the possibility of the parties reaching a stipulation and the results being admitted.

Second, the record supports the presumption that counsel's actions were strategic, and Petitioner presents no evidence to the contrary. *See Strickland*, 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (internal quotation omitted)). The record shows that counsel was making an effort to investigate the polygraph results before presenting them to the jury. (*See* 8 RT 864-65; 11 RT 1366 ("[B]efore I make that stipulation I'm going to have an independent person other than myself or Mr. Lee from the Police Department tell me what those polygraph results are. [¶] I'm not going to stick her head on the chopping block without covering our respective rears."); 11 RT 1369.) Counsel explained:

> In no way would I ever have expected the issue of the polygraph to come up. . . . We all know what the polygraph – what the rules are of evidence regarding polygraphs. [¶] After we talked about the polygraph I found a person who would read the polygraph, and Mr. Groshan, co-counsel, prepared a declaration for Department 100 [for authorization for funding] and we have been moving expeditiously. [¶] I believe it was a day or two between when the polygraph was discussed and when Detective Richardson told me or Miss Maurizi told me they had the polygrams or whatever you call them. [¶] So we are not dragging our feet. And I'm doing it as fast as I can.

(11 RT 1369.) Counsel may well have decided, after investigating, that the results could have been questioned on cross-examination or were not as favorable as they

first appeared. Petitioner presents no evidence to the contrary. The California Supreme Court's denial of the claim was reasonable.

Claims 3D(7) and 3E(5) are DENIED.

XV. Claims 15, 16, 3D(8), 3D(9), and 3E(4)

In Claim 15, Petitioner alleges that the trial court violated her right to due process, to the presentation of a defense, and to the impeachment of witnesses when it "erroneously excluded an exculpatory tape recording of a secretly obtained conversation between Petitioner and Mr. Bernstein, where they did not know they were being recorded, while allowing Detective Daley to testify inaccurately to that conversation." (Pet. at 147-48; *see also id.* at 148-58.) In Claim 16, Petitioner alleges that the prosecution committed misconduct by knowingly presenting misleading testimony from Detective Daley and opposing the introduction of the tape recording. (*Id.* at 158-60.) In Claims 3D(8) and 3D(9), Petitioner faults defense counsel for failing to object "on constitutional grounds" and "under the Rule of Completeness" to Detective Daley's testimony. (*Id.* at 63 ¶¶ 198(8), 198(9).) In Claim 3E(4), Petitioner alleges that defense counsel was ineffective for failing to "perfect" Petitioner's request to play the tape recording. (*Id.* at 67-68 ¶¶ 212-215.)

First, the trial court did not exclude the tape recording. As Petitioner recounts in Claim 3E(4), the trial court left open the possibility of admitting the relevant portions of the tape. (*Id.* at 67-68.) The trial court allowed the defense to cross-examine Detective Daley about his testimony and did not prohibit Petitioner from introducing relevant portions of the tape recording. The California Supreme Court reasonably decided that Petitioner failed to show that the trial court violated her constitutional rights. *See Samuels*, 36 Cal. 4th at 130.

Second, the California Supreme Court reasonably observed on direct appeal that "defense counsel's vigorous questioning of Daley" elicited from him an accurate account of the conversation. *See Samuels*, 36 Cal. 4th at 129 (denying

Petitioner's claim of prosecutorial misconduct); (8 RT 878-80). The state court on habeas review may have reasonably concluded on the same basis that Petitioner failed to show prejudice from any deficient performance by counsel in objecting to Detective Daley's testimony or seeking to have the relevant portions of the tape admitted into evidence.

Claims 15, 3D(8), 3D(9), and 3E(4) are DENIED.

Finally, the California Supreme Court held on direct appeal that Petitioner's prosecutorial misconduct claim was barred for lack of contemporaneous objection. *Samuels*, 36 Cal. 4th at 128-29. Because Petitioner cannot show cause and prejudice through ineffective assistance of counsel to excuse the contemporaneous objection bar as to Claim 16, this Court would apply the bar to dismiss Claim 16. As noted above, however, the parties have not been given an opportunity to brief the application of procedural bars. Should Petitioner wish to oppose the application of the procedural bar to Claim 16, Petitioner shall file a brief no later than 21 days from the date of this Order. Petitioner's brief and any response shall be governed by the page limits and schedule set forth below.

XVI. Claim 17

A. Factual Background

As the California Supreme Court summarized on direct appeal:

> Paul Gaul testified for the prosecution pursuant to a plea agreement. He recalled a conversation that took place on a sheriff's bus with defendant. Gaul testified defendant stated she understood that he was testifying against her because he was given no choice. Gaul also testified that defendant said, 'You're the only one who can cut me loose. You already – I know you took your deal. You can cut me loose.' Gaul testified that he told defendant that this was not the case and that he was simply telling the truth.
>
> To impeach Gaul's testimony, defendant attempted to call Wanda Piety. Piety was also present on the bus during the conversation between Gaul and defendant and allegedly heard Gaul tell defendant

> that he knew she was innocent, but that he had to testify against her in order to get his plea agreement. However, when faced with the possibility of being cross-examined by the prosecution, Piety advised the court that she would assert her Fifth Amendment rights. The defense then moved the court to grant Piety immunity, which the court denied.

Samuels, 36 Cal. 4th at 127. In Claim 17, Petitioner raises a number of challenges to the prosecutor's and the trial court's actions. (Pet. at 89-99; Opening Br. at 161-68.)

B. Overbroad Cross-Examination

At the outset, Petitioner argues that the prosecution:

> overreached by asserting its intent to cross examine Piety on matters far beyond the direct and as to her guilt of the crime with which she was charged. The trial court then grievously erred in holding it would allow this improper cross examination, effectively denying Petitioner her right to compel and present an important witness on behalf of the defense. . . . [T]he trial court's decision to allow the prosecution to pursue cross examination as to whether Piety was guilty of a wholly unrelated crime apparently resulted from some . . . superficial similarity between the crimes with which Petitioner was charged and those with which Piety was charged. (28 RT 3636.)

(Opening Br. at 92-93 (internal citation edited); *see* Pet. at 163-68; *see also* 28 RT 3621-22 (prosecutor's statement to trial court that Ms. Piety was accused of attempting to kill a former romantic partner and attempting to hire someone to kill him after she failed to do so).)

