

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA

Jerry Grant Frye v. Warden, San Quentin Prison

Frye · No. No. 2:99-cv-0628 KJM CKD · Decided September 22, 2025

SUMMARY

This is an order from the United States District Court for the Eastern District of California in Jerry Grant Frye's federal habeas corpus proceeding. The court reviews the effect of Cullen v. Pinholster and later AEDPA precedent on previously granted requests for evidentiary hearings, adopts the magistrate judge's amended findings and recommendations in part, and addresses Frye's claims concerning ineffective assistance of counsel, juror conduct, and other constitutional issues.

CASE DETAILS

COURT	United States District Court for the Eastern District of California
JURISDICTION	United States District Court for the Eastern District of California
DECIDED	September 22, 2025
DOCKET	No. 2:99-cv-0628 KJM CKD
DISPOSITION	other
PROCEDURAL POSTURE	Petitioner sought federal habeas relief under 28 U.S.C. § 2254 after the California Supreme Court affirmed his capital conviction and sentence and summarily denied his state habeas petitions. The district court reviewed objections to amended magistrate-judge findings and recommendations, reconsidered an earlier order granting evidentiary hearings on several claims in light of intervening Supreme Court precedent, denied relief on most claims, and granted a writ on a juror third-party-contact claim.
STANDARD OF REVIEW	The court presumed the magistrate judge's factual findings correct and conducted de novo review of the objected-to findings under 28 U.S.C. § 636(b)(1)(C) and Local Rule 304. For claims adjudicated on the merits by the California Supreme Court, the court applied the deferential standards of 28 U.S.C. § 2254(d)(1) and (d)(2), including the double deference applicable to ineffective-assistance claims under Strickland v. Washington. For the juror-contact claim, the court applied the Mattox/Remmer framework as articulated in Godoy v. Spearman.

PRECEDENTIAL VALUE	unpublished
PARTIES	State of California v. Jerry Grant Frye

TOPICS

federal habeas corpus post-conviction relief ineffective assistance sentencing criminal procedure

PRACTICE AREAS

federal habeas corpus capital punishment criminal procedure ineffective assistance of counsel
juror misconduct

QUESTIONS PRESENTED

1. Whether federal habeas review under 28 U.S.C. § 2254(d)(1) and (d)(2) is limited to the evidentiary record before the California Supreme Court.
2. Whether the district court should reconsider its 2006 orders granting evidentiary hearings in light of *Cullen v. Pinholster* and *Harrington v. Richter*.
3. Whether Frye was entitled to an evidentiary hearing or habeas relief on his ineffective-assistance, prosecutorial-misconduct, right-to-counsel, mitigation, and capital-sentencing-scheme claims.
4. Whether juror Fairfield's consultation with her minister about the death penalty was third-party contact that was possibly prejudicial under the *Mattox/Remmer* framework.
5. Whether Frye was entitled to relief on the shackling claim after the Ninth Circuit reversed the district court's prior grant of habeas relief.

HOLDINGS

1. When reviewing a state-court merits decision under 28 U.S.C. § 2254(d)(1) or (d)(2), the district court's review is limited to the evidentiary record that was before the California Supreme Court.
2. The court properly reconsidered its 2006 order granting evidentiary hearings because intervening controlling law changed the permissible scope of review and the applicable reasonableness standard.
3. A federal habeas petitioner challenging a California Supreme Court summary denial must satisfy § 2254(d) by showing that the state decision was contrary to or an unreasonable application of clearly established federal law, or was based on an unreasonable determination of the facts in light of the state-court evidence.
4. Frye was not entitled to habeas relief or an evidentiary hearing on his penalty-phase ineffective-assistance claims because the state court's denial was not unreasonable under the doubly deferential standards of § 2254 and *Strickland*.
5. Frye was not entitled to relief on his claim that California's death-penalty scheme permits arbitrary and capricious sentencing because Ninth Circuit precedent had upheld the scheme against a facial constitutional challenge.

6. A juror's consultation with a minister about the death penalty during the interval between the guilt and penalty phases was at least possibly prejudicial third-party contact, triggering a presumption of prejudice under the Mattox/Remmer framework. California failed to show there was no reasonable possibility that the communication influenced the verdict, so Frye was entitled to habeas relief on claim 42.
7. Frye was not entitled to habeas relief on claim 44 because the Ninth Circuit held that relief was unavailable under either § 2254(d)(1) or § 2254(d)(2).

