FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SERGIO OCHOA, *Petitioner-Appellant*, v. RONALD DAVIS, Warden, California State Prison at San Quentin, *Respondent-Appellee.*	No. 18-99007 D.C. No. 2:02-cv-07774-RSWL OPINION

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted March 22, 2022
Pasadena, California

Filed October 5, 2022

Before: Johnnie B. Rawlinson, Kenneth K. Lee, and Lawrence VanDyke, Circuit Judges.

Opinion by Judge VanDyke

SUMMARY*

Habeas Corpus/Death Penalty

The panel affirmed the district court's denial of Sergio Ochoa's habeas corpus petition under 28 U.S.C. § 2254 challenging his conviction and death sentence imposed in California state court.

The district court issued a certificate of appealability for two of Ochoa's claims.

In the first claim certified by the district court, Ochoa contended that his constitutional rights were violated under *Wainwright v. Witt*, 469 U.S. 412 (1985), and *Witherspoon v. Illinois*, 391 U.S. 510 (1968), because seven prospective jurors were improperly removed for cause based on their moral qualms about the death penalty that did not substantially impair their abilities to perform their duties in a capital case. The California Supreme Court, whose opinion on direct review is the last reasoned decision on this issue, concluded that both the prosecutor's questioning of the challenged jurors and the excusals were proper. Applying the deferential review under the Antiterrorism and Effective Death Penalty Act (AEDPA) to the last reasoned state court decision, the panel held that the California Supreme Court's conclusion was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent.

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

In the second claim certified by the district court, Ochoa contended that his trial counsel were ineffective because the excusals were based upon counsel's failure to investigate, adequately object, and/or rehabilitate the prospective jurors. On this issue, the California Supreme Court's denial of Ochoa's second state petition is the last reasoned decision. The California Supreme Court summarily denied the ineffective assistance of counsel claim "on the merits." The panel took this opportunity to make explicit what has to this point been implicit: the California Supreme Court's summary denial is a decision on the merits and thus entitled to AEDPA deference. The panel held that Ochoa failed to overcome the presumption that defense counsel's conduct fell within the wide range of professional assistance, and failed to show how trial counsel's failure to object or try to rehabilitate some of the jurors prejudiced him. Applying AEDPA deference, the panel concluded that it was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent for the California Supreme Court to have determined that Ochoa's counsel were not ineffective during voir dire. The panel held that the district court did not abuse its discretion in denying Ochoa's request for an evidentiary hearing.

Because jurists of reason could disagree with the district court's denial of two uncertified claims, the panel expanded the certificate of appealability to cover those claims.

In the first uncertified claim, Ochoa contended that his defense counsel were ineffective during the penalty phase for failing to present mitigating evidence, such as evidence of his brain damage and traumatic childhood. He also faults his counsel for failing to investigate and attack the prosecution's aggravation evidence, including failing to

present a gang expert. Ochoa raised this claim in both of his state habeas petitions. The California Supreme Court summarily denied the claim "on the merits." The panel held that Ochoa failed to rebut the presumption of counsel's competence, and failed to establish prejudice with respect to counsel's alleged deficiencies. Applying AEDPA deference, the panel concluded that the California Supreme Court's conclusion was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent.

In the second uncertified claim, Ochoa asserted that his death sentence violates the Eighth Amendment because he "suffered mental impairments that are as severe as mental retardation from the date of his arrest to the present[,]" and he is therefore ineligible for execution under *Atkins v. Virginia*, 536 U.S. 304 (2002). Ochoa raised this claim in his second state habeas petition. The California Supreme Court summarily denied the claim "on the merits." Evaluating the criteria set forth in *Atkins*, and applying AEDPA deference, the panel held that it was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent for the California Supreme Court to have determined that Ochoa failed to demonstrate the onset of intellectual functioning and adaptive deficits as a minor.

COUNSEL

C. Pamela Gomez (argued) and Ajay V. Kusnoor, Deputy Federal Public Defenders; Cuauhtémoc Ortega, Federal Public Defender; Office of the Federal Public Defender, Los Angeles, California; for Petitioner-Appellant.

Nicholas Webster (argued), A. Scott Hayward and Analee J. Brodie, Deputy Attorneys General; James William Bilderback II, Senior Assistant Attorney General; Lance E. Winters, Chief Assistant Attorney General; Rob Bonta, Attorney General; Office of the Attorney General, Los Angeles, California; for Respondent-Appellee.

OPINION

VANDYKE, Circuit Judge:

I. INTRODUCTION

Petitioner Sergio Ochoa appeals from the district court's denial of his habeas corpus petition under 28 U.S.C. § 2254, challenging his conviction and death sentence imposed in California state court. In 1992, Ochoa was convicted of two counts of first-degree murder and one count of attempted robbery. *People v. Ochoa*, 26 Cal. 4th 398, 415–16 (2001). The jury found true the allegations that a principal was armed with respect to all three offenses and that Ochoa personally used a firearm with respect to one of the murders and the attempted robbery. *Id.* The jury also found true the special circumstance allegations that Ochoa committed multiple murders and that a murder was committed while he was engaged in robbery. *Id.* The jury set the penalty at death. *Id.*

Ochoa's conviction and death sentence were appealed to the California Supreme Court, which affirmed the judgment in its entirety. *Id.* at 464. Ochoa twice sought habeas relief from the California Supreme Court, but those petitions were denied. Ochoa also commenced federal habeas proceedings in the United States District Court for the Central District of California, but this petition was also denied. The district court issued a certificate of appealability for two of Ochoa's claims (together, "the certified claims"): (1) that seven jurors were improperly removed for cause under *Wainwright v. Witt*, 469 U.S. 412 (1985), and *Witherspoon v. Illinois*, 391 U.S. 510 (1968); and (2) that his trial counsel were ineffective for failing to object to the prosecutor's use of misleading hypothetical scenarios during voir dire and for failing to rehabilitate prospective jurors challenged for cause. On appeal, Ochoa requests that we expand the certificate of appealability to include two additional claims (together, "the uncertified claims"): (1) that trial counsel were also ineffective for failing to investigate and present mitigating evidence during the penalty phase; and (2) that his execution would violate the Eighth Amendment because he suffers from cognitive impairments and mental illness that are equivalent to intellectual disability.

We grant Ochoa's request to expand the certificate of appealability with respect to the uncertified claims, given that the accuracy of the district court's resolution of these claims is reasonably debatable. But we affirm the district court's denial of Ochoa's habeas corpus petition because he fails to establish that the California Supreme Court's conclusion as to any of his claims was contrary to or constituted an unreasonable application of clearly established federal law or an unreasonable factual determination. *See* 28 U.S.C. § 2254(d)(1), (2).

II. BACKGROUND

Appellant Sergio Ochoa was born in 1968 in Tijuana, Mexico. Three years later, he and his family moved to San Diego, and soon thereafter they moved to Los Angeles. In time, two of Ochoa's older siblings joined a Los Angeles street gang called the 18th Street Gang. Ochoa followed suit, joining the gang's Pee Wee Winos clique when he was eleven years old.

A decade later, Ochoa was still a member of the 18th Street Gang, which was engaged in a gang "war" with the Crazy Riders. On December 15, 1989, while Ochoa was walking with a fellow 18th Street Gang member, a white Toyota pulled up alongside them, and a Crazy Rider nicknamed "Pompis" stepped out of the car and shot at them five times. The next day, the Crazy Riders shot an 18th Street Gang member. Later that same day, an 18th Street Gang member killed a Crazy Rider in retaliation. On the evening of January 3, 1990, Pompis, in the same white Toyota, pulled up alongside a car carrying three 18th Street Gang members and shot one of them in the head.

Approximately three hours later, Ochoa drove up to a corner at which four fellow 18th Street Gang members were assembled and told them that he had just spotted the white Toyota. The four men, one of whom was armed with a double-barreled shotgun, got in Ochoa's truck. While driving, Ochoa again spotted what he believed to be the Crazy Riders' car, and he pulled up alongside it. Someone in Ochoa's truck fired two shotgun blasts into the car, and Ochoa drove off. The car Ochoa believed was the Crazy Riders' car turned out to be a white Datsun with a license plate number similar to that of the Crazy Riders' white Toyota; the Datsun's driver, a nineteen-year-old named

Pedro Navarette who was not involved with either gang, died of a shotgun wound to the head.

Weeks later, on the evening of January 20, 1990, Ochoa convinced four fellow gang members to join him for a carjacking. After agreeing that a particular parked car was a good target, Ochoa and an accomplice approached the car's driver side, while two other accomplices approached the passenger side. Ochoa, the only armed member of the group, placed a gun in driver Jose Castro's face and ordered him to exit the vehicle. When Castro refused, Ochoa stated, "I'm gonna shoot him." A passing motorist saw the tallest man in the group, who was standing on the driver side, shoot Castro; Ochoa was by far the tallest of the four assailants. When he returned to the car in which he and his accomplices had arrived, Ochoa told the getaway driver that he had shot Castro in the leg. Castro died from the gunshot wound; the bullet entered his left shoulder and exited the right side of his chest, which was consistent with the scene described by the eyewitness.

Later that night, Ochoa and three male accomplices approached a man at a gas station. They kicked the man to the ground, and when the man stood up, Ochoa punched him and warned, "Give up the car, otherwise I'm going to shoot you." An accomplice pressed a gun against the man's torso, Ochoa entered the man's car and sat down in the driver's seat, and the four drove off.

Ochoa was arrested the next day. During questioning, Ochoa denied having any knowledge of the Navarette killing. After that interview, Ochoa, who already had many 18th Street Gang tattoos, got a tattoo over his eye of the number "187," the California Penal Code section that proscribes murder. In February 1990, Ochoa admitted that on the night of the Navarette murder he drove the shooter

and others, but he claimed that he did not know the shooter was armed until he heard the gunshot. In March 1990, the eyewitness to the Castro murder was shown a photographic lineup that included an image of Ochoa, but the witness was unable to identify Ochoa as the shooter. In September of that year, however, the eyewitness selected Ochoa from a live lineup, identifying him as the shooter.

On August 31, 1992, Ochoa was convicted of two counts of first-degree murder and one count of attempted second-degree robbery in Los Angeles County Superior Court. At the penalty phase, the jury fixed the penalty to be imposed as death, and on December 10, 1992, the court sentenced Ochoa to the same. On August 6, 2001, the California Supreme Court affirmed Ochoa's convictions and sentence on direct appeal. *Ochoa*, 26 Cal. 4th at 464. On April 29, 2002, the U.S. Supreme Court denied Ochoa's petition for a writ of certiorari.

Ochoa filed his first state habeas petition on February 20, 2001. The California Supreme Court summarily denied the petition "on the merits" on August 21, 2002. Ochoa filed a federal habeas petition in the district court on September 19, 2003. Ochoa returned to the state court with a second state habeas petition on December 15, 2003, and the district court stayed the federal proceedings. The California Supreme Court summarily denied Ochoa's second state petition "on the merits" and on procedural grounds on December 21, 2010.

After his second state habeas petition was denied, Ochoa filed the operative amended petition with the district court. On July 8, 2014, the district court granted in part and denied in part the State's motion to dismiss. Ochoa filed a motion for reconsideration, which the district court likewise granted in part and denied in part. On August 13, 2018, the district

court denied all of Ochoa's remaining claims for relief on the merits. The district court issued a certificate of appealability as to the certified claims.

On September 10, 2018, Ochoa filed a notice of appeal, reserving the right to request that we expand the certificate of appealability. Ochoa challenges the district court's determinations regarding the certified claims and requests that we expand the certificate of appealability to include the uncertified claims.

III. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. We review the district court's denial of a habeas petition de novo and its findings of fact for clear error. *See Stanley v. Schriro*, 598 F.3d 612, 617 (9th Cir. 2010). Because Ochoa's federal petition was filed after April 24, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") governs our review. *See Murray v. Schriro*, 745 F.3d 984, 996 (9th Cir. 2014). Under AEDPA, habeas relief may not be granted unless the state court's decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1), (2). We apply the deferential review under AEDPA to the last reasoned state court decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803–04 (1991); *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012).