While Petitioner presents clearly established federal law in support of her right to present witnesses, Petitioner cites only state authority regarding the proper scope of cross-examination. (*See* Opening Br. at 92-93.) The United States Supreme Court has held that "[t]he extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court." *Alford v. United States*, 282 U.S. 687, 694 (1931); *see also Davis v. Alaska*, 415

U.S. 308, 316 (1974) ("Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, . . . the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness."). Prior conduct involving moral turpitude and feelings of hostility toward the opposing party are both appropriate subjects of inquiry under California law. *People v. Williams*, 43 Cal. 4th 584, 632-34 (2008) (prosecutor was permitted to cross-examine defense witness on prosecution of the witness's husband by the same District Attorney's Office, to show "a feeling of hostility towards the party against whom [the wintess] is called" (internal quotation omitted)); *People v. Wheeler*, 4 Cal. 4th 284, 300 n.14 (1992) (witness may be asked on cross-examination whether she committed conduct involving moral turpitude); *see also People v. Hinton*, 37 Cal. 4th 839, 888 (2006) (attempted murder involves moral turpitude). Petitioner's argument that the allegedly overbroad cross-examination violated her right to present a defense fails for lack of clearly established federal law in support.

C. Striking Testimony

Next, Petitioner argues that the trial court erred in "ruling that if Piety was called, and if she did plead the Fifth, her entire testimony would be stricken." (Opening Br. at 94 (emphasis omitted); *see* Pet. at 163, 166.) Petitioner argues that the "remedy of striking the testimony of one who pleads the Fifth" did not apply to Ms. Piety's situation in part because the "proposed cross-examination . . . did not, rationally, tend to show that Piety was biased in Petitioner's favor . . . ." (Opening Br. at 94, 95-96 (citing California authorities).)

First, the trial court did not strike Ms. Piety's testimony as a formal matter. The court ruled that the prosecution's proposed cross-examination would be allowed (28 RT 3634, 3643); Ms. Piety told the court that she would plead the Fifth Amendment (28 RT 3636-37); and the court ruled that the defense could not call Ms. Piety to assert her Fifth Amendment privilege before the jury (28 RT 3643-44).

Second, as held above, Petitioner presents no clearly established federal law to show a constitutional violation in the trial judge's implicit ruling that a person could be biased in favor of another accused of similar crimes (*cf.* 28 RT 3631 (trial judge stating, "I think these cases are not just similar. I think they are remarkably similar.")), or in disallowing testimony from a witness without cross-examination. *Cf. Kansas v. Cheever*, 571 U.S. 87, 94 (2013) ("We explained in *Brown v. United States*, 356 U.S. 148, 156 (1958), which involved a witness's refusal to answer questions in a civil case, that where a party provides testimony and then refuses to answer potentially incriminating questions, '[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.'" (internal citation edited)). Petitioner's claim lacks support in clearly established federal law.

D. Refusing to Allow the Defense Not to Rest

After the trial court's ruling discussed above, defense counsel asked that the defense be allowed not to rest in the presentation of its evidence until after Ms. Piety's case was concluded. (28 RT 3644-45; *see* Pet. at 163.) The trial court responded, "Her case won't be over, if she is convicted, until all the appeals are done and that's a couple of years. . . . If her case gets over before this case is over and she's found innocent, we will call here [sic] then and there wouldn't be any 5th [sic] Amendment issues." (28 RT 3644-45.) Petitioner alleges that the start of Ms. Piety's trial "was deliberately and strategically delayed by the prosecutor until after Petitioner's trial, [showing] improper coercion by the prosecution which should have been, but was not, ameliorated by the trial court." (Opening Br. at 96.) Petitioner fails, however, to present clearly established federal law to show that a defendant is entitled to delay the conclusion of its presentation of evidence under these circumstances.

E. Failure to Grant Immunity

Petitioner further alleges that the trial court erred by denying her request to require the prosecution to grant immunity to Ms. Piety. (*See* 28 RT 3645; Opening Br. at 97-98; Pet. at 163-65.) This claim, too, lacks support in clearly established federal law. *See Allen v. Woodford*, 395 F.3d 979, 996 (9th Cir. 2005) (holding that there is no established constitutional rule providing "a due process right to judicial immunity for . . . defense witnesses, independent of prosecutorial misconduct"). Petitioner has failed to show prosecutorial misconduct as to Ms. Piety and fails to show a constitutional violation in the trial court's denial of Petitioner's request for immunity.

F. Refusal to Admit Written Statement

Finally, Petitioner alleges that the trial court erred in refusing to admit Ms. Piety's written statement for lack of foundation. (Opening Br. at 98-99; Pet. at 162-63 (citing 36 RT 4781 (Ms. Maurizi: People further object to [Exhibit] K which is the Wanda Piety statement and there has been no testimony so therefore no foundation. The Court: That's right."')).) Petitioner argues that there was "no legitimate dispute" over its authenticity and that "[i]f Piety was precluded from even testifying that she wrote the statement, Defense Investigator Bob Birney could have testified that . . . he saw the writing made or executed." (Opening Br. at 98.) The California Supreme Court may have reasonably rejected this argument on the basis that Petitioner failed to show that a foundation was ever, in fact, laid for the document, and the trial court did not erroneously prevent Petitioner from doing so.

Claim 17 is DENIED.

XVII. Claims 21B, 21C, and 22

In Claim 21B, Petitioner challenges the trial court's preliminary instruction on proof beyond a reasonable doubt (CALJIC 2.90). The California Supreme Court reasonably rejected the claim, as the United States Supreme Court approved

of an identical instruction in *Victor v. Nebraska*, 511 U.S. 1, 8 (1994). (Pet. at 184-86); *see Samuels*, 36 Cal. 4th at 131.

In Claim 21C, Petitioner challenges CALJIC 2.01, instructing the jurors on circumstantial evidence that if one interpretation of the evidence appeared to be reasonable and the other interpretation to be unreasonable, it was their duty to accept the reasonable interpretation and to reject the unreasonable. (Pet. at 186-90.) The California Supreme Court reasonably rejected the claim. *See Gibson v. Ortiz*, 387 F.3d 812, 822-24 (9th Cir. 2004) (holding that "[h]ad the instructions ended" on reasonable doubt after CALJIC 2.01 and others were given, as opposed to proceeding to CALJIC 2.50.1, "our inquiry would have ended with a denial of [the] petition"), *overruled on other grounds by Byrd v. Lewis*, 566 F.3d 855 (9th Cir. 2009).

In Claim 22, Petitioner alleges that defense counsel was ineffective for failing to make a pretrial motion for the prosecution to identify alleged accomplices and for failing to make a proper argument after the presentation of evidence to have Heidi Dougall, Celina Krall, and David Navarro identified as additional accomplices. (Pet. at 197-99.) Petitioner presents no authority to support his argument that a pretrial motion was necessary to render constitutionally adequate assistance of counsel. Defense counsel did request the identification of Ms. Dougall, Ms. Krall, and Mr. Navarro as accomplices after the presentation of evidence. (37 RT 4913-22.) Petitioner fails to specify how competent counsel would have better supported that request. The California Supreme Court may have reasonably rejected the claim as conclusory.