KEY QUOTATIONS

“the proper scope of the evidentiary record under review in this case is limited to the evidentiary record before the California Supreme Court on Frye’s unsuccessful habeas petitions.” (at 12–13)

“The court finds that a reasonable jurist could have applied heavy deference to the choices Frye’s trial counsel made in the penalty phase and, accordingly, have denied relief.” (at 78–80)

“This overall message, combined with the moral authority of the minister, on a topic directly related to Juror Fairfield’s responsibilities and given that Fairfield’s decision could determine whether Frye lived or died, was prejudicial to Frye as it interfered with Fairfield’s responsibilities as a juror.” (at 112–14)

FACTUAL BACKGROUND

In 1988, Frye was convicted of murdering Robert Lee Brandt and Lucille Jane Brandt, as well as first-degree robbery, residential burglary, and unlawful driving or taking of a vehicle. The jury found multiple capital special circumstances and returned a death sentence. During the interval between the guilt and penalty phases, juror Fairfield consulted her minister about the death penalty, and the minister provided a written response concerning the propriety of the death penalty. The district court determined that the contact created a presumption of prejudice that California failed to rebut.

PROCEDURAL HISTORY

Frye was convicted in California state court of two first-degree murders and related offenses and sentenced to death. The California Supreme Court affirmed the conviction and sentence and summarily denied Frye's first two state habeas petitions. In the federal habeas proceeding, the district court initially granted evidentiary hearings on several claims, but later reconsidered that ruling after *Cullen v. Pinholster* and *Harrington v. Richter*. After a prior grant of relief on the shackling claim was reversed by the Ninth Circuit, the district court resolved the remaining claims in this order, granting relief on claim 42 and denying the other claims addressed.

DISPOSITION

other

REMAND INSTRUCTIONS

The State of California must, within ninety days from the filed date of the order, either initiate a new penalty-phase trial or resentence Frye in accordance with California law and the United States Constitution. The sentence of death is vacated effective ninety days from the filed date.

CASES CITED

- Cullen v. Pinholster, 563 U.S. 170 (2011)
- Harrington v. Richter, 562 U.S. 86 (2011)
- Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009)
- United States v. Raddatz, 447 U.S. 667 (1980)
- Strickland v. Washington, 466 U.S. 668, 687–89, 694 (1984)
- Porter v. McCollum, 558 U.S. 30, 39–40 (2009)
- Karis v. Calderon, 283 F.3d 1117, 1141 n.11 (9th Cir. 2002)
- Mattox v. United States, 146 U.S. 140, 150 (1892)
- Remmer v. United States, 347 U.S. 227, 229–30 (1954)
- Godoy v. Spearman, 861 F.3d 956, 956, 966–70 (9th Cir. 2017)
- Caliendo v. Warden of Cal. Men's Colony, 365 F.3d 691, 697 (9th Cir. 2004)
- Frye v. Broomfield, 115 F.4th 1155, 1166 (9th Cir. 2024)
- People v. Frye, 18 Cal. 4th 894 (1998)
- People v. Duvall, 9 Cal. 4th 464, 474 (1995)
- Drope v. Missouri, 420 U.S. 162 (1975)
- Pate v. Robinson, 383 U.S. 375 (1966)
- Lockhart v. Fretwell, 506 U.S. 364 (1993)
- Woodford v. Visciotti, 537 U.S. 19, 24 (2002)
- Frantz v. Hazey, 533 F.3d 724, 737 (9th Cir. 2008)
- Thomas v. Chappell, 678 F.3d 1086, 1103 (9th Cir. 2012)
- Tarango v. McDaniel, 837 F.3d 936, 936, 947 (9th Cir. 2016)
- Clark v. Chappell, 936 F.3d 944, 971 (9th Cir. 2019), amended, 948 F.3d 1172 (9th Cir. 2020)
- Von Tobel v. Benedetti, 975 F.3d 849, 857 (9th Cir. 2020)
- Kipp v. Davis, 971 F.3d 866, 876 (9th Cir. 2020)
- Morris v. Woodford, 229 F.3d 775, 780 (9th Cir. 2000)
- Slack v. McDaniel, 529 U.S. 473, 120 S. Ct. 1595, 1604 (2000)
- United States v. Dutkel, 192 F.3d 893 (9th Cir. 1999)
- United States v. Rosenthal, 454 F.3d 943 (9th Cir. 2006)

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 FOR THE EASTERN DISTRICT OF
CALIFORNIA 10 11 | Jerry Grant Frye, No. 2:99-cv-0628 KJM CKD 12 Petitioner, ORDER 13 v.
14 Warden, San Quentin Prison, 15 Respondent. 16 17 In 2006, the undersigned—then acting as
the assigned magistrate judge on the case—ruled 18 | ten of petitioner Jerry Grant Frye’s 45 claims
for relief warranted an evidentiary hearing (claims 19 | 2,3, 4,5, 7, 25, 28, 29, 42, 44).

