

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF  
CALIFORNIA**

**Glenn Cornwell, Jr. v. Warden, San Quentin State Prison**

Cornwell · No. 2:06-cv-0705 TLN CSK DP · Decided September 29, 2025

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**SUMMARY**

The United States District Court for the Eastern District of California considers petitioner Glenn Cornwell Jr.'s unopposed motion for an evidentiary hearing and request to expand the record in a capital habeas proceeding. The court finds the motion untimely but grants an extension nunc pro tunc under Federal Rule of Civil Procedure 6(b) based on excusable neglect. The court then addresses the standards governing an evidentiary hearing under AEDPA and determines that a hearing is justified regarding Claim 3, which alleges ineffective assistance of trial counsel during the penalty phase.

**OPINION**

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 FOR THE EASTERN DISTRICT OF  
CALIFORNIA 10 11 GLENN CORNWELL, Jr., No. 2:06-cv-0705 TLN CSK DP 12 Petitioner,  
DEATH PENALTY CASE 13 v. 14 WARDEN, SAN QUENTIN STATE ORDER PRISON, 15  
Respondent. 16 17 Petitioner is a state prisoner under sentence of death. Petitioner's unopposed  
motion for 18 evidentiary hearing is before the Court.

(ECF No. 153.) 19 I. BACKGROUND 20 On April 21, 1995, petitioner was convicted of murder  
and robbery and sentenced to 21 death; in addition, the court imposed a consecutive, determinate  
term of 11 years, comprised of 5 22 years for the personal use of a firearm, 5 years for the prior  
serious felony conviction, and 1 year 23 for the prior prison term. (ECF No. 52 at 40.)

The court imposed the sentence but stayed 24 execution on the robbery and felon-in-possession of  
a firearm counts. (Id.) 25 The district court found petitioner's first amended petition (ECF No. 52)  
was timely filed. 26 (ECF No. 85.) Ruling on the remaining procedural default issues was deferred  
pending ruling on 27 the 28 U.S.C. § 2254(d) issues. (Id.) Respondent filed an answer on March  
29, 2013.

(ECF No. 28 106.) Petitioner filed a reply on September 25, 2013. (ECF No. 114.) 1 On February  
15, 2018, the previously-assigned magistrate judge issued findings and 2 recommendations on the  
§ 2254(d) issues. (ECF No. 119.)

In the findings and recommendations, 3 the magistrate judge denied petitioner's non-specific  
requests for discovery and an evidentiary 4 hearing as follows: 5 Here and there in his arguments  
regarding the application of section 2254(d) generally, petitioner mentions that discovery and an 6

evidentiary hearing are necessary. Petitioner provides very few descriptions of what that fact-finding might be and almost no legal justification for it.

The few requests this court ferreted out include general requests to present evidence regarding trial counsel's ineffective assistance of counsel and the Sacramento County District Attorney's office use of impermissible racial criteria in the decision to bring the death penalty against petitioner. Petitioner's requests for discovery and an evidentiary hearing are denied because they are not specific, not legally justified, and/or not reasonable.

(Id. at 26.) The magistrate judge addressed all of petitioner's ineffective assistance of counsel subclaims together, and found that petitioner established a clear prima facie case of ineffective assistance of counsel during the penalty phase on the grounds asserted in Claim 3 and found no reason the California Supreme Court could have held otherwise.

(Id. at 55, 90-93 (reasonableness of counsel's conduct); 94-96 (prejudice).) The magistrate judge found the California Supreme Court was not unreasonable in denying petitioner's ineffective assistance of state appellate counsel (Claim 34). (Id. at 231.)

The magistrate judge did not consider petitioner's ineffective assistance of habeas counsel arguments (Claim 34) because petitioner acknowledged that this is not a stand-alone claim but was raised only to establish "cause" to overcome procedural bars under *Martinez v. Ryan*, 566 U.S. 11 (2012). (Id. at 231-32.) On March 19, 2019, the district court adopted the findings and recommendations in full.

(ECF No. 129.) The district court found that petitioner satisfied U.S.C. § 2254(d) for Claim 3, consideration of the allegation in Claim 34 that state habeas counsel was ineffective is deferred until the consideration of any procedural default issues, and petitioner failed to satisfy section 2254(d) for the remaining claims and subclaims in the amended petition and habeas relief on those claims and subclaims was denied.<sup>1</sup> (ECF No. 129.)

The dismissal of the remaining claims 1 Claim 3 relates to allegations of ineffective assistance of counsel at the penalty phase. See ECF No. 52 at 143-260 (sub-claims 3(a) through 3(h)). 1 included the dismissal of petitioner's claim in Claim 34 that he was denied effective assistance of 2 appellate counsel. (ECF No. 119 at 231.)

Thus, the ineffective assistance of counsel Claim 34 is 3 limited to the ineffective assistance of state habeas counsel, which is raised only to establish 4 "cause" to overcome procedural bars. (Id. at 232 (citing *Martinez*, 566 U.S. at 1).) 5 On September 3, 2019, the parties filed a joint statement addressing the following issues. 6 (ECF No. 131.)