Under § 2254(d)(1), "clearly established" "refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision."

Lockyer v. Andrade, 538 U.S. 63, 71–72 (2003). A state court's decision is contrary to clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000) (O'Connor, J., concurring). A state court's decision is an unreasonable application of clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the [petitioner's] case." *Id.* "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (cleaned up).

IV. DISCUSSION

Ochoa presents four claims on appeal, two certified and two uncertified. We begin by addressing the certified claims and then turn to the uncertified claims.

A. The Certified Claims

1. First Certified Claim: *Witt*/*Witherspoon* Claim

Ochoa contends that his constitutional rights were violated because seven prospective jurors were improperly removed for cause based on their moral qualms about the death penalty that did not substantially impair their abilities to perform their duties in a capital case under *Witt* and *Witherspoon*.

On this issue, the California Supreme Court's opinion on direct review in *Ochoa*, 26 Cal. 4th 398, is the last reasoned decision. In that opinion, the California Supreme Court

concluded that both the prosecutor's questioning of the challenged jurors and the excusals were "proper." *Id.* at 428. Specifically:

> Prospective Juror Linda H.'s comments revealed her unambiguous opposition to the death penalty, and the trial court properly excused her. Substantial evidence likewise supports the exclusion of the other jurors. To the extent their responses could support multiple inferences, we defer to the trial court's determination of their unfitness to serve.

Id. at 432.

The district court considered the California Supreme Court's rejection of this claim and found that it was reasonable under AEDPA because the record supported the conclusion that the challenged jurors were substantially impaired. The district court thus denied Ochoa's *Witt/Witherspoon* claim.

Because the California Supreme Court's conclusion was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent, we affirm the district court. *See* 28 U.S.C. § 2254(d)(1), (2).

a. Applicable Law

In *Witherspoon*, the Supreme Court allowed the exclusion of jurors who "would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial . . . ." 391 U.S. at 522 n.21. In *Witt*, the Supreme Court replaced

Witherspoon's "automatic vote" test with a different formulation: a juror in a capital case is properly excluded for cause where the juror's views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." 469 U.S. at 424 (cleaned up). A juror's opposition to the death penalty is insufficient grounds for exclusion if the juror can set aside this view in making a decision with regard to penalty. *See Lockhart v. McCree*, 476 U.S. 162, 176 (1986). "[I]t is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." *Witt*, 469 U.S. at 423. At the same time, a juror's bias does not have to be proved with "unmistakable clarity." *Id.* at 424. When there is ambiguity in the prospective juror's statements, the trial court is "entitled to resolve it in favor of the State." *Id.* at 434.

In determining whether juror exclusion for bias is unreasonable, a trial court's findings of juror partiality are entitled to special deference. *See Uttecht v. Brown*, 551 U.S. 1, 9 (2007) ("Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, . . . a factor of critical importance in assessing the attitude and qualifications of potential jurors."); *see also Morgan v. Illinois*, 504 U.S. 719, 730 (1992) ("The adequacy of *voir dire* is not easily the subject of appellate review . . . ."). Such deference is necessary for practical reasons:

> [M]any veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true

> feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.

Witt, 469 U.S. at 424–26. Consequently, the Supreme Court has admonished the lower courts to "respect the limited role of federal habeas relief in this area." *Uttecht*, 551 U.S. at 10. In addition, § 2254(d) builds on the deference owed to the trial court by requiring us to review the California Supreme Court's determination through a "deferential lens." *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011) (cleaned up).

b. Analysis

The prospective jurors were questioned in nine groups of eleven to seventeen people. Each prospective juror submitted a juror questionnaire, and during voir dire was questioned first by the trial court, then by defense counsel, and finally by the prosecutor. After the first two groups had been questioned, the trial court granted the defense some "rebuttal" voir dire. Each side had thirty minutes for questioning, except for the last group, which was the smallest, so each side had twenty minutes. During each group's voir dire, the prosecutor explained the felony-murder and accomplice-liability doctrines that were applicable to the charges in the case. The prosecutor used hypotheticals to illustrate how the doctrines operate.

Ochoa contends that the trial court improperly removed the following seven prospective jurors from four different groups: Gertrude W., Patrice V., Alicia B., Linda H., Martha C., Arthur R., and Lynn J. Ochoa claims that the jurors gave disqualifying answers only after the prosecutor posed

hypotheticals that were "highly misleading" because they (1) "improperly described" the state-law framework to the jury by introducing "the theory of accidental, aiding and abetting felony murder" without clarifying that a defendant guilty of such a crime would be categorically ineligible for death; and (2) described a scenario that was a lot less blameworthy than Ochoa's crime as they described "an unintentional or accidental murder." Ochoa argues no deference should be applied to the trial court's decision to remove the jurors because the state law principles were improperly described to them. Ochoa also claims that the California Supreme Court unreasonably applied clearly established Supreme Court precedent, when it placed the burden of showing that the jurors were substantially impaired not on the prosecutor—the party seeking exclusion—but on the defense.

We address Ochoa's contentions as to each challenged juror based on the order in which their respective groups were questioned during voir dire, beginning with Getrude W. who was in the first group of prospective jurors, then Patrice V. and Alicia B. who were in the second, then Linda H. who was in the sixth group, and finally, Martha C., Arthur R., and Lynn J. who were in the eighth group.[1]

[1] The State argues that Ochoa's *Witt/Witherspoon* claim must be limited to the first three of the seven challenged jurors—Gertrude W., Patrice V., and Alicia B.—because the prosecutor modified her hypotheticals in later groups and Ochoa fails to explain how those hypotheticals were misleading. With respect to Ochoa's challenge to the first three jurors, the State argues that the claim is procedurally defaulted because the state court denied it relying on an adequate and independent state ground: counsel's failure to make a contemporaneous objection to the prosecutor's hypotheticals. Because we affirm the district court on the merits with respect to each of the seven prospective jurors, we need

i. Gertrude W.

Gertrude's panel was first apprised of the facts of the case during the voir dire by Ochoa's counsel. The prosecutor, who went next, also touched on the facts of the case. The prosecutor then discussed the aiding and abetting principle and gave a bank robbery hypothetical. Specifically, she described a situation where three people conspired to rob a bank, one acted as a getaway driver, the other as the lookout, and the third went into the bank, pointed a gun, and took the money. She noted that all three people can be guilty of bank robbery.

The prosecutor then described the second murder "that's alleged to have occurred on a different date, different time, under different circumstances" and that also involved "a somewhat complex legal principle," specifically, the felony-murder rule. The prosecutor pointed out that under this rule, even if a bank robber's gun accidentally went off during a struggle with a security guard, the robber would be guilty of first-degree murder, even though there was no intent to kill. The prosecutor explained that the felony-murder rule

> even reaches out to the people in the car, the driver and the person standing by the door, and in some situations they can be guilty of first[-]degree murder, too. The point I'm trying to make is under our law with the theory of first[-]degree murder, it's not necessary that an intent to kill be proven to

not address the State's alternative procedural arguments. *See Forest Guardians v. Dombeck*, 131 F.3d 1309, 1313 n.1 (9th Cir. 1997).

> find the defendant guilty of first[-]degree murder too.

Defense counsel did not object to the prosecutor's hypotheticals.

The prosecutor then moved on from the guilt phase to the penalty phase. She repeated that one of the murders and one of the special circumstances making Ochoa eligible for the death penalty involved the felony-murder rule. She asked whether knowing more about the charges, anybody felt that the death penalty "is an option." Gertrude spoke up, explaining that the death penalty "could be an option . . . when somebody" acts "deliberately" or "premeditated[ly]." This view was consistent with her answers in the questionnaire. But Getrude later explained that based on the circumstances of Ochoa's case, the death penalty "would not be an option for [her]." When pressed by the prosecutor and the trial court, she unequivocally confirmed her opposition.

When the prosecution asked to remove Gertrude for cause, Ochoa's counsel objected. Defense counsel pointed out that there was "a divergence" between Gertrude's questionnaire and oral responses, with her questionnaire making her "almost" eligible for challenge for cause by defense, "but when she was questioned in court, she indicated she could be, in fact, open to the evidence and she doesn't think she would consider it, but she didn't rule out that possibility." The trial judge disagreed:

> I tried to pin her down at the end and I think I did. Frankly, I thought I might be able to rehabilitate her, but I couldn't. I am satisfied that in this case she is of a state of mind that she would not consider a death verdict. And I think that's good for a challenge for cause.

With this background in mind, we turn to Ochoa's arguments on appeal. Ochoa contends that the prosecutor's hypothetical was "most egregious and misleading" when she spoke to the first group of prospective jurors, including Gertrude. But the prosecutor's hypothetical was neither "egregious" nor "misleading." Rather, the prosecutor's hypothetical accurately described a relevant principle of California law for the jurors. To be sure, the prosecutor discussed an accidental or unintentional murder by a triggerman through a felony-murder hypothetical. She also mentioned that a non-triggerman can be guilty of first-degree murder "in some situations." As the prosecutor explained, the "point" of her hypothetical was that under a felony-murder theory, "it's not necessary that an intent to kill be proven to find the defendant *guilty* of first[-]degree murder." This is both an accurate statement of California law and a principle relevant to this case because the prosecutor did not need to prove intent in Castro's homicide. And while it is true that under California law a getaway driver may be guilty of first-degree murder, but not eligible for the death penalty, *see People v. Armstrong*, 6 Cal. 5th 735, 763 (2019) ("Some getaway drivers, although guilty of first[-]degree felony murder, may not even be death eligible."), the prosecutor's hypothetical was introduced while addressing the guilt phase of trial, not the penalty phase. Moreover, any erroneous impression the prosecutor may have created was dispelled by both the defense and prosecution referencing the facts of Ochoa's case—the jury was aware that Ochoa was not alleged to be an aider or abettor with respect to any accidental shooting in the course of a felony. In short, the prosecutor's explanation of aiding and abetting and felony-murder principles was an accurate statement of California law and did not misrepresent the state-law framework. *See Ochoa*, 26 Cal. 4th at 431*; see also People v. Billa*, 31 Cal. 4th 1064, 1068 (2003) ("Th[e] felony-murder rule covers a

variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident . . . ." (cleaned up)).

With respect to Ochoa's argument that the prosecutor's hypothetical described a defendant that was a lot less blameworthy, Ochoa relies on the California Supreme Court's opinion in *Armstrong* for the proposition that with "sufficiently mild hypothetical scenarios, many competent jurors might say they would be quite likely to vote for life without the possibility of parole[,]" but that does not mean "that the same juror would not vote for death under more aggravating circumstances." 6 Cal. 5th at 756. In *Armstrong*, the defendant was charged with murder, kidnapping, robbery, rape, and torture, with six special circumstances and two sentencing enhancements. *See id.* at 748. During voir dire, the prosecutor presented potential jurors with several hypotheticals that involved accomplice liability, including a bank robbery hypothetical with a getaway driver, a lookout, and the actual killer who went inside and shot someone. *See id.* at 752–53. The California Supreme Court found a *Witt/Witherspoon* violation because the trial court excused four jurors for cause, erroneously focusing on "whether they would be equally willing to impose death on an aider and abettor as on an actual killer, rather than on whether they could follow the law and consider death as an option." *Id.* at 757. Ochoa argues that like in *Armstrong*, the prosecutor in his case questioned the potential jurors' view on the death penalty application "under significantly less aggravating circumstances than those presented in her case-in-chief." Consequently, the jurors' answers were not informative as to the question whether they would be able to fulfill their duties in this case by considering both penalty options, and those answers could not be used to find the jurors substantially impaired.