In 2008, the undersigned then held an evidentiary hearing on 20 | claims 42 and 44. Two years later, Frye moved for an evidentiary hearing on claim 37. While 21 | the court's resolution of the merits of claims 42 and 44 and the motion for evidentiary hearing on 22 | claim 37 were pending, the Supreme Court decided *Cullen v. Pinholster*, 563 U.S. 170 (2011). 23 | Pinholster potentially upended the court's 2006 grant of an evidentiary hearing, as it limited the 24 | scope of federal habeas review under 28 U.S.C. § 2254(d)(1) in the first instance to the record 25 | before the state court that adjudicated the claims on the merits in the first instance.

In 2011, after 26 | the undersigned was appointed as a district judge, a successor magistrate Judge requested briefing 27 | on the effect of Pinholster's holding "on both the existing fact-finding and on further fact-finding 1 in this proceeding." Order (May 3, 2011) at 2, ECF No. 584.1 In 2015, the next successor 2 magistrate judge then issued amended Findings and Recommendations based on the supplemental 3 briefing the parties provided.

The magistrate judge now recommends denying an evidentiary 4 hearing on claims 2, 3, 4, 5, 7, 25 and 37 and granting an evidentiary hearing on claims 28 and 5 29. The magistrate judge also recommends the court find the evidentiary hearing on claims 42 6 and 44 was warranted but recommends denying those claims on the merits. Both Frye and 7 California have submitted objections to the magistrate judge's findings and recommendations and 8 each party also has submitted responses to the opposing party's objections.

9 The court presumes the magistrate judge's findings of fact are correct. See *Orand v. 10 United States*, 602 F.2d 207, 208 (9th Cir. 1979). In accordance with the provisions of 28 U.S.C. 11 § 636(b)(1)(C) and Local Rule 304, the court has conducted a de novo review of the case. See, 12 e.g., *Barnett v. Wong*, No. 99-2416, 2010 WL 653754, at *1 (E.D. Cal. Feb.

19, 2010) (applying 13 Local Rule 304 to AEDPA cases); *Hernandez v. Lewis*, No. 12-1661, 2017 WL 2954232, at *1 14 (E.D. Cal. July 11, 2017) (same). Having reviewed the file, the court, as described more fully 15 below, adopts the magistrate judge's findings and recommendations in part. 16 I. BACKGROUND 17 In 1988 Frye was convicted of two counts of first-degree murder for killing Robert Lee 18 Brandt and Lucille Jane Brandt.

He also was convicted of first-degree robbery, residential 19 burglary, and the unlawful driving and taking of a vehicle. See Reporter's Transcript of 20 Proceedings on Trial (RT) (May 9, 1988) 9371–9379. The jury also found special allegations to 21 be true: Frye was armed with a shotgun during both murders, he used the shotgun during both 22 murders, he committed multiple murders, and he committed the murders in the course of 23 committing a robbery and in the course of committing a burglary.

See *id.* The same jury then 24 returned a death sentence verdict at the end of the penalty phase of the proceedings. See *id.* 25 9786–9788 (Aug. 5, 1988–Aug. 8, 1988). The California Supreme

Court affirmed Frye's 26 conviction and sentence. See *People v. Frye*, 18 Cal. 4th 894 (1998).

The California Supreme 1 Pages cited here are those applied at the top right by the CM/ECF system with the exception of state court and state appellate transcripts. 1 Court then summarily denied Frye's first and second state habeas petitions. See *Frye (Jerry 2 Grant)* on H.C., No. S062455 (Oct. 14, 1998) and *Frye (Jerry Grant)* on H.C., No. S087755 3 (Jan. 24, 2001).

Frye then filed his operative petition for habeas corpus with this court. See 2d. 4 Am. Pet., ECF No. 104. 5 On July 19, 2004, Frye filed his first motion for an evidentiary hearing. See ECF No. 162. 6 As noted above, the undersigned, as the assigned magistrate judge, granted the motion in part on 7 the following claims: 8 Claim 2: Frye's trial counsel failed to investigate and present evidence that Frye 9 lacked the mental state necessary to commit felony murder.

See Order (Dec. 1, 10 2006) at 33–36, ECF No. 214. 11 Claim 3: Frye's counsel provided ineffective assistance of counsel at the guilt 12 phase of the trial, including promising witnesses would testify and then not calling 13 them, failing to have a coherent trial strategy, and engaging in insulting behavior. 14 See *id.* at 24–26. 15 Part of Claim 7: Frye's counsel was ineffective for failing to object to the 16 prosecutor's vouching for its star eyewitness's credibility.

See *id.* at 26–32. 17 Claim 25: Jailers interfered with Frye's right to counsel. See *id.* at 43–45. 18 Claims 28 and 29: Frye's counsel failed to investigate and present mental health 19 evidence, evidence of traumatic events in Frye's childhood and the effects of 20 Frye's alcohol dependence, as well as allow Frye to give an allocution before the 21 jury at the penalty phase of the trial.

