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E-FILED - 11/17/06

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

<p>DOUGLAS SCOTT MICKEY,</p> <p>Petitioner,</p> <p>v.</p> <p>ROBERT L. AYERS, Warden of California State Prison at San Quentin,</p> <p>Respondent.</p>	<p>No. C-93-0243 RMW</p> <p>ORDER GRANTING IN PART AND DENYING IN PART PETITION FOR WRIT OF HABEAS CORPUS, AND GRANTING IN PART AND DENYING IN PART CERTIFICATE OF APPEALABILITY</p>
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Douglas Scott Mickey challenges his state murder conviction and death sentence by way of a petition for writ of habeas corpus. On May 6, 2002 the court issued its Order Granting in Part and Denying in Part Respondent's Motion for Summary Judgment. The court granted summary judgment in favor of respondent on all of petitioner's claims except on Claim 1 alleging ineffective assistance of counsel, Claim 9 alleging that petitioner was incompetent to waive his rights when he gave a statement to the police during extradition from Japan, and Claim 10 asserting that he was incompetent to stand trial. In a notice dated November 4, 2003, petitioner withdrew Claim 10 and that portion of Claim 1 that alleges counsel were ineffective for not raising a doubt as to petitioner's competence at

1 trial.

2 An evidentiary hearing on the remaining portion of Claim 1 and Claim 9 was conducted
3 beginning on April 27, 2004 and continuing through April 30, 2004. The court hereby denies the
4 petition for a writ of habeas corpus on the guilt phase claims but grants it on the penalty phase claim
5 of ineffective assistance of counsel.

6 **I. PETITIONER'S CONVICTION AND SENTENCE AND DIRECT REVIEW**

7 Petitioner was tried and convicted by a San Mateo County jury of the first degree murders of
8 Eric Hanson and Catherine Blount. He was sentenced on September 23, 1983 to death for both
9 murders. On October 31, 1991, the California Supreme Court affirmed the convictions and several
10 of the special circumstance findings, as well as the death sentence. *People v. Mickey*, 54 Cal. 3d 612
11 (1991). Petitioner sought a writ of certiorari from the United States Supreme Court. The application
12 was denied on October 5, 1992. *Mickey v. California*, 506 U.S. 612 (1992).

13 **II. REQUESTS FOR HABEAS CORPUS RELIEF**

14 Petitioner applied for appointment of counsel in this court on January 22, 1993. His appointed
15 counsel filed his federal petition for habeas corpus relief on December 1, 1995. That petition included
16 unexhausted claims, and the case was stayed pending exhaustion in state court. On June 10, 1996,
17 Mickey filed a state petition in the San Mateo County Superior Court. It was denied on June 19, 1996
18 without prejudice to its being refiled in the California Supreme Court. The petition was then refiled
19 on July 8, 1996 in the state supreme court. It was denied on December 18, 1996.

20 On January 31, 1997, petitioner filed again in the California Supreme Court contending that
21 he had not received a fair and constitutionally adequate review of his death sentence. That petition
22 was denied on February 19, 1997.

23 On December 18, 1997, petitioner filed an amended petition in this court.

24 **III. THE MURDERS**

25 In September 1980 Mickey was living in Japan with his wife and her two children at an
26 Air Force Base where his wife worked as a nurse. They were having financial and marital difficulties

1 and on September 17, 1980, Mickey returned to California. He stayed in Concord with Edward
2 Rogers, a longtime friend. Mickey disclosed several reasons to Rogers for his visit. Primarily, he
3 intended to rob and murder Eric Lee Hanson, a former friend, who lived in Placer County, and then
4 to possibly travel to Alaska and kill his wife's former husband for the proceeds of a life insurance
5 policy.

6 Hanson dealt in marijuana and hashish and had a business partner named Randy Hoehne.
7 Hanson lived with his lover, Catherine Blount, in a house in a rural community. Hoehne also lived
8 there but slept in a tent some distance away in order to guard his and Hanson's marijuana crop.
9 Although Mickey had in the past been a friend of Hanson, he apparently carried a grudge against
10 Hanson because he thought Hanson had stolen certain items from his family. In 1979, Mickey had
11 raided Hanson's marijuana crop in retaliation.

12 After Mickey arrived in California in September of 1980, he retrieved the marijuana from
13 the place where he had hidden it. He thereafter regularly consumed marijuana along with alcohol.
14 He discussed his planned revenge against Hanson with Rogers.

15 On September 22, 1980, Mickey traveled to Hanson's home in a car he had borrowed
16 from Rogers in order to carry out his plan. He arrived about 11 p.m. He was armed with a rifle
17 belonging to Rogers, which he had fitted with a homemade silencer. Blount was alone in the house;
18 Hanson and Hoehne were out on the property. Blount invited defendant in. Hanson returned and the
19 three visited. Hanson left the next day. During his time at the property, Mickey observed Hanson
20 counting "a good size stack of money." Mickey tried to sell Hanson some of the marijuana he had
21 stolen the year before but was unsuccessful.

22 On September 28, 1980, Mickey traveled with Rogers back to Hanson's home in
23 Rogers's pickup truck. They drove to the property where Rogers left Mickey off at about
24 midnight. Mickey was armed with a knife which belonged to him and a pistol belonging to Rogers.
25 Hanson and Blount were alone in the house; Hoehne was in his tent. Hanson and Blount greeted
26 Mickey at the door and invited him in.

1 During the early hours of September 29, 1980, evidently after Hanson and Blount went
2 to sleep, Mickey killed them. He bludgeoned Hanson with a baseball bat and slit his throat from ear
3 to ear down to the spinal cord. He stabbed Blount seven times in the chest in a close pattern, piercing
4 her heart with three of the blows. Immediately thereafter, he removed a substantial quantity of
5 property from the house, loaded it into Hanson's Volkswagen, and departed to a spot where he had
6 agreed to meet Rogers. Some distance away from the meeting place, Mickey and Rogers transferred
7 the goods to the truck Rogers had brought, wiped the Volkswagen clean of fingerprints and abandoned
8 it there. Mickey said he wanted to go back and burn the house but Rogers persuaded him otherwise.

9 On September 30, 1980, Mickey fled the country from Travis Air Force Base and
10 returned on October 3 to the Air Force Base in Japan. On October 2, 1980, Rogers made a statement
11 to officers at the Placer County Sheriff's Department implicating himself and Mickey in the murders
12 and related activities. Mickey was arrested in Japan on October 14, 1980 for the murders of Hanson
13 and Blount. He was advised of his *Miranda* rights and in response said he did not want to decide at
14 that time whether he would speak to law enforcement. On January 16, 1981, Mickey departed Japan
15 for the United States in the custody of several law enforcement officers.

16 **IV. GUILT PHASE ISSUES**

17 **A. Mickey's Alleged Incompetence to Waive Rights with Respect to Statements Made During
18 Extradition From Japan (Claim 9)**

19 Mickey was flown from Tokyo to Honolulu and after an overnight stay in Honolulu brought
20 to San Francisco. During the Tokyo-Honolulu flight and later in Honolulu, Mickey made inculpatory
21 statements to Detective Curtis Landry. During the Tokyo-Honolulu flight Mickey and Detective
22 Landry initially engaged in small talk but about three hours into the flight, after a lull in their
23 conversation, Mickey asked about the burial of Hanson and Blount. After Detective Landry answered,
24 Mickey became emotional and made comments suggesting the murders never should have happened
25 and that Hanson should have listened to him. Landry remained passive during this period and said
26 nothing. Thereafter, Mickey regained his composure and chatted about his family, his wife and her

1 children, his hobbies and politics. However, when Mickey was getting off the plane, he told Detective
2 Landry that he wanted to continue their conversation. After conversing with his superior, Detective
3 Landry met with Mickey at the jail and advised him again of his *Miranda* rights. Mickey waived his
4 rights and then Landry asked questions about the murders. Mickey gave answers implicating himself
5 and became emotional on several occasions. However, he seemed alert and aware and never
6 suggested that he wanted the conversation to stop.

7 At trial Mickey unsuccessfully moved to suppress his statements. The trial court held a
8 hearing and found that Mickey had been given his *Miranda* rights before he was extradited and
9 transported to the United States, that he effectively invoked his right to counsel in Japan, and that he
10 again was given a *Miranda* warning in Honolulu. However, the trial court concluded that the
11 statements at issue were knowing and voluntary, not the result of any "softening up," and not coerced.

12 In its review of the trial court decision, the California Supreme Court concluded that
13 petitioner's statements were made knowingly and voluntarily and were admissible.

14 Having carefully scrutinized the record, we are of the opinion that the trial
15 court did not err by denying Mickey's motion to suppress the "inflight" and "Honolulu
admissions."

16 First, after independent review we believe that Mickey's "inflight admissions"
17 were voluntary under the due process clauses of both the federal and state
Constitutions.