Ochoa's argument fails for two reasons. First, *Armstrong* is not clearly established United States Supreme Court precedent. Second, *Armstrong* is plainly distinguishable. The bank robbery hypothetical regarding the getaway driver in *Armstrong* was too dissimilar from the facts of that case: an accomplice holding down a woman being raped and tortured and helping kick her to death. *Compare id.* at 745–47, *with id.* at 752–53. More importantly, it was not used to test whether the jurors would faithfully apply the law of accomplice-liability. Rather, it was used to find out how a juror would vote in a particular fact scenario, which is improper. *See id.* at 752–53.

This is not what happened during voir dire in Ochoa's case. The prosecutor's hypothetical explaining the principles of accomplice-liability and felony-murder was not that different from the facts of this case: trying to steal a car with the owner sitting in it is no more violent or inflammatory than a bank robbery. Further, it was reasonable for the prosecutor to ask about unintentional shootings. The defense's position during the penalty phase was that Ochoa "did not intend Castro's death." *Ochoa*, 26 Cal. 4th at 460. The prosecutor was entitled to test whether the jurors would be willing to apply California law with respect to the felony-murder rule in this case even if they believed Ochoa did not intend to kill Castro. *See Morgan*, 504 U.S. at 733. Furthermore, Gertrude was not asked how she would vote with respect to a getaway driver in a bank robbery, that is, she was not asked to commit herself to a particular result. Rather, the prosecutor used the hypothetical to explore Gertrude's ability to convict Ochoa.

Additionally, the State is correct that there is no clearly established Supreme Court precedent that restricts the prosecutor from posing legally correct hypotheticals during

voir dire. Likewise, no Supreme Court authority demands that, for voir dire purposes, the prosecutor must disclose all facts that comprise its case. In *Morgan*, the United States Supreme Court held that general questions of ability to "follow the law" are not sufficient to afford the defendant adequate voir dire to figure out whether the prospective juror would be capable of imposing a life sentence; instead, the defendant was entitled to ask, "'If you found [the defendant] guilty, would you automatically vote to impose the death penalty no matter what the facts are?'" *Id.* at 723, 739. While *Morgan* established the minimum constitutional requirement to life-qualify a jury, the inquiry proposed by the defendant in that case did not involve any case-specific questions. Accordingly, *Morgan* left unanswered whether any case-specific inquiry is appropriate to determine whether a juror can consider both a life and a death sentence in a particular case.

Only the holdings in the Supreme Court's decisions constitute "clearly established Federal law." *Atwood v. Ryan*, 870 F.3d 1033, 1046 (9th Cir. 2017). "[I]f a habeas court must extend a rationale before it can apply to the facts at hand, then by definition the rationale was not clearly established at the time of the state-court decision." *White v. Woodall*, 572 U.S. 415, 426 (2014) (cleaned up). A state court's refusal to extend a precedent does not warrant habeas relief unless "it is so obvious that a clearly established rule applies to a given set of facts that there could be no fairminded disagreement on the question." *Id*. at 427 (cleaned up). Because *Witt*, *Witherspoon*, and *Morgan* only provide broad principles on the type of inquiry that is appropriate to death- and life-qualify the jury, they cannot foreclose the California Supreme Court's allowance of hypotheticals during voir dire as an unreasonable application of clearly established Supreme Court precedent. *See*

28 U.S.C. § 2254(d)(1); *see also Carey v. Musladin*, 549 U.S. 70, 77 (2006) (explaining that when Supreme Court precedent gives no clear answer, "it cannot be said that the state court unreasonably applied clearly established Federal law" (cleaned up)).

Ochoa's related contention that Gertrude was not substantially impaired to start with, but "vacillated only after the prosecutor misrepresented the state-law framework," is also not supported by the record. Gertrude's refusal to consider the death penalty with respect to felony murder was in line with her answers in the questionnaire. Further, after the prosecutor's questioning, the judge followed up with Gertrude and reminded her that there were two murders in the case and only one of them was based on the felony-murder rule. But Gertrude was firm that she was not willing to consider the death penalty. This supports an inference that Gertrude was not influenced by the prosecutor's hypothetical and her reaction to the hypothetical simply exposed her preexisting views on the death penalty.

Ochoa further contends that after misleading Gertrude, the prosecutor "badgered her into giving a disqualifying response." But this too is not supported by the record. The context of the prosecutor's questions does not demonstrate harassment. Rather, the prosecutor's questioning merely demonstrates an effort to satisfy the burden to establish that Gertrude was substantially impaired.

Finally, Ochoa claims that the California Supreme Court unreasonably applied clearly established Supreme Court precedent, when it placed the burden of showing bias not on the prosecutor—the party seeking exclusion—but on the defense. Ochoa relies on the following language in the state court's opinion: "To the extent a more accurate characterization of the case was possible, defendant had the

opportunity to provide it." *Ochoa*, 26 Cal. 4th at 431. But Ochoa's argument is contrary to Supreme Court precedent. In *Witt*, the Supreme Court also pointed out defense counsel's failure to question a prospective juror, reasoning that such "questioning might have resolved any perceived ambiguities in the questions." 469 U.S. at 435; *see also id.* at 431 n.11 ("[C]ounsel's failure to speak in a situation later claimed to be so rife with ambiguity as to constitute constitutional error is a circumstance we feel justified in considering when assessing respondent's claims."). Accordingly, the California Supreme Court's observation about defense counsel's actions in this case was a proper consideration and did not shift the burden of showing bias from the State to Ochoa.

Because the California Supreme Court's conclusion with respect to Gertrude W. was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent, we affirm the district court's judgment as to Gertrude. *See* 28 U.S.C. § 2254(d)(1), (2).

ii. Patrice V. and Alicia B.

Patrice's answers to the questionnaire showed her strong opposition to the death penalty. As she put it, it "is state-sanctioned murder," and the idea of voting for death "scares" her. Patrice felt that she could put aside her feelings "in determining guilt or innocence, but if the defendant was found guilty, [she] would have a difficult emotional time with the penalty portion."

In contrast, Alicia's questionnaire was very sparse and conveyed that she did not have "a certain opinion" regarding the death penalty. She also stated that the death penalty was imposed "too seldom." But when questioned by defense

counsel, Alicia clarified that she misunderstood the question and that she did not "fully agree with the death penalty."

Like the first group, the second group of prospective jurors was first informed of the facts of the case by Ochoa's counsel. When it was her turn, the prosecutor noted that with respect to one of the murders, Ochoa "did not actually pull the trigger" and explained the principle of aiding and abetting using a bank robbery hypothetical. The prosecutor then discussed the other murder Ochoa was charged with where it was alleged that he "killed someone during the commission of an attempted robbery." The prosecutor explained the felony-murder rule and referred to the bank robbery hypothetical where the bank robber struggled with a security guard and the gun "accidentally" went off and killed the security guard. This time, the prosecutor did not mention her theory of accidental aiding and abetting felony murder.

Beginning with Patrice, the prosecutor confirmed Patrice's opposition to the death penalty. Turning next to Alicia, the prosecutor asked whether she saw herself "imposing [the death penalty] in this type of case." Alicia answered unequivocally, "No." When the prosecutor asked again, Alicia twice confirmed her opposition to the death penalty in "this particular case."

At that point, defense counsel for the first time raised an objection to the prosecutor's hypotheticals. The judge overruled the objection and granted the prosecutor's challenge for cause as to Patrice. Defense counsel objected that her last answer, although unequivocal, was based on "an inapplicable hypothetical." The judge disagreed: "I think her views taken as a whole from all the oral and written responses she gave indicate that she does have a problem with death."

The prosecutor then challenged Alicia for cause. Even after the judge followed up with Alicia, she did not budge from her position that "this case is not the case for [the] death penalty" and that no matter what the prosecutor presented at the penalty phase, she would not vote for death. The court then excused Patrice and Alicia for cause.

Ochoa's arguments with respect to Patrice and Alicia do not differ from the ones related to Gertrude. With respect to the merits of his claim, it is notable that Ochoa argued that the prosecutor's hypothetical was "most egregious and misleading" when she talked to the first group of prospective jurors. Nevertheless, Ochoa elsewhere insists that "the prosecutor mischaracterized the state[-]law framework using the same misleading hypothetical." Specifically, Ochoa objects to the following statement by the prosecutor: "Under the law of aiding and abetting all three people are equally guilty of robbery. In other words, the law makes no distinction as to their level of culpability." Ochoa contends this is misleading because "California law does make a distinction as to the level of culpability between the triggerman and non[-]triggermen for death eligibility." Ochoa emphasizes that the hypothetical was so misleading that the trial court "felt the need to caution that the jurors were 'not getting the full picture.'" The concern is that jurors were disqualified for cause because they mistakenly believed the facts to be so benign that they would not support consideration of the death penalty.

As with the first group, the prosecutor's hypothetical was not misleading. She made no mention of the accidental aiding and abetting felony murder—the only arguably inapplicable statement in her hypothetical to the first group. The three people in the bank robbery hypothetical that the prosecutor presented to later groups—the getaway driver,

the robber, and the lookout—were in fact guilty of robbery under California law, like the prosecutor stated. The prosecutor did not discuss the liability of the triggerman and non-triggermen and did not state that any of those three people were eligible for the death penalty. She simply demonstrated an aiding and abetting principle under California law. Further, the judge cautioned about the jurors not getting the full picture. This was because the prosecutor's focus on the Castro murder could have resulted in the jurors losing sight of the willful, deliberate, and premeditated nature of the Navarette murder and the additional aggravating factors that would be presented during the penalty phase.

Turning to the merits of Patrice's removal, there was sufficient evidence in the record to support the conclusion that her personal beliefs about the death penalty would prevent or substantially impair her ability to abide by her oath and follow instructions. It was proper for the trial court to exclude her given her strong opposition to the death penalty and her contradictory statements on whether she could follow instructions regarding its application. *See Witt*, 469 U.S. at 434 (explaining that it is proper to resolve ambiguities in a juror's statements "in favor of the State"). It is also important to note that defense counsel did not ask the court to follow up with Patrice to rehabilitate her, even though counsel made this request about Alicia following the prosecutor's challenge to both Patrice and Alicia. This failure provides an inference that counsel must have made a judgment call that Patrice was not able to be rehabilitated. *See id.* at 431 n.11, 434–35.

The trial court's removal of Alicia was also proper. Even after the trial court followed up with her, she remained firm that she could not consider the death penalty in this case.

Defense counsel informed the prospective jurors that the Navarette murder involved a gang pay back. And the trial court reminded Alicia that there were two murders and that she might hear additional aggravating evidence during the penalty phase before she expressed her opinion that she could not consider imposing the death penalty. The trial judge's decision is entitled to considerable deference because it is based on his face-to-face credibility assessment of Alicia. *See id.* at 426–29.

Because the California Supreme Court's conclusions with respect to Patrice V. and Alicia B. were neither unreasonable factual determinations nor contrary to or unreasonable applications of clearly established Supreme Court precedent, we affirm the district court's judgment as to Patrice and Alicia. *See* 28 U.S.C. § 2254(d)(1), (2).

iii. Linda H.

Linda's answers to the questionnaire reflected both a clear opposition to the death penalty and an inability to follow the law. She indicated, for example, that she was "against the death penalty," believing it to be "murder on another human being." She also indicated that she would "always vote against death, no matter what evidence might be presented during a penalty trial," which she confirmed orally to the trial court.

As with prior groups of prospective jurors, defense counsel described the facts of the case to Linda's group before questioning from the prosecutor. While the prosecutor was explaining the principle of aiding and abetting, Linda expressed some confusion about the principle and asked for clarification. The prosecutor then used a hypothetical store robbery scenario to explain the principle. The prosecutor went on to explain the felony-

murder rule, which she illustrated with a hypothetical where a robber "gets nervous and pulls the trigger, totally spur of the moment kind of reaction, and he kills th[e] cashier."