Claims 21B, 21C, and 22 are DENIED.

XVIII. Claim 33 as to Guilt Phase of Trial

In Claim 33, Petitioner alleges, in relevant part, that the cumulative effect of errors at the guilt phase of her trial warrants habeas relief. (Pet. at 265-68.)

As a preliminary matter, the Court finds no prejudice from any ineffective assistance of counsel at the guilt phase of trial, considered cumulatively. (*See, e.g.*, *supra* Claims 3E(1) (request for individual voir dire); 3D(1) (objection to judicial bias); 3D(6) (objection or request for admonition in response to alleged prosecutorial misconduct); 3D(4) (objection to testimony from Mr. Samuels' divorce attorney); 3D(5) (objection to Mr. Samuels' autopsy photographs); 3E(7) (objection to testimony from Susan Conroy regarding Frank Samuels); 3E(2) (questioning of Detective Daley); 3E(6) (questioning of Paul Gaul and Darrell Edwards on drug use); 3H(1) (presenting evidence that Anne Hambly was afraid of Petitioner); 3D(8), 3D(9), and 3E(4) (objection to Detective Daley's testimony about Petitioner's recorded conversation with Mr. Bernstein and efforts to admit relevant portions of the recording).) The Court has not found any prosecutorial misconduct or trial court errors at the guilt phase of trial.

"[W]hile a defendant is entitled to a fair trial, he is not entitled to a perfect trial, 'for there are no perfect trials.'" *United States v. Payne*, 944 F.2d 1458, 1477 (9th Cir. 1991) (rejecting cumulative error claim based on trial court errors) (quoting *Brown v. United States*, 411 U.S. 223, 231-32 (1973)). Although "prejudice may result from the cumulative impact of multiple deficiencies," Petitioner fails to show any such prejudice here. *Harris v. Wood*, 64 F.3d 1432, 1438-39 (9th Cir. 1995); *see also United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996); *United States v. Nadler*, 698 F.2d 995, 1002 (9th Cir. 1983). Claim 33 as to the guilt phase of trial is DENIED.

PENALTY PHASE CLAIMS

I. Background

A. Deliberations

The penalty phase verdict was not a foregone conclusion for the jurors. The jury deliberated at the penalty phase of trial for approximately five days. (*See* 48 RT 6094, 6095, 6101, 6111, 6146, 6148.) On the second full day of deliberations,

1 the jurors asked, "Does 'without the possibility of parole' mean no chance of
2 parole – ever!" (49 RT 6102; 4 CT 1144.) The trial court responded by referring
3 the jurors to the given instructions on the available penalties. (49 RT 6102-09; 4
4 CT 1144 ("Please refer to paragraph 2 of instruction 1 and paragraph 1 of
5 instruction 27."); *see* 5 CT 1148 ("It is the law of this state that the penalty for a
6 defendant found guilty of murder of the first degree shall be death or confinement
7 in the state prison for life without possibility of parole in any case in which the
8 special circumstances alleged in this case have been specially found to be true.");
9 5 CT 1174 ("It is now your duty to determine which of the two penalties, death or
10 confinement in the state prison for life without possibility of parole, shall be
11 imposed on the defendant.").) On the third full day of deliberations, a juror sent a
12 letter to the trial judge stating that she had "come to realize that [she had] serious
13 questions about [her] ability to vote for the death penalty should [she] become
14 convinced of its appropriateness in this case." (4 CT 1142-43; 49 RT 6112-27.)
15 The trial judge asked the juror:

16 The Court: Have they taken any votes in there?

17 Juror [A. W.]: Yes.

18 The Court: Is it 11 to 1?

19 Juror [A. W.]: One of them was, yes. . . . Let me say it's gone, you
20 know, it's still going back and forth. . . .

21 The Court: . . . When the vote was the 11 to 1, were you the 1?

22 Juror [A. W.]: Yes.

23 The Court: Okay. And then did the vote change after that?

24 Juror [A. W.]: Yes.

25 The Court: And did it change again?

26 Juror [A. W.]: We haven't done another one.

27

28

(49 RT 6127-28.) The court removed Juror A. W. (49 RT 6141-42), and the jury continued to deliberate for two days.

B. Prosecutor's Penalty Phase Closing Argument

In her penalty phase closing argument, the prosecutor made references to the Bible. She argued:

> To those of you who have deep seated religious beliefs . . . , perhaps the thornier question is will the Bible or any of your other strongly held religious beliefs in the end prevent you or cause you to reject the death penalty. . . . Those of you with such concerns, and for no other reason, I'd like to quote again very briefly from the Bible. . . . Genesis chapter 9 verse 6; Exodus chapter 21 verse 12; and the Book of Numbers chapter 35, verse 31 all repeat the same basic message: 'Whoever sheds the blood of man, by man shall his blood be shed, for in his image did God make man.' . . . 'He who fatally strikes a man shall be put to death.' [¶] Exodus even answers a common defense argument that only God can take a life. [¶] 'It is not man, not God who is to execute murderers. By man shall his, the murderers [sic] blood be shed.' [¶] Although some look to the New Testament and quote, 'Vengeance is mine, I will repay saith the Lord,' in the very next chapter, Romans, Paul calls for capital punishment by saying, 'The ruler bears not the sword . . . in vain for he is the minister God, a revenger to execute wrath upon him that doeth evil.'

(48 RT 6034-35, 6037-38.) The prosecutor then said to the jurors she was not telling them to use the Bible, but was telling them "not to use the Bible" because the law given from the judge, and not the Bible, is the law of the land. (48 RT 6038.) She said she read the quotes "for any of you who may have personal reservations against the death penalty because you believe that it is against your own beliefs." (48 RT 6038); *compare People v. Wrest*, 3 Cal. 4th 1088, 1106-07 (1992) ("Although the prosecutor's [improper] comments here were strategically phrased in terms of what he was not arguing, they embody the use of a rhetorical device – paraleipsis – suggesting exactly the opposite."); (49 RT 6105 ([Defense counsel to the Court:] "She argued it [future dangerousness] without argument.

You can argue it without saying it. You don't have to say the magic words. [The prosecutor:] However, I made an express statement to the contrary. [Defense counsel:] Great. So you argued out of both sides of your mouth.")).