18 The requisite coercive activity by the state or its agents is absent . . . [Mickey]
opened discussion and directed its course . . . So far as the challenged statements are
concerned, Landry hardly acted at all---and manifestly did not "overreach" in any way
19

* * *

20 [Mickey] claims he experienced ["psychological and physiological pressure"]
as a result of such factors as his extended incarceration in a foreign detention facility,
his longing for his family, and the demands of travel.

21 There was no state coercion [The "pressure's"] direct and substantial
22 source was Mickey's decision to flee from California to Japan in an attempt to avoid
apprehension for the murder of Hanson and Blount—a decision for which the state
cannot be held responsible.

* * *

23 In the course of his argument, defendant urges strenuously that . . . Detective
24 Landry intended to "soften" him up-i.e., to "coerce" a statement out of him by cajolery-
--and that [he] succeeded in doing so. The trial court made a determination to the
25 contrary---soundly in our judgment

26 Second, after independent review we believe that defendant's "inflight
admissions" were voluntary under *Miranda*.

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. . . To be sure, defendant was in custody. But he was simply not interrogated. Plainly, there was no express questioning by any of the officers, including Detective Landry. Nor, in our view, were there any words or actions on their part that they should have known were reasonably likely to elicit an incriminating response *Miranda* . . . does not "prohibit the police from merely listening to . . . voluntary, volunteered statements" uttered by a person, whether or not in custody, "and using them against him at the trial."

* * *

Third, after independent review we believe that defendant's "Honolulu admissions" were voluntary under the due process clauses of both the federal and state Constitutions We find absent both the requisite coercive activity by the state or its agents and the necessary causal connection between such activity and the statements in question

Fourth, after independent review we believe that defendant's "Honolulu admissions" were voluntary under *Miranda*.

We recognize the prophylactic rule . . . [that] "an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused initiates further communication, exchanges, or conversations with the police." There was no violation here. Defendant initiated further discussion

Mickey, 54 Cal.3d at 649-652 (internal citations omitted)

Under the law applicable at the time the instant petition was filed, findings of the state court were generally entitled to a presumption of correctness. 28 U.S.C. § 2254(d)(former); *Neuschaffer v. McKay*, 870 F.2d 839, 841 (9th Cir. 1987) ("In federal habeas corpus proceedings, deference must be granted to the findings of state appellate courts as well as state trial courts.") None of the circumstances stated in section 2254(d)(1) to (7) which except findings from the presumption of correctness have been established here. Petitioner has not met the burden of persuading the court by clear and convincing evidence that the trial court's conclusion that the statements were freely and voluntarily given was erroneous. *See Tinsley v. Borg*, 895 F.2d 520, 526 (9th Cir. 1990).

Petitioner contends that his statements were not made knowingly, voluntarily or intelligently. His contention is based primarily on the testimony of Dr. Donald Stonefeld, a psychiatrist and neurologist practicing in Wisconsin who was retained by petitioner's current counsel. Dr. Stonefeld opined that Mickey was incompetent to waive his rights as a result of the effect of his isolation in a cell in Japan, his desire to identify with his captors and his longing for human contact. Under these circumstances it is easy, according to Dr. Stonefeld, to get someone to confess. Dr. Stonefeld believes

1 Mickey is a paranoid schizophrenic and that one with this illness tries to hide the degree of his illness
2 and "would try to act as normal as possible, and if he thought a confession looked normal, that's what
3 he'd do." Evidentiary Hearing 228:2-10 ("EH _____").

4 Dr. Stonefeld's conclusion that Mickey's statements were involuntary is not supported by the
5 evidence. Mickey displayed no signs of delusions or hallucinations during his inculpatory
6 conversations with Landry. There is no evidence that Mickey was mistreated during his detention in
7 Japan. His wife, Allison, and her three children visited three or four times, and he wrote them on
8 numerous occasions. There is no evidence that law enforcement attempted to interrogate Mickey
9 during the flight from Tokyo to Honolulu.

10 Although Dr. Stonefeld diagnosed petitioner as a paranoid schizophrenic, he did not testify as
11 to the extent that this condition made him more likely to confess than one who did not have the illness.
12 Dr. Stonefeld presented no facts to support a finding that Mickey's statements were other than
13 knowingly and voluntarily made.

14 The circumstances existing at the time Mickey made his statements do not suggest he was
15 incompetent to make them. The evidence shows that Mickey's comments made to Landry during the
16 flight were volunteered by Mickey and not the result of any inquiry by Landry. The statements made
17 in Honolulu were made after a second *Miranda* warning. There is no evidence of coercion or an
18 attempt to "soften-up" Mickey so he would confess. There is also no evidence that Mickey did not
19 make his statements knowingly.

20 Claim 9 is denied.

21 **B. Alleged Ineffectiveness of Counsel (Claim 1)**

22 **1. Standard for Determining Whether Counsel Was Ineffective**

23 The test for evaluating whether counsel was ineffective is set forth in *Strickland v. Washington*,
24 466 U.S. 668 (1984). The petitioner must establish that: (1) counsel's representation "fell below an
25 objective standard of reasonableness," and (2) that such performance prejudiced the defendant. *Id.*
26 at 688, 694. To establish prejudice the petitioner "must show that there is a reasonable probability

1 that, but for counsel's unprofessional errors, the result of the proceedings would have been different.
2 A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at
3 693. Therefore, in the guilt phase the essential question is whether there is a reasonable probability
4 that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. *Hendricks*
5 *v. Calderon*, 70 F.3d 1032, 1036 (9th Cir. 1995). There is a strong presumption "that counsel's
6 conduct falls within the wide range of professional assistance because it is all too easy to conclude that
7 a particular act or omission of counsel was unreasonable in the harsh light of hindsight." *Bell v. Cone*,
8 535 U.S. 685, 702 (2002).

9 Petitioner was represented at trial by appointed lead counsel Fred Tuttle, the former
10 Public Defender of Placer County, and Lyle Shattuck. Both attorneys apparently had good
11 reputations. Tuttle died in 1999 and Shattuck is currently unable to testify or provide information
12 concerning the case.

13 **2. Failure to Investigate and Present Mental Health Diminished Capacity Guilt Phase**
14 **Defense**

15 There is no question that Mickey committed the two brutal murders. Petitioner, however, is
16 critical of counsels' handling of the guilt phase for essentially ignoring an allegedly viable mental
17 health defense. Specifically, petitioner contends counsel's performance was deficient because: (a)
18 counsel chose not to call David Axelrad, M.D., a psychiatrist, who held the opinion that Mickey was
19 insane and suffered from diminished mental capacity; (b) counsel did not undertake an adequate
20 mental health investigation, and an adequate one would have resulted in persuasive evidence that
21 petitioner suffered from schizophrenia, paranoid type, and had a viable diminished capacity defense;
22 and c) counsel presented a self-defense theory that was neither accurate nor believable and conflicted
23 with the mitigation case.

24 **a. Failure to Call Dr. Axelrad, M.D., a Psychiatrist**

25 Attorney Tuttle requested and obtained court authorization to hire an investigator and
26 psychiatrist, which he did. Tuttle had Mickey examined before the preliminary hearing by Frederick

1 Whipple, M.D., a forensic psychiatrist. Dr. Whipple's notes reflect that he found Mickey oriented,
 2 somewhat depressed, but not anxious. Dr. Whipple reported no compulsions, obsessions or
 3 hallucinations. After Dr. Whipple's examination of Mickey prior to the preliminary hearing, Dr.
 4 Whipple did not have any further involvement with the case. Defense attorney Tuttle thereafter
 5 retained David Axelrad, M.D., a forensic psychiatrist. Dr. Axelrad then associated Grant Hutchinson,
 6 Ph.D., a neuropsychologist, and Tom Morrison, Ph.D., a clinical psychologist, to assist in the
 7 evaluation of petitioner. Dr. Hutchinson's testing disclosed no evidence of a major affective or
 8 psychotic disorder and no evidence of organic brain dysfunction. He found Mickey to be fully
 9 oriented as to time, place and person and to have an IQ of 106 (within a normal range). None of the
 10 experts working with Dr. Axelrad diagnosed Mickey as being a paranoid schizophrenic.

11 Dr. Axelrad, who examined petitioner three times before trial made a principal diagnosis of
 12 organic delusional syndrome. He also found that Mickey had isolated explosive disorder and a
 13 borderline personality disorder. He concluded that Mickey was delusional and psychotic at the time
 14 of the murders and was unable to premeditate or deliberate and thus suffered from a diminished
 15 capacity.