Following the prosecutor's explanation of these principles, Linda confirmed her feelings that the death penalty was "premeditated murder" and that she was "against the death penalty always . . . in every case" and could not vote for the death penalty "in any case." Defense counsel did not try to rehabilitate Linda during rebuttal voir dire. He objected, however, to Linda's removal for cause. The trial court noted that Linda "was very strong at the end in stating, quote 'in no case could I vote for the death penalty.'" The California Supreme Court singled out Linda in its opinion, noting that she was properly excused because her "comments revealed her unambiguous opposition to the death penalty." *Ochoa*, 26 Cal. 4th at 432.

As with the prior groups, the prosecutor's hypothetical was not misleading. It was an accurate reflection of California law and closely tracked the facts of the Castro murder. And the two people described in the hypothetical were in fact guilty of robbery under California law, as the prosecutor stated. In addition, defense counsel described the facts of Ochoa's crimes to prospective jurors as well.

Further, there was sufficient evidence in the record to support the trial court's conclusion that Linda's beliefs about the death penalty would prevent or substantially impair her ability to abide by her oath and follow instructions. It was proper for the trial court to exclude her given her adamant opposition to the death penalty and her mostly consistent statements that she could not follow instructions regarding application of the death penalty. Notably, defense counsel reserved time for rebuttal voir dire but used that time on questioning other jurors. This might reflect counsel's

judgment call that Linda was beyond rehabilitation. *See Witt*, 469 U.S. at 431 n.11, 434–35.

Because the California Supreme Court's conclusion with respect to Linda H. was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent, we affirm the district court's judgment as to Linda. *See* 28 U.S.C. § 2254(d)(1), (2).

iv. Martha C., Arthur R., and Lynn J.

In her questionnaire, Martha expressed general opposition to the death penalty and an inability to follow the law. For example, she, like Linda H., indicated that she would "always vote against death, no matter what evidence might be presented during a penalty trial." Martha confirmed these feelings when questioned during voir dire. Arthur's questionnaire, on the other hand, showed his support of the prosecution and the death penalty. Finally, Lynn's questionnaire presented a balanced view of the death penalty.

As with the prior groups, the defense briefly informed the group of the facts regarding the two murders before questioning by the prosecutor. After hearing the prosecutor's description of aiding and abetting liability, Arthur volunteered he would have a "somewhat" difficult time finding an aider and abettor guilty of first-degree murder, but he could do so where it was "pretty clear that the person was really connected." Upon further questioning by the prosecutor, Arthur equivocated until finally concluding that even if the death penalty were "appropriate," he "would . . . not [be] able to follow through" with voting for it.

The prosecutor then explained the felony-murder rule. She posed her bank hypothetical where a person went to rob a bank, got into a struggle with a security guard, and the security guard was killed when the gun went off "accidentally." Finally, she discussed multiple murder and robbery-murder special circumstances, noting that this was "[not] an accidental killing necessarily, but it was a killing during the commission of a robbery without any premeditation or deliberation on the part of the defendant to kill his victim." Lynn volunteered he thought it might be best to limit capital punishment to premeditated and deliberate murders and confirmed his questionnaire statement that the death penalty should be limited to cases of mass murder, unusual cruelty, torture, or murder while in prison. Consistent with this view, he agreed "that this is not a case where [he] could consider the penalty of death."

The defense objected to the removal of Martha, Arthur, and Lynn for cause because their responses were based on "very misleading hypothetical situations which didn't bring about the facts of the case." The trial court responded it did not believe it was a close question as to any of the three jurors.

As with the prior groups, it was not misleading for the prosecutor to refer to accidental murder, as it qualifies as first-degree murder under the felony-murder rule in California. *See Billa*, 31 Cal. 4th at 1068. Notably, the prosecutor was not discussing an aider and abettor when talking about an accidental murder. And following the presentation of the hypothetical, the prosecutor clarified that the Castro murder was "[not] an accidental killing necessarily, but it was a killing during the commission of a robbery without any premeditation or deliberation on the part of the defendant to kill his victim." This was consistent

with the defense's description of the Castro murder to this group of jurors. In short, the jury was on notice that there was no accidental murder charged in this case.

Moreover, all three jurors provided unequivocal responses that they could not consider the death penalty and apply the law. That position was consistent with Martha's and Lynn's questionnaire answers. Martha's answers showed that she would always vote for life regardless of the evidence. Lynn's answers showed he was willing to consider the death penalty only in specific situations that did not include Ochoa's case, such as mass murders, torture, and murder while in prison. While Arthur's questionnaire was supportive of the death penalty, he went back and forth during the voir dire before finally concluding that he would not be able to impose the death penalty. The trial court was able to observe Arthur's demeanor and consider his final, unequivocal answers before it decided to exclude him. *See Uttecht*, 551 U.S. at 20 (holding that the trial court was within its discretion to exclude a juror because the record "show[ed] considerable confusion on the part of the juror"). As the Supreme Court emphasized in *Darden v. Wainwright*, 477 U.S. 168 (1986), even when "[t]he precise wording of the question asked of [the juror], and the answer he gave, do not by themselves compel the conclusion that he could not under any circumstance recommend the death penalty," deference to the trial court is necessary because so much may turn on its assessment of a juror's demeanor. *Id.* at 178. The trial court observed that it was not a close question as to any of the three jurors. And the court did not perceive any need to follow up with these three jurors after the prosecutor's questioning.

Because the California Supreme Court's conclusions with respect to Martha C., Arthur R., and Lynn J. were

neither unreasonable factual determinations nor contrary to or unreasonable applications of clearly established Supreme Court precedent, we affirm the district court's judgment as to Martha, Arthur, and Lynn. *See* 28 U.S.C. § 2254(d)(1), (2).

v. Totality of Voir Dire

"In applying the principles of *Witherspoon* and *Witt*, it is instructive to consider the entire *voir dire*." *Uttecht*, 551 U.S. at 10. In this case, the jury was selected over the course of seven days. There is no significant disparity between the trial court's rulings on the parties' challenges. *See id.* Moreover, before deciding a contested challenge, the trial court allowed each side to explain its position. And when issuing a decision, the trial court provided "careful and measured explanations." *Id.* at 11.

Several challenges illustrate the court's thoughtful and careful consideration and application of the *Witt/Witherspoon* substantial impairment standard. In the first group of prospective jurors, for example, the trial judge excused a prospective juror for cause on his own motion, over the prosecutor's objection, reasoning that the prospective juror was "all over the place" and thought Ochoa was guilty because he did not turn around to look at the jury. The record also reflects that the trial court paid close attention to the jurors' body language. *See Ristaino v. Ross*, 424 U.S. 589, 595 (1976) ("[T]he determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge." (cleaned up)).

The totality of voir dire thus supports the conclusion that the trial court's decisions as to the seven prospective jurors are entitled to deference. *See Uttecht*, 551 U.S. at 10–13

(analyzing the number of challenges for cause each party made and the number granted, that the trial court "gave each side a chance to explain its position and recall the potential juror for additional questioning[,]" that "the court gave careful and measured explanations[,]" and scrutinizing the vigor and persuasiveness of defense's objections). For all the reasons noted above, we affirm the district court's judgment as to Ochoa's *Witt*/*Witherspoon* claim.

2. Second Certified Claim: Ineffective Assistance of Counsel for Failing to Rehabilitate Prospective Jurors Challenged for Cause

Ochoa contends that his trial counsel were ineffective because the excusals for cause challenged in the claim above were based upon "counsel's failure to investigate, adequately object[,] and/or rehabilitate the prospective jurors." On this issue, the California Supreme Court's denial of Ochoa's second state petition is the last reasoned decision. The California Supreme Court summarily denied Ochoa's ineffective assistance of counsel claim "on the merits."

Applying AEDPA deference, the district court also denied this claim on the merits:

> The California Supreme Court may have reasonably rejected as speculative Petitioner's claims that there is a reasonable probability that counsel's investigation and rehabilitation of the jurors would have spared them. As to Petitioner's allegation that trial counsel should have objected to the prosecutor's hypothetical, the California Supreme Court may have reasonably held that prospective jurors Gertrude W., Patrice V., and Alicia B. were substantially impaired

> in their ability to impose the death penalty unrelated to the prosecutor's hypothetical. It may have reasonably denied that portion of the claim for lack of prejudice.

Because the California Supreme Court's conclusion was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent, we affirm the district court's denial of relief. *See* 28 U.S.C. § 2254(d)(1), (2).

a. Standard of Review

Before addressing the merits of Ochoa's claim, we must determine the proper standard of review. In his briefing, Ochoa argues that because the California Supreme Court summarily denied his ineffective assistance of counsel claim without conducting an evidentiary hearing, it was only a determination that he failed to state a prima facie case and thus de novo review, rather than AEDPA deference, is the appropriate standard of review. Notably, during oral argument Ochoa's counsel explicitly disclaimed this argument. Nevertheless, "we must determine the appropriate standard of review." *United States v. Ziskin*, 360 F.3d 934, 938 (9th Cir. 2003); *cf. Hernandez v. Holland*, 750 F.3d 843, 856 (9th Cir. 2014) ("[T]he AEDPA standard of review itself cannot be waived.").

Almost two decades ago in *Nunes v. Mueller*, 350 F.3d 1045 (9th Cir. 2003), a panel of this court expressly credited a prima facie argument similar to Ochoa's. *Id.* at 1056. But in *Pinholster*, the Supreme Court seemingly rejected the same argument, holding that AEDPA deference "applies even where there has been a summary denial." 563 U.S. at 187; *see Richter*, 562 U.S. at 99 ("There is no merit to the assertion that compliance with § 2254(d) should be excused

when state courts issue summary rulings . . . ."). Since then, we have consistently rejected—albeit implicitly—similar prima facie arguments. *See, e.g.*, *Montiel v. Chappell*, 43 F.4th 942, 956–57 (9th Cir. 2022); *Ochoa v. Davis*, 16 F.4th 1314, 1344 (9th Cir. 2021); *Sully v. Ayers*, 725 F.3d 1057, 1067 n.4 (9th Cir. 2013). Accordingly, we take this opportunity to make explicit what has to this point been implicit: the California Supreme Court's summary denial of Ochoa's claims—both certified and uncertified—is a decision on the merits and thus entitled to AEDPA deference.

b. Applicable Law

To prevail on his ineffective assistance claim, Ochoa must demonstrate that: (1) "counsel's performance was deficient"; and (2) the "deficient performance prejudiced [his] defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see Williams*, 529 U.S. at 390–91. Under the first prong, *Strickland* requires a showing that counsel's performance was deficient, measured under "an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. This standard gives a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, [Ochoa] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (cleaned up). Under the second prong, Ochoa must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 694.

"The *Strickland* standard is a general one, so the range of reasonable applications is substantial." *Richter*, 562 U.S. at 105. "Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more

difficult. The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." *Id.* (cleaned up). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

c. Analysis

i. Counsel's Performance

Ochoa contends that defense counsel's performance was deficient because counsel failed to: (1) object to the prosecutor's bank robbery hypotheticals; and (2) rehabilitate the jurors who were challenged under *Witt* and *Witherspoon*. But Ochoa fails to overcome the presumption that defense counsel's conduct fell within the wide range of reasonable professional assistance. *See Strickland*, 466 U.S. at 687. As discussed above, the prosecutor's hypotheticals were not objectionable. They were an accurate statement of relevant California law. Accordingly, counsel was not deficient in failing to raise a meritless objection.

Nevertheless, after the prosecutor challenged the jurors from the second group, Ochoa's counsel did object to the prosecutor's hypotheticals. Defense counsel vigorously argued that the prosecutor was downplaying both murders, which resulted in exclusion of four jurors. Counsel also asked the court to follow up with Alicia with the same questions that the court asked another juror, to remind Alicia that there were two murders in this case and that the prosecutor may present aggravating evidence during the penalty phase. After the second group was dismissed and following a recess, counsel renewed the objection to the prosecutor's hypothetical. Counsel also asked the court to

reverse the order in which the parties do their questioning and allow defense to go after the prosecution. While the court refused to reverse the order, it allowed defense counsel to reserve some time to rehabilitate the jurors. Counsel continued raising the objection with respect to the hypotheticals in subsequent groups.