As to the procedural bars, respondent indicated: 7 the procedural default challenges are limited to Claim 3(e) whether trial counsel unreasonably failed to rebut the prosecutor's argument 8 that

because Mr. Cornwell was not insane at the time of the 1983 and 1992 crimes, there was no mitigation and Claim 34, ineffective assistance of state habeas counsel.

10 (Id. at 2.) Respondent proposed that the procedural bars be addressed in post-discovery or 11 evidentiary hearing briefing when the parties brief the merits of the remaining claims. (Id.) 12 As to discovery, petitioner stated his intention to seek discovery as to all subclaims of 13 Claims 3 and Claim 34, and would be seeking a 90 day extension of time to file a motion for 14 discovery.

(Id. at 3.) Respondent had no objection to the extension, but may oppose the 15 discovery motion, and anticipated seeking an order to obtain trial counsel's defense file. (Id.) 16 As to the evidentiary hearing, petitioner stated he would seek an evidentiary hearing on 17 Claim 3 upon completion of the discovery process. (Id.)

As to scheduling, the parties stated that 18 "[a]fter the discovery motion is resolved, the parties will be able to propose a time frame for the 19 completion of discovery." (ECF No. 131 at 3.) Petitioner sought 45 days after the discovery 20 process was completed to file a motion for evidentiary hearing. (Id.) 21 On March 25, 2021, the previously-assigned magistrate judge ordered as follows.

(ECF 22 No. 133.) Procedural default challenges are limited to Claim 3(e), whether trial counsel 23 unreasonably failed to rebut the prosecutor's argument that because petitioner was not insane at 24 the time of the 1983 and 1992 crimes, there was no mitigation;<sup>2</sup> and Claim 34, ineffective 25 assistance of state habeas counsel, and procedural bars will be addressed in post-discovery or 26 27 <sup>2</sup> Respondent argued that the state court denied claim 3(e) (raised in the first state habeas petition 28 as claim 4(c)) as untimely.

(ECF No. 68 at 4.) 1 evidentiary hearing briefing when the parties brief the merits of the remaining claims. (Id. at 1-2, 2 3.) Petitioner was directed to file the discovery motion within 90 days, and respondent was 3 directed to file the motion to obtain trial counsel's defense file within 60 days. (Id. at 2, 3.) 4 "Upon completion of the discovery process involving all sub-claims of Claims 3, and Claim 34, 5 petitioner shall have 45 days in which to file a motion for evidentiary hearing." (Id. at 2-3.)

6 On February 9, 2022, the magistrate judge granted respondent's motion to produce trial 7 counsel's file (ECF No. 134) in part, as limited in the order, and subject to a protective order. 8 (ECF No. 141.) 9 On March 1, 2022, the magistrate judge granted petitioner's motion to discover 10 petitioner's prison and jail records and parole and probation files (ECF No. 136), but denied the 11 remaining requests.

(ECF No. 142 at 16-17.) On March 22, 2022, petitioner filed a memo 12 concerning petitioner's compliance with the February 9, 2022 order. (ECF No. 145.) Petitioner 13 noted he was arranging the necessary releases to obtain petitioner's prison, parole and probation 14 records. (Id. at 5.) 15

On April 2, 2024, this case was reassigned to the undersigned due to the retirement of the 16 previously-assigned magistrate judge.

(ECF No. 146.) 17 On October 16, 2024, the undersigned noted that two and a half years had passed since the 18 discovery motions were addressed by the Court in March 2022, and no motion for evidentiary 19 hearing had been filed. (ECF No. 148 at 2.) “The Court therefore presumes that petitioner no 20 longer seeks an evidentiary hearing.” (Id.)

The parties were directed to file a joint status report 21 setting forth a briefing schedule on the remaining procedural default issues and the merits of the 22 remaining claims. (Id.) 23 Following an extension of time, the parties filed a joint status report on November 20, 24 2024. (ECF No. 152.)

The parties proposed a briefing schedule, and petitioner noted his 25 intention to file a motion for evidentiary hearing and explain why the motion is not untimely. (Id. 26 at 1.) On December 12, 2024, petitioner filed a motion for evidentiary hearing and request to 27 expand the record. (ECF No. 153.)

On December 17, 2024, the Court issued an order setting a 28 briefing schedule. (ECF No. 154.) 1 Following an unopposed extension of time, respondent was granted an extension of time 2 to respond to petitioner’s motion for evidentiary hearing. (ECF No. 156.)

On January 23, 2025, 3 respondent filed a statement of non-opposition to petitioner’s motion for evidentiary hearing and 4 request to expand the record, but “does not concede the admissibility of petitioner’s evidence -- 5 the witnesses and exhibits listed in his motion -- in state and federal court and intends to litigate 6 any evidentiary issues at the hearing.” (ECF No. 157.)