16 Despite Dr. Axelrad's opinion that Mickey suffered from diminished capacity at the time of
 17 the murders, defense counsel made the tactical decision not to call Dr. Axelrad as a trial witness. The
 18 evidence establishes a number of reasons for this decision. The overriding concern was to not lose
 19 credibility, because the primary focus was on saving Mickey from the death penalty. The specific
 20 reasons for not calling Dr. Axelrad included: (1) that Mickey, in Dr. Axelrad's opinion, had a good
 21 memory and was a reliable reporter, however, he gave Dr. Axelrad a description of the murders which
 22 was inconsistent with his statement to Landry and which potentially suggested premeditation and
 23 deliberation and included a profit motive; (2) Dr. Axelrad recognized a risk that the story Mickey gave
 24 him could suggest premeditation and deliberation; (3) Dr. Axelrad was negative and defensive when
 25 asked hard questions; (4) Dr. Axelrad believed that given the right circumstances, Mickey could kill
 26 again; (5) Dr. Axelrad knew about Mickey's incestuous relationship with his mother which counsel

1 wanted kept from the jury; and (6) Dr. Axelrad would probably be perceived as a defense-oriented
2 witness—he had testified for the defense in four capital cases and all four defendants had received the
3 death penalty.

4 Defense counsel's decision not to call Dr. Axelrad was a tactical decision to which deference
5 must be accorded. Counsel had legitimate reasons for their decision.

6 **b. Failure to Undertake an Adequate Mental Health Investigation Which Would**
7 **Have Provided Evidence That Petitioner Suffered from Schizophrenia, Paranoid**
8 **Type, and Thus Had a Viable Diminished Capacity Defense**

9 Petitioner argues that although defense counsel retained Jules Burstein, Ph.D., a clinical and
10 forensic psychologist, and David Smith, M.D., an extraordinarily qualified and experienced specialist
11 in the study of diseases produced by drugs and the study and treatment of addictive diseases, they were
12 retained only for the penalty phase and not in time to be prepared for the guilt phase. Petitioner asserts
13 that had Dr. Burstein and Dr. Smith been retained earlier and had they been provided available
14 materials (which counsel, to a large extent, had failed to obtain), the defense, through Dr. Burstein and
15 Dr. Smith, would have been able to present a persuasive diminished capacity defense in the guilt
16 phase.

17 California had a judicially created diminished mental capacity defense until it was abolished
18 in 1982. The theory of the diminished responsibility defense was that

19 since deliberation and premeditation are necessary elements by definition of the crime
20 of first degree murder, the defendant should be permitted to introduce evidence of an
21 abnormal mental condition, although not sufficient to establish legal insanity as a
22 complete defense to or excuse for the crime, for the purpose of showing either that he
23 did not have the capacity to, or in fact did not, deliberate or premeditate the act at the
24 time the homicide was committed, and that for this reason only murder in the second
25 degree was in fact committed. In support of this theory some courts have pointed out
26 that voluntary intoxication is admissible for the purpose of negating a certain state of
27 mind, and have stated that evidence of an abnormal mental condition should be no less
28 pertinent to the existence of a specific state of mind.

22 ALR § 5; see *People v. Gorshen*, 51 Cal. 2d 716 (1959); *People v. Ford*, 65 Cal. 2d 41 (1966).

29 On June 8, 1982 the defense of diminished capacity was eliminated by Initiative Measure,
30 approved by the people.

1 The defense of diminished capacity is hereby abolished. In a criminal action, as well
2 as any juvenile court proceeding, evidence concerning an accused person's
3 intoxication, trauma, mental illness, disease, or defect shall not be admissible to show
or negate capacity to form the particular purpose, intent, motive, malice aforethought,
knowledge, or other mental state required for the commission of the crime charged.

4 Cal. Penal Code § 25(a). Mickey, therefore, committed his murders when the diminished mental
5 responsibility defense was available but he was tried at a time when, although he could assert it, the
6 defense was no longer available to persons then committing crimes. In fact, the public as a whole in
7 California at the time Mickey was tried was hostile to mental defenses to murder charges and
8 frustrated with the California Supreme Court's perceived hostility to implementation of the death
9 penalty. On November 7, 1978 seventy-two percent of the voters approved the Briggs Initiative which
10 expanded the circumstances that called for the death penalty. In that year Dan White shot and killed
11 San Francisco Mayor George Moscone and Supervisor Harvey Milk and was successful, to the dismay
12 of many, in his 1979 trial of asserting the diminished mental capacity defense (popularly referred as
13 the "twinkie defense"). As previously noted, in 1982 the voters passed the initiative abolishing the
14 defense. Shortly after Mickey's trial, Chief Justice Rose Bird and two of her colleagues were rejected
15 for retention at the November 4, 1986 general election, based primarily on their perceived efforts to
16 frustrate the implementation of the death penalty. Less than forty percent of the voters supported
17 Chief Justice Bird's retention.

18 Since the diminished mental responsibility defense was available to Mickey, *see*
19 *People v. Pensinger*, 52 Cal. 2d 1210, 1241 (1991), the question here is whether his counsel was
20 ineffective for failing to develop and present it more effectively. Petitioner contends that the jury
21 would have been significantly more receptive to a diminished capacity defense if Mickey's acts
22 occurred during a psychotic episode resulting from schizophrenia, paranoid type as opposed to during
23 a period of drug and alcohol psychosis.

24 Dr. Burstein now suggests that had he been retained earlier and provided with certain available
25 information which he was not given at the time he was retained by defense counsel, it is "quite
26 probable" that he would have diagnosed Mickey as suffering from paranoid schizophrenia and been

1 able to support a diminished capacity defense. EH 765:19-766:5. The information which he did not
2 have but was available includes the results of a September 15, 1981 MMPI administered to Mickey
3 consistent with a diagnosis of paranoia schizophrenia, information from Mickey's ex-wife Rochelle
4 Packard that when she and Mickey were together from 1973-1978 he convinced himself after reading
5 books of a spiritual nature that he was a spiritual warrior and had spiritual powers, and the report of
6 Ronald Bruce, Ph.D., a clinical psychologist at San Quentin who examined Mickey in 1983,
7 diagnosing Mickey as a paranoid schizophrenic. Dr. Burstein testified that this information and other
8 information reflecting a long history of bizarre behavior by Mickey tend to support the conclusion that
9 Mickey suffered from an underlying mental disease of schizophrenia, paranoid type, and this disease
10 substantially contributed to his psychotic episodes. Therefore, the psychotic episode during which
11 Mickey committed the murders is best explained by a combination of his toxic psychosis caused by
12 drug and alcohol abuse and his underlying paranoid schizophrenia.

13 Dr. Burstein's testimony at the evidentiary hearing and in his declaration in support of the
14 petition was extraordinarily critical of Mickey's trial counsel.

15 In sum, I believed and still believe that the performance by Mr. Mickey's two
16 attorneys was a mockery of justice. They were shockingly disorganized, impervious
17 to the advice of experts, unwilling to provide their experts with critical information,
18 with little or no working knowledge of the facts and issues in the case. Every aspect
19 of the ordeal became a source of profound frustration . . . both attorneys remained
unavailable to me at every step, and they consistently failed to provide the materials
necessary for me to provide meaningful assistance. They were wholly uninterested in
learning fundamental mental health principles, without which they were incapable of
effectively utilizing expert testimony.

20 Burstein declaration dated August 4, 2000, ¶ 39 ("Burstein decl. ¶ ____").

21 The court, however, is reluctant to give substantial weight to Dr. Burstein's criticism of counsel
22 because it seems unreasonably exaggerated and appears to involve opinions beyond those for which
23 Dr. Burstein had an adequate foundation. He came across at the evidentiary hearing as an advocate
24 and not as an expert impartially evaluating the evidence pertaining to mental health issues. However,
25 essentially all the members of the defense side were critical of the defense counsels' lack of interest
26 in and preparation of mental health issues.

1 Dr. Smith states in a declaration filed supporting Mickey's petition for a writ of habeas corpus
 2 that "[i]t was and still is my opinion that Mr. Mickey had significant psychological problems that
 3 predated his multiple drug abuse. However, it was not within my realm of expertise to put a label on
 4 those problems." Smith declaration dated August 4, 2003, ¶ 4 ("Smith decl. ¶ ____"). Dr. Smith only
 5 renders diagnoses on drug-induced psychiatric disorders. In cases where the defendant appears to
 6 have significant psychological problems apart from drug usage and a dual diagnosis is appropriate,
 7 Dr. Smith defers to the appropriate psychiatric expert to render a diagnosis as to the defendant's
 8 underlying psychopathology. If he had been asked to testify in the guilt phase of Mickey's trial, he
 9 would have testified that Mickey's long-standing abuse of alcohol and drugs, in combination with his
 10 profound thought disorder that pre-dated his drug use, contributed to a diminished mental state at the
 11 time of the murders and that

12 Mr. Mickey lacked the capacity to conform his conduct to the requirements of the law,
 13 he was unable to rationally and meaningfully premeditate or deliberate, he was unable
 14 to meaningfully and maturely reflect upon the gravity of his actions Mr. Mickey
 15 did not have the capacity to make reasoned, rational choices about his behavior;
 16 instead, his actions resulted from irrational, compelling thoughts.