Moral justifications for the death penalty were a main focus of the prosecutor's penalty phase closing argument. Of the approximately 38 pages of transcript recording her argument (48 RT 6000-35, 6037-40), approximately 12 pages discussed moral justifications for capital punishment. (*See* 48 RT 6028-33, 6034-35, 6037-40.) The prosecutor quoted from the Bible in the conclusion of her remarks. *Cf. McDermott v. Johnson*, No. CV 04-457 DOC, 2017 WL 10562953, at *25 (C.D. Cal. Aug. 15, 2017) ("[I]n view of the fact that these [biblical] arguments comprised nearly all of the last seven pages of the prosecutor's closing penalty argument, they served as a "grand finale" substantially overshadowing the earlier arguments." (internal citation omitted)) (remarking that prosecutorial misconduct in biblical arguments would warrant habeas relief if not procedurally barred); *Roybal v. Davis*, 148 F. Supp. 3d 958, 1051 (S.D. Cal. 2015) (granting relief where "[t]he misconduct [of the prosecutor's biblical arguments] was deliberate, substantial, and perfectly timed with crescendo effect at the close of argument").

Just as the prosecutor told the jurors they should not consider the Bible, she told the jurors not to consider the possibility that Petitioner's sentence could be commuted. She argued:

> Even in California there was a time when the death penalty was repealed and all those on death row had their sentences commuted. [¶] Now, please don't misunderstand me. I'm not suggesting that that will happen in this case. You cannot consider that and that's not the reason I bring it up. [¶] The only reason I bring it up is to suggest to you that such analogies and such comparisons are not fair.

(48 RT 6033.) The prosecutor also told the jury that Petitioner "will have appellate review." (48 RT 6029.)

II. Allegations

The prosecution's penalty phase presentation consisted of only one witness, Mr. Samuels' sister, who provided relatively brief victim impact testimony. (45 RT 5776-82 (testimony of Susan Conroy).) The prosecution's penalty phase case overwhelmingly rested on its guilt phase presentation. In Claims 3B, 3C, and 3G, Petitioner challenges trial counsel's failure to object to the admission of prejudicial character evidence, discussed in detail below.

In Claim 3G, Petitioner alleges that counsel, "having failed to make a generalized motion in limine, failed to limit and exclude the mass of bad character evidence that overwhelmed the trial. Trial counsel failed to understand the prosecution's theory was that bad people do bad acts and that Petitioner had to be portrayed as a 'bad person.'" (Pet. at 76.) In Claim 3B, Petitioner alleges, in relevant part, that the evidence "would have been inadmissible and could have been objected to under California Penal Code section 190.3 as aggravation evidence at the penalty phase of a capital trial," yet "by the time the penalty phase arrived, all of this evidence had already been presented." (*Id.* at 60.) In Claim 3C, Petitioner alleges that there was no reasonable strategy in allowing the admission of the evidence. (*Id.* at 61-62.)

Petitioner raised the claims on state habeas review. The California Supreme Court summarily denied them on the merits, as it did all of Petitioner's claims that were not premature. (*See* Lodg. D5); *see also Richter*, 562 U.S. at 102 ("Under § 2254(d), a habeas court must determine what arguments or theories . . . could have supported[] the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.").

III. Defense Counsel's Presentation of Evidence and Failure to Object

The bulk of the objectionable evidence concerned Petitioner's use of cocaine and marijuana, her daughter Nicole's use of cocaine and Petitioner's

provision of cocaine to her, Petitioner's provision of cocaine to Nicole's friends, alcohol use by Nicole and her underage friends while out with Petitioner, and photographs Petitioner took with Nicole to enter a "cheesecake photo" contest. The evidence was not relevant to the crimes charged, even considering Nicole's alleged involvement in the crimes and considering relevance broadly.

A. Cocaine Use

1. Counsel's Unreasonable Strategy

Defense counsel sought to present evidence that:

> David Navarro is in fact one of the persons who participated in the killing of Bob Samuels. He did so on behalf of Jim Bernstein. [¶] He has a business arrangement, had one with Jim Bernstein during the time period where they both sold cocaine to persons such as Anne Hambly, Paul Gaul, and others. [¶] Mr. Navarro used cocaine and admitted doing so prior to one of the interviews with the Los Angeles Police Department. [¶] And I think this is my offer of proof as to issues that might arise, as well as the fact that Mr. Navarro had motive and opportunity and knew Miss Hambly, and we believe was involved in the killing of Jim Bernstein over Mr. Bernstein's drug business.

(10 RT 1167-68.)

In advance of Mr. Navarro's testimony, defense counsel told the trial court, "To my knowledge, to this day he [Mr. Navarro] has not been granted immunity. And I believe there are widespread 5th Amendment issues with this witness." (10 RT 1167.) The prosecutor responded:

> I have interviewed him. I do not believe, based on my interview, that there are any 5th Amendment privileges. . . . I don't believe that this witness will testify in any way, shape or form that he was involved in any one of those two incidents. That is, either one of the murders. [¶] He will testify that he was solicited by the defendant, and that he turned down that solicitation. [¶] As far as any indication of drug use, there's been a great deal of questions and answers about drug use since the beginning of trial. And I'm sure there will be up until the end. [¶] However, the People can't prosecute a drug use in the

> abstract based on statements. There has to be a corpus. There has to be some evidence of drugs. And there is none. [¶] So I don't believe, again at this time that there is any need for an attorney.

(10 RT 1167-69.)

The trial court had at times appointed counsel for witnesses to advise them on their privilege against self-incrimination. The prosecutor informed the court that one of Mr. Navarro's close family members was a criminal attorney and was present with him in court. (10 RT 1167, 1169.) The court and both parties considered the matter resolved. (*See* 10 RT 1169.) Defense counsel did not request a hearing under California Evidence Code § 402 to determine whether Mr. Navarro would invoke his Fifth Amendment privilege (*compare* 10 RT 1227-28), and none was held, even though the court held several such hearings as to other witnesses. (*See, e.g.*, 13 RT 1569-81, 1654; 14 RT 1726-29; 25 RT 3281-82; 26 RT 3425-29; 28 RT 3620-44.)

Later the same day, defense counsel sought to question Celina Krall, Nicole's close friend, about Mr. Navarro's and Mr. Bernstein's drug sales. (10 RT 1221.) The prosecutor objected:

> I think David Navarro's possible involvement in drugs is irrelevant in this case and it's also improper character evidence. If either one of them was under the influence or taking drugs such that it would affect credibility or actions being under the influence, that's one thing; but I think that it's irrelevant, improper character evidence and under [California Evidence Code section] 352 should not be allowed to be gone into.

(10 RT 1221-22.) Defense counsel responded that the drug transactions were relevant and counsel believed that Ms. Krall was involved in them. (10 RT 1222.)