7 On March 14, 2025, the parties’ subsequent motion to vacate the briefing schedule (ECF 8 No. 158) was granted. (ECF No. 160.) 9 II. TIMELINESS OF MOTION FOR EVIDENTIARY HEARING 10 Initially, the Court finds that the previous denial of petitioner’s general and vague 11 mentions of a need for discovery and an evidentiary hearing in arguments regarding the 12 application of section 2254(d) does not subsequently preclude petitioner from seeking discovery 13 or an evidentiary hearing by formal motion.

This finding is supported by the subsequent 14 discovery granted in this case. The Court turns now to petitioner’s arguments in the motion to 15 file a motion for evidentiary hearing. 16 First, petitioner argues that the motion for evidentiary hearing is not untimely, despite the 17 Court’s October 16, 2024 order, because no scheduling order had issued, and therefore the record 18 was not clear as to when discovery closed.

(ECF No. 153 at 3.) Petitioner claims the failure to 19 enter a scheduling order regarding discovery, once discovery is ordered, is error. (Id. (citing 20 Rubin v. Jenkusky, 661 F. App’x 606,

610-11 (10th Cir. 2015)).) That said, petitioner 21 acknowledges that “a judge’s failure to issue a timely scheduling order does not deprive the judge 22 of the power to take other actions, including merits dispositions.” (Id. (citing 1 Steven Gensler, 23 Federal Rules of Civil Procedure, Rules and Commentary, Rule 16).)

24 The Court disagrees with petitioner’s first argument. The March 25, 2021 order stated 25 that “[u]pon completion of the discovery process involving all sub-claims of Claims 3, and Claim 26 34, petitioner shall have 45 days in which to file a motion for evidentiary hearing.” (ECF No. 133 27 at 2-3.)

On February 9, 2022, and March 1, 2022, the parties’ motions for discovery were 28 addressed, and on March 22, 2022, petitioner filed a memo confirming production of counsel’s 1 files, and indicated petitioner’s prison, parole, and probation records would be obtained through 2 record requests. (ECF No. 143.) No motion to compel or further motion for discovery was filed 3 in 2022, 2023, or early 2024.

Indeed, even now, petitioner does not maintain that further 4 discovery is anticipated or requested. 5 While no formal scheduling order issued, the court did set a deadline for filing a motion 6 for evidentiary hearing. (ECF No. 133.)

The Court finds that the March 25, 2021 order implicitly 7 tied the filing of the motion for evidentiary hearing to the completion of discovery related to the 8 two pending discovery motions, meaning that once petitioner’s counsel received all the records 9 from the records requests served as stated in petitioner’s March 22, 2022 memo, and had a 10 reasonable time to review such records, the motion for evidentiary hearing should have been filed 11 45 days thereafter.

If counsel was unclear as to the timing of the evidentiary motion deadline, 12 counsel could have sought clarification, as he did on April 16, 2018. (ECF No. 123.) Even 13 liberally granting petitioner an additional 120 days after the filing of the March 22, 2022 memo, 14 to allow for serving, receiving and reviewing the records requested by petitioner, the motion for 15 evidentiary hearing should have been filed near the end of July 2022.

However, by October 2024, 16 no motion had been filed. Considering the passage of over two years, the Court cannot find that 17 the motion for evidentiary hearing was timely. 18 Second, in the alternative, petitioner argues that even if there had been an implicit 19 deadline, he is entitled to an extension of time under Rule 6(b) of the Federal Rules of Civil 20 Procedure.

(ECF No. 153 at 3.) Respondent did not oppose this extension. 21 In pertinent part, Rule 6 provides: 22 (1) In General. When an act may or must be done within a specified time, the court may, for good cause, extend the time: 23 24 (B) on motion made after the time has expired if the party failed to 25 act because of excusable neglect. 26 Fed. R. Civ. P. 6.

The district court has discretion to determine whether a party's failure to act 27 was excusable neglect. *Pincay v. Andrews*, 389 F.3d 853, 858 (9th Cir. 2004). Under *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993), in determining 1 whether a party's neglect was excusable, a court must examine "(1) the danger of prejudice to the 2 non-moving party, (2) the length of delay and its potential impact on judicial proceedings, (3) the 3 reason for the delay, including whether it was within the reasonable control of the movant, and 4 (4) whether the moving party's conduct was in good faith." *Mendez v. Knowles*, 556 F.3d 757, 5 765 (9th Cir.

2009) (applying factors from *Pioneer Inv. Servs. Co.*); see also *Anh Van Thai v. 6 Cnty. of L.A.*, 2021 WL 1610057, at \*2 (S.D. Cal. Apr. 26, 2021) (citing *Lemoge v. United 7 States*, 587 F.3d 1188, 1192 (9th Cir. 2009)) (quoting *Pioneer Inv. Servs. Co.*, 507 U.S. at 388, 8 394) ("Excusable neglect encompass[es] situations in which the failure to comply with a filing 9 deadline is attributable to negligence and includes 'omissions caused by carelessness[.]'").