Although Ochoa claims that counsel should have objected sooner to the hypothetical the prosecutor presented to the first and second group, the timing of the objection appears to be irrelevant since the objection was overruled. And Ochoa does not claim that objections with respect to the other groups were inadequate. After the first group, the prosecutor never again referenced an aider and abettor in a felony-murder situation.

Furthermore, there was considerable evidence that each of the challenged jurors was substantially impaired in his or her ability to impose the death penalty in this case. Ochoa has not explained how investigating them or further questioning would have rehabilitated a single excused juror to the point that excusal for cause was unconstitutional. First, they expressly stated that they would not be able to consider the death penalty and follow the law in response to questions from the prosecutor, the defense, and the trial court. Second, to the extent their answers were not clear, the judge followed up with some jurors either on his own accord or at the request of counsel. The judge also allowed the defense to save time at the end for a rebuttal voir dire and defense counsel did use that time.

Moreover, counsel was constrained by the ordinary and customary practical considerations such as the limited amount of time allowed for voir dire and a concern about tainting the jury against the defendant by highlighting the worst facts about the murders. *See United States v. Cronic*,

466 U.S. 648, 661–62, 662 n.31 (1984) (explaining that "external constraints" imposed on counsel do not give rise to an ineffective assistance of counsel claim merely because they make counsel's task more difficult). Counsel had thirty minutes for voir dire with each group of up to seventeen jurors. In addition to questioning, counsel strived to explain certain concepts to the jury. That left less than two minutes per juror to find out about their individual biases, clarify answers in the questionnaire, and attempt rehabilitation.

Finally, the presumption that counsel's conduct was reasonable is even stronger when an experienced trial counsel is involved. *Stewart v. Sec'y, Dep't of Corr.*, 476 F.3d 1193, 1209 n.25 (11th Cir. 2007). Both of Ochoa's counsel were experienced capital defense attorneys. Prior to being appointed to represent Ochoa, the counsel who handled the questioning of jurors during voir dire had been appointed or retained more than ten times in capital cases. Despite Ochoa's insistence on faulting counsel, he offered no testimony or other evidence from them on this issue. This omission is particularly significant given the range of deference given to counsel's strategic decisions based on, among other things, observations of jurors' credibility and demeanor.

For all these reasons, Ochoa fails to overcome the presumption that defense counsel's conduct fell within the wide range of reasonable professional assistance. *See Strickland*, 466 U.S. at 687.

ii. Prejudice to Ochoa

Ochoa also fails to show how trial counsel's failure to object or try to rehabilitate some of the jurors prejudiced him. Ochoa must show a "reasonable probability" that an objection would have led to any of the jurors not being

excused for cause. *See Knowles v. Mirzayance*, 556 U.S. 111, 127 (2009) (citing *Strickland*, 466 U.S. at 694). Ochoa cannot meet this standard. All he has done is speculate about whether any of the excused jurors would have given different answers to different hypotheticals. Further, "the trial court expressly indicated it would not dismiss for cause a prospective juror who based her stated inability to impose the death penalty on a description of the case that the court deemed misleading." *Ochoa*, 26 Cal. 4th at 431–32.

Because it was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent for the California Supreme Court to have determined that Ochoa's counsel were not ineffective during voir dire, we affirm the district court. *See* 28 U.S.C. § 2254(d)(1), (2).

d. Request for Evidentiary Hearing

Ochoa contends that the district court abused its discretion in denying an evidentiary hearing with respect to his ineffective assistance of counsel claim. He argues that "[a]t a hearing, [he] could have questioned the removed jurors regarding the impact of the prosecutor's hypothetical in order to establish a reasonable probability that at least one of the jurors would not have been removed."

We review the district court's denial of a petitioner's request for an evidentiary hearing for abuse of discretion. *See Schriro v. Landrigan*, 550 U.S. 465, 468 (2007); *Earp v. Ornoski*, 431 F.3d 1158, 1166 (9th Cir. 2005). AEDPA prohibits an evidentiary hearing where a petitioner has not been diligent in pursuing his claims in state court. *See* 28 U.S.C. § 2254(e)(2). The diligence determination is reviewed de novo. *Baja v. Ducharme*, 187 F.3d 1075, 1077 (9th Cir. 1999). In addition to finding diligence, "[i]n

deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations," and whether those allegations, if true, would entitle him to relief. *Landrigan*, 550 U.S. at 474.

Ochoa has not shown that an evidentiary hearing could result in any useful evidence to prove the factual allegations in his petition. First, even if the excluded jurors remembered what impact a hypothetical by the prosecutor had on them almost thirty years ago, there is no evidence in the record to show that the jurors if presented with the concepts of aiding and abetting and felony murder in a less innocuous fashion would conclude that they could apply the death penalty in a case like Ochoa's. After all, Gertrude made clear in her questionnaire that she felt anybody who did not commit premeditated murder should get life in prison. Likewise, Lynn felt that the death penalty should be limited to cases of mass murder, torture, or murder in prison, and none of those circumstances was present in this case. Second, any such testimony by the excluded jurors would not change whether counsel perceived them as substantially impaired and whether counsel believed any of them could be rehabilitated. Third, even if the jurors testified that they remembered that the prosecutor's hypothetical made a significant impact on their ability to consider the death penalty in this case, Ochoa would still not be able to show that in light of their demeanor and answers on the questionnaires, counsel would have successfully convinced the trial court that they were not substantially impaired. *See Witt*, 469 U.S. at 424–25. Moreover, the trial court is entitled to resolve any ambiguity in answers in favor of the State. *Id.* at 434. At most, the trial court would have been left with conflicting answers, and thus, it would have been justified in resolving the

ambiguities in favor of the State and excluding the jurors. *Id.*

Because the district court did not abuse its discretion in denying Ochoa's request for an evidentiary hearing, we affirm the district court's denial of his request.[2]

B. The Uncertified Claims

We may not review Ochoa's uncertified claims unless a certificate of appealability is granted on them. *See* 28 U.S.C. § 2253(c)(1)(A) ("Unless a . . . judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a habeas corpus proceeding."). To obtain a certificate of appealability on a claim, "a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (cleaned up). While we ultimately affirm the district court's judgment on the merits with respect to both of the uncertified claims, because we conclude that "jurists of reason could disagree" with the district court's denial of these claims, we expand the certificate of appealability to cover them. *See id.* at 327; *see also* 28 U.S.C. § 2253(c)(2).

[2] To the extent Ochoa argues that an evidentiary hearing is warranted with respect to his uncertified claims, he fails to specifically argue what an evidentiary hearing would add to the state court record. Accordingly, we also affirm the district court's denial of Ochoa's request for an evidentiary hearing with respect to his uncertified claims. *See Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992) ("Issues raised in a brief which are not supported by argument are deemed abandoned."); *see also Landrigan*, 550 U.S. at 474.

1. First Uncertified Claim: Ineffective Assistance of Counsel During the Penalty Phase

Ochoa contends that his defense counsel were ineffective during the penalty phase for failing to present mitigating evidence, such as evidence of his brain damage and traumatic childhood. He also faults his counsel for failing to investigate and attack the prosecution's aggravation evidence, including failing to present a gang expert.

Ochoa raised this claim in both of his state habeas petitions. The California Supreme Court summarily denied the claim "on the merits."

The district court also denied Ochoa's claim, finding that trial counsel was not deficient. The district court found that counsel's investigation and penalty phase presentation were reasonable, and counsel reasonably relied on Dr. Michael Maloney's evaluation of Ochoa. The district court further determined that the record belied Ochoa's allegations that counsel ignored evidence of grossly ineffective parenting. Counsel's strategy during the penalty phase was to evoke sympathy for Ochoa's family. Although counsel's investigation uncovered evidence of the father's drinking and siblings' gang affiliations, it was a reasonable strategic decision not to present this evidence to avoid undermining the defense's strategy. Likewise, the decision not to present a gang expert was done after a reasonable investigation and was itself reasonable.

Because the California Supreme Court's conclusion was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent, we affirm the district court. *See* 28 U.S.C. § 2254(d)(1), (2).

a. Applicable Law

As discussed above, ineffective assistance of counsel claims are reviewed under "[t]he standards created by *Strickland* and § 2254(d)[,] . . . both [of which are] highly deferential and when appl[ied] in tandem, review is doubly so." *Richter*, 562 U.S. at 105 (cleaned up). When reviewing a penalty-phase ineffective assistance of counsel claim, we first "focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [petitioner's] background *was itself reasonable*." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). To assess prejudice in the context of such a claim, federal courts must "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Id.* at 534. Ochoa must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694. In a capital case, this means he must show "a reasonable probability that at least one juror" would have voted for a life sentence. *Wiggins*, 539 U.S. at 537.

b. Analysis

i. Evidence Presented During the Penalty Phase

During the penalty phase, the prosecution presented evidence that Ochoa had previously pleaded guilty to several felonies as an adult. When Ochoa was eighteen years old, he and another gang member jumped out of the car, beat up fourteen-year-old Lionel Fricks and took his radio. *Ochoa*, 26 Cal. 4th at 419. When Ochoa was twenty, Ochoa took a vehicle without the owner's consent. *Id.* at 420. And when he was twenty-one, just hours after the Castro murder, Ochoa robbed Freddie Garcia at a gas station. *Id.*

The jury was also apprised that Ochoa had an "extensive" juvenile record, spent a year in a juvenile camp, and was on probation after the camp. The jury also learned that while awaiting trial in this case, Ochoa participated in a fight between black and Hispanic inmates in the jail; a deputy found a makeshift handcuff key inside Ochoa's wristband while he was transported to court; and another deputy found a shank in Ochoa's property bag. *Id.*

The victims' families provided victim impact evidence. Rudolfo Rivera, Navarette's brother and passenger on the night of the murder, testified Navarette worked long hours six days a week to help support his family. *Id.* Navarette's "death was especially difficult for his mother . . . nearly three years after the shooting." *Id.* Castro's sisters testified how close their family was and how much their mother was impacted. *Id.* Castro's wife testified that they were high school sweethearts and that he had a close relationship with their thirteen-year-old son, Joey. Joey had been attending counseling since the murder. He often asked his mother "what would Daddy do" in certain situations. *Id.* at 420–21.

In response, the defense produced Rosalba ("Rosie") Gallegos, Ochoa's oldest sister, Eduardo Ochoa Sr., Ochoa's father, and Lisa Martinez, mother of Ochoa's daughter, to describe Ochoa's life and character. *Id.* at 421–22. They testified that Ochoa was the fourth of five children born to Eduardo Sr. and Ofelia Ochoa in Tijuana. *Id.* at 421. The other children were Rosie, Eduardo Jr., Gloria, and Lisa. Ochoa's family moved to the United States when he was three years old. *Id.* His parents worked outside the home during the day, so Rosie often acted as Ochoa's surrogate mother. *Id.* Eduardo Sr. and Rosie testified that Ochoa was the only one of the children that had "trouble with the law." Although Ochoa did well in elementary school, he began

missing school, dressing as a gangster, and getting tattoos once he was in high school. *Id.* at 422.

When Ochoa was fifteen years old, he met Lisa Martinez. Ochoa studied with Lisa to become a dental technician. He earned his diploma but was unable to find work in the field. *Id.* Ochoa and Lisa had a daughter, Claudia. *Id.* They lived together with Ochoa's parents and siblings for two years. Ochoa loved and played with Claudia a lot. He also stayed in touch with Claudia after the couple split up and while he was in jail waiting for trial. Ochoa also maintained close ties with his sister Rosie's children. They visited him in prison and were excited when he called to speak with them on the phone.