See *id.* at 40–43. 22 Part of Claim 42: Juror Fairfield sought the advice of her minister on the death 23 penalty. See *id.* at 45–49. 24 Claim 44: Frye's due process rights were violated because jurors saw him 25 shackled. See *id.* at 49–50. 26 The undersigned also allowed Frye to brief claims 4 and 5 as background information for 27 the adjudication of claim 2 but otherwise denied an evidentiary hearing for those two additional 28 claims.

See *id.* at 22–24. In 2008, the court held the evidentiary hearing on claims 42 and 44 and 1 the parties also briefed the merits of those claims. See ECF Nos. 396, 421, 437, 446. The parties 2 then conducted depositions on the other eight claims between 2008 and 2010. Further, Frye also 3 moved for the court to grant an evidentiary hearing on claim 37: that “the California death penalty 4 scheme in effect in 1985 was not structured so as to prevent the penalty from being administered 5 in an arbitrary and unpredictable fashion.” See Mot.

Misc. Relief at 2, ECF No. 549 (quoting 2d 6 Am. Pet. ¶ 817). As noted, in February 2011 the case was reassigned to another magistrate judge. 7 See Am. Order (Feb. 18, 2011), ECF No. 574. 8 In 2011, the Supreme Court issued its opinion in *Cullen v. Pinholster*, holding federal 9 courts' habeas review under 28 U.S.C. § 2254(d)(1) of a state court's decision on the merits is 10 limited to the record that was before the state court.

See 563 U.S. at 180–83. As a consequence 11 of this opinion, the magistrate judge assigned at the time directed Frye to brief two questions: 12 (1) whether the court may consider evidence introduced for the first time in the federal 13 proceeding when reviewing a state court decision under 28 U.S.C. § 2254(d)(2); and (2) with 14 respect to the claims for which Frye was granted an evidentiary hearing and with respect to claim 15 37, whether the California Supreme Court’s decision meets the standards set out in either 16 28 U.S.C. § 2254(d)(1) or (2) without reference to any evidence or facts developed in the federal 17 proceeding.

See Order (May 3, 2011) at 2, ECF No. 584. The magistrate judge required 18 California to brief (1) whether evidence presented at a federal evidentiary hearing may be 19 considered by a federal court in its review under sections 2254(d)(1) and 2254(d)(2); (2) whether 20 arguments made by Frye in briefing dating from 2006 showed he had already satisfied the 21 requirements of § 2254(d)(2) for each claim on which the court had granted an evidentiary 22 hearing; and (3) its response to Frye’s arguments made in his briefing.

See *id.* at 2–3.2 In this 23 order, the court construes the briefs answering these questions as court-directed motions for 24 reconsideration, based upon an intervening change in the controlling law, of the court’s 2006 25 order granting Frye an evidentiary hearing on ten claims as well as supplemental briefing to assist 26 the court in resolving Frye’s motion to have an evidentiary hearing on claim 37.

2 On August 2, 2011, the Chief Judge reassigned Magistrate Judge Delaney—the currently assigned magistrate judge—to this case. See Order (Aug. 2, 2011), ECF No. 596. 1 Both parties submitted the briefing as directed. See Pet’r’s Brief, ECF No. 612; Resp’t’s 2 Opp’n, ECF No. 616; Pet’r’s Reply, ECF No. 629.

On December 4, 2013, the magistrate judge 3 issued findings and recommendations based on the briefing. See F&Rs, ECF No. 632. Both Frye 4 and California filed objections to the findings and recommendations and each party responded to 5 the other’s objections. See Resp’t’s Objs., ECF No. 640; Pet’r’s Objs., ECF No. 649; Pet’r’s 6 Resp., ECF No. 652, Resp’t’s Resp., ECF No. 657.

On September 2, 2014, the case was 7 reassigned to the undersigned, as district judge. See Order, ECF No. 655. 8 After consideration of the parties’ objections to the original findings and 9 recommendations, the magistrate judge issued amended findings and recommendations—the 10 operative findings and recommendations—on January 22, 2015. See ECF No. 658.

In the 11 amended findings and recommendations, the magistrate judge stated, “objections made to the 12 December 4, 2013[,] findings and recommendations will be considered objections to these 13 amended findings and recommendations. Within thirty days after being served with these 14 amended findings and recommendations, any party may file supplemental objections to the 15

portions of these amended findings and recommendations that differ from the December 3, 16 2013[,] findings and recommendations.” Am.

F&Rs at 122. 17 Frye moved for reconsideration, arguing the magistrate judge overstepped her authority 18 and violated Frye’s due process rights by amending her findings and recommendations. See Mot. 19 Recon. at 2–3, ECF No. 661.

