

C.A. No. 12-55667
D.C. No. 10-CV-03743-DMG-AJW

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOPHIA DAIRE,
Petitioner - Appellant

v.

MARY LATTIMORE, WARDEN,
Respondent - Appellee

Appeal from the United States District Court
for the Central District of California
The Honorable Dolly M. Gee

**APPELLANT SOPHIA DAIRE'S PETITION
FOR PANEL REHEARING
AND REHEARING *EN BANC***

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SOPHIA DAIRE,)	C.A. No. 12-55667
)	D.C. No. 10-CV-03743-DMG-AJW
Petitioner - Appellant)	
)	
v.)	
)	
MARY LATTIMORE, WARDEN,)	
)	
Respondent - Appellee)	
_____)	

Pursuant to Federal Rules of Appellate Procedure 35 and 40, and Ninth Circuit Rules 35-1 and 40-1, appellant Sophia Daire petitions for a panel rehearing and for rehearing *en banc* of the panel decision filed in the above-captioned case on March 19, 2015. Counsel believes that a panel rehearing is necessary as the decision overlooks or misapprehends several points of fact. Ms. Daire also petitions for rehearing *en banc* because (1) the panel decision conflicts with Glover v. United States, 531 U.S. 198 (2001) and Lafler v. Cooper, 1332 S. Ct. 1376, 1385-86 (March 21, 2012), therefore consideration by the full court is necessary to secure and maintain uniformity of the Court’s decisions, and (2) the proceeding involves a question of exceptional importance, which is whether it is clearly established Federal law, as determined by the Supreme Court of the United States, that Strickland v. Washington is the proper standard by which to evaluate an ineffective assistance of counsel claim in a noncapital sentencing hearing.

I. INTRODUCTION

The district court in this case held that Ms. Daire’s ineffective assistance of counsel claim met both prongs of the Strickland test and that she deserved *habeas* relief, but that the court was unfortunately constrained from granting such a writ by prior panel decisions that incorrectly contradict prior Supreme Court case law.

[ER 36 -37.] The district court held that “[i]rrespective of the proper interpretation of the Supreme Court precedents pertaining to ineffective assistance of counsel, the Court is bound by [the panel decisions] until they are reversed *en banc*” [ER 37.] The parties to this case briefed and argued whether the district court should have followed the Supreme Court law rather than the incorrect panel decisions.

The instant panel decision does not resolve the state of the law, however, but instead simply finds that Ms. Daire’s claims did not meet either prong of the Strickland test. The panel decision should be reheard because points of law that it cites to support this decision regarding the Strickland test prongs are misapprehended, and the case should be heard *en banc* because the Court should correct the state of the law so that the Circuit decisions are uniform in this regard.

II. FACTS AND PROCEDURAL HISTORY

Ms. Daire is a woman who has no violent criminal convictions. In 2007, she was sentenced to a prison term of forty years to life after a “third strike” conviction for one count of burglary in violation of California Penal Code 459. During her

sentencing hearing, the judge stated that “[i]t is her drug problem that is spurring her on to re-offend . . . There is nothing about this particular offense and its timing and the prior offenses that would indicate any mitigation” [ER 73.]

Daire argued in her *habeas* petition that her sentencing counsel was ineffective because counsel failed to convey any information about Ms. Daire’s bipolar disorder to the court. Counsel also failed to investigate or convey to the court that (1) Ms. Daire’s bipolar disorder had impacted her prior efforts to complete drug abuse treatment programs;¹ (2) Ms. Daire’s bipolar disorder could be managed;² or that (3) Ms. Daire could succeed at substance abuse treatment if her bipolar disorder was treated first or treated simultaneously to the drug abuse.³

Upon reviewing Ms. Daire’s *habeas* petition, the district court found that Ms. Daire’s claims met both prongs of the Strickland standard, but that it was constrained from granting a writ by the Ninth’s Circuit panel decision in Davis v.

¹ The psychiatrist opined that “[i]t is highly probable that Ms. Daire’s drug addiction could not be properly treated in the absence of correct treatment for her active mental health issues” and “psychiatric records from Tarzana Treatment Center . . . indicate that Ms. Daire’s Bipolar disorder was not stabilized and that she was seriously distressed and her functioning was seriously impaired by her Bipolar disorder at the time of her [failed] treatment at Tarzana Treatment Center.” [ER 113.]

² The psychiatrist opined that it could be managed and “probably quite easily if she were clean and sober.” [ER 113.]

³ The psychiatrist opined that “persons with dual-diagnosis such as bipolar disorder and drug abuse need to have simultaneous treatment for both conditions, or if not simultaneous, need to have their bipolar disorder stabilized first before they can fully participate in substance abuse treatment.” [ER 112.]

Grigas, 443 F.3d 1155, 1158 (9th Cir. 2006) (citing Cooper-Smith v. Palmateer, 397 F.3d 1236, 1244 (9th Cir. 2005). [ER 33:22-34:2.] Davis and Cooper-Smith both stated that the Supreme Court of the United States had not yet decided what standard should apply to ineffective assistance of counsel claims in the noncapital sentencing context. Because *habeas* relief shall not be granted “unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” *see* 28 U.S.C. § 2254(d)(1) (West 2012), Davis and Cooper-Smith effectively preclude relief for ineffective assistance claims in the noncapital sentencing context.

Ms. Daire petitioned this Court for relief, because neither Davis nor Cooper-Smith had acknowledged a prior United States Supreme Court decision that clearly established the federal law on this point: Glover v. United States, 531 U.S. 198, 201 (2001). In Glover, the unanimous Court (1) applied the Strickland standard to a claim of ineffective assistance of counsel in a noncapital sentencing hearing; (2) found that prejudice was established based on the facts presented, and (3) explained the reasons why this was the correct result. Glover explained that the Seventh Circuit had erred in engrafting an additional requirement onto the prejudice branch of the Strickland test when evaluating an ineffective assistance of counsel claim based on a miscalculation made at a sentencing hearing that resulted

in a sentence of eighty-four months in prison for activities including labor racketeering, money laundering, and tax evasion. Glover, 531 U.S. at 203-204; *see also* Lafler v. Cooper, 1332 S. Ct. 1376, 1385-86 (March 21, 2012) (describing Glover as “precedent” that serves to “establish that there exists a right to counsel during sentencing in . . . noncapital cases.”)

Upon *de novo* review, a panel of this Court held that “[w]e see some merit to Daire’s argument. . . . As a three-judge panel of this circuit, however, we are bound by prior panel opinions Were we writing on a clean slate, we might conclude that it was clearly established that the Strickland standard applies, but the slate is not clean.” Daire v. Lattimore, No. 12-5567, slip op. at 12- 13 (9th Cir. Mar. 19, 2015). The panel decision further explained that “[e]ven assuming, arguendo, that Strickland’s applicability is clearly established, Daire cannot prevail under the review standard imposed by the AEDPA,” and overturned the district court findings that Ms. Daire’s claims met both prongs of the Strickland test. *Id.*

III. ARGUMENT

A. OVERLOOKED AND MISAPPREHENDED FACTS MERIT PANEL REHEARING

The panel supposed that after reading Daire’s initial psychiatric evaluation, sentencing counsel must have made a reasonable professional judgment not to bring to light several “damaging” aspects of the report. Daire slip op. at 17.