Counsel argued that "the jury is allowed to hear what type of person she is as far as her character" and also that:

> Mr. Navarro and Mr. Bernstein were involved in this business together and Mr. Navarro made threats to kill Mr. Bernstein because of business issues that Mr. Navarro – Mr. Bernstein would not pay any jewelry bills that he charged off of Mr. Navarro's credit cards. . . . David Navarro and Jim Bernstein entered into an agreement to sell cocaine and that David Navarro, as part and parcel of his payment for his assistance in the Samuels homicide [at Mr. Bernstein's direction], David Navarro was given Jim Bernstein's cocaine business except Jim kept one or two good clients. . . . [I]t is a rift between Mr. Navarro and Mr. Bernstein regarding the line of credit involved. [¶] And Mr. Groover told me he heard Mr. Bernstein threaten Mr. Navarro and furthermore he saw Mr. Navarro at his home, being Navarro's, with a gun saying that he was going to go over and kill Mr. Bernstein. . . . Our theory is that Mr. Gaul and Mr. Edwards killed Mr. Bernstein but it was done through David Navarro . . . that Mr. Navarro is one of three people behind Jim Bernstein's murder and these are the motives. . . . It is the business relations between the two that provide a motive for Mr. Navarro to turn on Mr. Bernstein and have motive to kill him.

(10 RT 1222-27.)

Defense counsel told the court that when interviewed by police, Mr. Navarro admitted selling drugs. (10 RT 1224.) The prosecutor argued that "that should be gone into with the witness himself [Mr. Navarro] and not through" Celina Krall. (10 RT 1227.) Defense counsel responded that he had "a sneaky suspicion David Navarro, if over your objection it's allowed, David Navarro is going to have no recollection of dealing in cocaine . . . ." (*Id.*)

On voir dire, the prosecution elicited testimony from Ms. Krall that the first time she used cocaine, Jim Bernstein gave it to Petitioner and Nicole, and Petitioner supplied it to her. (10 RT 1234.) Ruling on the prosecutor's objection

to evidence of Mr. Navarro's drug sales, the court stated:

> I'm amazed at both your positions, but I have been amazed before. [¶] I'm going to admit all of it including the part the defendant supplied cocaine and everything else. [¶] I think out of an abundance of fairness demands it. It's amazing one would ask the question. I'm amazed the other side would object to it, but that's your right.

(10 RT 1250.) Defense counsel did not argue at any point that Ms. Krall's testimony should be limited to exclude prejudicial evidence of Nicole's or Petitioner's cocaine use.

When Mr. Navarro took the stand seven days later, he had been granted immunity. (13 RT 1626.) Petitioner does allege that the prosecution improperly failed to disclose any information regarding Mr. Navarro's immunity. On questioning by the prosecutor, Mr. Navarro openly testified to his cocaine sales and distribution with Mr. Bernstein. (13 RT 1615-29.) He testified that Mr. Bernstein's customers "had already transferred over" to him by the time Mr. Bernstein left town because he was afraid of the police. (13 RT 1625, 1648.) He also testified that at one point, Mr. Bernstein told him that "there was a hit on me [Mr. Navarro] or he was going to put out a hit on me." (13 RT 1621.) Mr. Navarro said he took it seriously and talked to his friends about it. (*Id.*) Defense counsel was able to ask Mr. Navarro, "Did you go over and tell Mr. Groover that you had a gun and you were going to blow Jim Bernstein's head off because he was cheating you in cocaine and didn't pay you for the jewelry?" to which Mr. Navarro replied, "I don't believe I said that or I don't remember saying that." (14 RT 1738-39.)

Defense counsel's push to allow questions about Mr. Navarro's and Mr. Bernstein's cocaine sales had repercussions throughout the trial. In one instance, the prosecution sought to question its own witness about whether he had ever been involved in the use or sale of cocaine, to establish that he had not and to bolster his credibility. (11 RT 1303-04.) Defense counsel attempted to argue that "just

because I raised it with a witness or two doesn't mean every other witness who comes on should be subject to, 'Did you ever use or sell cocaine?' [¶] I mean, it is improper character evidence. . . . I believe it is improper even though I raise the issue regarding other witnesses." (11 RT 1305-06.) The prosecutor asserted, "I didn't raise the issue of drug usage. In fact, I specifically made every attempt to keep it out of the consideration of the jury. [¶] It was only Mr. Nameth who introduced the issue of cocaine usage with regard to the lack of credibility of many of my witnesses." (11 RT 1304.) Defense counsel responded that he "brought up the cocaine issue with David Navarro. I never asked Celina if she should used [sic] cocaine. That was Miss Maurizi's line of questioning so she could get it in that Mary Ellen gave it to her on that occasion." (11 RT 1305.) The trial court ruled that it would decide whether each witness could be questioned about cocaine use or sales on an individual basis, "because Mr. Nameth did open the door." (11 RT 1306.)

At a later point in the trial, defense counsel moved to exclude testimony from Jim Bernstein's brother, Michael Bernstein, that he observed Petitioner using what she told him was the drug ecstacy. (18 RT 2254-57.) The prosecutor told the court:

> I don't know if this motion is limited just to statements about the taking of the drug ecstasy or not; however, . . . there's evidence that she in fact used cocaine during their presence. And since counsel has introduced the issue of cocaine usage and has cross-examined other witnesses as to their usage of it, I believe that that becomes relevant and is not excludable under 352.

(18 RT 2255.) Defense counsel responded that he was only asking to exclude the statement about ecstasy. (*Id.*) The trial judge ruled that he "ha[d] not heard anything" at that point to prompt him to exclude the evidence, but that defense counsel could raise an objection as the evidence was developed. (18 RT 2256-57.) The prosecutor did not ask Michael Bernstein about Petitioner's drug use.

Later, during the direct examination of witness Anna Davis, defense counsel elicited testimony that she witnessed a drug transaction between Mr. Bernstein and Mr. Navarro at Petitioner's home. (25 RT 3194 (preceding a successful objection by the prosecution for lack of foundation).) The trial judge warned defense counsel, "[I]f you want to paint your client out to be present when all these dope dealings are going on – you understand you are doing that?" (25 RT 3196.) Defense counsel responded by implying that Petitioner was not present at the time, and the judge reiterated, "I want to make sure you are aware of that." (*Id.*) Defense counsel responded, "With the good comes the bad sometimes." (*Id.*)

At a minimum, defense counsel would have been able to present the evidence about Mr. Navarro's cocaine sales with Mr. Bernstein through limited questioning of Mr. Navarro on his statements to police. Counsel need not have opened the door to extensive testimony about Petitioner's and Nicole's cocaine use by questioning Ms. Krall on the matter. Effective counsel would have confirmed that Mr. Navarro would not invoke his Fifth Amendment privilege and explored the availability of Mr. Navarro's beneficial testimony by requesting a hearing under California Evidence Code § 402. It was unreasonable for counsel to accede to "the bad" evidence entering with "the good." The record makes plain that counsel's unreasonable strategy allowed significant, damaging evidence to come before the jury. The evidence summarized below was admitted through defense counsel's own questioning or absent any objection from defense counsel, except as noted.