The magistrate judge denied the motion. See ECF No. 662. 20 California filed a response, stating it would rely on its original objections as the magistrate 21 judge’s amendments had not changed its legal position with respect to the findings and 22 recommendations. See Response at 2 (March 23, 2015), ECF No. 664. 23 Meanwhile, Frye moved again for reconsideration—this time before the undersigned— of 24 the magistrate judge’s decision to issue amended findings and recommendations.

See ECF No. 25 663. The court, relying on *United States v. Raddatz*, 447 U.S. 667 (1980), denied Frye’s motion 26 for reconsideration of the constitutionality of the magistrate judge’s amending her findings and 27 recommendations but reversed the magistrate judge’s limitation on the parties’ ability to file 28 objections to the amended findings and recommendations.

See Order (Nov. 17, 2015) at 6–8, 1 ECF No. 669. The court ordered the parties to file any objections to the amended findings and 2 recommendations within thirty days and allowed the parties to reference the original findings and 3 recommendations in their new objections should they choose to do so. See *id.* at 8. Frye moved 4 again for reconsideration, arguing the court incorrectly relied on *Raddatz* in its order.

3d Mot. 5 Recon. at 2–3, ECF No. 673. The court denied the motion for reconsideration, although agreeing 6 it had previously incorrectly relied on *Raddatz*. See Order (Aug. 9, 2016) at 4–5, ECF No. 678. 7 The court ruled instead that the magistrate judge could issue amended findings and 8 recommendations based on a contextual reading of 28 U.S.C. § 636(b)(1).

See *id.* at 8. The court 9 concluded the order with this directive: 10 Objections to the amended F&Rs, ECF No. 658, if any, shall be filed 11 within thirty days. The parties may rely on their original objections 12 to the magistrate judge’s now-vacated F&Rs, as [California] has 13 done here; if a party chooses this route the court will construe the 14 objections as lodged against the amended F&Rs.

Alternatively, the 15 parties may file objections to the amended F&Rs; if a party chooses 16 this route, the court will consider only these objections. The court 17 will itself only consider the amended F&Rs and any objections to 18 those F&Rs as clarified here. 19 Order (Aug. 9, 2016) at 9–10. Frye submitted objections to the amended findings and 20 recommendations.

See Pet'r's Objs., ECF No. 692. On November 11, 2021, Frye moved the 21 court to withdraw two exhibits, a declaration by his sister Alice Frye and the transcript of a 22 deposition by his sister Alice Frye. See ECF No. 706. California does not oppose the motion to 23 withdraw the evidence. See ECF No. 726.

The court grants Frye's request to withdraw the 24 evidence and does not consider the evidence for the purposes of deciding whether or not to adopt 25 the magistrate judge's findings and recommendations. 26 On November 21, 2021, Frye moved for his immediate release. See Mot. Set Aside, ECF 27 No. 704.

The court issued an order to show cause why this action should not be set for a 28 mandatory settlement conference. See ECF No. 707. Frye responded by requesting the court rule 29 on just one of Frye's claims: that he did not receive a fair trial because he was shackled in front of 30 the jury (Claim 44). Frye Response OSC (Dec. 15, 2021) at 3, ECF No. 710.

On May 19, 2022, 31 the court declined to adopt the amended findings and recommendations as to claim 44, issued a 1 writ of habeas corpus and granted judgment on Frye's behalf. See ECF Nos. 715, 716. California 2 appealed the decision to the Ninth Circuit and the Ninth Circuit reversed, holding that "reasonable 3 minds could differ about whether the state court had sufficient evidence to conclude the shackling 4 was not prejudicial" and that relief was unavailable to Frye under either 28 U.S.C. § 2254(d)(1) or 5 28 U.S.C. § 2254(d)(2) for claim 44.

See *Frye v. Broomfield*, 115 F.4th 1155, 1166 (9th Cir. 6 2024). As a consequence of the Ninth Circuit's decision, the court reopened the case and now 7 returns to evaluate the remainder of the amended findings and recommendations. 8 The court bases its order below on its review of the following: 9 1.

The magistrate judge's amended findings and recommendations (ECF No. 658). 10 2. California's objections to the initial findings and recommendations, construed as 11 objections to the amended findings and recommendations (ECF No. 640). 12 3. Frye's response to California's objections (ECF No. 652). 13 4. Frye's objections to the amended findings and recommendations (ECF No. 692).

14 5. California's response to Frye's objections to the initial findings and recommendations, 15 construed as its response to Frye's objections to the amended findings and 16 recommendations (ECF No. 657). 17 II. ANALYSIS 18 A. Scope of the Evidentiary Record Under Review (Question 1 for Both Parties) 19 Both parties generally do not disagree in their briefing that the record the court may 20 consider in this case is limited to the factual record before the state court under both § 2254(d)(1) 21 and § 2254(d)(2).