However, the “damaging” aspects of the evaluation cited by the panel largely consist of inaccurate, overlooked, or misapprehended facts. For example:

1. “Dr. Jaffe indicated that Daire has a violent personality disorder.” [Daire slip op. at 17.]

This “fact” is simply inaccurate; Dr. Jaffe’s report never makes this professional medical assessment, or even alludes to a similar conclusion.⁴

2. “Dr. Jaffe indicated that Daire . . . is unpredictable.” [Daire slip op. at 17.]

This “fact” is inaccurate and/or misapprehended. Dr. Jaffe’s report never uses the word “unpredictable.” Dr. Jaffe’s report did explain that

“I have not spoken with anyone from Tarzana Treatment Center, but it is possible that [Ms. Daire’s] mental condition was not adequately treated while she was a resident at Tarzana [drug treatment center] and this may have contributed to her premature departure. Bipolar disorder commonly causes persons to be . . . impulsive.” [ER 109.]

If the panel meant to equate “unpredictable” and “impulsive” based on this reference in the report, then it must have misapprehended the significance of the entire passage; untreated bipolar disorder causes persons to be impulsive, and Dr. Jaffe did not know whether Ms. Daire’s disorder had been treated. The only reasonable professional judgment that sentencing counsel could have made after reading this comment by the doctor would have been to investigate whether Ms. Daire’s mental condition had been adequately treated while she was at Tarzana,

⁴ Moreover, Ms. Daire does not have any violent convictions.

because untreated bipolar disorder would have explained her failure to complete the drug treatment program.⁵

3. “Dr. Jaffe indicated that Daire . . . has a history of abandoning psychiatric treatment.” [Daire slip op. at 17.]

This “fact” is misapprehended. Dr. Jaffe’s report states that she “took her medications inconsistently,” [ER 105], but it not did offer any detail showing that she “abandoned” treatment.⁶ Ms. Daire often “returned to the streets due to her drug problem,” [ER 107], and may not have had the resources necessary to obtain and take her psychiatric medications consistently in the first place.

4. “Dr. Jaffe indicated that Daire . . . is too unstable to live in the community.” [Daire slip op. at 17.]

This “fact” is misapprehended; while the excerpted phrase is accurately copied from Dr. Jaffe’s report, the whole passage expresses the very different view that adjusting medications would stabilize Ms. Daire.

⁵ In fact, Dr. Jaffe later wrote that “new records from Tarzana Treatment Center that you provided me indicate that Ms. Daire’s Bipolar disorder was not stabilized and that she was seriously distressed and her functioning was seriously impaired by her Bipolar disorder at the time of her treatment at Tarzana Treatment Center. It is highly probable that Ms. Daire’s drug addiction could not be properly treated in the absence of correct treatment for her active mental health issues (Bipolar disorder).” [ER at 113.]

⁶ Dr. Jaffe’s report describes incidences of Ms. Daire leaving *substance abuse* treatment programs, but not psychiatric treatment programs. Taken in the context explained at II(A)(2) *supra*, the only reasonable professional judgment sentencing counsel could have made would have been to obtain the Ms. Daire’s medical records and investigate whether Ms. Daire’s mental condition was adequately treated at the time she undertook substance abuse treatment.

The defendant's medications need to be adjusted to stabilize her mood. I have not spoken with anyone from Tarzana Treatment Center [drug treatment center], but it is possible that [Ms. Daire's] mental condition was not adequately treated while she was a resident at Tarzana and this may have contributed to her premature departure.... She is too unstable to live in the community and cannot control her substance abuse." (emphasis added). [ER 109.]

This information directly reads on Ms. Daire's likelihood of recidivism, and would have been critical mitigating information for the sentencing judge to consider.

5. **"If [sentencing] counsel had used excerpts of Dr. Jaffe's letter to argue that medical treatment would lower the risk of recidivism, prosecutors almost certainly would have countered with Daire's history of abandoning treatment programs." [Daire slip op. at 19.]**

This hypothetical "fact" is misapprehended. Sentencing counsel *did* choose to portray Ms. Daire as a person "mostly motivated by her . . . drug use." [Daire slip op. at 18, citing sentencing counsel's Romero motion]. Given this concession, the risk that prosecutors might reveal that Ms. Daire had not completed a drug treatment program could not possibly outweigh the benefit that would have accrued from offering Dr. Jaffe's professional medical opinion that "[i]t is highly probable that Ms. Daire's drug addiction could not be properly treated in the absence of correct treatment for her active mental health issue" [ER at 113], and that her bipolar disorder was in fact not stabilized when she ceased participation in the Tarzana program. In this situation, the only reasonable professional judgment

by sentencing counsel would have been to present the mitigating mental health factors to the judge.

6. “Dr. Jaffe noted that [Ms. Daire’s] bipolar disorder results in manic fits of violence.” [Daire slip op. at 19.]

This “fact” is misapprehended. Ms. Daire self-reported during her interview with Dr. Jaffe that she “has episodes lasting up to two days where she is extremely angry and irritable and does not sleep and swears at people and her thoughts go faster than normal and she is violent.” [ER at 105 and 108.] There are no examples of the adult Ms. Daire actually acting on these feelings of “violence” beyond swearing at people, and Ms. Daire has no violent convictions. It could not have been a reasonable professional judgment to hide strong mitigating evidence from the sentencing court due to a fear that Ms. Daire’s emotions might be described by prosecutors to the court.

7. “During the psychiatric evaluation, Daire admitted stabbing a friend with a butcher knife.” [Daire slip op. at 20.]

This “fact” is inaccurate and misapprehended. The entire passage of the report recounts that Ms. Daire self-reported to Dr. Jaffe that when she was 12 years old

a young boy had a butcher knife and swung it at her sister. The defendant cut the boy’s fingers with a knife and was sent to juvenile hall for two days and placed on probation. Otherwise, she was never again in juvenile hall. [ER at 106.]

First, this incident reportedly took place when Ms. Daire was a 12 year old girl!⁷ Second, there is no evidence that this incident ever actually occurred; there is no arrest nor conviction in the record, etc. Third, even if the incident did happen in the manner in which it was recounted, it shows that a 12 year-old little girl was trying to defend her younger sister. The only reasonable professional judgment that sentencing counsel could make when faced with this “fact” is that it is not the kind of information that American courts use to justify long custodial sentences for adults, and therefore not a reason to hide strong mitigating evidence of Ms. Daire’s bipolar disorder.

8. “During the psychiatric evaluation, Daire admitted . . . assaulting a homeless man just ‘for fun.’” [Daire slip op. at 20.]

This “fact” is inaccurate and misapprehended. The report states that Ms. Daire self-reported to Dr. Jaffe that, apparently when she was 12 or 13 years old, she “once kicked a bum off a cargo train for fun.” [ER 107.] There is no mention anywhere that Ms. Daire ever touched anyone, much less “assaulted” a person-- perhaps she simply warned the person that it was illegal to be on the train, or threatened to report him to authorities. Also, this incident reportedly took place when Ms. Daire was a child, and there is no evidence that this incident actually did

⁷ Ms. Daire was 41 years old when she was sentenced after her second trial (the first resulted in a hung jury) in 2007.

occur in any case. The only reasonable professional judgment that sentencing counsel could make when faced with this “fact” is that it is not the kind of information that our courts use to justify life sentences for 40-year-old adults, and therefore not a reason to hide strong mitigating evidence of Ms. Daire’s bipolar disorder.