17 Smith decl. ¶ 14.

18 If Mickey's trial counsel had retained Dr. Smith and Dr. Burstein for the guilt phase of
 19 Mickey's trial to support a diminished mental capacity defense and had given them access to all
 20 available relevant evidence including a detailed life history such as that later prepared by David Lisak,
 21 Ph.D. for Mickey's habeas counsel, evidence pertaining to Mickey's long term drug and alcohol abuse
 22 and probably his deviant sexual behavior would have come into evidence. The court finds that trial
 23 counsel's decision to not call them in the guilt phase was not the decision that most competent counsel
 24 would have made had they known the full scope of the evidence and expert opinions available.

25 However, the decision not to present a fully developed, diminished capacity defense must be
 26 evaluated based upon what trial counsel knew, or should have known, about Mickey's background and
 27 mental health as they prepared for trial. Before counsel made the decision not to call witnesses to
 28 support a diminished capacity defense, Mickey had been evaluated at counsels' request by several

1 mental health professionals (Dr. Wipple, Dr. Hutchinson, Dr. Morrison, and Dr. Axelrad). To hold
 2 that counsels' performance fell below the standard of care because they should have hired additional
 3 mental health experts before making a decision on the approach to be taken in the guilt phase would
 4 be unreasonable. As pointed out in *Strickland*:

5 A fair assessment of attorney performance requires that every effort be made to
 6 eliminate the distorting effects of hindsight, to reconstruct the circumstances of
 7 counsel's challenged conduct, and to evaluate the conduct from counsel's perspective
 8 at the time. Because of the difficulties inherent in making the evaluation, a court must
 9 indulge a strong presumption that counsel's conduct falls within the wide range of
 10 reasonable professional assistance; that is, the defendant must overcome the
 11 presumption that, under the circumstances, the challenged action might be considered
 12 sound trial strategy.

13 466 U.S. at 689.

14 The decision not to call witnesses and to limit the guilt phase defense to cross-examination of
 15 the People's witnesses avoided opening up areas (e.g. long history of drug abuse, sexual misconduct,
 16 likelihood of future violent acts) which may not have been well-received by the jury given the
 17 environment of the time. Counsels' approach was not outside the wide range of reasonable
 18 professional assistance.

19 More significantly, counsels' performance did not prejudice Mickey—Mickey has not shown
 20 that there is a reasonable probability that, but for counsel's alleged unprofessional errors, the result of
 21 the guilt phase of the trial would have been different. *See id.* at 694. The evidence of Mickey's guilt
 22 was overwhelming. If Dr. Smith had testified in the guilt phase, he would have faced, as he did in the
 23 penalty phase, the difficulty of explaining Blount's murder.

24 Q. I gather from your interview with him you could not determine whether
 25 or not his killing of Blount fit into the scheme of separate reality or
 26 material reality, is that true.

27 A. It would be hard—this religious statement ["now be with God, my
 28 child"] would suggest that it fit into the separate reality, but she was
 not—I talked about that in some detail. She was not a central focus of
 his paranoid delusional system; Eric was.

Q. In fact, she was not a focus of his delusional system at all, isn't
 that true?

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A. That was the perception that I was given in the interview. The central focus of the delusional system was Eric.

Reporter's Transcript on Appeal, ¶ 3105:2-3109:2 ("RT _____"). In addition, the People would have undoubtedly questioned whether Mickey was even under the influence of alcohol or drugs at the time of the murders and thus strengthened the premeditated aspect of the crimes.

The court concludes that although a persuasive argument can be made that counsel should have presented a diminished capacity defense, counsel was not ineffective because they made the decision not to do so.

c. Presentation of Self-Defense Theory that Was Neither Accurate nor Believable and Conflicted with Mitigation Case

As noted by the California Supreme Court, Mickey offered little evidence in his defense and did not testify. He argued that the People failed to meet their burden of proof and pointed out why certain witnesses should not be believed. He argued that the prosecution failed to prove any requisite criminal intent, that he acted in self-defense and that he had diminished capacity as a result of voluntary intoxication. His defense was not persuasive as there was overwhelming evidence that he killed Hanson and Blount, and the only evidence of self-defense came from Mickey's extrajudicial statements introduced by the People.

Petitioner argues that his trial counsel were ineffective because they tried to argue self-defense and failed to put on a diminished capacity case based upon Mickey's underlying mental diseases (paranoid schizophrenia and toxic psychosis) and that the self-defense claim was inconsistent with the mitigation case. However, it does not appear that defense counsels' guilt phase argument increased the probability of Mickey's conviction as charged. Additionally, as stated above, the decision not to put on a diminished capacity defense beyond that which was presented, was not outside the wide range of reasonable professional assistance.

3. Defense Counsels' Guilt Phase Performance Was Not Ineffective

For the reasons stated above, the court concludes that defense counsels' decision to not present a diminished capacity defense of the type now urged by petitioner did not result in a violation of

1 Mickey's constitutional right to effective representation primarily because the failure did not result in
 2 prejudice. Claim 1 is, therefore, denied as to petitioner's claim that he was denied effective assistance
 3 of counsel in the guilt phase.

4 V. PENALTY PHASE ISSUES

5 A. Alleged Ineffectiveness of Counsel (Claim 1)

6 1. Counsel Has a Duty to Conduct a Thorough Investigation of Defendant's Background 7 and Present and Explain All Mitigating Evidence

8 In *Correll v. Ryan*, the Ninth Circuit set forth the duty of defense counsel with respect to
 9 the penalty phase of a capital case. Although the trial in *Correl* took place in 1984, the same duty
 10 existed when Mickey was tried in 1983:

11 Counsel has a duty at penalty phase to conduct a thorough investigation of the
 12 defendant's background. To perform effectively in the penalty phase of a capital case,
 13 counsel must conduct sufficient investigation and engage in sufficient preparation to
 be able to present and explain the significance of all the available evidence. When it
 comes to the penalty phase of a capital trial, it is imperative that all relevant mitigating
 information be unearthed for consideration.

14 ---- F.3d ----, 2006 WL 2796489 (9th Cir. 2006) (internal citations and quotations omitted).

15 2. Trial Counsels' Alleged Failure to Investigate and Present Substantial 16 Mitigating Evidence

17 Petitioner is highly critical of trial counsel's penalty phase presentation claiming that
 18 substantial mitigating evidence was not presented because trial counsel failed to timely
 19 investigate Mickey's entire life history and failed to uncover available mitigating evidence.

20 "[A] penalty phase ineffective assistance claim depends on the magnitude of the discrepancy
 21 between what counsel did investigate and present and what counsel could have investigated and
 22 presented." *Hovey v. Ayers*, 458 F.3d 892, 929-830 (9th Cir. 2006) (quoting *Stankewitz v.*
 23 *Woodford*, 365 F.3d 706, 716 (9th Cir. 2004)).

24 a. What Trial Counsel Presented in the Penalty Phase

25 Petitioner's trial counsel called thirty lay witnesses and two experts, Dr. Burstein and
 26 Dr. Smith, in the penalty phase. The essence of the defense mitigation case was that Mickey

1 was a decent, gentle and caring child up until approximately the time his mother died. His good
2 character was attested to by family, teachers and friends. After his mother died he engaged in
3 heavy drug use, and he began associating with those involved in the drug culture including
4 Rochelle Schriber, whom he married in 1973. Schriber introduced Mickey to Hanson. Dr.
5 Burstein explained that Mickey had a borderline personality disorder which combined with his
6 multiple drug use caused him to become delusional. Mickey believed Hanson was robbing him
7 of his power and that he needed to contain Hanson's soul in a gourd so Hanson could not hurt
8 him. Dr. Smith explained Mickey acted in a state of toxic psychosis when he committed the
9 murders. The defense also called two correctional officers who attested to Mickey's good
10 behavior during pretrial incarceration. The implication was that Mickey was a different person
11 away from drugs.

12 Dr. Burstein explained in his testimony that "I was asked to conduct a psychological
13 evaluation of Doug Mickey and to provide feedback to counsel on whether or not he had any
14 psychological problems; if so, what were the nature of those problems." RT 3088:10-13. Dr.
15 Burstein interviewed Mickey on three separate occasions, obtained a life history, administered
16 four mental health tests and had information that was passed on to him from Dr. Smith. In the
17 course of Dr. Burstein's explanation of the tests administered to Mickey, counsel asked and Dr.
18 Burstein replied:

19 Q. What does that profile [overall profile from MMPI] show you as
20 far as Doug Mickey's personality or problems are concerned?

21 A. It strongly suggests to me that he's a man with very severe
22 psychological problems in many realms, including the ones that
23 are indicated there. And the two that were of most concern to me
24 were the Sc scale and the Pa scale. The Sc scale is the
25 schizophrenia scale, the Pa scale is a paranoia scale.
26 He's considerably elevated beyond what any person free of
27 psychological problems would score on both of those scales and
28 I've picked out some items which he answered

[Dr. Burstein read a number of Mickey's answers to questions
from the schizophrenia and paranoia scales].

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Q. Did you tell us what [the schizophrenia scale] measures?