See Pet'r's Brief at 47–48; Resp't's Opp'n at 18–22.3 The magistrate judge so 22 recommends. See Am. F&Rs at 12 (citing *Pinholster*, 563 U.S. at 180–88). The court agrees 23 with this

conclusion and adopts the magistrate judge's recommendation that the proper scope of the evidentiary record under review in this case is limited to the evidentiary record before the California Supreme Court on Frye's unsuccessful habeas petitions.

However, the court notes the magistrate judge exclusively relied on *Pinholster* when recommending that both § 2254(d)(1) and 3 More specifically, Frye's answer to the question is "maybe but it does not matter." Pet'r's Brief at 47–48; Pet'r's Reply at 24. 1 § 2254(d)(2) bar review of evidence introduced for the first time in a federal hearing. See Am. 2 F&Rs at 12.

Pinholster's holding addressed only the scope of federal habeas review under 3 § 2254(d)(1). See 563 U.S. at 180–83. Nevertheless, both the majority and the dissent in that 4 case assumed federal courts were barred from evaluating evidence that was not before the state 5 court under § 2254(d) (2) because the statute explicitly states that an application for a writ of 6 habeas corpus on behalf of a person in custody pursuant to a judgement in state court may be 7 granted when the state court's adjudication of the merits of that claim "resulted in a decision that 8 was based on an unreasonable determination of the facts in light of the evidence presented in the 9 State court proceeding." Compare *Pinholster*, 563 U.S. at 211 (Sotomayor, J., dissenting) with 10 *id.* at 185 n.7 (majority opinion).

Based upon *Pinholster*'s holding regarding § 2254(d)(1) and 11 based upon the statutory language of § 2254(d)(2), the court concludes it may evaluate Frye's 12 claims under § 2254(d) using only evidence Frye first brought to the attention of the California 13 Supreme Court. 14 B. Has Frye Already Established a Need for an Evidentiary Hearing on all 15 Relevant Claims?

(Question 2 for California) 16 The magistrate judge recommended that the 2006 order granting Frye an evidentiary 17 hearing for the ten (10) claims referenced above should be reconsidered based upon changes in 18 the law.

As noted above, the Supreme Court in *Pinholster*, 563 U.S. at 170, limited the scope of 19 review to the evidence before the state court. See Am. F&Rs at 23–24. Further, in *Harrington v. 20 Richter*, 562 U.S. 86 (2011), the Supreme Court altered the standards of reasonableness federal 21 courts use when evaluating a state court decision under § 2254(d)(2), meaning the test the court 22 used in 2006 to evaluate the California Supreme Court's denial of Frye's claims is no longer valid 23 law.

See *id.* Effectively, the current magistrate judge is recommending reconsidering the 2006 24 order based on an intervening change in the controlling law. See *Marlyn Nutraceuticals, Inc. v. 25 Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009). While Frye contested a similar 26 claim made by California in its briefing, see Pet'r's Reply at 27–30, he has not objected to the 27 magistrate judge's recommendation that this court can no longer rely on the 2006 order granting 28 an evidentiary hearing for these claims because the 2006 order considered evidence that was

not 1 presented to the California Supreme Court and because it used a standard of reasonableness the 2 Supreme Court has since ruled violates AEDPA's deferential standard for federal habeas review 3 of state court decisions.

See F&Rs at 24. The court agrees with the magistrate judge's 4 recommendations and thus it reconsiders the 2006 order granting in part Frye's request for an 5 evidentiary hearing on ten claims and reevaluates those ten claims as well as claim 37 under 6 § 2254 according to the currently controlling federal law. 7 Unless otherwise noted below, the court, adopts the magistrate judge's recommended 8 legal standard for evaluating § 2254 claims after a summary denial by the California Supreme 9 Court of a state habeas petition found on pages 11 to 17 of the amended Findings and 10 Recommendations and gives only a brief summary of the relevant law here.

11 First, while Frye took some of his claims up on direct appeal, and the California appellate 12 court issued a written decision explaining its decision on those claims, Frye raised most of his 13 claims only in his state habeas petitions, which the California Supreme Court summarily denied. 14 Under California law, a summary denial means the California Supreme Court determined Frye 15 failed to make a prima facie case he was entitled to relief even assuming the allegations in his 16 petition were true.

The denial is presumed to be on the merits. To obtain relief from this denial 17 under § 2254, Frye must show either the decision: 18 (1) resulted in a decision that was contrary to, or involved an unreasonable 19 application of, clearly established federal law, as determined by the 20 Supreme Court of the United States; or 21 (2) resulted in a decision that was based on an unreasonable determination of 22 the facts in light of the evidence presented in the state court proceeding.

23 28 U.S.C. § 2254(d). The standard of review under § 2254 is extremely deferential. A petitioner 24 must show "that the state court's ruling on the claim being presented in federal court was so 25 lacking in justification that there was an error well understood and comprehended in existing law 26 beyond any possibility for fairminded disagreement." Richter, 562 U.S. at 786–87.