2. Evidence Presented

a. Petitioner Used Cocaine and Marijuana

Celina Krall testified on redirect examination by the prosecutor that Petitioner used cocaine at Petitioner's home in Celina's presence. (11 RT 1279-80.) Celina's brother, John Krall, testified on direct examination by the prosecution that he was present at Petitioner's home when Petitioner was smoking

marijuana. (12 RT 1434.) Anna Davis, on cross-examination by the prosecutor, testified that she saw Petitioner use cocaine twice and that others used cocaine often at Petitioner's home and in limousines Petitioner hired. (25 RT 3246-47, 3250.)

On direct examination, Petitioner denied using cocaine with Celina Krall, said Ms. Krall never used cocaine in her presence, and said that it was false that Petitioner bought cocaine from Mr. Bernstein that Petitioner, Nicole, and Celina used. (32 RT 4242.) She testified on direct examination that she "told off" Jim Bernstein in November 1987 because he attempted to sell drugs in her living room and told him never to do so again. (32 RT 4233-36.) Petitioner acknowledged on cross-examination that she used cocaine "maybe five or six times total," all in or around March 1988, and that the first time was on her birthday in March 1988. (34 RT 4445-47.) She testified on cross-examination that she used cocaine in a limousine with Anne Hambly and Heidi Dougall once. (34 RT 4445.) She denied on cross-examination using cocaine in her home and said she was not aware that there frequently had been cocaine in her home. (34 RT 4447.) She also testified on cross that she learned later from Anna Davis that cocaine was used at her home. (34 RT 4447-48.)

Defense counsel could have had no reasonable strategy in introducing the testimony on direct examination or in failing to object to the questions on cross-examination. Among other problems, counsel's failure to object allowed the jury to hear that Petitioner used cocaine herself approximately four months after telling her daughter not to do so and finding cocaine in her daughter's dresser. (*See infra* § II(A)(2)(b).)

b. Petitioner's Daughter Used Cocaine and Petitioner Provided it to Her

Defense counsel elicited testimony from Nicole that she first used cocaine in early 1987 (26 RT 3454; *cf.* 27 RT 3593, 3599-3600 (on cross-examination)),

when she was approximately 17 years old. (*See* 26 RT 3444.) Nicole testified on cross-examination that she was addicted from the second time she used cocaine, in the spring or summer of 1987, because she wasn't hungry and wasn't eating. (27 RT 3600, 3613-15; 28 RT 3680-81.) She testified on cross-examination that for the next three months, she used cocaine monthly. (27 RT 3612-13.) Defense counsel elicited her testimony that by late 1987, she was using cocaine every day. (26 RT 3459.)

Defense counsel elicited testimony from Nicole that Petitioner discovered her drug use when she found cocaine in one of her drawers in November 1987. (26 RT 3465-66.) Defense counsel elicited Nicole's testimony that when she found the cocaine, Petitioner "told me not to use it. And if she ever caught me using it, that I was going to be in trouble." (26 RT 3466.) On direct examination, Petitioner testified that in late 1987, she found drug paraphernalia with a white powdery substance in Nicole's room and confronted Nicole about her drug use. (32 RT 4238-39; *see also* 34 RT 4447 (same topic on cross-examination).) Petitioner further testified on direct that she found out that Jim Bernstein was supplying Nicole with cocaine when Nicole told her in 1987. (34 RT 4414.) Defense counsel elicited Nicole's testimony that she continued to use cocaine daily for almost a year, from late 1987 (26 RT 3459, 3465) to late 1988.

John Krall testified on questioning by the prosecutor that in the fall of 1988, he and Nicole were at Petitioner's home while Petitioner was smoking marijuana. (12 RT 1433-35; *cf.* 28 RT 3658 (Nicole's testimony on cross-examination that she, Nicole, had used marijuana once).) He testified on cross-examination by defense counsel that he and Nicole used cocaine on the way there. (12 RT 1449.) The prosecutor elicited Nicole's testimony that for the last four months of her cocaine use, from December 1988 through March 1989, she was using cocaine twice a day. (27 RT 3684.) Nicole testified on cross-examination that she quit

using cocaine by March or May 1989 (27 RT 3684; 28 RT 3660), around the time she turned nineteen. (*See* 26 RT 3444.)

Bonnie Bernstein testified, in response to questions posed by the prosecutor, that she saw Petitioner snort cocaine in a bathroom maybe five or six times one evening in March 1989, not only in Nicole's presence but with Nicole snorting cocaine as well. (18 RT 2295, 2299-2300.)

The prosecutor questioned Nicole in detail about her drug use and her use of cocaine in particular, including when her cocaine use began (27 RT 3592-93, 3599); from whom she got it (27 RT 3612; 28 RT 3686-87, 3714, 3726, 3730); if she snorted, smoked, or injected it (28 RT 3683); where and with whom she used it (27 RT 3599-3600, 3613); and whether she used it with Petitioner on the occasion Ms. Bernstein described. (28 RT 3706.) The prosecutor elicited testimony from Nicole that she liked cocaine because it helped her to lose weight. (27 RT 3613.)

Defense counsel's introduction of evidence regarding Nicole's cocaine use and Petitioner's response to her cocaine use was not based on an effective strategy, even under the deferential standards of 28 U.S.C. § 2254(d) and *Strickland*. Counsel's questions and failure to object allowed the presentation of evidence that Petitioner: (a) did not discover Nicole's cocaine habit until Nicole was using daily, after using and not eating for at least six months, and discovered it not through Nicole's behavior but in her dresser; (b) simply told Nicole not to use it and that she would be in trouble if she did; (c) used cocaine herself approximately four months later (*see supra* § II(A)(2)(a)); (d) failed to notice or act when Nicole arrived at her house under the influence of cocaine a year after she told Nicole not to use again, on an occasion when Petitioner was herself using marijuana in Nicole's presence; and (e) used cocaine with Nicole, according to one witness.

c. Petitioner Provided Cocaine to Her Daughter's Friend

Celina Krall, on redirect examination by the prosecutor, testified that she first used cocaine at Petitioner's home in the year after she graduated high school. (11 RT 1278; *see* 10 RT 1172.) She testified that Jim Bernstein handed the cocaine to Petitioner and Petitioner shared it with her. (11 RT 1278-79.) Ms. Krall said that Petitioner was using cocaine on that occasion and that she, Ms. Krall, knew what to do with it by watching Petitioner and Nicole. (11 RT 1280.) When the prosecutor asked if she remembered when she first used cocaine, defense counsel asked the trial judge, "May we approach?" (11 RT 1278.) The trial judge declined. (11 RT 1278.) Defense counsel did not object and did not make any other requests as the prosecutor continued her line of questioning. (11 RT 1278-80.) Counsel could have had no reasonable strategy in failing to do so.