A. Well, I gave some sample responses, and if I didn't what I meant to imply is that it is a measure of distorted perceptions, false beliefs, delusions, hallucinations, various things that a person is fearful of that tend to be irrational social alienation, and so so (*sic*). All of those things that typifies (*sic*) schizophrenic individuals.

* * *

Q. [W]ould you tell us what [the paranoia scale] shows as far as –

A. The paranoia scale is a scale that measures a phenomenon that I think jurors generally are familiar with is the unwarranted suspiciousness people have, groundless beliefs that people are following them with the intent to do them harm, have wired their homes, and so on

RT 3105:2-3109:2.

Dr. Smith explained that Mickey had major psychological problems that predated his use of drugs. Dr. Smith said the interaction between Mickey's underlying psychological problems and his history of abuse of drugs, combined with his reading of Hindu religious material and later the Carlos Castenada series, popular in the drug culture, established the foundation for an elaborate and long standing psychotic delusional system. He started believing that Hanson was robbing him of the power he needed to become a spiritual warrior. Dr. Smith concluded that at the time of the murders, Mickey "was a psychiatrically disturbed polydrug abuser, abusing at the time of the crime alcohol and marijuana, and that he had a polydrug induced paranoid schizophrenic like reaction." RT 2927:9-12. "[H]is mental capacity was severely impaired as a consequence" RT 2927:19-20.

No evidence was offered suggesting that Mickey grew up in a dysfunctional family or that any of his family members were abusive, were alcoholics or suffered from mental illnesses.

Defense counsel summarized the mitigation case for Mickey in their penalty closing argument.

1 These tragic killings were an isolated incident They weren't part of
2 a pattern of violent behavior.

3 The evidence in the penalty phase is all to the contrary. Before he
4 became involved in the use of alcohol and drugs, he was described by more than
5 a dozen witnesses . . . that said he was a good boy, a hard worker, he was
6 reliable and helpful, courteous, friendly, considerate, trustworthy, artistic,
7 sensitive, gentle, and that he avoided violence.

8 What happened to that boy? What changed his personality and led to
9 these tragic killings?

10 The evidence was presented by the defense, and it showed that he had
11 many tragic experiences in his family. His half brother, Randall, was killed
12 when he was very young. His mother, Dorothy, was killed when he was about
13 18. He suspected that she committed suicide, and he felt responsible even
14 though he was not there. His brother Ron committed suicide some time later,
15 after the mother died.

16 * * *

17 Now, the evidence clearly showed that, after his mother died, he started
18 to drink alcohol. One of the witnesses testified that he showed shock and
19 blamed himself for her death.

20 Now, shortly after that, he started using marijuana, and from time to time
21 he let his hair and beard grow. Then he'd shave it off and let it grow again, and
22 he began to take up with the drug culture, counter-culture that's so familiar to
23 all of us.

24 Now, his wife Rochelle introduced him to Eric Hanson, and he regressed
25 further from marijuana and knew such dangerous drugs as, LSD, commonly
26 known as acid; PCP, angel dust; psilocybin, which comes out of mushrooms;
27 and peyote, which, I think, also comes out of mushrooms. He continued his use
28 of hashish and marijuana.

 The evidence showed that he became more and more involved with Eric;
that they went---tried to go into business together to grow a million dollars
worth of marijuana. They were engaged in a woodcutting enterprise. They had
discussions of religion and far-eastern beliefs, but Doug used these drugs not for
recreation, but for mind expansion, to seek the truth, sort of semi-religious, I
guess. His personality was fairly altered by those drugs, and his release became
delusional.

 Now, our experts have testified that he became delusional because of the
toxic effects that these drugs had on his body and brain.

 Why doesn't everyone who takes that type of drug develop toxic
psychosis?

 Dr. Burstein indicated that the toxic psychosis was added to a
personality---I think he called it borderline personality disorder, which is a
condition independent of toxic psychosis; that is to say, if he hadn't already had
the borderline personality disorder, the toxic psychosis would not have had such
a marked effect on his conduct or on his thinking. Now, he developed delusions
of false beliefs which contributed to the case of this present story.

 * * *

 . . . [Dr. Burstein] described some of the beliefs that Doug had developed
as a result of his toxic psychosis and borderline personality disorder.

 Doug thought that Eric Hanson had stolen his marijuana crop the year
before; that he was responsible for his clothes being stolen after making a
telephone call to either Japan or Hawaii. He thought Eric was responsible for

1 the failure of his restaurant job in Alaska and had the deluded belief that Eric
2 was commanding him to come to California, to leave his family and come to
California.

3 [Dr. Bernstein] said Doug thought he could control pain, thought he
4 could stop bleeding with his own mind. He thought he could run sideways on
5 a hill, in defiance of gravity, and he thought Eric as somehow draining his
energies at long range, using him for some nefarious purpose, and that
somewhere along this line, Doug got to thinking he had to kill Eric Hanson to
protect himself and his family.

6 That's sort of delusional psychic self-defense, if you please. That made
it easier for him to lie to Curtis Landry and give a self-serving statement of self-
7 defense, which you will remember we did not urge.

8 He said that Doug told him he believed he was a spiritual apprentice and
that Eric betrayed him, and he couldn't give any evidence of what that betrayal
consisted of. He began to collect shells and obtained the necklace of power.

9 * * *

10 He said he performed rituals. He had a gourd with eyes on it with which
he was going to contain Eric's soul so he couldn't harm Doug.

11 Now, that indicates that his personality disorder, independent of toxic
psychosis, was serious and probably still is serious as far as his thinking was
concerned.

12 * * *

13 Dr. Burstein thought that robbery and financial gain were probably
secondary because of Doug's toxic psychosis and because of his borderline
personality disorder at the time.

14 RT 3925:7-3931:21. Based upon the evidence outlined in counsels' argument, the defense
15 requested that Mickey's life be spared.

16 **b. What Trial Counsel Could Have Investigated and Presented**

17 Petitioner asserts a multitude of complaints about his counsels' penalty phase
18 preparation. He contends that the investigation for the mitigation case was a last-minute,
19 inadequate one which was in large part delegated to non-lawyers. Petitioner maintains that
20 relevant, available mitigating evidence was not obtained and the experts worked with
21 incomplete information. Petitioner argues that trial counsel were therefore unable to explain
22 the significance of his background and make a compelling mitigation presentation.

23 Many of petitioner's complaints constitute second-guessing defense counsels'
24 performance in light of the fact that the verdict was a death sentence. "Judicial scrutiny of
25 counsel's performance must be highly deferential. It is all too tempting for a defendant to
26 second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for

1 a court, examining counsel's defense after it has proved unsuccessful, to conclude that a
 2 particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689. As aptly
 3 put in *Smith v. Mitchell*, the court's role on habeas review "is not to nitpick gratuitously
 4 counsel's performance. After all, the constitutional right at issue here is ultimately the right to
 5 a fair trial, not to perfect representation." 348 F.3d 177, 206 (6th Cir. 2003).

6 Two aspects of defense counsels' performance, however, "fell below an objective
 7 standard of reasonableness": (1) counsels' failure to marshal and present evidence that Mickey
 8 grew up in a dysfunctional family where he was abused and surrounded by individuals with
 9 alcohol and mental health problems and that Mickey himself was a psychiatrically disturbed
 10 individual who suffered delusions before he began abusing drugs; and (2) counsels' failure to
 11 effectively utilize the expertise of their mental health experts, Dr. Burstein and Dr. Smith, in
 12 both the preparation and presentation of petitioner's mitigation case and in rebutting the
 13 People's case.

14 **I. Failure to Marshal and Present Evidence That Mickey Grew up in a**
 15 **Dysfunctional Family and Was a Psychiatrically Disturbed Individual with**
 16 **Profound Thought Disorder Predating His Drug Abuse**

17 Mickey needed to present some mitigating explanation for his actions given the brutality
 18 and apparent motives for the murders. Counsel faced a difficult challenge because a
 19 presentation that Mickey was a long-time poly-drug abuser would likely result in little
 20 sympathy for Mickey. Therefore, to effectively represent Mickey in the penalty phase,
 21 Mickey's life story had to be told in a way that would gain some sympathy with the jury and
 22 explain why he committed the murders. To some extent, Mickey's trial counsel argued what
 23 could have been a significant part of an effective mitigation presentation, specifically that
 Mickey was psychiatrically disturbed before he began his long standing drug abuse.

24 Why doesn't everyone who takes that type of drug develop toxic
 25 psychosis?

26 Dr. Burstein indicated that the toxic psychosis was added to a
 personality---I think he called it borderline personality disorder, which is a
 condition independent of toxic psychosis; that is to say, if he hadn't already had

1 the borderline personality disorder, the toxic psychosis would not have had such
2 a marked effect on his conduct or on his thinking.