The remaining evidence at the penalty phase was presented in rebuttal to the prosecution's case-in-aggravation. A fellow gang member testified that Ochoa did not hit the teenager during the robbery, but his accomplice did; correctional officers testified that Ochoa was a lesser player in the jail fight; and a correctional consultant testified regarding security measures at high-security California prisons housing life prisoners.

ii. Evidence Submitted with Ochoa's State Habeas Petitions

With his state habeas petitions, Ochoa submitted declarations from family members, neighbors, and experts. Ochoa contends that if his trial counsel were effective, the jury would have heard that: (1) Ochoa was raised in "desolate conditions" and left with an alcoholic father and then a babysitter during weekdays for the first two years of his life; (2) Ochoa was "plagued with risk factors making gangs attractive [to him], coupled with the utter lack of protective factors that could have helped him resist the gang

influence"; (3) Ochoa had neuropsychological deficits "probably from birth" that were worsened by the violent attacks he suffered during gang warfare; (4) Ochoa's tattoos, including the "187" he carved in his forehead while waiting for trial, were a reflection of how vulnerable and unprotected he had felt since childhood; and (5) Ochoa's sister Gloria suffered from cognitive disabilities and was most likely the victim of incest with her father.

According to the declarations, when Ochoa was "a baby," Eduardo Sr. and Ofelia went to work in the United States, leaving their children with a babysitter in Tijuana. The neighbors told Ofelia that the babysitter fed the children tortillas and black coffee and left them with Rosie while she went dancing. When Ofelia and Eduardo came home, the children were vomiting and had spots on their faces from coffee.

Ochoa's parents provided "little or no supervision" or guidance to Ochoa and his siblings. And throughout Ochoa's childhood, Eduardo Sr. drank heavily. Although Eduardo Sr. was arrested three times for driving under the influence, he was never violent or abusive when drunk.

Ochoa initially joined the Pee Wee Winos, the junior subgroup of the 18th Street gang, when he was eleven years old. He was jumped into the 18th Street gang when he was thirteen. According to Gloria, "it was normal to join the gangs" in their neighborhood, and half of the kids from their school were in gangs. Eduardo Jr. joined the 18th Street gang at thirteen years old and dropped out at eighteen. According to him, "[i]n those days, being in the gang really just meant hanging out together." Gloria joined the gang after Ochoa. Ochoa's parents "seemed to be concerned that their children were joining the gangs but they didn't know what to do about it. The mother used to cry a lot."

A psychologist, Dr. Patricia Pérez-Arce, conducted neuropsychological testing of Ochoa eleven years after the murders, and opined that Ochoa suffers from "significant deficits in his ability to analyze visual and verbal information when the content is abstract, complex, and/or unfamiliar, in using common sense judgment to solve problems, and in visual spatial memory functions." "This central nervous impairment is likely to have been present from birth and probably exacerbated" by two attacks from rival gang members Ochoa suffered as a teenager. Specifically, when Ochoa was twelve years old, he was "hit with a bumper jack in the chest" and "blanked out." And when he was eighteen, Ochoa was beaten by rival gang members with a bat. He had a "neck fracture" and spent time in the hospital.

Another psychologist, Dr. Nancy Kaser-Boyd, also conducted a psychological evaluation of Ochoa eleven years after the murders. She opined that Ochoa has a history of "overwhelming environmental stress by way of family circumstances and economic hardship." She diagnosed Ochoa with post-traumatic stress disorder ("PTSD") based on the assaults he experienced. She also opined that due to either "environmental deprivation, family genetics, or head trauma, [Ochoa] had limited cognitive abilities and coping skills" at the time of the offenses.

A third psychologist, Dr. Francisco Gomez, summarized Ochoa's life history and opined that his mental impairments were recognized by his peers when he was quite young.

According to Ochoa's gang expert Father Gregory Boyle, S.J., "[t]he mere presence or absence of tattoos will not necessarily tell you how involved a person is in gang violence." Tattoos "are a way of stating your involvement in the gang, but they can be posturing and posing." Father

Boyle also disputed the expertise of prosecution expert Detective Michael Berchem.[3] He believed that police officers who testify as experts "have limited knowledge of the actual lives of the gang members they arrest and interrogate."

Finally, the Silva family, the Ochoas' neighbors, and Lisa Martinez (who lived with the Ochoas for two years), believed that Eduardo Sr. carried on an incestuous relationship with his daughter, Gloria, and is the likely father of her five children. They related several incidents that appeared suspicious to them.

iii. Counsel's Performance

Ochoa fails to rebut the presumption of counsel's competence mandated by *Strickland*. As part of their investigation, Ochoa's trial counsel hired a mitigation investigator Sheryl Duvall, M.S., to assist with the preparation of the penalty phase defense. Duvall conducted a comprehensive review of Ochoa's background. She met with Ochoa in jail and reported to defense counsel, "He gave me a fairly comprehensive picture of his background." Duvall personally interviewed members of Ochoa's immediate family, including his parents, siblings, and the mother of his child, as well as Ochoa's former teacher and a former principal at Ochoa's court-ordered juvenile camp, two neighbors and close family friends, and a next-door neighbor of more than twenty-five years. Duvall also

[3] The trial court permitted Detective Berchem "to testify as an expert concerning [Ochoa's] gang-related tattoos, including the '187' mark." *Ochoa*, 26 Cal. 4th at 439. Detective Berchem explained the significance of this mark to the jury and testified that "the extent of [Ochoa's] 18th Street Gang tattoos signified his 'hard-core' member status." *Id.* at 437.

gathered and analyzed documents pertaining to Ochoa's education, physical health, and juvenile court record.

Counsel also retained Dr. Maloney, who was well known in the criminal defense community, had testified "hundreds of times" for both the prosecution and defense, and was liked by counsel after previously working for them. In a letter to Dr. Maloney in preparation for his work on Ochoa's case, counsel enclosed summary police reports and informed him that there was also extensive documentation from two "Murder Books" that was available. Counsel advised Dr. Maloney that Duvall should have provided him with her interview reports and that he would send Ochoa's medical records from an assault at age eighteen that had been subpoenaed. Counsel said that Ochoa was "a real mystery" and asked for Dr. Maloney's help in understanding him:

> His family background is different from other Death Penalty cases I have handled in that his parents seem extremely caring and concerned (as you can tell from Sheryl Duval[l]'s Reports). Though they do not speak English at all, they show up at every Court Appearance, including continuances. The parents, and Sergio's siblings have been very cooperative in terms of background investigation. In other words, Sergio does not seem to have the horrible family background that so often spawns Death Penalty candidates. . . .
>
> [T]he cold blooded Castro murder does not make sense to me in light of Sergio's background and family history, and in light of what his family and other people we have

> interviewed say about him; that is, that he is a nice, thoughtful, considerate guy.

Finally, counsel retained Diego Vigil, Ph.D., to assist in the preparation of the penalty phase. Dr. Vigil, a professor at the University of Southern California, had "extensive background and training in the field of Gangs, and Gang Activity, with a specialty in Hispanic Gangs." Dr. Vigil interviewed Ochoa, reviewed documents, and consulted with counsel on three occasions.

Ochoa raises several arguments why this investigation was not reasonable. First, he relies on counsel's "admission" that they presented a false picture of their client. He specifically points to the following argument that counsel made during closing:

> We always learn things at a trial.
>
> And yesterday one of the most significant things that I learned and that [my co-counsel] learned during the course of this trial was just how out of touch with reality Sergio's family was regarding his activities.
>
> If you will recall Rosie testified and Mr. Ochoa both testified that . . . the first time in his life there were problems was when he was approximately [thirteen] years old . . . .
>
> Yet yesterday there was testimony from Dr. Maloney which not only surprised me but I felt had inherent credibility to it, and clearly demonstrated the problems perceiving Sergio

> that unfortunately his parents had, their lack of touch with reality as to what was going on in his life . . . .
>
> [Y]esterday for the first time in when we were questioning Dr. Maloney regarding what information he relied on and he testified that he was relying on . . . Sergio's direct and clear statements to him that he first became involved in gang activity when he was about eleven and the gang was the Pee Wee Winos.

Ochoa's argument is not persuasive. This was no "admission" of incompetence, and it did not show that a false picture was presented to the jury. There was some confusion about the exact timing when Ochoa joined the gang because Ochoa did join the 18th Street gang—the gang that he committed the relevant offenses with—at thirteen years old. Other witnesses who submitted declarations with Ochoa's state habeas petitions discussed that fact as well.

Further, counsel used this fact to illustrate the mitigating factor that they had been presenting throughout the penalty phase—that Ochoa's family was well-meaning, but not attentive and did not notice him joining a gang for two years. Most importantly, there is no evidence that the difference between Ochoa joining a gang at age eleven or thirteen would have changed the jury's view of Ochoa. Rather, it seems to have not been a significant fact.

Next, Ochoa complains that counsel ignored "red flags" such as Ochoa being influenced by his older siblings' gang membership and joining the gang in their footsteps, as well as his father's heavy drinking. First, it is unclear whether either one of those could fairly be characterized as "red

flags." An argument about the older siblings' bad influence is not supported by the record. Further, while Eduardo Sr.'s drinking was unfortunate, Duvall's investigation concluded that it had minimal—if any—impact on the children.

More importantly, it was a reasonable strategic choice for counsel not to present the evidence of Ochoa's father's drinking and his siblings' gang affiliations. As the district court correctly found, Ochoa's counsel strategically chose to present the "family sympathy" defense at the penalty phase. This was a reasonable decision. Many witnesses discussed how loving, hardworking, and giving the Ochoa parents were. It was both their strength and weakness because they tried very hard for their children, but in the process left them without attention. While an extended family may have stepped in to help and provide supervision if they were still in Mexico, all that the children had in South Central were gangs. Evidence of Ochoa's father's drinking and his siblings' gang affiliations, while not of material mitigating weight, could have undermined this "family sympathy" defense. *See Livaditis v. Davis*, 933 F.3d 1036, 1048 (9th Cir. 2019) (explaining that counsel's decision to plead for mercy on behalf of Livaditis's family rather than delve into his mother's abuse of him was reasonable given the closeness of the family and the fact that emphasizing the mother's abuse "would have been inconsistent with portraying her as a sympathetic witness and would therefore have limited the efficacy of a family sympathy approach"); *see also Ochoa*, 16 F.4th at 1335 (holding that it was not unreasonable for the California Supreme Court to conclude that defense counsel's decision to present "humanizing portrayals of Ochoa by his family" at the penalty phase instead of "evidence regarding Ochoa's dysfunctional upbringing and mental health evaluations" was reasonable).

Further, counsel was not ineffective for failing to uncover the remainder of the mitigation evidence now identified by Ochoa. With respect to neglect by the babysitter in the first two years of Ochoa's life, counsel's failure to discover this information did not stem from any failure to ask sufficiently probing questions, but from the family either not remembering or not attaching significance to the event.

Ochoa also claims that counsel sought and received funding to go to Mexico but did not go for reasons unexplained in the record. Ochoa contends it was unreasonable for counsel to not interview family members in Mexico who could have apprised them of the Ochoa family's dysfunctionality. But it was reasonable for counsel not to interview the family in Mexico. None of the interviews conducted by Duvall showed any significant family dysfunction. And because the family left Mexico when Ochoa was two or three years old, it was reasonable for counsel to not consider the family in Mexico as an important source of mitigation material absent indications to the contrary.

The record supports this conclusion, as a review of the declarations that Ochoa submitted from the relatives in Mexico shows that they did not have a lot of insight into family dynamics, and any dysfunction they discussed was in conclusory terms. Moreover, this type of information was cumulative to what counsel already knew. It was also conclusory and innocuous and therefore would not have changed the jury's view of Ochoa. Ochoa appears to argue that despite what trial counsel found, they simply should have found more. But counsel need not undertake exhaustive witness investigation. The question is not "what is prudent or appropriate, but only what is constitutionally

compelled." *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (cleaned up). And the Constitution does not compel counsel "to mount an all-out investigation into petitioner's background in search of mitigating circumstances" if, as here, the decision not to do so "was supported by reasonable professional judgment." *Id.*

Ochoa also contends that counsel should have presented evidence of his neuropsychological deficits. Ochoa relies on declarations from Dr. Pérez-Arce, who diagnosed Ochoa with a brain impairment, as well Drs. Kaser-Boyd and Gomez, who diagnosed him as suffering from symptoms consistent with PTSD. According to Pérez-Arce, Ochoa's visual problems, which counsel was aware of, indicated the need to further test for neurological impairments. Finally, Ochoa claims that counsel did not properly assist Dr. Maloney in forming an accurate opinion of Ochoa. Specifically, counsel knew that Ochoa had poor coordination and could not complete his work at dental technology school, yet they "did not insist that when Ochoa was examined by his mental health expert, that he be examined uncuffed, so as to determine whether Ochoa had any visual-spatial memory impairments."