A 10 district court abuses its discretion by failing to engage in this four-factor test or at least the 11 equitable analysis thereunder. *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1261 (9th Cir. 12 2010). 13 Upon considering the factors provided in *Pioneer Inv. Servs. Co.*, the Court finds 14 excusable neglect, exercises its discretion, and grants petitioner an extension of time, nunc pro 15 tunc, to file the motion for evidentiary hearing.

The Court finds that as to the first and second 16 factors, respondent will not be prejudiced by the belated filing of the motion for evidentiary 17 hearing as evidenced by respondent's non-opposition to the motion.

As noted by petitioner, the 18 case was largely inactive during the period of delay, respondent did not indicate that discovery 19 had been completed, and issues of procedural default have not yet been addressed, and the 20 evidentiary hearing could clarify issues of procedural default.

As to the third and fourth factors, 21 there is no indication that petitioner's counsel acted in bad faith. While the filing of the motion 22 was within petitioner's counsel's control and the Court set a deadline for filing the evidentiary 23 hearing motion, no formal scheduling order setting a firm deadline for the completion of 24 discovery issued under Rule 16 of the Federal Rules of Civil Procedure and respondent filed 25 nothing after petitioner's March 22, 2022 memo to signal to petitioner or the court that the 26 discovery produced was satisfactory, or that the discovery process was completed.

Further, 27 providing petitioner relief under Rule 6(b) may assist the Court in ruling on the merits of Claim 3. 28 See *Ahanchian*, 624 F.3d at 1261. Rule 6(b)(1), "like all the Federal Rules of Civil Procedure, 1 [is] to be liberally construed to effectuate the general purpose of seeing that cases are tried on the 2 merits." *Id.* (citation omitted). 3 On balance, the Court finds that the equities weigh

in favor of finding good cause to grant 4 petitioner relief under Rule 6(b) and grants petitioner an extension of time to file the motion for 5 evidentiary hearing, nunc pro tunc.

The Court now turns to petitioner's unopposed motion for 6 evidentiary hearing. 7 III. MOTION FOR EVIDENTIARY HEARING 8 Petitioner seeks an evidentiary hearing on Claims 3 and 34. Respondent does not oppose 9 the motion. 10 A. Legal Standards 11 The decision to grant an evidentiary hearing is generally a matter left to the sound 12 discretion of the district courts.

28 U.S.C. § 2254; Habeas Rule 8(a); *Schriro v. Landrigan*, 550 13 U.S. 465, 473 (2007). To obtain an evidentiary hearing in federal court under the Antiterrorism 14 and Effective Death Penalty Act of 1996 ("AEDPA"), a petitioner must allege a colorable claim 15 by alleging disputed facts which, if proved, would entitle him to relief. *Landrigan*, 550 U.S. at 16 474.

17 Whether a prisoner is entitled to relief is limited by 28 U.S.C. § 2254(d), which provides 18 that a writ of habeas corpus: 19 shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of 20 the claim— 21 (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as 22 determined by the Supreme Court of the United States; or 23 (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the 24 State court proceeding.

25 28 U.S.C. § 2254(d). 26 The AEDPA further limits when district courts may grant an evidentiary hearing. Section 27 2254(e)(2) provides: 28 /// 1 If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary 2 hearing on the claim unless the applicant shows that-- 3 (A) the claim relies on-- 4 (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously 5 unavailable; or 6 (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and 7 (B) the facts underlying the claim would be sufficient to establish by 8 clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the 9 underlying offense.

10 28 U.S.C. § 2254(e)(2). "[Section] 2254(e)(2) applies only when a prisoner 'has failed to develop 11 the factual basis of a claim.'" *Shinn v. Ramirez*, 596 U.S. 366, 382 (2022); *Williams v. Taylor*, 12 529 U.S. 420, 433 (2000). 13 Thus, under AEDPA, the district court must first determine whether petitioner failed to 14 develop the factual basis of the claims in state court.

*Insyxiengmay v. Morgan*, 403 F.3d 657, 15 670 (9th Cir. 2005). "[T]he prisoner must be 'at fault' for the undeveloped record in state court," 16 meaning the prisoner "'bears responsibility for the failure' to develop the record." *Shinn*, 596 17 U.S. at 381 (quoting *Williams*, 529 U.S. at 432). A petitioner will only be charged with a "failure 18 to develop" the facts if "there is lack of

diligence, or some greater fault, attributable to the 19 prisoner or the prisoner's counsel." Williams, 529 U.S. at 432.

The petitioner must have "made a 20 reasonable attempt, in light of the information available at the time, to investigate and pursue 21 claims in state court." Id. at 435. "Diligence will require in the usual case that the prisoner, at a 22 minimum, seek an evidentiary hearing in the state court in the manner prescribed by state law." 23 Id. at 437. 24 Then, if the petitioner has not failed to develop the factual basis of a claim in state court, 25 an evidentiary hearing is required if (1) the petitioner establishes a colorable claim for relief—i.e., 26 the petitioner alleges specific facts that, if proven, would entitle him to habeas relief, and (2) the 27 petitioner did not receive a full and fair opportunity to develop those facts in state court.