3 RT 3926:19-3927:2.

4 The problem, however, with the argument that counsel made is that the only evidence
5 presented that Mickey was psychiatrically disturbed before the onset of his drug abuse came
6 from the doctors who had only Mickey as their source of evidence. On cross-examination, Dr.
7 Burstein testified:

8 Q. Doctor, have you been able to ever find in sources outside
9 Mickey, any witnesses, such as Mr. Mickey's former wives,
10 friends, or even in the interview with Detective Landry,
11 evidence of this alleged thought or delusion that Eric Hanson
12 was in some way controlling him?

13 A. I had a problem with that. This is one of the few cases in which
14 I've not been able to interview significant others. It's typical for
15 me to interview his wives. In this case, I interviewed his wife, and
16 was told that the three wives, or at least the one, Allison, was in Japan. So it was my
17 impression that there was no one available locally for me to interview that could have been
18 useful in confirming or disconfirming what Doug had told me.

19 * * *

20 Q. Did you think that that was something that would be important
21 in determining whether or not you should rely on Mr. Mickey's
22 say so suffering delusional beliefs, to try to find some evidence
23 for it in external sources?

24 A. Oh yes. Absolutely.

25 RT 3191:14-3192:1.

26 Dr. Smith was asked on cross-examination: "What information did you have, if any,
27 about the existence of any delusional beliefs or paranoid delusional system of beliefs by Mr.
28 Mickey before you interviewed him? A[nsWER] None." RT 2959:11-14. This cross-
examination was particularly devastating since the prosecutor was able to show many examples
of information obtained from Mickey that were inconsistent with other evidence in the case.
For example, Dr. Burstein assumed from the information he had that Mickey had consumed
large quantities of alcohol and marijuana immediately before the time of the murders. The

1 prosecution asked Dr. Burstein many questions about Mickey's acts on the night of the murder
2 that suggested Mickey was not highly intoxicated. Dr. Burstein had to admit he was not aware
3 of those acts and that if Mickey had not consumed large amounts of marijuana and alcohol "[i]t
4 would certainly preclude the diagnosis of toxic psychosis." RT 3180:26-28.

5 However, if counsel had conducted a thorough investigation, they would have
6 uncovered substantial, independent evidence that Mickey was a psychiatrically disturbed
7 individual before he began to abuse drugs and that he had suffered delusions years before the
8 murders. They would also have learned that Mickey grew up in an abusive, dysfunctional
9 family with members who had significant mental health issues. If Dr. Burstein and Dr. Smith
10 had been provided that information, they would have been able to cite evidence that came other
11 than from Mickey in support of their opinions. In fact, Dr. Burstein who has reviewed available
12 evidence that he was not provided before he testified now believes that Mickey probably suffers
13 from and did suffer from paranoid schizophrenia at the time of the murders.

14 Both Dr. Burstein and Dr. Smith were frustrated by counsels' failure to provide
15 necessary information to them. Counsel has an affirmative duty to provide mental health
16 experts with information needed to develop an accurate profile of the defendant's mental health.
17 *See Caro v. Calderon*, 280 F.3d 1247, 1255 (9th Cir. 2002). Dr. Burstein states in his
18 declaration that defense counsel, despite requests, failed to provide police reports and records
19 of key witness interviews such as the statement of Ed Rogers and the names and addresses of
20 Mickey's ex-wives. Counsel also failed to provide the results of an MMPI conducted in 1981.
21 Although Dr. Burstein does not identify anything specific in the police reports or statements
22 of Rogers that would have been helpful except that they would have shed light on Mickey's
23 behavior on the night of the crimes and over time, he would not have been so vulnerable on
24 cross-examination to questions that showed that he based his opinion on questionable facts
25 obtained from Mickey and lacked information he agreed would have been helpful. The
26 prosecution persuasively suggested that Dr. Burstein's and Dr. Smith's opinions were based

1 upon uncorroborated information obtained from Mickey himself and that Mickey was a drug
2 abuser whose testimony was not reliable or truthful.

3 Dr. Burstein declares that information available from Mickey's second wife, Rochelle
4 Schreiber [Packard], whom he was not advised was available for interview, would have been
5 very significant to him. Schreiber could have provided :

6 . . . insights and observations that not only corroborate some of Mr. Mickey's
7 self-reports, but also reveal his ongoing emotional struggles, functional and
8 emotional deterioration and, in some instances, evidence of disturbed thought
9 processes. In particular, Ms. Packard's knowledge of Mr. Mickey's bizarre
10 behavior and drug use, which she observed several years prior to the offense and
11 trial, would have been critically important to my evaluation and testimony. Her
12 knowledge and observations would have confirmed the nature and extent, as
13 well as the longevity, of Mickey's drug abuse, disturbed thought processes, and
14 bizarre behavior and buttressed my testimony at the penalty phase. Her
15 knowledge and observations were especially critical in demonstrating the
16 longevity of his impairments, thus providing essential information about the
17 course of his illness.

18 Burstein decl. ¶ 13.

19 Dr. Smith in his declaration in support of the current petition explains that he was given
20 very limited materials to review although he had asked for objective verification of Mickey's
21 drug use but was told there was none available. He has since learned that Navy discharge
22 records showed Mickey received a medical discharge from the Navy after admitting drug use.
23 He also asked counsel to obtain external, objective verification of Mickey's delusional thought
24 processes. He did not have such evidence at trial but has now learned that letters written by
25 Mickey between October 21, 1980 and January of 1981 were available and contained pictures
26 Mickey had drawn of gourds with differing facial expression to symbolize himself and capture
27 his moods. A photograph was also available that shows a home-made altar with candles,
28 figures of animals, shells and several necklaces arranged in a purposeful fashion. The
29 photograph corroborates Mickey's descriptions to Dr. Smith of the rituals Mickey engaged in
30 and his delusion that gourds could hold an individual's spirit.

31 The prosecution presented the testimony of Kate B. Yago, M.D., a psychiatrist, who

1 explained that she reviewed the packet of letters written by Mickey dating from October of
2 1980 through the end of January of 1981 (the ones Dr. Smith did not have when he testified)
3 and spoke with Mickey's then wife Allison and found no evidence of delusional thinking. In
4 fact, Dr. Yago testified that the evidence suggested Mickey seemed quite lucid. Dr. Smith at
5 the time he testified did not have the letters or know Dr. Yago's opinion and thus had no
6 opportunity to rebut Dr. Yago's testimony.

7 Trial counsel portrayed Mickey as essentially a good, hard-working boy who had a
8 healthy and close relationship with his mother and grew up in an essentially normal
9 environment. Available evidence would have shown otherwise. Trial counsels' last minute
10 preparation failed to uncover the evidence. Beth Bonora and Lois Heaney of the National Jury
11 Project were retained in January of 1983 to assist with jury selection. When they first met
12 Mickey they felt he had serious mental and emotional problems. When Bonora and Heaney met
13 with counsel for the first time on March 18, 1983, they realized that little had been done to
14 prepare the penalty phase. Trial was scheduled to start in May 1993. They urged counsel to
15 prepare a social history of petitioner's life and background from which a penalty phase theme
16 could be developed and witnesses identified and chosen.

17 In April 1983, Mickey's trial counsel retained Jeanette Gurevich, a social worker intern,
18 to prepare a social history. Counsel told Gurevich to get the social history from Mickey and
19 give the names of any potential witnesses to Milton Moeschler, the defense investigator, rather
20 than interview them herself.

21 Defense counsel made several largely unsuccessful motions to continue the trial
22 acknowledging that they were not prepared for the penalty phase. Just prior to the start of jury
23 selection, trial counsel gave Milton Moeschler, their investigator, a list of potential witnesses
24 for the penalty phase and told him to locate and interview them. On May 15, 1983, trial counsel
25 gave Moeschler the State's list of thirty-four trial witnesses and asked him to interview them.
26 On June 6, 1983, Gurevich gave Moeschler a list of thirty-nine potential penalty phase

1 witnesses. Moeschler was unable to contact all of the witnesses, in part because he was injured
2 in an automobile accident. Petitioner contends that a number of witnesses were not contacted
3 who could have provided relevant information for the penalty phase, including Sheila Roberts,
4 the former wife of Ronnie Mickey, petitioner's brother who committed suicide, and Nancy Tall,
5 petitioner's first wife. Petitioner asserts that counsel did not personally interview some
6 witnesses, and, in particular, failed to obtain an abundance of available important social history
7 information from petitioner's second wife, Rochelle Packard Schreiber.