As noted above, counsel hired Dr. Maloney to assist in preparing the mitigation case. Dr. Maloney interviewed and evaluated Ochoa and administered several psychological and neuropsychological tests. Dr. Maloney was not able to perform some of the tests because Ochoa was handcuffed. Dr. Maloney testified at trial that he knew that Ochoa suffered a head injury at age eighteen when he was beaten with a baseball bat. Dr. Maloney conducted specific tests, such as the Bender Gestalt Test, and the Symbol Digit Modalities Test, because he "wanted to see if there was any kind of deficit as a result of [the beating]." Ochoa "did better

than average on all of those." Dr. Maloney concluded, "there really wasn't any suggestion of that kind of deficit." Dr. Maloney opined that there was no indication of psychosis or schizophrenia, Ochoa was somewhat insecure, not grossly disturbed, and he knew right from wrong.

There is no indication that counsel was deficient in relying on Dr. Maloney's opinion. According to Dr. Kaser-Boyd, the fact that Ochoa was handcuffed should not have precluded a complete examination because "psychologists routinely request that the handcuffs be removed for psychological testing, or changed to leg restraints." But Dr. Kaser-Boyd did not account for the fact that Ochoa was a death row prisoner housed in a "high powered module" because he was fighting in jail, had possessed a shank and a makeshift handcuff key, and was thus considered an escape risk. She also did not know whether Dr. Maloney made any unsuccessful request for the handcuffs to be removed. Without more information, Ochoa's claim that Dr. Maloney was deficient in testing Ochoa is speculative.

Furthermore, counsel cannot be ineffective for not supervising under what conditions a qualified, experienced expert does his testing and what testing the expert orders. It is not counsel's obligation to challenge the expert's decision or find a different expert. *See Payton v. Cullen*, 658 F.3d 890, 896 (9th Cir. 2011) ("Having retained qualified experts, it was not objectively unreasonable for [trial counsel] not to seek others."); *Earp v. Cullen*, 623 F.3d 1065, 1077 (9th Cir. 2010) (noting that there is "no constitutional guarantee of effective assistance of experts").

Finally, because Drs. Pérez-Arce, Kaser-Boyd, and Gomez conducted their analyses eleven years after the murders, their diagnoses carry less weight. *See Runningeagle v. Ryan*, 825 F.3d 970, 988 (9th Cir. 2016)

(discounting a diagnosis produced more than twenty years after the crimes were committed). In addition, they are based, in part, on two assaults when Ochoa was an adolescent. One of the assaults was self-reported by Ochoa eleven years after the crime and Ochoa has not described any injuries from it or that he sought medical attention.

Ochoa also argues that counsel should have presented a rebuttal of the prosecution's gang expert's testimony about Ochoa's tattoos. Because counsel hired Dr. Vigil as a gang expert for the penalty phase but did not present him, Ochoa argues the "only inference" to be drawn is that Dr. Vigil did not meet expectations and that a new expert should have been retained. That is speculative. Dr. Vigil had the requisite experience, met with Ochoa, reviewed documents, and consulted with counsel. There is nothing in the record that would suggest he was incompetent. Absent evidence to the contrary, the presumption is that counsel made a strategic choice not to call Dr. Vigil as a witness. *See Strickland*, 466 U.S. at 689.

As a point of comparison, Ochoa presents the expert hired by habeas counsel, Father Boyle. But Father Boyle's declaration about the significance of tattoos on Ochoa's body appears to be cumulative to the testimony presented by Dr. Maloney. Specifically, Dr. Maloney testified that the "187" tattoo could indicate lack of remorse, but it could also be used to signal to other gang members "how tough" Ochoa was and where he stood in a pecking order in jail. With respect to Father Boyle's attack on Detective Berchem's expertise, the jury heard that Detective Berchem's expertise was acquired through investigating the gangs' criminal activities. That a police officer would not have knowledge of all aspects of criminals' lives is within jurors' common

experience and does not need to be explained by a rebuttal expert.

Ochoa relies on *Hinton v. Alabama*, 571 U.S. 263 (2014), for the proposition that deficient performance can be found when defense counsel fails to request additional funds to replace an inadequate expert. In *Hinton*, the Supreme Court determined that trial counsel was deficient because he failed to research the expert-funding statute, and he then presented an expert at trial whom he knew to be unqualified based on his mistaken belief that he was not entitled to more funds. *Id.* at 273. The Court characterized this deficiency as a failure to "make reasonable investigations," and it emphasized that the deficient performance it found in the case "does not consist of the hiring of an expert who, though qualified, was not qualified enough." *Id.* at 274–75. The Court specifically stressed that "[w]e do not today launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired." *Id.* at 275. Thus, *Hinton* does not help Ochoa, as he invites the very examination *Hinton* expressly says that federal courts may not conduct.

Finally, Ochoa contends that counsel failed to investigate his father's incestual relationship with Ochoa's older sister, Gloria, and his father begetting Gloria's five children. Ochoa relies on declarations of three witnesses who knew the family explaining why they suspected the relationship. But none of these declarations constitute reliable evidence of an incestuous relationship. "[C]ounsel is not deficient for failing to find mitigating evidence if, after a reasonable investigation, nothing has put the counsel on notice of the existence of that evidence." *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998) (cleaned up). Counsel can hardly be faulted when Ochoa, his family,

family friends, and neighbors all failed to relate the information about incest when asked about family dynamics. Furthermore, if defense counsel put this evidence on, there are no assurances that the jury would have drawn a conclusion that there was an incestuous relationship, and it is even less certain that they would have found this information mitigating. There was a real danger that it would have turned into a mini trial on who was the father of Gloria's children, which certainly could have undermined Ochoa's "family sympathy" defense.

For all these reasons, Ochoa fails to overcome the presumption that his counsel's conduct fell within the wide range of reasonable professional assistance. *See Strickland*, 466 U.S. at 687.

iv. Prejudice to Ochoa

Ochoa likewise fails to establish prejudice with respect to counsel's alleged deficiencies. According to Ochoa, even though counsel failed to present powerful mitigating evidence, the jury still struggled to reach a decision: during deliberations, the jury sent out a note indicating that while they had reached a verdict as to the Castro murder, they were at an impasse as to the Navarette murder and "most [jurors were] not flexible either way." After the note, the jury did not ask for any readback or clarifications and did not pose any questions; they reached a verdict of death on the remaining count in the afternoon the following day. Because of this, Ochoa argues that the likelihood of a different result is substantial.

Ochoa overstates the significance of the jury's note. While longer jury deliberations may suggest a difficult case and thus weigh against a finding of harmless error, *see United States v. Velarde-Gomez*, 269 F.3d 1023, 1036 (9th

Cir. 2001) (en banc), at the time the jury sent the note, they had already reached agreement to impose a death sentence with respect to the Castro murder.

Ochoa also relies on *Sears v. Upton*, 561 U.S. 945 (2010), *Porter v. McCollum*, 558 U.S. 30 (2009), *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins*, and *Williams*, to support his claim, but these cases are inapposite. The additional evidence submitted by Ochoa was not so different in quality or kind that it would have shifted the jury's view of Ochoa as a person or his responsibility for the killings. The jury knew that even though his family loved him, Ochoa had been neglected growing up; the family worked hard but remained poor; he and his siblings were bullied for their ethnicity by neighborhood children; their home was burglarized on several occasions; one of the sisters was severely beaten; Ochoa was a good father; and he had a low-end IQ. The evidence gathered by habeas counsel is largely cumulative of the evidence presented at trial, and the remainder fails to dramatically change the way the jury would have viewed Ochoa.

At the same time, the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—must be reweighed against the aggravating evidence. *Williams*, 529 U.S. at 397–98. Ochoa participated in the killing of two people within the span of three weeks. The murder victims were not gang members and were very sympathetic. One was a teenager, murdered in front of his brother who was also endangered in the attack. The other was a Marine veteran who had a teenage son. Within hours of committing the second murder, Ochoa participated in another robbery, where he punched, kicked, and threatened to shoot the victim if he did not give up his car. That robbery could have ended

as dreadfully as the earlier one, had the victim tried to resist as Castro did. Even though Ochoa was only twenty-one years old at the time of the offenses, he already had prior adult criminal history, a long juvenile record, and he also committed misconduct in prison while waiting for trial. Ochoa fails to establish a "reasonable probability that . . .the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Because it was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent for the California Supreme Court to have determined that Ochoa's counsel were not ineffective during the penalty phase, we affirm the district court. *See* 28 U.S.C. § 2254(d)(1), (2).

2. Second Uncertified Claim: *Atkins* Violation

Ochoa asserts that his death sentence violates the Eighth Amendment because he "suffered mental impairments that are as severe as mental retardation from the date of his arrest to the present[,]" and he is therefore ineligible for execution under *Atkins v. Virginia*, 536 U.S. 304 (2002).

Ochoa raised this claim in his second state habeas petition. The California Supreme Court summarily denied the claim "on the merits."[4]

The district court also denied the claim on the merits under AEDPA, determining that the California Supreme Court could have reasonably concluded that Ochoa "failed to demonstrate the onset of intellectual functioning and

[4] *See* Section IV(A)(2)(a) supra.

adaptive deficits *while still a minor*, or *during his developmental period*."

Because the California Supreme Court's conclusion was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent, we affirm the district court. *See* 28 U.S.C. § 2254(d)(1), (2).

a. Applicable Law

The Supreme Court in *Atkins* explained that "the medical community defines intellectual disability according to three criteria": (1) "significantly subaverage intellectual functioning"; (2) "deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances)"; and (3) "onset of these deficits during the developmental period." *Hall v. Florida*, 572 U.S. 701, 710 (2014) (*citing Atkins*, 536 U.S. at 308 n.3). Subsequently, in *Hall*, the Supreme Court held that it is unconstitutional to foreclose "all further exploration of intellectual disability" on the sole ground that the petitioner has an IQ above 70. *Id*. at 704.

With respect to significantly subaverage intellectual functioning, IQ test scores may be "of considerable significance." *Id.* at 723. Because "[e]ach IQ test has a 'standard error of measurement'" of plus or minus five points, however, "IQ test scores should be read not as a single fixed number but as a range." *Id*. at 712–13. When a defendant scores between 70 and 75 on an IQ test, he or she "must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id*. at 723.

Subsequently, in *Moore v. Texas* ("*Moore I*"), 137 S. Ct. 1039 (2017), the Court held that states do not have unfettered discretion to reject medical community standards in defining what constitutes intellectual disability. *Id.* at 1048–49. In *Shoop v. Hill*, 139 S. Ct. 504 (2019), the Court "consider[ed] what was clearly established regarding the execution of the intellectually disabled . . . ." *Id.* at 506–07. The Court observed that *Atkins* "left 'to the [s]tates the task of developing appropriate ways to enforce the constitutional restriction'" on executing intellectually disabled persons. *Id*. at 507 (*quoting Atkins*, 536 U.S. at 317). In *Moore v. Texas* ("*Moore II*"), 139 S. Ct. 666 (2019), the Court reaffirmed its holding in *Moore I* that the petitioner, with an average IQ score of 70.66, "had demonstrated sufficient intellectual-functioning deficits to require consideration of the second criterion—adaptive functioning." *Id*. at 668 (*citing Moore I*, 137 S. Ct. at 1048–50).