Earp v. 28 Ornoski, 431 F.3d 1158, 1167 (9th Cir. 2005). The second requirement is met by a showing that: 1 (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by 2 the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there 3 is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court 4 hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.

5 6 Townsend v. Sain, 372 U.S. 293, 312 (1963), overruled on other grounds by Keeney v. Tamayo- 7 Reyes, 504 U.S. 1 (1992); see Baja v. Ducharme, 187 F.3d 1075, 1078 (9th Cir. 1999). 8 B. 28 U.S.C. § 2254(d) Review 9 1. Claim 3 10 On February 15, 2018, the previously assigned magistrate judge found that petitioner's 11 Claim 3 presented colorable ineffective assistance of trial counsel claims during the penalty 12 phase, as set forth below: 13 Petitioner alleges counsel was ineffective for failing to investigate and present "readily available and compelling" mitigating evidence 14 at the penalty phase.

(ECF No. 103 at 120.) Petitioner asserts that reasonably competent counsel "would have realized that a thorough 15 investigation of [petitioner's] background and family history, including... his medical, mental health, academic and social and 16 psycho social history, was essential to the adequate preparation of the penalty phase." (Id. at 119-20.) This claim involves multiple 17 sub-claims: (a) trial counsel unreasonably failed to retain and supervise appropriate investigators and other staff to conduct an 18 adequate and timely investigation; (b) trial counsel failed to investigate and present readily available and substantially mitigating 19 social history evidence; (c) trial counsel unreasonably failed to investigate, develop, and present mitigating evidence regarding 20 petitioner's mental state at the time of the 1983 prior convictions, and at the time of the 1993 offense to rebut the prosecution's case in 21 aggravation; (d) trial counsel failed to present adequate evidence and argument, and failed to object to or rebut the prosecutor's arguments, 22 so the jury never learned about substantial mitigating evidence regarding the 1983

and 1993 offenses and/or understood the 23 mitigating value of the evidence that was presented; (e) trial counsel unreasonably failed to rebut the prosecutor's argument that because 24 petitioner was not insane at the time of the 1983 and 1993 crimes, there was no mitigation; (f) trial counsel failed wholly or adequately 25 to present evidence, to object, and to rebut the prosecutor's argument that petitioner's background and childhood were irrelevant to the 26 penalty phase determination; (g) trial counsel inadequately failed to consult with, prepare, and present testimony from penalty phase 27 experts; and (h) cumulative effect of counsel's errors at the penalty phase.

Petitioner raised these claims in his first state habeas petition, 28 and the California Supreme Court summarily rejected them on the 1 merits. (LD 10, 18.) Because the subclaims are interrelated, this court will address them together.

As set out below, this court finds 2 petitioner has established a clear prima facie case of ineffective assistance of counsel during the penalty phase on the grounds 3 asserted in claim 3 and can find no reason the California Supreme Court could have held otherwise. 4 5 (ECF No. 119 at 55-56; id. at 96.)

The district court adopted the findings and recommendations 6 in full. (ECF No. 129.) 7 2. Claim 34 8 In Claim 34, petitioner argues that his state appellate and habeas counsel rendered 9 ineffective assistance of counsel by failing to preserve evidence, investigate relevant issues, 10 adequately consult with petitioner, present to the California Supreme Court all issues of which he 11 was, or should have been aware, and adequately research issues.

(ECF No. 52 at 488-90; ECF 12 No. 119 at 230-32.) 13 In the motion for evidentiary hearing, petitioner seeks an evidentiary hearing on both 14 prongs of Claim 34: the ineffective assistance of state appellate and habeas counsel. (ECF No. 15 153 at 14-15.) Indeed, petitioner states that Claim 34 was also determined to meet 28 U.S.C. 16 § 2254(d) review. (ECF No. 153 at 5:12-16.)

As for state appellate counsel, however, the court 17 found that petitioner failed to establish his claim for ineffective assistance of appellate counsel 18 (Claim 34), and therefore the California Supreme Court was not unreasonable in denying that 19 claim. (ECF No. 119 at 231.)

Thus, petitioner is not entitled to an evidentiary hearing on the 20 ineffective assistance of appellate counsel claim prong of Claim 34. See Shinn, 596 U.S. at 382 21 ("under § 2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise 22 consider evidence beyond the state-court record based on ineffective assistance of state 23 postconviction counsel").

24 As for habeas counsel, the court declined to consider petitioner's ineffective assistance of 25 habeas counsel (Claim 34) arguments because the court deferred consideration of any procedural 26 default arguments until after resolution of the § 2254(d) issues, noting petitioner "acknowledges 27 that this is not a stand-alone claim" and was "raised only to establish 'cause' to overcome 28 procedural bars." (ECF No. 119 at 231 (citing Martinez, 566 U.S. at 1).)