8 Petitioner asserts that his trial counsel did not obtain a detailed social history which
9 could have been relied upon by Dr. Smith and Dr. Burstein to support their opinions. Such a
10 life history was prepared by David Lisak, Ph.D., who was retained by petitioner's counsel in
11 1995. Dr. Lisak is a forensic psychologist who teaches at the University of Massachusetts and
12 also has a clinical practice. He focuses on the relationship between child abuse and the impact
13 of abuse on males later in life. He has been retained by the defense in thirty-six capital cases.
14 Dr. Lisak was asked "to identify and assess the social, development, psychiatric, familial, and
15 life experience factors that shaped Doug Mickey's personality and emotional development, and
16 that influenced his behaviors and mental states at critical stages in his adult life." Lisak
17 declaration dated June 3, 1995, ¶ 6. Dr. Lisak compiled a social history of Douglas Mickey.
18 Based on interviews with Mickey, reviews of interviews with many people acquainted with
19 Mickey and a review of numerous documents relating to Mickey's life, Dr. Lisak concluded
20 that the Mickey family was profoundly dysfunctional. Both parents were alcoholic. There was
21 a history of neglect. Mickey and his mother suffered from depression. His father was distant,
22 violent and unpredictably abusive. Mickey's mother died unexpectedly as a result of an
23 accident or suicide when Mickey was 17 years old. Acquaintances including a high school
24 teacher report that Mickey was devastated. Mickey's father remarried within less than five
25 months and when his new wife and her daughter moved in, Mickey's bedroom was given to the
26 daughter. Within fifteen months of Mickey's mother's death, Mickey's grandfather died and

1 then less than two years later, his brother Ronnie committed suicide.

2 Mickey had an abnormal, sexualized relationship with his mother that crossed over at
3 one point to an incestuous act. Dr. Lisak noted Mickey's history of deviant sexual behavior,
4 including exposing himself and molesting girls who were left in his charge. He believes that
5 this behavior is consistent with Mickey's own history of abuse and corroborates Mickey's
6 incestuous relationship with his mother.

7 Dr. Lisak did not make any diagnosis of Mickey's mental health at the time of the
8 murders of Eric Hanson and Cathy Blount. Nevertheless, he believes that Mickey viewed
9 Hanson in the same way that petitioner viewed his mother—the relationship was based on a
10 similar power struggle. He believes that Mickey's incestuous relationship with his mother
11 contaminated all of his other relationships—it was the origin of his relationship with Hanson.
12 Because his mother died when he was only 17, Mickey was never able to differentiate himself
13 from her.

14 Whether defense counsel should have presented Dr. Lisak's theory that Mickey viewed
15 Hanson in the same way as he viewed his mother and that Mickey's incestuous relationship with
16 his mother contaminated all of his other relationships seems problematic. Counsel had chosen
17 to keep from the jury evidence of the sexual misconduct of Mickey and that decision was a
18 reasonable tactical one even though Dr. Lisak felt it was an illustration of how Mickey's
19 mother's conduct had affected him. Mickey's sexual conduct could have alienated a jury even
20 if it was caused in part by his mother's incestuous behavior. However, what Dr. Lisak did
21 provide was a wealth of information showing that through no fault of his own, Mickey grew
22 up in a dysfunctional, abusive household. This information would have enabled Dr. Smith to
23 explain that:

24 Studies confirm a strong correlation between a genetic history of addictive
25 disorders and predisposition to developing addictions. In fact, if one or more
26 parents is an alcoholic, an individual's chances of developing an addictive
disorder increases four times Dr. Lisak's social history . . . offers insight
into the severity of the addictions within Mr. Mickey's family and the manner

1 in which the family dynamics were distorted by alcohol and drug abuse. The
2 social history also documents the dysfunctional and unstable environment that
3 contributed to or caused Mr. Mickey's own mental impairments and alcohol and
4 drug use. Mr. Mickey's genetic loading, combined with his family environment
5 and underlying mental illness, caused him to be predisposed to alcohol and drug
6 dependency.

7 Smith decl. ¶ 20.

8 In summary, what defense counsel presented was a mitigation case that essentially
9 portrayed Mickey as one who had a relatively normal childhood, was a good young man until
10 he started to abuse alcohol and drugs following the death of his mother to whom he was very
11 close. Although the defense mental health experts opined that Mickey had an underlying
12 psychiatric condition that pre-dated his drug abuse, there was little, if any, evidence offered to
13 support that opinion except for information related by Mickey himself to Dr. Burstein and Dr.
14 Smith. Counsel's argument that Mickey had an underlying psychiatric disease and that the
15 murders were committed by Mickey in a state of toxic psychosis was effectively challenged by
16 the cross-examination of Dr. Burstein and Dr. Smith showing that they did not have facts to
17 corroborate their opinions other than some coming from Mickey himself, were missing
18 important types of information, and had some facts that appeared to be in error such as the state
19 of Mickey's sobriety at the time of the murders.

20 What could have been presented was a portrayal of Mickey's childhood in a
21 dysfunctional family giving specific examples of dysfunctional behavior. The defense could
22 have presented a mitigation case that Mickey was a psychiatrically disturbed individual who
23 was exposed to abuse and surrounded by family members who had psychiatric problems
24 themselves. Counsel could have explained through witnesses why Mickey got to a point where
25 he was in an unreal, delusional state and committed the murders, as Dr. Smith declared, "during
26 a major break with reality" when he was subject to delusions, paranoia with ideas of reference,
27 distorted thinking and a loss of contact with reality." Smith decl. ¶ 13. The magnitude of the
28 discrepancy between what defense counsel did investigate and present and what counsel could

1 have investigated and presented was substantial. Counsel's performance fell below the standard
2 of care defined in *Hovey, supra*.

3 **ii. Failure to Effectively Utilize the Expertise of Their Mental Health**
4 **Experts**

5 Although Dr. Smith and Dr. Burstein were aware of each other's involvement in the
6 case, counsel made no effort to have them work as a team. As explained by Dr. Smith:

7 My standard approach was then, and still is, much different than the way
8 work was done in the Mickey case. My standard is a team approach where I and
9 the other experts, such as psychologists and psychiatrists, work together. We
10 consult with each other and discuss our separate findings so that each member
11 of the team learns from other members and knows what each other is doing. I
12 have found, during my extensive career, that this type of collaborative approach
is the best way to present expert testimony. The interchange of ideas in this
kind of collaborative effort provides a greater arena of knowledge which
facilitates the presentation of each expert's opinion in his or her area of
expertise. This type of approach is especially important in a case such as Mr.
Mickey's where the individual suffers both substance abuse and psychiatric
disorders.

13 Smith decl. ¶ 9. Dr. Burstein and Dr. Smith never even spoke to one another during their
14 involvement on Mickey's case. Since Dr. Smith does not testify outside his area of expertise
15 and defers to another psychiatric expert with respect to the diagnosis of psychological problems
16 apart from those resulting from drug usage, a team effort was particularly important. The
17 presentation of Mickey's mitigation case could have been substantially improved by providing
18 all available materials to the two doctors and coordinating a team effort between them because
19 a critical factor in Mickey's case was the dual nature of his mental health issues.

20 The defense case was particularly devastated by the un rebutted testimony of the People's
21 psychiatric expert, Dr. Yago. The prosecution had provided Dr. Yago with statements and
22 testimony that were available to defense counsel but never seen by Dr. Burstein or Dr. Smith.
23 The prosecution had Dr. Yago sit through the testimony of Dr. Burstein and Dr. Smith. In
24 contrast, defense counsel not only failed to have either Dr. Burstein or Dr. Smith listen to Dr.
25 Yago's testimony, they never even consulted with either of them about their views on her
26 opinions. Therefore, Dr. Yago's testimony was not effectively challenged. Dr. Burstein has

1 now reviewed her testimony and strongly disagrees with much of it. Mickey's defense counsel
2 clearly failed to meet the standard of care by failing to utilize their own experts to rebut and
3 challenge the prosecution case.

4 Dr. Yago testified that she had reviewed Mickey's letters written between October 1980
5 through June of 1981 and found no evidence of delusional thinking—Dr. Smith has now seen
6 the letters and disagrees ("Mr. Mickey's correspondence . . . corroborates his delusions,
7 specifically his ideas regarding the use of gourds to hold an individual's spirit. Throughout his
8 letters, Mr. Mickey drew pictures of gourds with differing facial expressions to symbolize
9 himself and capture his mood or feelings." (Smith decl. ¶ 19)).

10 Dr. Yago had spoken with Allison, Mickey's third wife, and she denied that Mickey was
11 heavily involved with drugs between January 1979 and October 1980. Dr. Burstein was told
12 Allison was not available. Further, Dr. Burstein has now seen Dr. Lisak's report and the
13 declarations of other significant people in Mickey's life which reveal, with specific examples,
14 Mickey's psychological deterioration from his early adult years through the time of his arrest.
15 The report and declarations show Mickey's troubled and abusive childhood, his longstanding
16 dependence on alcohol, marijuana, LSD and other mind-altering drugs, and his increasingly
17 bizarre and ritualistic behaviors. This information would have corroborated the testimony of
18 Dr. Burstein and Dr. Smith and contradicted Dr. Yago's opinions and the bases therefore. It
19 also would have raised doubt about the accuracy of the report from Allison that Mickey's drug
20 usage was somewhat limited.