Thus, federal 27 habeas relief is precluded if "fairminded jurists could disagree on the correctness of the state 28 court's decision." Am. F&Rs at 12 (quoting Richter, 562 U.S. at 786). Further, when the court 1 considers Frye's claims the California Supreme Court summarily denied, it must consider any 2 reasonable basis that Court may have had to deny Frye relief.

Id. at 13 (citing Richter, 562 U.S. 3 at 786.) To overcome this deferential standard, Frye thus must show "there was no reasonable 4 basis for the state court to deny relief." Id. (quoting Walker v. Martel, 709 F.3d 925, 939 (9th Cir. 5 2013)). 6 If Frye does show the California Supreme Court's decision was unreasonable under 7 § 2254, then this court reviews his claim for relief de novo and may develop the evidentiary 8 record through a hearing, or, in the case of claims 42 and 44, evaluate those claims on the hearing 9 record it held in 2008.

See Am. F&Rs at 17 (citing *Frantz v. Hazey*, 533 F.3d 724, 737 (9th Cir. 10 2008)). 11 C. Constitutional Issues Related to California's Habeas Corpus Process 12 Before arguing the specific claims mentioned above satisfy § 2254(d)(1) or § 2254(d)(2), 13 Frye claims the process by which California courts adjudicate habeas corpus petitions is 14 unreasonable under § 2254 because it violates his federal constitutional rights in a variety of 15 ways.

See Pet'r's Brief at 51–80. The court construes these challenges to California's habeas 16 procedures as a motion for the court to hear all eleven claims de novo without first applying 17 § 2254 deference to the California Supreme Court's decision. Many of Frye's claims involve the 18 argument that California violates the federal Constitution by requiring its habeas petitioners to 19 overcome a presumption that state court decisions were true, fair and accurate.

See *id.* at 57 20 (citing *People v. Duvall*, 9 Cal. 4th 464, 474 (1995)). Frye also requests, for the first time, an 21 evidentiary hearing to determine how the California Supreme Court arrived at a decision to 22 summarily deny his petitions for habeas corpus as well as to decide for the first time claim 39 in 23 his operative petition before this court—a claim the court did not address in its 2006 decision— 24 that the California Supreme Court arbitrarily reviews capital habeas corpus cases.

See *id.* at 78– 25 80. Several courts in this district have heard similar arguments to the ones Frye makes and have 26 denied relief. See *Riel v. Warden, San Quentin Prison*, No. 01-0507, 2015 WL 6690127, at *11– 27 13 (E.D. Cal. Oct. 30, 2015), findings and recommendations adopted by No. 01-0507 (E.D. Cal. 28 Mar. 19, 2018); *Cornwall v. Warden, San Quentin Prison*, No.06-0705, 2018 WL 934542, at 1 *11–16 (E.D.

Cal. Feb. 15, 2018), findings and recommendations adopted by 2019 WL 12117105 2 (E.D. Cal. Mar. 19, 2019). 3 The magistrate judge recommends denying an evidentiary hearing on Frye's claims that 4 are based solely on the contention that California's procedures violated Frye's constitutional 5 rights and denying an evidentiary hearing on claim 39 or otherwise allowing investigating the 6 procedures or decision-making of California state courts in habeas proceedings.

See Am. F&Rs 7 at 17–23, 30–32. Frye has objected to these recommendations. See Pet'r's Objs. at 12–38, 41– 8 46. Having reviewed the file, the court finds the findings and recommendations regarding Frye's 9 claims relating to California's alleged procedural defects in its consideration of habeas corpus 10 petitions to be supported by the record and by the proper analysis.

11 D Application of § 2254 to Frye's Specific Claims 12 The remainder of this order addresses the magistrate judge's recommendations regarding 13 reconsideration of the order granting Frye's motion for an evidentiary hearing on claims 2, 3, 4, 5, 14 7, 25, 28–29, 37, 42, and 44. 15 Before addressing each claim, the court considers Frye's objections that cut across many 16 of his individual claims for relief.

First, Frye objects to the magistrate judge's handling his 17 claims on a claim-by-claim basis as opposed to analyzing all ineffective assistance of counsel 18 claims collectively. See Pet'r's Objs. at 39–41. The court finds the magistrate judge's analysis to 19 be proper. While Frye claims Pinholster requires federal courts to evaluate claims identically to 20 the way the state supreme court evaluated them, Pinholster says no such thing.

The Court in 21 Pinholster was concerned with the evidentiary record before the state court and not the claim or 22 claims before the state court. See 563 U.S. at 180–81. Further, it was Frye who presented 23 ineffective assistance of counsel as many distinct claims in his operative petition. See generally 24 2d Am. Pet.