Therefore, contrary to 1 petitioner's claim in the current motion, there was no ruling on whether petitioner's ineffective 2 assistance of habeas counsel arguments were determined to meet 28 U.S.C. § 2254(d). 3 C. Claims Brought in State Court 4 1. Claim 3 5 All of petitioner's Claim 3 subclaims were presented in petitioner's first state habeas 6 petition filed July 2, 2004.

Cornwell (Glenn) on H.C., S126032. (Lodged Document ("LD") No. 7 10 at 17-181; ECF No. 153 at 8-14.) Petitioner also requested an evidentiary hearing in his first 8 state habeas petition. Id. (LD No. 10 at 342). On June 24, 2009, the California Supreme Court 9 summarily denied all of these subclaims on the merits. Id. ("All claims, except claim 11, are 10 denied on the merits.") 11 Petitioner's subclaim 3(e), brought as claim 4(c) was also held to be untimely.<sup>3</sup> In re 12 Cornwell, S126032 ("Claims 1, 4(c), 16 and 19 are denied as untimely.") (citing In re Robbins 13 (1998) 18 Cal.4th 770, 780; In re Clark (1993) 5 Cal.4th 750, 797).).

14 2. Claim 34 15 Petitioner mentioned Claim 34 in section V of the first state habeas petition filed on July 16 2, 2004, "but was not brought as a claim because appellate counsel was also state habeas counsel, 17 and it would have been a conflict of interest for him to bring a claim against himself." (ECF No. 18 153 at 15.)

The first time Claim 34 could have been brought was in a supplemental state habeas 19 petition. (Id.) Claim 34 was presented to the California Supreme Court as "Supplemental Claim 20 20" in petitioner's supplemental petition filed on May 7, 2007. Cornwell, Jr. (Glenn) on H.C., 21 S152880. Petitioner also requested an evidentiary hearing in his supplemental first state habeas 22 petition.

Id. (LD No. 10 at 342). Supplemental Claim 20 (Claim 34) was denied on the merits. 23 Id. ("All claims, except claim 11, are denied on the merits.") In addition, the California Supreme 24 Court ruled that: 25 /// 26 3 Petitioner states that subclaim 3(f) was also denied as untimely, citing the state court's denial of 27 claim 4(c) as untimely. (ECF No. 153 at 13.)

But petitioner also states that subclaim 3(f) was raised in the state court petition as Claim 4(d), which is not specifically referenced in the June 24, 28 2009 order by the California Supreme Court. 1 Claim 20 also is barred to the extent it repeats claims made in petitioner's first petition for writ of habeas corpus. (In re Miller 2 (1941) 17 Cal. 2d 734, 735.)

To the extent this claim asserts ineffective assistance appellate counsel, it also is barred as untimely 3 (In re Robbins, supra, 18 Cal. 4th at p. 780) and successive (In re Clark, supra, 5 Cal. 4th at pp. 767-768). 4 5 Id. 6 D. Discussion 7 1. Claim 3 8 This case involves at least two Townsend factors: "the state factual determination is not 9 fairly supported by the record as a whole" and "the fact-finding procedure employed by the state 10 court was not adequate to afford a full and fair hearing." Townsend, 372 U.S. at 313.

Petitioner's 11 state habeas petition was summarily dismissed. See *Taylor v. Maddox*, 366 F.3d 992, 1000-01 12 (9th Cir. 2004) (federal courts applying AEDPA cannot defer to state court's view of facts where 13 state court does not make findings), cert. denied, 543 U.S. 1038 (2004).

The unexplained 14 summary denial of the state habeas petition by the California Supreme Court does not contain 15 implicit factual findings subject to a presumption of correctness. *Fisher v. Roe*, 263 F.3d 906, 16 913 (9th Cir. 2001), overruled in part on an unrelated point in *Payton v. Woodford*, 346 F.3d 17 1204, 1218 n.18 (9th Cir. 2003) (en banc).

The Court finds an evidentiary hearing is justified in 18 this case based on the same factors the Court considered above in finding the state court's factual 19 determinations unreasonable under § 2254(d). 20 Both Ninth Circuit and United States Supreme Court decisions emphasize the importance 21 of evidentiary hearings in habeas corpus proceedings where the state court failed to hold its own 22 evidentiary hearings or otherwise permit the factual development of claims.

See, e.g., *Taylor v. 23 Maddox*, 366 F.3d at 999-1000 (citing *Wiggins v. Smith*, 539 U.S. 510 (2003), and Ninth Circuit 24 cases). 25 An evidentiary hearing is important to ensure an adequate factual record, and provide for 26 meaningful appellate review. This is particularly true when addressing mitigation evidence at the 27 penalty phase. "It is imperative that all relevant mitigating information be unearthed for 28 consideration at the capital sentencing phase." *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir.