21 Dr. Yago claimed that Dr. Smith's description of Mickey as having a "schizophrenic-like
22 reaction" was a description made up by Dr. Smith but not one that is generally accepted or used
23 by psychiatrists to describe a recognized syndrome. She further stated that she disagreed with
24 Dr. Smith's appraisal that Mickey was suffering from a poly-drug abuse induced paranoid
25 schizophrenic-like reaction at the time of the murders. "[I]t is extremely rare, if not totally
26 unheard of, that no one would hear about his symptoms, or no one would hear from him

1 directly, meaning family, friends, acquaintances." RT 3333:10-13. "I can find no evidence . .
2 . to indicate to me that he ever had that delusional belief system in the years he has stated that
3 he did have it." RT 3333:18-24. "It is also extremely rare that someone who was that greatly
4 impaired would not end up in a hospital at some point." RT 3334:12-14.

5 Dr. Burstein could have rebutted Dr. Yago's assertion that Mickey's alleged failure to
6 display evidence of delusional thinking before the murders casts doubt on Dr. Smith's
7 assessment of Mickey's condition. However, he was not asked to do so. If he had been asked
8 and properly prepared, he could have explained that Mickey spent most of his adult life
9 somewhat removed from society living in rural areas within various subcultures surrounded by
10 others with their own drug abuse and other problems. "Mr. Mickey's lifestyle made it far more
11 likely that his condition would go undetected or be dismissed as simply odd." Burstein decl.

12 ¶ 14. Dr. Burstein also would have been able to describe Dr. Yago's view that a psychotic
13 individual will reveal his delusions as simplistic, inaccurate and not substantiated. Finally, Dr.
14 Burstein could have pointed out, as he learned when contacted concerning Mickey's habeas
15 claim, that Mickey did reveal both delusional thinking and bizarre behavior to Rochelle
16 Packard.

17 Dr. Yago also pointed out an inconsistency between Dr. Smith and Dr. Burstein as to
18 whether Mickey had to have been acutely intoxicated at the time of the murders to be properly
19 diagnosed as suffering with toxic psychosis at the time of the murders. This conflict could have
20 been avoided, or at least explained, if Dr. Smith and Dr. Burstein had worked as a team.
21 Although Dr. Yago agreed with Dr. Smith that acute intoxication was not necessary for the
22 diagnosis, she disagreed that Mickey was so suffering at the time of the crimes. She explained
23 that the "meticulous way in which he went about this crime, the preplanning of the crime, the
24 elaborate lengths he took to protect himself once he committed the crime" all suggest he was
25 not suffering from toxic psychosis. RT 3336:26-3337:3.

26 Dr. Yago also explained that she does not believe that Mickey had a borderline

1 personality disorder as originally suggested by Dr. Burstein but rather an atypical personality
2 disorder. Regardless of the correct personality disorder, Dr. Yago testified that such disorders
3 do not mean that one's ability to judge right and wrong is impaired or that the person is
4 suffering from severe emotional distress. It rather means that they are likely to have
5 "difficulties with their personality function which impairs them . . . usually at work or at home
6" RT 3349:10-14.

7 In light of information obtained in connection with the current habeas proceedings, Dr.
8 Burstein believes that Mickey probably suffered from paranoid schizophrenia at the time of his
9 offenses.

10 The question is whether I think it's still toxic psychosis or more
11 clearly paranoid schizophrenia.

12 I think it's much more likely to be schizophrenia, and I think he
did have a borderline personality then, and still has one now.

13 Q. So what is---what would your current diagnosis be?

14 A. Well, . . . to say what my diagnosis would be of a man I haven't
15 seen in 21 years, so this would be a provisional diagnosis.

16 But I've been very persuaded . . . that it's quite probable that I
would more likely find it paranoid schizophrenia

17 RT 765:5-21. Although Dr. Burstein's diagnosis of paranoid schizophrenia is only provisional
18 and based in part on Dr. Stonefeld's diagnosis which was not available to Dr. Burstein at the
19 time of Mickey's trial, the bottom line is that the defense mitigation evidence presented
20 portrayed Mickey as one who probably induced his own psychotic symptoms, when there was
21 significant available evidence which had not been gathered to support a conclusion that Mickey
22 was a delusional individual burdened by a mental sickness. A jury is certainly more likely to
23 be sympathetic with one who has an illness for which he is not responsible than one who
24 induces his own psychotic symptoms by ingestion of drugs. Defense counsel's failure to
25 provide their experts with all reasonably available background material, failure to work with
26 them as a team, and failure to have them listen to and rebut the prosecution mental health expert

1 fell below acceptable standards.

2 **c. Prejudice to Petitioner**

3 Although Mickey's defense counsel's representation fell below an objective standard of
 4 reasonableness, Mickey's constitutional rights were not violated unless such performance
 5 prejudiced him. There must be a probability sufficient to undermine confidence in the
 6 appropriateness of a death sentence. *See Strickland*, 466 U.S. at 693. The Ninth Circuit has
 7 observed that "[e]vidence regarding social background and mental health is significant, as there
 8 is a 'belief, long held by this society, that defendants who commit criminal acts that are
 9 attributable to a disadvantaged background or to emotional and mental problems, may be less
 10 culpable than defendants who have no such excuse.'" *Allen v. Woodford*, 395 F. 3d 979,1005
 11 (9th Cir. 2005) (quoting *Douglas v. Woodford*, 316 F. 1079, 1090 (quoting *Boyde*, 494 U.S. at
 12 382, *cert. denied*, 540 U.S. 810 (2003))). In *Allen*, the failure of trial counsel to prepare for the
 13 sentencing phase until a week before that phase began, and his resulting failure to thoroughly
 14 investigate and present Allen's mitigation case, was constitutionally deficient. However, while
 15 counsel erred in failing to investigate and present the potential mitigation testimony of many
 16 family members, friends, and associates of Allen's that Allen could be pleasant, the court found
 17 no prejudice. There was not a reasonable probability that had trial counsel presented the
 18 potential mitigation evidence, the jury would have weighed the evidence in favor of a life
 19 sentence for Allen whom it had just convicted of murdering three people and conspiring to
 20 murder four others while he was serving a life sentence for yet another murder. In contrast
 21 here, the potential mitigating evidence would have shown that Mickey's crimes could be
 22 attributable to a disadvantaged background and to emotional and mental problems.

23 Mickey's jury may not have been persuaded by the potential mitigating evidence that
 24 Mickey should have received a life sentence. The People offered significant evidence of
 25 premeditation and the potential mitigating evidence leaves little explanation for Blount's
 26 murder. Nevertheless, as pointed out by the Supreme Court in *Strickland*, "[t]he result of a

1 proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors
2 of counsel cannot be shown by a preponderance of the evidence to have determined the
3 outcome." 466 U.S. at 694.

4 Trial counsels' representation of Mickey in the penalty phase fell below an objective
5 standard of reasonableness and that representation prejudiced Mickey.

6 **3. Defense Counsels' Penalty Phase Representation Was Ineffective**

7 For the reasons stated above, the court concludes that defense counsels' penalty phase
8 representation was ineffective and prejudicial. Claim 1 is, therefore, granted as to petitioner's
9 claim that he was denied effective assistance of counsel in the penalty phase.

10 **VI. CERTIFICATE OF APPEALABILITY**

11 An appeal may not be taken to the court of appeals from the final order in a habeas
12 corpus proceeding in which the detention arises from a state court judgment. 28 U.S.C. § 2253.
13 A certificate of appealability may issue only if the applicant has made a substantial showing of
14 the denial of a constitutional right. *Id.* The court must indicate which specific issue or issues
15 satisfy the showing required. *Id.*

16 In this case, the court finds that Mickey has made a substantial showing of the denial
17 of a constitutional right on his ineffective assistance of counsel claims set forth in Claim 1 with
18 respect to both the guilt phase (failure to raise diminished mental capacity defense) and penalty
19 phase (failure to investigate and present substantial mitigating evidence). In order to obtain a
20 certificate of appealability, the petitioner must show only that reasonable jurists could debate
21 whether the petition should have been resolved differently or that the issues presented deserve
22 encouragement to proceed further. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Beardslee*
23 *v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004). That showing has been made with respect to
24 Claim 1. It has not been made with respect to Claim 9 or any of the claims for which summary
25 adjudication was granted by the Order Granting in Part and Denying in Part Respondent's
26 Motion for Summary Judgment filed May 6, 2002. This current order and the May 6, 2002

1 summary judgment order explain why petitioner's claims other than Claim 1 lack merit and thus
2 do not call for a certificate of appealability.

3 The court orders that this case be remanded to the Superior Court for the County of San
4 Mateo for a new trial on the penalty phase. The remand order, however, is stayed pending
5 appeal.

6 IT IS SO ORDERED.

7 DATED: 11/17/06

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RONALD M. WHYTE
United States District Judge

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United States District Court
For the Northern District of California

1 Copy of Order Mailed to and E-Filed on 11/17/06:

2 J. Frank McCabe
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27 ORDER GRANTING IN PART AND DENYING IN PART PETITION FOR WRIT OF HABEAS CORPUS, AND GRANTING IN
28 PART AND DENYING IN PART CERTIFICATE OF APPEALABILITY
C-93-0243 RMW 36