9. “[Daire] also apparently tried to burn her family’s house down.” [Daire slip op. at 20.]

This “fact” is misapprehended. The entire passage in Dr. Jaffe’s report states that Ms. Daire self-reported the following:

[h]er grandparents raised her, as her mother and father were in California and she lived in Louisiana until she was 12. . . . After her grandmother died, her grandfather could no longer take care of her, so at age 12, she went to live with her mother who worked two jobs. This is when she started having trouble. . . . She set a fire at the age of 13 in her home, because she wanted to burn the home down so they would move. [ER 106-7.]

Yet again, this incident was reported to have taken place when Ms. Daire was a child, and there is no evidence that this incident actually did occur in any case. The only reasonable professional judgment that sentencing counsel could make when weighing the balance of this weak “fact” against the strong mitigating evidence of Ms. Daire’s untreated bipolar disorder and its effect on her efforts at drug treatment would be to present the court with the mitigating evidence.

10. “[Daire] left one [drug treatment] program because she did not like living in a facility alongside men, and left another after an altercation with a fellow patient.” [Daire slip op. at 23-24.]

These “facts” are misapprehended, and this unfair characterization of these “facts” as indicators that Ms. Daire was not committed to her drug abuse treatment programs and could not be rehabilitated overlooks other facts in the record regarding the tremendous amount of violence that Ms. Daire has suffered.⁸ Given her history of experiencing violence, Ms. Daire’s fear of living with persons who had actually assaulted her (for example, the entire passage re the “altercation” in Dr. Jaffe’s report states that Ms. Daire “left Tarzana Treatment Center due to issues with anger after a resident knocked a plate out of her hand” (emphasis added) [ER 105]), or with persons who closely resembled those who had assaulted her (men), was not unreasonable. Even Dr. Jaffe’s treatment recommendation included “a sober living home . . . which is for female parolees only.” [ER 109.]

⁸ Ms. Daire was shot twice (once when she was 13 years old and once when she was 15 years old), was forced to have sex with older persons as a teenager, was raped and locked inside a car trunk when she was 17 years old, had her throat slit so badly that she was in the hospital for two weeks in her early 20’s, etc. [ER 106; 108].

IV. PANEL DECISION CONFLICTS WITH SUPREME COURT PRECEDENT AND INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE

A. The Panel's Decision Conflicts With Supreme Court Decisions

The panel decision held that prior panel decisions that there is no clearly established federal law on point is binding, even though those decisions conflict with prior authoritative case law as expressed in Glover v. United States, 531 U.S. 198 (2001). See Daire slip op. at 13, citing Davis v. Grigas, 443 F.3d 1155, 1158 (9th Cir. 2006) and Cooper-Smith v. Palmateer, 397 F.3d 1236, 1244 (9th Cir. 2005). The panel decision thus conflicts with a prior Supreme Court decision.

In 2001, the Supreme Court extended the Strickland standard to noncapital sentencing proceedings through Glover v. United States, 531 U.S. 198, 201 (2001). The petitioner in Glover had been sentenced to eighty-four months in prison by the federal district court for his activities while acting as a union official, including labor racketeering, money laundering, and tax evasion. *Id.* at 201. After a hearing on whether the money laundering counts could be grouped with the other counts for sentencing purposes, the court ruled that they should be counted separately. *Id.* at 200. Glover filed a *pro se* motion arguing ineffective assistance of counsel, because his attorney did not contest the grouping at sentencing. *Id.* at 201. The district court denied the petition, holding that an increase of 6 to 21 months in his sentence was not significant enough to amount to prejudice for the purposes of

Strickland. *Id.* at 202. The Seventh Circuit Court of Appeal affirmed on that theory. *See id.*

The issue presented to the Supreme Court in Glover was the following: assuming arguendo that the trial court erred in applying the Sentencing Guidelines and the legal error increased petitioner's prison sentence by at least 6 months, would the error constitute prejudice under Strickland if it resulted from counsel's deficient performance? Glover, 531 U.S. at 200. The Court found that it would, holding that:

The Seventh Circuit was incorrect to . . . deny relief to persons attacking their sentence who might show deficient performance in counsel's failure to object to an error of law affecting the calculation of a sentence because the sentence increase does not meet some baseline standard of prejudice. Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice. Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance. . . . We hold that the Seventh Circuit erred in engrafting this additional requirement onto the prejudice branch of the Strickland test.

Glover, 531 U.S. at 203-204.

The Supreme Court was aware that it was applying Strickland in a noncapital case: the issue had been briefed below, and the United States had specifically argued that "Strickland v. Washington governs claims of ineffective assistance of counsel at noncapital sentencing and appeal." *See* Brief for the Respondent United States at 11, Glover v. U.S., 531 U.S. 198 (2001), (No. 99-8576), 2000 WL 1469341.

Consistent with this clear holding, the Supreme Court has since cited Glover as “precedent” that serves to “establish that there exists a right to counsel during sentencing in . . . noncapital cases.” Lafler v. Cooper, 1332 S. Ct. 1376, 1385-86 (March 21, 2012) (citing Glover v. U.S., 531 U.S. 198, 203–204 (2001)). The Lafler Court explained that “[e]ven though sentencing does not concern the defendant’s guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in Strickland prejudice because ‘any amount of [additional] jail time has Sixth Amendment significance.’” *Id.* (citing Glover, *supra*, at 203.).

B. The Panel’s Decision Involves a Question of Exceptional Importance

The court should consider *en banc* the exceptionally important question of whether it is clearly established Federal law, as determined by the Supreme Court of the United States, that Strickland v. Washington is the proper standard by which to evaluate a claim of ineffective assistance of counsel in a noncapital sentencing hearing. Unless the panel brings current Circuit law into alignment with Glover, no person who received ineffective assistance of counsel during a noncapital sentencing hearing in the Ninth Circuit qualifies for *habeas* relief.

V. CONCLUSION

For the above-stated reasons, Ms. Daire respectfully requests that the Court grant panel rehearing and rehearing *en banc*.

C.A. No. 12-55667

CERTIFICATE OF COMPLIANCE

I certify that:

Pursuant to Fed. R. App. P. 32, 35 and 40, and 9th Cir. R. 35-4 and 40-1, the attached petition for panel rehearing and *en banc* determination is proportionately spaced, has a typeface of 14 points or more and contains 3726 words.

April 2, 2015
DATE

/s/ Sara J. O'Connell
SARA J. O'CONNELL
Attorney for Appellant Sophia Daire

C.A. No. 12-55667

STATEMENT OF RELATED CASES

Counsel for the appellant, Sophia Daire, is unaware of any related cases to be considered with this matter.

C.A. No. 12-55667

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF
System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 2, 2015.

I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

April 2, 2015
DATE

/s/ Sara J. O'Connell
SARA J. O'CONNELL
Attorney for Appellant Sophia Daire

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SOPHIA DAIRE, <i>Petitioner-Appellant,</i> v. MARY LATTIMORE, Warden <i>Respondent-Appellee.</i>
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No. 12-55667

D.C. No.
CV 10-3743-
DMG(AJW)

OPINION

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted
July 10, 2014—Pasadena, California

Filed March 19, 2015

Before: Fortunato P. Benavides,* Kim McLane Wardlaw,
and Richard R. Clifton, Circuit Judges.