1 1999). The focus of the penalty phase of trial differs from the guilt phase. See *id.* ("The 2 determination of whether to impose a death sentence is not an ordinary legal determination which 3 turns on the establishment of hard facts.") (citation omitted); see also *Wallace v. Stewart*, 184 4 F.3d 1112, 1117 n.5 (9th Cir. 1999) ("[T]he lawyer's burden might differ at the guilt phase from 5 that at the penalty phase... "), cert. denied, 528 U.S. 1105 (2000). "Even where the sentencer is 6 aware of facts underlying the defendant's mitigation case, trial counsel may not necessarily rest 7 on these facts." *Stanley v. Schriro*, 598 F.3d 612, 624 (9th Cir.

2010) (citing *Caro*, 165 F.3d at 8 1227 (clarifying that although the jury had information regarding the defendant's background, it 9 did not "have the benefit of expert testimony to explain the ramifications of [this background] on 10 Caro's behavior"). While evidence of mental illness may not provide a legal defense, "where 11 counsel is on notice that his client may be mentally impaired, counsel's failure to investigate his 12 client's mental condition as a mitigating factor in a penalty phase hearing, without a supporting 13 strategic reason, constitutes deficient performance." *Wallace*, 184 F.3d at 1117 (quoting 14 *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir.

1995), cert. denied, 517 U.S. 1111 (1996). 15 In *Wallace*, the court noted that failure to conduct an evidentiary hearing precluded 16 disposition of the claim. "Because there was no hearing, the

State did not have an opportunity to 17 cross-examine Wallace’s affiants, or to present evidence of its own.” Id. at 1118. “However, 18 were the district court to accept all of Wallace’s evidence, it could find that Wallace’s lawyers 19 were ineffective, and conclude that ‘there is a reasonable probability that the death sentence 20 would not have been imposed’ had they been effective.” Id. (quoting Hendricks, 70 F.3d at 1044 21 (9th Cir.

1995). 22 In conclusion, the record reflects that petitioner established a clear prima facie case of 23 ineffective assistance of trial counsel during the penalty phase on the grounds asserted in Claim 3 24 and its subclaims. (ECF No. 119 at 55-56; id. at 96); see Wallace, 184 F.3d at 1118.

The Court 25 finds that petitioner did not fail to develop the evidence of ineffective assistance of counsel in 26 state court, and therefore is not subject to 28 U.S.C. § 2254(e)(2). See Shinn, 596 U.S. at 382. 27 Finally, petitioner meets at least two of the Townsend factors. See Townsend, 372 U.S. at 313. 28 Accordingly, the Court exercises its discretion and finds that petitioner is entitled to an 1 evidentiary hearing on the ineffective assistance of counsel subclaims (a) through (g) in Claim 3.

2 It does not appear that Claim 3(h) (cumulative prejudice) is suited to an evidentiary hearing and 3 should be addressed in post-evidentiary hearing briefing. 4 2. Claim 34 5 As described above, petitioner is not entitled to an evidentiary hearing on the ineffective 6 assistance of appellate counsel claim prong of Claim 34. See Shinn, 596 U.S. at 382 (“under 7 § 2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise consider 8 evidence beyond the state-court record based on ineffective assistance of state postconviction 9 counsel”).

10 As to the habeas counsel claim prong of Claim 34, petitioner did not fail to develop in 11 state court any of the facts he seeks to present in support of the ineffective assistance of habeas 12 counsel arguments in Claim 34.

However, petitioner failed to provide authority for this Court to 13 hold an evidentiary hearing for petitioner to establish “cause” to overcome procedural bars. In 14 addition, petitioner failed to identify what factual disputes as to “cause” require an evidentiary 15 hearing.

Thus, petitioner’s motion is denied as to Claim 34 but he is granted leave to file a 16 second motion for an evidentiary hearing as to the habeas counsel claim prong of Claim 34 within 17 30 days of the date of this order.

The Court is not inclined to further extend this deadline. If a 18 second motion as to the habeas counsel claim prong is not filed within 30 days of the date of this 19 order, petitioner will be deemed to have withdrawn his request for an evidentiary hearing as to 20 Claim 34. 21 E. Consent/Waiver and Scheduling Conference 22 Petitioner’s motion for evidentiary hearing was unopposed.

Thus, it appears the parties consent to have the undersigned decide the motion for evidentiary hearing rather than issue findings and recommendations. Accordingly, the motion for evidentiary hearing as to the ineffective assistance of counsel subclaims (a) through (g) in Claim 3 is granted pending confirmation of the parties' consent.

In an abundance of caution, the parties shall indicate whether they consent by submitting the attached notice of election form within 21 days from the date of this order. If the parties do not consent, the Court will issue findings and recommendations, the parties will be provided with an opportunity to object and respond to objections, the district judge will review, and scheduling and coordination for the evidentiary hearing will occur thereafter.

If the parties consent, the matter will be set for a status and scheduling conference on November 17, 2025, at 10:00 a.m. before the undersigned to move forward in scheduling and coordinating for the evidentiary hearing as petitioner indicated that the evidentiary hearing "could be scheduled and completed within a relatively short time." (ECF No. 153 at 4:9.)