California Penal Code § 1376, which governs *Atkins* claims for the state's prisoners, uses the same "intellectual disability" term adopted by the Supreme Court in *Hall*. *See* CAL. PENAL CODE § 1376(a). At the time when the California Supreme Court denied Ochoa's *Atkins* claim, that statute defined intellectual disability as "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of [eighteen]." CAL. PENAL CODE § 1376(a) (2010). Under California law, "[t]o state a prima facie claim for relief, the petition must contain 'a declaration by a qualified expert stating his or her opinion that the petitioner is mentally retarded" and "the declaration must explain the basis for the assessment of mental retardation in light of the statutory standard." *In re Hawthorne*, 35 Cal. 4th 40, 47 (2005).

b. Analysis

At age fifteen, Ochoa had a Wide Range Achievement Test score of 78. Prior to trial, Dr. Maloney administered the Wechsler Adult Intelligence Scales Test ("WAIS-III").[5] Ochoa, then twenty-four years old, scored a verbal IQ of 74, though if he were given the same test in Spanish, he would have scored several points higher, "in the 80 range." Dr. Maloney explained that although Ochoa was "functioning below average," his score was "above the cutoff for mental retardation" and that he was "not mentally retarded."[6] At age thirty-five, on WAIS-III, Ochoa's verbal IQ was 79. He had made no gains in his arithmetic skills, since scoring at the fifth-grade level at the time of the trial.

Ochoa relies on the declarations of Drs. Gomez, Pérez-Arce, and Kaser-Boyd to support his claim. As discussed above, Dr. Pérez-Arce determined that Ochoa suffers from significant impairment in the right part of the brain, that "is likely to have been present from birth and probably exacerbated by two attacks" that Ochoa suffered when he was twelve and eighteen years old. Additionally, Dr. Kaser-Boyd diagnosed Ochoa as suffering from PTSD and Cognitive Disorder Not Otherwise Specified. Dr. Gomez summarized Ochoa's life history and opined that his obvious

[5] WAIS-III, the standard instrument for assessing intellectual functioning, measures an intelligence range from 45 to 155, with an IQ "between 70 and 75 or lower . . . typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Atkins*, 536 U.S. at 309 n.5.

[6] The term "intellectual disability" has now replaced the phrase "mentally retarded." *See, e.g.*, *Brumfield v. Cain*, 576 U.S. 305, 308 n.1 (2015).

mental impairments were recognized by his peers and his teachers when he was quite young.

Ochoa contends he has subaverage intellectual functioning and deficits in adaptive functioning that occurred before he was eighteen years old. If we conclude that the state court's denial of his *Atkins* claim was reasonable, he asks that the court grant him a stay to exhaust a claim that he is categorically excluded from the death penalty under the new substantive rule announced in *Moore II*.

Ochoa's claim fails for several reasons. First, as the district court noted, none of Ochoa's experts diagnosed him with an intellectual disability. On appeal, Ochoa contends that the evidence he presented to the state court regarding his disability "substantially complied" with the California requirements of § 1376(a) and *Hawthorne*. But Ochoa does not explain how a different diagnosis equals substantial compliance and does not present any authority that substantial compliance is sufficient.

During Ochoa's habeas proceedings in the California Supreme Court, the State filed a supplement to the informal response, arguing that Ochoa's *Atkins* claim failed under *Hawthorne* because he had not submitted a declaration from an expert that he was intellectually disabled. Ochoa conceded that he had not submitted such a declaration. He argued, however, that his experts' declarations showed that he "suffers from cognitive impairments and mental illness that are *equivalent* to mental retardation."

Ochoa fails to cite any law, let alone clearly established Supreme Court precedent, supporting his contention that *Atkins* bars the execution of individuals with an impairment "equivalent" to intellectual disability. In fact, several other

courts that have considered this "equivalency" argument have rejected it. *See, e.g.*, *In re Soliz*, 938 F.3d 200, 203 (5th Cir. 2019) (explaining that the defendant failed to show that his fetal alcohol spectrum disorder is medically equated to intellectual disability as defined in *Atkins*); *Murphy v. Ohio*, 551 F.3d 485, 510 (6th Cir. 2009) ("[A]lthough it is evident that Murphy has severe psychological problems and certain mental deficiencies, these characteristics alone do not make him 'mentally retarded' such that his execution would violate *Atkins*.").

Second, the range of Ochoa's IQ scores generally falls above the range that clinical sources consider as satisfying *Atkins* prong one: an IQ range of approximately 65 to 75. Due to the standard error of measurement, the lowest of his scores, 74, could have qualified as falling into the intellectually disabled range. But Dr. Maloney, who administered that test, opined that the score was "probably a low estimate of" Ochoa's ability because "in some areas, nonverbal areas, he perform[ed] very much better than that." He opined that if the test was given in Ochoa's native Spanish, he would have scored "in the 80 range."

Considering the IQ score of 74 alone, without Dr. Maloney's explanation, Ochoa might still be classified as intellectually disabled, depending upon the level of deficits at prong two. *See Hall*, 572 U.S. at 720 ("Treating the IQ with some flexibility permits inclusion in the Mental Retardation category of people with IQs somewhat higher than 70 who exhibit significant deficits in adaptive behavior." (cleaned up)). Although the evidence on Ochoa's adaptive functioning is somewhat mixed, it does not appear that Ochoa had *significant* deficits in that area. Ochoa did well in school until seventh grade when he became involved in a gang and his grades dropped. *Ochoa*, 26 Cal. 4th at 421–

22. Ochoa was never held back in school. He did not graduate from high school, but did graduate from a dental technology school at age seventeen. During his six-month stay in the juvenile camp at the age of fifteen, Ochoa "performed above average in school and in the camp program." Dr. Pérez-Arce noted that Ochoa "has shown significant gains in his fund of general knowledge, the breadth of his vocabulary, and spelling skills" since his incarceration on death row. These fluctuations in Ochoa's academic performance in different settings are inconsistent with intellectual disability. *See Heller v. Doe*, 509 U.S. 312, 323 (1993) ("Mental retardation is a permanent, relatively static condition . . . .").

Likewise, Ochoa has not shown significant deficits in adaptive functioning with respect to his social relationships. Ochoa lived with his girlfriend and cared for their daughter for a year. He maintained the relationship with the daughter and her mother after the separation. He attempted to get a job as a dental technician after school, but his family and neighbors believed he was unsuccessful because he insisted on dressing as a gangster. The Silva family, neighbors of the Ochoas, discussed Ochoa being "very slow," "very quiet, more than normal," a follower, and having poor hygiene. But their perception of Ochoa was not corroborated by other neighbors. Bonzie Williams, the Ochoas' next-door neighbor of twenty-five years, discussed Ochoa's participation in her club where neighborhood kids got together once a week to talk, sing, and play. Ochoa participated from eight years old until twelve or thirteen. In Williams' opinion, Ochoa was not "easily influenced by his peers"; on the contrary, he "seemed to be somewhat of a leader in the neighborhood." *Cf. Atkins*, 536 U.S. at 318 ("[I]n group settings [intellectually disabled people] are followers rather than leaders.").

Other witnesses did not see anything wrong either. Ochoa's first- and second-grade teacher did not recall that Ochoa had any learning difficulties that indicated a need for special education. Ochoa's aunt from Mexico visited the family when Ochoa was eight years old and noted that he "was a normal eight-year[-]old boy." Eduardo Sr. told mitigation investigator Duvall that until high school and his involvement in the gang, Ochoa "did well in school and was considered by his teachers and the family to be quite bright."

Moreover, the trial judge, Ochoa's counsel, and Ochoa's accomplices all saw Ochoa as a leader in connection with his crimes. His counsel wrote a letter to Dr. Maloney, noting with respect to the Navarette murder that Ochoa denied knowing about the presence of the gun in the car, but "[s]tatements by his cohorts definitely dispute this. As a matter of fact, they indicate he was the leader, and since he was the oldest of the group, this is probably true." The trial court characterized the Castro murder as the result of a "planned affair." *Ochoa*, 26 Cal. 4th at 460. The court believed Ochoa was the "moving force" behind the Navarette murder, "the one who caused this entire incident to take place." *Id*. The court also found that several hours after murdering Castro, Ochoa "led an attack on" Freddie Garcia. *Id*. When arrested, Ochoa gave a false name to police and told them he did not know about the gun in his car, which shows a degree of adaptive skill.

Next, Ochoa's evidence does not show that he meets the last *Atkins* prong: onset before the age of eighteen. Dr. Kaser-Boyd diagnosed Ochoa with brain damage "likely to have been present from birth and probably exacerbated by two brutal attacks with bats that Mr. Ochoa suffered in early adulthood." The first attack was when Ochoa was twelve years old. He did not tell anyone and "was more guarded

after that." Dr. Kaser-Boyd noted that he "had the symptoms of" PTSD afterwards. The next assault Ochoa alleges and that is supported by documentation from the hospital occurred after Ochoa turned eighteen. In addition, when Ochoa was twenty-one years old, three months before the crimes at issue, he was struck by a car and thrown fifteen feet. He struck his head and lost consciousness. Finally, while waiting for trial in this case, he was involved in a fight in jail. Dr. Kaser-Boyd opined that "the head injuries [Ochoa] suffered likely changed the cognitive ability that is necessary for judgment and impulse and emotional control." Neither Ochoa nor Dr. Kaser-Boyd, however, alleged any head injuries from the assault at age twelve, and all the other assaults took place after Ochoa turned eighteen. In addition, Dr. Kaser-Boyd's diagnosis is contradicted by Dr. Maloney's testimony.

Ochoa faces an additional hurdle: namely, the requirement that he must show that the California Supreme Court's decision fails to pass muster under AEDPA. Ochoa relies on *Hall* and *Moore II*, but those decisions came after the California Supreme Court's 2010 denial of his *Atkins* claim. So he cannot rely on those decisions. *See Ybarra v. Filson*, 869 F. 3d 1016, 1024–25 (9th Cir. 2017) (noting that *Moore I* and *Hall* "cannot show that the [prior state court decision] applied *Atkins* in a way that 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement'" (quoting *Richter*, 562 U.S. at 103)). Ochoa may rely on *Atkins* itself, but *Atkins* "'did not provide definitive procedural or substantive guides' to determine who qualifies as intellectually disabled." *See id.* at 1024 (quoting *Bobby v. Bies*, 556 U.S. 825, 831 (2009)).

Moreover, at the time when the California Supreme Court denied Ochoa's *Atkins* claim, California law defined "intellectual disability" consistently with *Atkins* as "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of [eighteen]." CAL. PENAL CODE § 1376(a) (2010). Indeed, California law at the time was consistent even with the Supreme Court's subsequent decisions in *Hall* and *Moore I* and *II*. First, consistent with *Hall*, California's definition of intellectual disability did not "include a numerical IQ score." *See Hawthorne*, 35 Cal. 4th at 48; *see also Hall*, 572 U.S. at 702 (noting that "many [s]tates have . . . passed legislation allowing defendants to present additional intellectual disability evidence when their IQ score is above 70"). Second, consistent with *Moore I* and *II*, California law required a hearing "[u]pon the submission of a declaration by a qualified expert stating his or her opinion that the defendant is mentally retarded." CAL. PENAL CODE § 1376(b)(1) (2010). Accordingly, any stay of the appeal, so that Ochoa can exhaust a claim under *Moore II*, would be futile.[7]

Because it was neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent for the California Supreme Court to have determined that Ochoa failed to demonstrate the onset of intellectual functioning and adaptive deficits as a minor, we affirm the district court. *See* 28 U.S.C. § 2254(d)(1), (2).

[7] In *Moore II* the Court simply reaffirmed its relevant holding from *Moore I*. 139 S. Ct. at 668.

V. CONCLUSION

We expand the certificate of appealability as to Ochoa's uncertified claims, but we affirm the district court's denial of Ochoa's habeas petition.

AFFIRMED.[8]

[8] The outstanding motions, Dkt. Nos. 58, 59, and 60, are **GRANTED**.