B. Nicole and Her Friends Consumed Alcohol with Petitioner While Underage

1. Testimony from Celina Krall

Celina Krall, on direct examination by the prosecutor, testified that when she and Nicole were 17 and 16 years old, respectively, Petitioner began to take them to nightclubs where she and Nicole would drink alcoholic beverages. (10 RT 1173.) This continued over the course of thirty or more times before Celina graduated from high school, she testified. (10 RT 1174.) The prosecutor asked:

Q. Was there ever any problem with you getting into bars and being served alcoholic beverages at that time when you were that young?

A. No.

Q. Why not?

A. Because she knew most of the people there.

Q. Who is "she?"

A. Mary Ellen.

Q. I'm sorry. Did I interrupt?

A. So they didn't ask any questions.

(10 RT 1173.) On cross-examination, defense counsel asked Ms. Krall a series of questions about whether the nightclubs ever checked identification ("ID") or asked her for ID. (10 RT 1201-04.)

The prosecution primarily elicited testimony from Ms. Krall about: (a) a failed plan by Petitioner, Nicole, and Mr. Bernstein to have Mr. Samuels killed while stealing his car, and Petitioner's statements that she wanted a new plan (10 RT 1180-81); (b) Nicole's statements to Celina on the day Celina learned Mr. Samuels was dead and within the following week (10 RT 1184-87); (c) Petitioner's and Nicole's statements to her about their concern that Mr. Bernstein would talk to police and Nicole's statements to her that Mr. Bernstein "was going to be taken care of." (10 RT 1195-98.) Celina's alcohol use at bars with Petitioner was unrelated to that testimony, with the exception of her testimony that when discussing a place to have Mr. Samuels killed, Celina suggested a certain establishment, and "[t]here was talk that we would go there and have a drink and see how it was, you know. See if it could be done there" (10 RT 1182-83), and with the possible exception of her testimony that she met Petitioner's new fiancé at a club. (10 RT 1187.) Defense counsel could have had no strategic basis for failing to object to Ms. Krall's testimony.

2. Testimony from Petitioner, Nicole, and Anne Hambly

On direct examination, although defense counsel asked Petitioner if she did anything to get Nicole or Celina into the bar or night club or to "see that Nicole or Celina could drink," and she said, "[a]bsolutely not," counsel went on to ask if she saw Nicole drink alcohol. (32 RT 4183-84.) Petitioner then said "you had to have a mandatory cocktail if you sat down," which Nicole would "sip." (32 RT 4184.) On cross-examination, the prosecutor asked Petitioner whether it was her idea of

good parenting to teach her daughter to go bar hopping at 16 years of age. (35 RT 4545.) Petitioner said it was not. (*Id.*)

Nicole testified on cross-examination that she went to clubs with Petitioner when she was underage with a fake ID. (28 RT 3650-53.)

Petitioner's friend, Anne Hambly, who was 20 years old when she met Petitioner in 1984, testified on direct examination by the prosecutor that Nicole and her friends would sometimes go to clubs with Ms. Hambly and Petitioner. (20 RT 2520-23.)

Defense counsel could have had no strategic basis for introducing Petitioner's testimony on direct examination or in failing to object to the prosecutor's questions to Petitioner, Nicole, and Anne Hambly.

C. Petitioner and Nicole Posed for "Cheesecake" Photos

As noted above, in his opening statement at the guilt phase of trial, defense counsel argued that Detective Daley, the lead investigator in the deaths of Mr. Samuels and Mr. Bernstein, made Petitioner a suspect after his investigation had been unsuccessful for more than a year and after Petitioner declined his romantic advances. (7 RT 718-20.) Defense counsel told the jury that Detective Daley "carried around with him photographs of Mary Ellen Samuels that were taken by the police department from the crime scene and showed them to people. These were photographs, one of Miss Samuels in a negligee and one of Miss Samuels in a bathing suit." (7 RT 719.)

On direct examination, defense counsel elicited testimony from Petitioner about:

> five pictures or six pictures that were taken of me that I was in a teddy, bathing suit, in a teddy sitting down, different pictures like that. . . . My daughter and I were going to be in a mother and daughter contest, and they were taken at my home . . . by Anne Hambly, and we were going to send them in. She took pictures of both my daughter and I . . . . [W]e used up most of the roll, probably

> 24 pictures. . . . Maybe ten [were of Petitioner and others were of Nicole].

(32 RT 4313-14.) On cross-examination, the prosecutor asked Petitioner:

> Q. . . [W]ere you shy when you posed with your daughter for those mother-daughter cheesecake photos that you told us about on Tuesday?
>
> A. Yes. I still had my clothes on.
>
> Q. . . What is this contest that you and your daughter were entering?
>
> A. If I can remember, it was a mother-daughter contest. It goes on at the beginning of the year, I believe, and you are judged on figure, personality, things like that. . . .
>
> Q. Did the contest rules specify that you had to have pictures in lingerie and teddies and bikinis?
>
> A. They said swimsuits and sports outfits. . . .
>
> Q. Your idea of good parenting was to teach her [Nicole] to dress scantily and go bar hopping at 16, right?
>
> A. No, it was not.
>
> Mr. Nameth: Objection.
>
> The Court: Overruled.
>
> Q. By Ms. Maurizi: And your idea of good parenting . . . was to pose with her for mother-daughter cheesecake type photos, right?
>
> A. It wasn't a cheesecake type photo.

(34 RT 4472-73; 35 RT 4545; *cf.* 36 RT 4733 (defense counsel clarifying on redirect that Nicole was 18 years old at the time of the photographs).)

Even if defense counsel may have had a reasonable strategy in introducing the photographs to establish Detective Daley's romantic interest in Petitioner (*see, e.g.*, 32 RT 4312-13 (Petitioner's testimony that Detective Daley told her they were "great pictures" and that he would keep them until the investigation was over); 34 RT 4474 (Petitioner's testimony that Detective Daley commented to her

on photos of her in a teddy and a negligee)), counsel could have had no strategic basis for introducing testimony that the photos were taken as part of a session for a mother-daughter contest. Petitioner did not make clear until cross-examination that the photographs of her in a teddy and a negligee were not for the contest, but only for "having fun with the camera." (34 RT 4473-74; 35 RT 4545-46; *see also* 36 RT 4731-32 (redirect examination).) Defense counsel reasonably should have moved to exclude any evidence of Nicole's involvement in the photo shoot as irrelevant and prejudicial. Counsel could have had no reasonable strategy in introducing that evidence.