Though respondent did not oppose petitioner's motion for an evidentiary hearing, respondent reserves the right to challenge the admissibility of the witnesses' testimony and intends to litigate any evidentiary issues at the hearing. At the status and scheduling conference, the parties should meet and confer in advance as to the following issues and be prepared to discuss these issues at the conference.

First, whether the parties agree that discovery is closed. The parties have not indicated that any discovery is anticipated or required before an evidentiary hearing is held. Second, a proposed deadline for the filing of any pre-evidentiary hearing motions that either party deems appropriate and identification of those motions. Third, as for the exhibits petitioner identified in his motion to expand the record, the parties shall meet and confer to determine whether they can stipulate to the admission of any of the exhibits.

Fourth, petitioner seeks the testimony of different witnesses, many of whom would testify as to multiple subclaims. It is not clear whether all proposed witnesses are available and can provide relevant testimony that is not cumulative.<sup>4</sup> Thus, the parties should meet and confer regarding the proposed witnesses, including to determine whether any witnesses are cumulative; whether the parties stipulate to the admissibility of certain witness testimony; and the manner of the witness testimony (e.g., by declaration, deposition, or live in-court testimony, etc.).

<sup>4</sup> For example, it appears that Myla Young, clinical neuropsychologist, proposed as a witness for claims 3(b), (d), (e), (f), and (g), died on November 18, 2013. See <https://www.greenvalleymortuary.com/obituaries/myla-young>, (accessed Sept. 16, 2025.) There is no need to present evidence that is already in the record being considered by this Court except

for that evidence which is necessary to any credibility determinations required to resolve the issue.

Fifth, proposed dates for the evidentiary hearing and its anticipated length. IV. REQUEST TO EXPAND THE RECORD Petitioner seeks to expand the record with multiple exhibits appended to the petition. Respondent does not oppose the request to expand the record, but reserves the right to challenge the admissibility of petitioner's exhibits, and litigate any evidentiary issues at the hearing.

Petitioner's unopposed motion to expand the record is granted, subject to respondent's reservation. See *Lopez v. Attorney General for Nevada*, 845 F. App'x 549, 554 n.3 (9th Cir. 2021). As indicated above, the parties need to meet and confer as to the exhibits identified by petitioner. V. ORDERS Accordingly, IT IS HEREBY ORDERED that: 1. Petitioner is granted an extension of time, nunc pro tunc, to file a motion for evidentiary hearing (ECF No. 153).

2. Within 21 days from the date of this order, the parties shall file the appended notice of election form. 3. Pending confirmation of the parties' consent, petitioner's motion (ECF No. 153) is partially granted and within 30 days from the date of this order, petitioner is granted leave to file a second motion for an evidentiary hearing as to the habeas counsel claim prong of Claim 34.

4. If both parties consent to the magistrate judge deciding the motion for evidentiary hearing, this matter will be set for a status and scheduling conference on November 25, 2025 at 10:00 a.m. in Courtroom #25 before the undersigned. Seven days prior to the status and scheduling conference, the parties shall submit a joint proposed schedule and status report that shall include: (1) whether the parties agree that discovery is closed; (2) a proposed deadline for the filing of any pre-evidentiary hearing motions that either party deems appropriate; (3) whether the parties agree as to any exhibits proposed by petitioner to expand the record; (4) whether any witnesses are cumulative, whether the parties stipulate to the admissibility of certain witnesses, and the proposed manner of witness testimony (e.g., by declaration, deposition, or live in-court testimony); and (5) proposed dates for the evidentiary hearing and its anticipated length.

| Dated: September 29, 2025 aA Aan Spe | CHI SOO KIM UNITED STATES  
MAGISTRATE JUDGE /V/com0705.mEH 1] 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27  
28 1 2 3 4 5 6 UNITED STATES DISTRICT COURT 7 FOR THE EASTERN DISTRICT OF  
CALIFORNIA 8 9 GLENN CORNWELL, Jr., No. 2:06-cv-0705 TLN CSK DP 10 Petitioner,  
DEATH PENALTY CASE 11 v. NOTICE OF ELECTION 12 WARDEN, SAN QUENTIN  
STATE PRISON, 13 Respondent.

14 15 Petitioner is a state prisoner under sentence of death. Petitioner filed a motion for 16  
evidentiary hearing. (ECF No. 153.) Respondent filed a statement of non-opposition to the 17  
motion for evidentiary hearing. (ECF No. 157.)

The party elects to proceed as follows: 18 \_\_\_\_\_ The undersigned party waives his right to have  
the district judge address the 19 motion for evidentiary hearing, and consents to have the  
magistrate judge decide 20 the motion for an evidentiary hearing and hold an evidentiary hearing  
in this case. 21 \_\_\_\_\_ The undersigned party declines to consent to have the magistrate judge  
address the 22 motion for evidentiary hearing.

The magistrate judge will issue findings and 23 recommendations. 24 25  
DATED:\_\_\_\_\_ 26 [Identify Party] 27 28