Opinion by Judge Benavides

* The Honorable Fortunato P. Benavides, Senior Circuit Judge for the U.S. Court of Appeals for the Fifth Circuit, sitting by designation.

SUMMARY**

Habeas Corpus

The panel affirmed the district court’s denial of a 28 U.S.C. § 2254 habeas corpus petition brought by California state prisoner Sophia Daire, who is serving a 40-year “three strikes” sentence for first-degree burglary.

Daire argued that she was deprived of effective assistance because her attorney failed to present evidence of mental illness in her *Romero* motion asking the sentencing court to disregard two of her strikes. The panel held that even assuming, *arguendo*, that the applicability of *Strickland v. Washington* to noncapital sentencing is clearly established such that federal courts can afford relief from a state court’s flawed application of *Strickland* in that context, Daire cannot prevail under the review standard imposed by AEDPA. The panel held that the state court’s findings – that trial counsel’s performance did not fall below an objective standard of reasonableness and that submission of Daire’s medical evidence would not have changed the outcome of her *Romero* hearing – were not unreasonable applications of federal law.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

DAIRE V. LATTIMORE

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COUNSEL

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James William Bilderback, II (argued), Trial Attorney; Xiomara Costello, Deputy Attorney General; Kamala D. Harris, Attorney General; Dane R. Gillette, Chief Assistant Attorney General; Lance E. Winters, Senior Assistant Attorney General; and Kenneth C. Byrne, Supervising Deputy Attorney General, Office of the Attorney General of California, Los Angeles, California, for Respondent-Appellee.

OPINION

BENAVIDES, Circuit Judge:

A California state prisoner petitions this court for writ of habeas corpus pursuant to the Anti-terrorism and Effective Death Penalty Act (“AEDPA”), 28 U.S.C. § 2254 (2012). Currently serving a forty-year “three strikes” sentence for first-degree burglary, California Penal Code § 459, the petitioner argues that she was deprived of effective assistance when her attorney failed to present evidence of mental illness at sentencing. Because the state’s adjudication of this claim was not an unreasonable application of clearly established federal law, 28 U.S.C. § 2254 (d), we AFFIRM the district court’s denial of the petition.

I.

Sophia Daire is a 48-year-old woman who has, by all accounts, led a rather difficult life. Her personal history is an unfortunate tapestry of poverty, addiction, mental illness, and incarceration. Interwoven among these dark elements is a disturbing pattern of violence, with Daire having suffered repeated physical and sexual abuse at the hands of friends, family members, and unknown assailants.

On September 8, 2006, Daire was charged with first-degree burglary in violation of § 459 of the California Penal Code. A neighborhood resident had reported various possessions missing from his home, including cash, perfume, clothing, and costume jewelry. Daire was seen wearing the resident's missing NFL jersey a few minutes later, but the more valuable stolen items were not in her possession and were never recovered. Upon her arrest, Daire denied having committed any crime, and insisted that she found the jersey and some of the other stolen property in a nearby garbage bin. She conceded, however, that she has a rather long history of similar residential burglaries.

When Daire's first trial resulted in a hung jury, she was retried and convicted. At sentencing, Daire admitted to three prior burglary convictions for the purposes of California's "three strikes" recidivism sentence enhancements, *id.* § 667(a)(1). Daire also filed a motion asking the court to disregard two of these strikes, as permitted by *Romero*¹ and § 1385 of the California Penal Code. Although defense counsel was aware of Daire's bipolar disorder, neither the

¹ *People v. Superior Court (Romero)*, 917 P.2d 628, 13 Cal. 4th 497, 53 Cal. Rptr. 2d 789 (Cal. 1996).

motion nor the subsequent oral argument included any information about Daire's mental health. Ruling from the bench, the court denied the motion, finding a high risk of continued recidivism and concluding that Daire represents the kind of "case[] that [the] Three Strikes [Rule] is for." The judge then sentenced Daire to forty years, the minimum permissible sentence in light of her record. A successful motion could have resulted in a sentence of fewer than ten years. *See* Cal. Penal Code § 461.

After unsuccessfully raising various challenges on direct appeal,² Daire filed a habeas petition in state court. Daire argued, *inter alia*, that counsel had been constitutionally ineffective by conducting insufficient research into Daire's medical history and by failing to use Daire's bipolar disorder as a mitigating factor at sentencing. In particular, Daire asserted that additional research would have revealed that her condition "can be managed with proper medication and treatment, probably quite easily." Under the standard established in *Strickland v. Washington*, 466 U.S. 668 (1984), representation is only constitutionally inadequate if counsel's conduct is unreasonable and results in prejudice to the defendant.

The California Superior Court declined to issue the writ, rejecting Daire's argument for two reasons. First, it found counsel's performance objectively reasonable in that counsel had "properly represented Daire throughout [the] matter," and had presented the sentencing judge with myriad mitigating factors at sentencing. *See In re Sophia Daire*, No. VA

² *People v. Daire*, No. B201976, 2008 WL 4926956 (Cal. Ct. App. Nov. 19, 2008), *review denied*, No. S169253 (Cal. Jan. 28, 2009), *and cert. denied*, 557 U.S. 905 (2009).

096706, 3–4 (Super. Ct. L.A. Cnty. July 15, 2010) [hereinafter “State Decision”]. In addition, the court concluded that the sentence was ultimately unaffected by the omission of any evidence regarding Daire’s mental health, as that evidence would not have overcome “her unrelenting record of recidivism.” *Id.* at 4–5. The decision was affirmed without comment by the intermediate court of appeals and by the California Supreme Court.³

Finding no relief from the state bench, Daire turned to the federal courts, renewing her ineffective assistance argument in a petition submitted to the Central District of California. Under the AEDPA, federal courts may afford habeas relief from state custody only where a state court’s adjudication of the same habeas claim was “contrary to, or . . . an unreasonable application of, clearly established Federal law.” 28 U.S.C. § 2254(d)(1). A magistrate judge found the AEDPA standard satisfied with respect to the first prong of the *Strickland* test. *See Daire v. Lattimore*, No. CV 10-3743-DMG(AJW), 2011 WL 7663701 (C.D. Cal. Nov. 10, 2011). Specifically, the judge found the state court’s analysis of counsel’s conduct “conclusory and unreasonable,” and that trial counsel “fail[ed] to present the most persuasive evidence to support the *Romero* motion.” *Id.* at *7 (footnote omitted). Nevertheless, the magistrate judge recommended denying the petition after finding that the state court’s adjudication of the prejudice prong was “neither contrary to, nor an unreasonable application of, the *Strickland* standard.” *Id.* at *8. As a

³ The Superior Court also found the claim procedurally barred. That argument has not been raised here; however, it appears the procedural bar was overruled when the California Supreme Court reached the merits of Daire’s petition. *See Trigueros v. Adams*, 658 F.3d 983, 991 (9th Cir. 2011).

consequence, the magistrate judge concluded, Daire was “not entitled to relief on the basis of this claim.” *Id.*

After reviewing the magistrate judge’s report, the district court accepted its recommendation only in part. *See* 2012 WL 1197645 (C.D. Cal. April 9, 2012). Although the district court agreed that the state court had unreasonably adjudicated effective assistance, the district court disagreed with the magistrate judge’s conclusions regarding prejudice. *Id.* at *1. Specifically, the district court found that the state courts had “failed to even consider whether the presentation of mental health evidence could have made a difference to the sentencing court.” *Id.* at *2. The district court explained:

Important to the prejudice assessment, and not even mentioned in the Superior Court’s denial of *habeas* relief, is the fact that when declaring a mistrial after the first trial ended with a deadlocked jury, the trial court stated, “[t]he court could attempt to undercut the People’s offer, certainly on *Romero*, and **I think there’s a strong basis for that.**” This statement suggests that the trial court, which had just heard the evidence presented during the first trial, was inclined to find a basis for granting a *Romero* motion. The *Romero* motion ultimately presented to the trial court, however, failed to include *any* evidence regarding petitioner’s severe mental illness, the effect of that mental condition on her culpability, and the medical opinion that her illness was treatable.