IV. Analysis

Counsel acknowledged the prejudicial nature of the evidence in his guilt phase closing argument:

> They [the prosecution] deal with the defense in a manner which is contrary to what Miss Maurizi asks you to do and that is not to look at the testimony but to look at the character. . . . [L]et's accuse her of being a bad mother. . . . Let's accuse her of taking her daughter and friends to bars. . . . I brought up the cheese cake photos on defense because the cheese cake photos were taken by Detective Daley. . . . But this is another red herring and another smoke screen that the prosecution is blowing in your face because the cheese cake photos were mother-daughter photos of her and Nicole. . . . Miss Maurizi got a couple jabs in about, you know, you think a good parent is somebody who has her daughter pose with a bathing suit on or whatever. . . . This is dodging the issues of the case. This is dirtying up the character of Miss Samuels. . . . [T]hey want you to find that the lifestyle of Mary Ellen Samuels is such that you will not like it and you will not like her. Therefore, you should convict her. . . . [T]he prosecution wants you to judge Mary Ellen Samuels not by her testimony, but by her lifestyle.

(42 RT 5522-23, 5530, 5537-38.) By that time, however, counsel's arguments against the prejudicial evidence rang hollow. When the trial progressed to a penalty phase, counsel did not object to the jury's consideration of the guilt phase

evidence. The only objection counsel raised was to the court's provision of the guilt phase exhibits in the jury room without a request from the jury. (49 RT 6096-97 ("[I]f they [the jurors] said, 'Can we see . . . certain exhibits from the guilt phase,' I wouldn't have a problem with that at all. But absent their request, to give them two boxes and charts and diagrams and pictures clearly overemphasizes one of the factors that they have to make a determination upon. . . . [I]t emphasizes the 'a' factor [the circumstances of the offense] . . . .").)

Notwithstanding the aggravating evidence presented at trial, counsel's failure to object to the evidence discussed above was prejudicial. The prosecution would not have been able to introduce it at the penalty phase of trial. "Under well-established law, evidence of a defendant's background, character or conduct that is not probative of any specific sentencing factor is irrelevant to the prosecution's case in aggravation and therefore inadmissible." *People v. Carter*, 30 Cal. 4th 1166, 1202 (2003) (citing *People v. Boyd*, 38 Cal. 3d 762, 773-74 (1985)); *see also People v. Banks*, 59 Cal. 4th 1113, 1197 (2014), *abrogated on other grounds by People v. Scott*, 61 Cal. 4th 363, 391 n.3 (2015). The record shows that counsel did not make a strategic decision in the penalty phase to open the door to that evidence. *See People v. Lucas*, 12 Cal. 4th 415, 495 (1995) (discussing *People v. Noguera*, 4 Cal. 4th 599, 644 (1992)).

Petitioner's claims satisfy 28 U.S.C. § 2254(d). It would be unreasonable to conclude that the evidence was not prejudicial when considered at the penalty phase of trial or that counsel acted strategically in presenting or failing to object to it. *See Richter*, 562 U.S. at 103 (petitioner must show "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement"); *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (decision must be "objectively unreasonable" (internal quotation omitted)); *Strickland*, 466 U.S. at 687. Had counsel adequately objected and refrained from introducing the evidence at the guilt phase of trial, there is a reasonable probability that the trial

court would have excluded it. There is also a reasonable probability that the jury would have returned a verdict for life without the possibility of parole. Because the existing record is adequate to decide the claims, the Court need not authorize discovery or an evidentiary hearing. *See Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998) ("[A]n evidentiary hearing is *not* required on issues that can be resolved by reference to the state court record." (emphasis in original)).

V. Remaining Penalty Phase Claims

The portions of Claims 3B, 3C, and 3G pertaining to evidence not discussed above are DENIED. The California Supreme Court may have reasonably concluded that Petitioner failed to show deficient performance or prejudice as to that evidence because the evidence was properly admissible.

In the penalty phase portion of Claim 1, Petitioner alleges a constitutional violation in the trial court's admission of prejudicial character evidence. The United States Supreme Court has stated that the "test prescribed . . . for a constitutional violation attributable to evidence improperly admitted at a capital-sentencing proceeding is whether the evidence 'so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process.'" *Kansas v. Carr*, 136 S. Ct. 633, 644-45 (2016) (quoting *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994)). This Court has not identified a case "in [Petitioner's] favor" on the matter, however. *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) ("Because our cases give no clear answer to the question presented, let alone one in Van Patten's favor, it cannot be said that the state court unreasonably applied clearly established Federal law." (internal quotations and alterations omitted)). Since this Court has determined that trial counsel's presentation of and failure to object to the evidence was deficient and prejudicial, it does not reach the penalty phase portion of Claim 1. The penalty phase portion of Claim 1 is DENIED AS MOOT.

1 Petitioner's remaining penalty phase claims and penalty phase portions of
2 claims are DENIED AS MOOT.

3 **ORDER**

4 Claims 3D(1), 3D(2), 3D(3), 3D(4), 3D(5), 3D(6), 3D(7), 3D(8), 3D(9),
5 3E(1), 3E(2), 3E(3), 3E(4), 3E(5), 3E(6), 3E(7), 3F(1), 3F(2), 3H(2), 3I, 4, 5, 6, 8,
6 9, 10, 11, 12, 14, 15, 17, 18, 19, 21B, 21C, and 22 are DENIED. As to the guilt
7 phase of trial, Claims 1, 3H(1), and 33 are DENIED.

8 Claims 3B, 3C, and 3G are GRANTED IN PART AND DENIED IN PART
9 as discussed above.

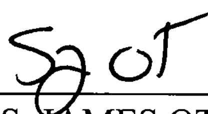
10 Claim 1 as to the penalty phase of trial and all remaining penalty phase
11 claims are DENIED AS MOOT.

12 Claims 2, 7, 13, and 16 are subject to dismissal as procedurally barred.
13 Should Petitioner wish to oppose the application of the procedural bars, Petitioner
14 shall file a brief, limited to 20 pages, no later than 21 days from the date of this
15 Order. Respondent shall file a response, limited to 20 pages, no later than 14 days
16 from the date of Petitioner's brief. Petitioner shall file any reply, limited to 10
17 pages, no later than 7 days from the date of Respondent's brief. Should Petitioner
18 elect not to challenge the application of procedural bars within 21 days from the
19 date of this Order, the Court will issue an order dismissing Claims 2, 7, 13, and 16.

20 **IT IS SO ORDERED.**

21 Dated: 11/21/19, 2019.

22



23 S. JAMES OTERO

24 United States District Judge

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