This Court finds that the mental illness evidence omitted by counsel in the *Romero* motion . . . potentially explains her drug use and recidivism, and would have provided the ‘strong basis’ for the *Romero* motion that the trial court initially anticipated.

Id. at *1–*2 (emphasis in original). The district court, however, ultimately denied the petition, reluctantly concluding that binding Circuit precedent precludes relief from any injustice arising out of ineffective assistance during noncapital sentencing. *Id.* at *2 (citing *Davis v. Grigas*, 443 F.3d 1155 (9th Cir. 2006), and *Cooper-Smith v. Palmateer*, 397 F.3d 1236 (9th Cir. 2005)). The district court then granted a certificate of appealability, encouraging Daire to seek relief from this Court.

II.

We begin by clarifying the scope of our review. The district court certified the question of whether *Strickland*’s applicability “to the sentencing procedure in a noncapital case was clearly established federal law” for the purposes of Daire’s claim. *Id.* (referring to the standard stated in 28 U.S.C. § 2254(d)(1)). Under AEDPA, our review is limited to “the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). A certificate of appealability must therefore “indicate which specific issue” implicates that right. *Id.* § (c)(3). The certificate granted here stops short of that standard, essentially certifying a question of pure legal theory. However, because we agree with the district court that Daire’s petition warrants further review, we construe the certificate as referring to the underlying constitutional issue raised by petitioner, *viz.*, whether Daire was deprived of

effective assistance when counsel failed to present a mental health defense at sentencing. That issue subsumes the narrower question certified by the district court. To whatever extent the district court did not intend to grant a certificate on the constitutional issue, we exercise our own authority to do so. *Id.* § (c)(1); *see also Jones v. Ryan*, 691 F.3d 1093, 1095 (9th Cir. 2012) (expanding district court’s certificate of appealability), *cert. denied*, — U.S. —, 133 S. Ct. 2831 (2013).

III.

The district court denied Daire’s petition after concluding that *Strickland*’s applicability to noncapital sentencing is not clearly established, and thus that federal courts can afford no relief from a state court’s flawed application of *Strickland* in that context. But, as explained later, whether or not *Strickland* is applicable to noncapital sentences is not determinative of the resolution of this appeal.

Federal review of habeas petitions from state prisoners is governed by the AEDPA, 28 U.S.C. § 2254. The AEDPA allows federal courts to issue a writ only where the petitioner can show that the state court’s adjudication of the petitioner’s habeas argument “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” *Id.* § 2254(d). Although the California Supreme Court denied the petition without explanation, its decision is nevertheless subject to § 2254 review. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1402 (“Section 2254(d) applies even where there has been a

summary denial.” (citing *Harrington v. Richter*, — U.S. —, 131 S. Ct. 770, 786 (2011)).

In 1984, the Supreme Court established the standard by which defense counsel’s performance is generally measured. *See generally Strickland*, 466 U.S. 668. *Strickland* involved a challenge to counsel’s handling of the sentencing phase of a capital murder case. *Id.* at 675. The petitioner, having been sentenced to death after confessing to three heinous murders, argued that counsel should have explored several mitigation options and should have presented evidence of mental illness at sentencing. *Id.* at 672, 675–76. The habeas petition was adjudicated by the Florida state courts, by the U.S. District Court for the Southern District of Florida, by the Fifth Circuit, and by the *en banc* Eleventh Circuit after that court split from the Fifth Circuit. *Id.* at 677–80. Each of these courts employed a slightly different approach to determining the effectiveness of counsel’s performance. *Id.* at 683–84. In order to ensure a uniform constitutional expectation, the Court explained that “[i]n any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” *Id.* at 688. With regard to the required showing of prejudice, the proper standard requires the defendant to “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. The Court then applied this newly articulated standard to the case before it, concluding that counsel’s decisions were part of a strategy to “rely as fully as possible on respondent’s acceptance of responsibility for his crimes.” *Id.* at 699. Because trial counsel is afforded “wide latitude” in making these “tactical decisions,” counsel’s performance was therefore adequate. *Id.* at 689, 699. And as for the omitted

evidence, the Court concluded that the new material “would barely have altered the profile presented to the sentencing judge.” *Id.* at 700. As a consequence, the petitioner was not entitled to relief. *Id.* at 701.

Any uncertainty regarding *Strickland*’s role in the present case results from the language of *Strickland* itself. By its own terms, the standard was originally limited to counsel’s performance during the trial itself and at capital sentencing. The Supreme Court expressly reserved the issue of effective assistance at noncapital sentencing:

The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The same principle applies to a capital sentencing proceeding such as that provided by Florida law. *We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer*, and hence may require a different approach to the definition of constitutionally effective assistance. A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision that counsel’s role in the proceeding is comparable to counsel’s role at trial

Id. at 686–87 (emphasis added) (citation omitted). Given this caveat, the parties stipulate that the assistance standard at

noncapital sentencing could not have been clearly established by *Strickland*.

As the district court observed, we have twice previously held that there is no clearly established law, as required under AEDPA for a federal court to provide habeas relief to a state prisoner, that the *Strickland* standard applies to sentencing in noncapital cases. See *Davis v. Grigas*, 443 F.3d 1155, 1158 (9th Cir. 2006), and *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1244 (9th Cir. 2005) (“Since *Strickland*, the Supreme Court has not decided what standard should apply to ineffective assistance of counsel claims in the noncapital sentencing context. Consequently, there is no clearly established law in this context.”). That is a proposition not free from debate, as indicated by the concurring opinion by Judge Graber in *Davis*, where she questioned whether *Cooper-Smith* was correct on that point. See *Davis*, 443 F.3d at 1159 (Graber, J., concurring); see also *Davis v. Belleque*, 465 F. App’x 728, 729 (9th Cir. 2012) (per curiam) (Paez, J., concurring) (agreeing with Judge Graber’s concurrence in *Davis*). Daire also argues that later Supreme Court decisions have made clear that the *Strickland* standard applies more generally, citing, for example, *Glover v. United States*, 531 U.S. 198, 201–02 (2001); *Premo v. Moore*, 131 S. Ct. 733, 737–38, 741–42 (2011); *Harrington*, 131 S. Ct. 770, 786 (2011); and *Lafler v. Cooper*, 132 S. Ct. 1376, 1385–86 (2012).

We see some merit to Daire’s argument. It is clear that the *Strickland* standard, though originally limited by the *Strickland* opinion itself to capital sentencing, see *Strickland*, 466 U.S. at 686, now applies in contexts beyond that.

As a three-judge panel of this circuit, however, we are bound by prior panel opinions and can only reexamine them when “the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority.” *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). “This is a high standard.” *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (internal quotation marks omitted). Were we writing on a clean slate, we might conclude that it was clearly established that the *Strickland* standard applies, but the slate is not clean.

In other circumstances, this panel would likely encourage the court to revisit this issue en banc. We do not need to do so here, however, because we conclude that Daire cannot prevail for another reason.

IV.

Even assuming, *arguendo*, that *Strickland*'s applicability is clearly established, Daire cannot prevail under the review standard imposed by the AEDPA. The AEDPA stops just “short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings.” *Varghese v. Uribe*, 736 F.3d 817, 823 (9th Cir. 2013) (quoting *Harrington*, 131 S. Ct. at 786), *cert. denied*, 134 S. Ct. 1547 (2014). “It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court’s decision conflicts with this Court’s precedents. It goes no farther.” *Harrington*, 131 S. Ct. at 786. Therefore, “[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error . . . beyond any possibility for fairminded disagreement.” *Id.* at

786–87. The district court concluded that Daire had met this onerous standard. We review that conclusion *de novo*. *Hedlund v. Ryan*, 750 F.3d 793, 798 (9th Cir. 2014).

A.

Before turning to the state court’s adjudication of Daire’s claim, some additional context may be helpful. Daire contends that she was deprived of effective assistance when counsel omitted her mental illness from the *Romero* motion and subsequent hearing. Prior to trial, counsel had arranged for a psychiatric evaluation by Dr. Mark E. Jaffe, M.D. Dr. Jaffe reported preliminary diagnoses of bipolar disorder, anti-social personality disorder, and substance addiction. He further noted that Daire had received treatment intermittently over the years, but “took her medications inconsistently.” Daire had been in a treatment facility as recently as a few weeks earlier, but moved out after a dispute with another patient. *Id.* This was not the first time Daire had discontinued treatment—the physician reported that “[s]he has been in several treatment programs but had difficulties and left.” Dr. Jaffe ultimately concluded that Daire was “too unstable to live in the community,” and recommended comprehensive in-patient treatment. Counsel did not provide Dr. Jaffe with any of Daire’s medical records, and apparently did not ask for an opinion on Daire’s risk of recidivism.

Three years later, post-conviction counsel provided some of Daire’s medical records to the same physician. Dr. Jaffe was asked to clarify his original statements and to estimate the risk of recidivism in light of Daire’s records. He replied that Daire’s bipolar disorder was readily treatable, but that

Ms. Daire require[s] confinement in a locked environment for between one to two years before being released on parole. . . . [B]y ‘too unstable to live in the community,’ I meant that her antisocial impulses were too severe in combination with her mental illness and substance abuse, and that she was likely to commit additional criminal acts in order to obtain money to buy drugs, unless she had a period of confinement of between one to two years . . . [in which] specific treatment recommendations that I would outline were followed.

He further reported that Daire had never received proper medical treatment for her bipolar disorder and that her substance addiction probably could not be overcome without such treatment. The remainder of Dr. Jaffe’s post-conviction letter was largely redundant of his earlier report.

In addition to having Dr. Jaffe review Daire’s records, habeas counsel asked Daire to draft a statement recounting her traumatic history and the context of her most recent offense. Daire indicated that she had been evicted from her home and raped in the 48 hours before the burglary. She also complained that trial counsel had not interviewed any of her friends or family members regarding her character. This evidence was submitted to the Superior Court with Daire’s state habeas petition.

B.

The state court’s adjudication of Daire’s claim was not an unreasonable application of the *Strickland* standard. Under

the AEDPA, review of counsel's performance is "doubly deferential," requiring both a "highly deferential look at counsel's performance," and additional deference to the state court's conclusions regarding that performance. *Pinholster*, 131 S. Ct. at 1403 (internal quotation marks and citations omitted); *see also Harrington*, 131 S. Ct. at 784 (requiring deference to state court unless there is "no reasonable basis" for its decision). With respect to Daire's ineffective assistance argument, the state court found "no evidence that Daire's trial counsel's performance fell below an objective standard of reasonableness." State Decision 3. This was not an unreasonable application of federal law.

Under California law, an attorney submitting a *Romero* motion should investigate a defendant's "background, character, and prospects," and then relay these findings to the court. *People v. Thimmes*, 138 Cal. App. 4th 1207, 1213, 41 Cal. Rptr. 3d 925, 929 (Ct. App. 2006). The state courts rejected Daire's argument after noting that counsel had done just that, explaining that she submitted a detailed *Romero* brief which included "a myriad of individualized considerations." State Decision 5 (quoting disposition of direct appeal, 2008 WL 4926956 at *7). Indeed, between the written motion and the hearing, counsel referred to Daire's poverty, her advanced age, the relatively inconsequential nature of her criminal record, her encounters with violence and abuse, and the fact that she was reportedly raped the day before the burglary. And although counsel never mentioned Daire's mental illness itself, she referred to Daire's seizures and substance addiction, and emphasized Daire's need for intensive treatment. Given the litany of mitigating factors presented at sentencing, it was reasonable for the state court to conclude that counsel had satisfied her constitutional obligation to Daire. *See Gonzalez v. Knowles*, 515 F.3d 1006,

1015 (9th Cir. 2008) (finding, upon *de novo* review, the omission of psychiatric evidence and family testimony reasonable where counsel presented “a number of mitigating factors” to judge).

Daire argues that her counsel’s assistance was inadequate insofar as counsel failed to conduct a more thorough investigation into Daire’s personal history. Even “less than complete” research is sufficient under *Strickland*, however, so long as “reasonable professional judgments support the limitations on investigation.” *Strickland*, 466 U.S. at 691. The only argument made here is that counsel failed to fully investigate Daire’s medical history. Yet trial counsel arranged for Dr. Jaffe’s psychiatric evaluation of Daire in November of 2006. Based on the resulting report, counsel was fully justified in choosing not to pursue any additional information on the subject. A fair reading of the doctor’s letter is at least as damaging to Daire’s case as it is mitigating. For example, Dr. Jaffe indicated that Daire has a violent personality disorder, that she is unpredictable, and that she has a history of abandoning psychiatric treatment. The doctor explicitly stated that Daire is “too unstable to live in the community.” It seems likely that a reasonable attorney would have recognized how counterproductive additional research might be, and might have made a strategic decision not to delve any further into Daire’s psychiatric issues. See *Rompilla v. Beard*, 545 U.S. 374, 383 (2005) (“[R]easonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.”). Accordingly, Daire has not established that the state court’s determination was unreasonable.

Counsel’s decision not to refer to Daire’s bipolar diagnosis was equally reasonable. Because there was

apparently not an evidentiary hearing on this issue, we cannot be certain as to the reason for the omission of a mental health defense. Nevertheless, we must presume that “the challenged action might be considered sound trial strategy.” *Strickland*, 466 U.S. at 689 (internal quotation marks and citation omitted). After all, Daire’s attorney arranged for the psychiatric evaluation and report. Accordingly, it seems counsel would have submitted the evidence that she herself procured if she thought it would help the case. Review of the written *Romero* motion suggests that counsel instead hoped to persuade the judge by portraying Daire as a misguided but largely harmless individual:

The court cannot ignore that while Ms. Daire has continued in her criminal conduct she has been mostly motivated by her poverty, homelessness, and drug use. She has chosen homes where largely the residents have not been present. . . . Only once has her non-violent conduct turned potentially violent.

Similarly, at the *Romero* hearing counsel described Daire as “circumspect” in her burglary, and noted that she has only taken “things of minimal and nominal value” and only when the “residences [] were not occupied.” Review of the trial record confirms that counsel chose to emphasize other mitigating factors, and apparently made a deliberate decision not to place Daire’s health at issue. Over the course of the two trials, neither counsel nor Daire made any mention of her mental illness. In fact, when prosecutors seemingly alluded to Daire’s psychiatric issues, defense counsel promptly

objected.⁴ So the record—far from suggesting that the absence of medical evidence at sentencing was an oversight or omission—suggests that the omission was part of a comprehensive effort to portray Daire as nothing worse than a petty thief. As a consequence of the elected defense, counsel could not refer to Daire’s mental health without undermining her primary argument that Daire was largely harmless. When evaluating a petitioner’s allegations regarding an evidentiary omission, we must consider “all the relevant evidence” that would have been revealed upon submission—“not just the mitigation evidence.” *Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (per curiam) (emphasis omitted). Under California law, a defendant cannot submit excerpts of a physician’s letter without disclosing the entire text to opposing counsel. Cal. Evid. Code § 356. And if Daire had revealed any “significant part” of a privileged medical record, she would have lost her privilege as to the remainder. *Id.* § 912(a). So counsel could not—as the district court implied—simply isolate the most sympathetic aspects of Daire’s health to submit at trial and sentencing.

For example, if counsel had used excerpts of Dr. Jaffe’s letter to argue that medical treatment would lower the risk of recidivism, prosecutors almost certainly would have countered with Daire’s history of abandoning treatment programs. Even worse, Dr. Jaffe reported that Daire showed anti-social tendencies and noted that her bipolar disorder results in manic fits of violence. During the psychiatric

⁴ Daire mentioned that on the day of the offense she had been “up for two days.” *Id.* When the prosecution asked how she had managed to “stay[] awake for two days,” defense immediately objected. *Id.* Counsel presumably anticipated that Daire’s answer would refer to her cocaine addiction or her manic episodes, or both.

evaluation, Daire admitted several prior violent outbursts that included stabbing a friend with a butcher knife and assaulting a homeless man just “for fun.” She also apparently tried to burn her family’s house down. This is hardly the behavior one would expect from a harmless and “circumspect” individual. Yet if counsel had put Daire’s mental health at issue, this ignominious resumé would have become fair game for the prosecution’s use at trial and at sentencing.

We do not mean to belittle Daire’s medical condition or suggest that her history is anything other than unfortunate. It seems likely that any violent disposition or mental illness Daire has is related to the shocking abuse Daire suffered as a child and young adult. As Dr. Jaffe himself stated, “[l]ike many women who are addicted to drugs and serve prison time, the defendant has an extensive history of trauma.” So it is possible that—as the district court concluded—counsel would have been better off adopting an alternate strategy. Perhaps instead of trying to characterize Daire as harmless and non-violent, counsel should have conceded the violent psychiatric disorders and then argued that those disorders could be overcome with proper intervention. The law, however, does not permit us to second-guess the trial attorney’s strategy. Instead, “every effort [must] be made to eliminate the distorting effect of hindsight.” *Strickland*, 466 U.S. at 689. We must therefore resist the temptation “to conclude that a particular act or omission was unreasonable” simply because it “proved unsuccessful” at trial. *Id.*

For that reason, we cannot assume, as the district court did, that the mental health records provided “the most persuasive evidence to support the *Romero* motion.” *Daire*, 2011 WL 7663701, at *7. Our precedent is clear that where a defendant’s psychiatric history is both mitigating and

incriminating, trial counsel is best positioned to determine how to incorporate a diagnosis into the defense.⁵ And as we have explained, informed counsel “need not present a defense just because it [is] viable.” *Mickey*, 606 F.3d. at 1238. Here, although we cannot be certain as to why the psychiatric evidence was omitted, the record as a whole suggests that Daire’s attorney devised an informed defense and a reasonable mitigating strategy, and that is all the Constitution requires.

C.

The state court found an absence of prejudice in denying Daire’s claim. “An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland*, 466 U.S. at 691. It is therefore not sufficient for Daire to simply argue that the omitted evidence might have made her *Romero* motion stronger. In order to prevail before the state habeas court, Daire needed to demonstrate a “reasonable probability” that submission of additional medical evidence would have resulted in a successful motion and a concomitantly reduced sentence. *Id.* at 694. In other words, the alleged failure must have been

⁵ See *Wong*, 558 U.S. at 18 (recognizing counsel’s right “to proceed cautiously, structuring his mitigation arguments and witnesses to limit [the] possibility” that opposing counsel will gain access to damaging evidence); *Mickey v. Ayers*, 606 F.3d 1223, 1238–39 (9th Cir. 2010) (holding that omitting a mental health defense was reasonable where psychiatric records contradicted other elements of defense and would have “opened the door” to incriminating issues); *Hendricks v. Calderon*, 70 F.3d 1032, 1037 (9th Cir. 1995) (finding reasonable a counsel’s decision to forgo mental health defense where it was not particularly persuasive and would have revealed criminal history).

egregious enough to “undermine confidence” in the outcome of the proceeding. *Id.* Although some jurists might find this standard satisfied, the state court’s contrary conclusion was not unreasonable.

Daire was sentenced in accordance with California’s so-called “three strikes” rule, which “consists of two nearly identical statutory schemes designed to increase the prison terms of repeat felons.” *Rios v. Garcia*, 390 F.3d 1082, 1084 (9th Cir. 2004) (quoting *Romero*, 917 P.2d at 630, 13 Cal. 4th at 504, 53 Cal. Rptr. 2d at 791) (punctuation revised). The statutes have minor differences, but both provide that when a defendant is convicted of a felony, and the state proves that the defendant has committed certain prior felonies, the defendant is subject to greatly enhanced sentencing requirements. *Id.* at 1085; *see also* Cal. Penal Code §§ 667(c), 1170.12(a). There is, however, an exception to the rule. If a defendant so moves, a judge may disregard a prior felony under “extraordinary” circumstances. *People v. Carmony*, 92 P.3d 369, 376, 33 Cal. 4th 367, 378, 14 Cal. Rptr. 3d 880, 889 (Cal. 2004). Before doing so, the judge must determine that the defendant lies “outside the spirit” of the scheme such that he “should be treated as though he had not previously been convicted of one or more” of the strikes. *Id.* (quoting *People v. Williams*, 948 P.2d 429, 437, 17 Cal. 4th 148, 161, 69 Cal. Rptr. 2d 917, 948 (Cal. 1998)). To prevail on one of these “*Romero*” motions, a defendant must overcome the “strong presumption that any sentence that conforms to these sentencing norms is both rational and proper.” *Id.* As a consequence, denial of a *Romero* motion is generally the expectation, not the exception. Here, as a fourth-strike defendant, Daire needed the judge to disregard two of her three prior felonies to even be eligible for a lesser

sentence. She therefore faced a considerable burden at the *Romero* hearing.

After reviewing the omitted evidence, we find reasonable the state court's conclusion regarding prejudice. Daire's medical history includes an ambiguous set of mitigating and incriminating factors. The sentencing judge rejected Daire's request for leniency after concluding that she is, essentially, an unrepentant recidivist: "[T]here is a substantial career of criminality in this defendant's background She has never been out for very long before she re-offends" The court on direct appeal apparently agreed with this characterization, finding no abuse of discretion and obliquely referring to Daire as having an "unrelenting record of recidivism." *Daire*, 2008 WL 4926956, at *7. Indeed, in addition to the three residential burglary convictions, Daire's record includes convictions or arrests for loitering, tampering, possession of controlled substance, possession of narcotics, assault resulting in bodily injury, vehicular theft, and parole violations. *Id.* As the Superior Court tersely observed, it seems Daire only avoids trouble with the law when she is in prison. *See* State Decision 6.

Daire argues that she was prejudiced in that the judge received no information regarding the possibility that she could be rehabilitated with proper medical treatment for bipolar disorder. Regrettably, this argument is belied by the proffered evidence itself. Not only does her medical history not *undermine* the risk of recidivism, it only *underscores* the extent to which rehabilitation is unlikely. Although Dr. Jaffe observed that Daire could perhaps be "easily" reformed with in-patient treatment, the record indicates a clear pattern of abandoning treatment programs. For example, she left one program because she did not like living in a facility alongside

men, and left another after an altercation with a fellow patient. In fact, Dr. Jaffe himself concluded that Daire needed to be in a “locked environment” because she was “likely to commit additional criminal acts.” He further cautioned that medical professionals could only effectively treat Daire if she chose to remain “clean and sober.” Yet the doctor made no comment as to the extent of that commitment on Daire’s part. Perhaps most damaging to Daire’s argument is the fact that she was apparently undergoing treatment and taking her medications at the time of the most recent offense. Consequently, it was not unreasonable for the state court to conclude that “[e]ven if the trial court would have heard more argument concerning Daire’s drug use, psychological issues, and childhood, Daire’s sentence would not have been any different.”⁶

We note, in addition, significant discrepancies in the letters provided by the consulting physician. In the original interview, Daire told Dr. Jaffe that she was taking Depakene at the time of the offense, and that she was being treated at a public health clinic. Depakene is a prescription medication used to treat manic episodes in bipolar patients. *See Physicians’ Desk Reference* 417–22 (61st ed. 2007). Daire indicated that she had originally been prescribed that medication while living at Tarzana Treatment Center, and that it made her feel “mellow” and more stable. In the 2010 letter requested for habeas purposes, Jaffe contradicted his

⁶ State Decision 4. It is not insignificant that the magistrate judge and district court judge disagreed as to whether this omission resulted in prejudice. Although the two judges arrived at contrary conclusions, they both provided carefully reasoned and legally defensible arguments in support of their respective positions. Under such circumstances, we would be hard-pressed to find the state’s decision unreasonable. *See Harrington*, 131 S. Ct. at 786–87.

original letter, reporting no “indication that she was prescribed medications for Bipolar disorder while in the [Tarzana] program.” This statement is puzzling, given Daire’s contrary testimony and considering that the Tarzana discharge record—a copy of which was given to Jaffe—clearly lists a diagnosis of “296.62 bipolar disorder,” and states that Daire was “medicated and compliant while in the unit.” We need not resolve these factual discrepancies today. Nevertheless, the inconsistencies render more reasonable the state’s conclusion regarding prejudice. In fact, the *Strickland* Court itself dealt with a similar discrepancy, ultimately finding “no reasonable probability that the omitted evidence would have changed the conclusion” at sentencing, and noting that the inconsistencies “might even have been harmful” to the defense. *See Strickland*, 466 U.S. at 676–77, 699.

Daire nevertheless tries to demonstrate prejudice by characterizing this particular judge as sympathetic to her cause. She points to a comment in the mistrial transcript regarding the weakness of the prosecution’s case, specifically that “the court could attempt to undercut the people’s offer, certainly on *Romero*, and I think there’s a strong basis for that.” But this comment implies little or nothing about the actual adjudication of the *Romero* motion, which was handled by a different judge.⁷ Moreover, the merits of the motion had not yet been presented, so the mistrial judge might well have felt differently after reviewing the submissions. Daire also takes the sentencing judge’s comments out of context by describing the *Romero* outcome as a “close” call. That

⁷ Judge Michael A. Cowell handled the original trial, and Judge Margaret Miller Bernal presided over the retrial and subsequent sentencing.

characterization is belied by the record. The judge mistakenly thought the sentence would be fairly “close” (*i.e.*, substantially the same) regardless of whether she granted the motion. Yet even after counsel emphasized how lengthy a three-strikes sentence would be, the judge nevertheless chose to deny the motion and impose the forty-year sentence. *Id.* So there is little indication that awareness of Daire’s bipolar disorder might have somehow tipped the balance in Daire’s favor. Indeed, given that the judge was unpersuaded by an eviction and reported rape within 48 hours of the offense, it seems unlikely that Daire’s dual-edged diagnosis—or anything else, for that matter—would have moved the court to leniency.

Finally, a recent *Romero* appeal supports the state court’s conclusion that the motion would have been denied irrespective of the proffered mitigating evidence. *See generally People v. Miller*, No. H037246, 2013 WL 6710724 (Cal. Ct. App. 2013) (unpublished). The *Miller* court considered a direct appeal involving an individual quite similar to Daire. The defendant had committed three robberies to support his substance addiction, which he described as his “biggest challenge” in life. *Id.* at *1 & n.3. In seeking *Romero* relief from a three-strikes sentence, the defendant pointed out that he suffered from an untreated mental illness and that none of his offenses had been very serious. *Id.* at *1. He urged leniency, arguing that he was “homeless,” “severely depressed,” and in need of medical help. *Id.* In opposing the motion, prosecutors used those very same factual predicates to argue that defendant was prone to recidivism and simply “unable to live a sober, stable,

or productive life.” *Id.* Agreeing with the prosecution and deeming the defendant a threat to public welfare, the sentencing judge denied the motion. *Id.* at *2. The appellate court affirmed, noting that *Romero* “does not compel a trial court to dismiss a prior strike simply because factors exist that may justify doing so,” and emphasizing that “there continues to be a strong presumption that sentences that conform to the sentencing norms set forth under the Three Strikes law are both rational and proper.” *Id.* at *6 (citing *Carmony*, 92 P.3d at 376, 33 Cal. 4th 367, 378, 14 Cal. Rptr. 3d 880, 889).

The parallels between *Miller* and *Daire* are readily apparent. In broad strokes, the only qualitative difference in their respective *Romero* arguments was that *Miller*’s motion incorporated a mental health defense. And yet *Miller*’s motion was denied in the same manner *Daire*’s was. We do not mean to overstate *Miller*’s implications for the present dispute, as even a perfectly analogous case could not possibly reveal how *Daire*’s *Romero* motion would have been resolved in light of her unique psychiatric history. Nevertheless, the *Miller* decision supports the state court’s conclusion that submission of *Daire*’s medical evidence would not have changed the outcome of the *Romero* hearing. Accordingly, we cannot say that there is no reasonable basis for that decision. *Harrington*, 131 S. Ct. at 784.

V.

For the reasons stated, we conclude that the state court’s decision was reasonable with respect to both prongs of *Strickland*. The federal courts are therefore precluded from affording the requested relief, irrespective of whether

Strickland's applicability to noncapital sentencing is clearly established. 28 U.S.C. § 2254(d)(1).

AFFIRMED.

The costs on appeal shall be taxed against petitioner-appellant.