Finally, Frye has made a separate cumulative claim, claim 45, but that claim is not 25 relevant to this order as Frye has not moved for an evidentiary hearing on that claim. See id. 26 ¶¶ 98–99. If and when the court evaluates that claim, all of Frye's ineffectiveness claims will be 27 considered collectively, along with all his other claims. This objection is overruled.

28 //// 1 Second, Frye objects to the magistrate judge's not considering the length of the jury's 2 deliberations—three days—when evaluating his ineffective assistance of counsel claims. See 3 Pet'r's Objs. at 57. Courts may consider the length of jury deliberations when evaluating the 4 prejudice prong of Strickland. See, e.g., *Thomas v. Chappell*, 678 F.3d 1086, 1103 (9th Cir.

5 2012) (collecting cases). But they are not required to consider deliberations. Further, there is no 6 evidence the California Supreme Court did not take the length of deliberations into account when 7 it denied Frye's petitions for habeas corpus. Further, for all of the claims addressed below, a 8 reasonable jurist could find, taking the length of deliberations into account, that Frye nevertheless 9 has not made out a prima facie case for relief.

Thus, the court finds no basis for not accepting the 10 magistrate judge's conclusions. This objection is overruled. 11 Third, Frye claims the magistrate judge erred in finding Frye failed to show the California 12 Supreme Court used an incorrect test for prejudice by following *Lockhart v. Fretwell*, 506 U.S. 13 364 (1993) instead of Strickland. See Pet'r's Objs. at 41.

This objection is overruled as the 14 magistrate judge's analysis that Frye has failed to make a showing that would overcome the 15 presumption that state courts know and follow the law, see *Woodford v. Visciotti*, 537 U.S. 19, 24 16 (2002) (collecting cases), is supported by the record and by the proper analysis. See Am. F&Rs at 17 32–36.

The court notes in particular that the California Supreme Court applied Strickland and did 18 not apply Fretwell in denying Frye's direct appeal. See Frye, 18 Cal. 4th at 952–53, 979. 19 Fifth, Frye argues the magistrate judge did not consider “allegations not refuted by the 20 record.” See id. at 46–49.

For example, according to Frye, the magistrate judge refused to 21 consider Frye’s allegation that an ex parte hearing was held early on in the case on November 21, 22 1985, during which Frye’s trial counsel at the time, Larry Dixon, informed the trial judge he was 23 incompetent to handle the case. Frye alleges the trial judge indicated he would not remove Dixon 24 as counsel unless he located substitute counsel.

Pet’r’s Objs. at 48. The magistrate judge 25 correctly noted, however, there is no evidence of this ex parte hearing in the state court record. 26 Thus, it was appropriate for her to not consider the allegation as evidence, faithfully adhering to 27 the holding of *Pinholster*. See 563 U.S. at 180–83. Frye’s objection is overruled. 28 // 1 Finally, Frye argues his habeas counsel should be replaced under *Trevino v. Thaler*, 569 2 U.S. 413 (2013) and *Martinez v. Ryan*, 466 U.S. 1 (2012), if the magistrate judge is correct in 3 asserting “petitioner made no attempt to place the evidence he has collected regarding petitioner’s 4 mental state within the legal context of the guilt phase determination.” Pet’r’s Objs. at 40–41 5 (quoting *Am.*

F&Rs at 61). But the court previously found Frye’s habeas counsel had properly 6 contextualized as relevant to the guilt phase determination. Moreover, the claim appears moot 7 given that Frye obtained new habeas counsel in 2019. See Order (Nov. 21, 2019), ECF No. 700. 8 The court now turns to consideration of each claim addressed by the pending findings and 9 recommendations.

10 1. Claim 2 11 In claim two, Frye alleges his trial lawyers were ineffective at the guilt stage because they 12 did not introduce mental health evidence that might have convinced a jury he could not have 13 formed the requisite intent for a felony murder conviction. See 2d *Am. Pet.* ¶¶ 225–252.

The 14 magistrate judge recommended denying Frye’s request for an evidentiary hearing under the 15 prejudice prong of *Strickland*. See *Am. F&Rs* at 37–63. 16 Frye makes two objections. First, Frye argues the magistrate judge applied the incorrect 17 standard under California law for a mental health defense in saying, “Petitioner only suffered 18 prejudice if the mental state defense would have been successful to show that ‘because of his 19 mental illness or voluntary intoxication, [petitioner] did not in fact form the intent unlawfully to 20 kill.’” *Am.*

F&Rs at 61 (emphasis in original) (quoting *People v. Saille*, 54 Cal. 3d 1103, 1116– 21 17 (1991)). The objection is overruled. The court finds the magistrate judge properly applied the 22 correct California law on mental state defenses and Frye’s objection to the phrase “in fact” mis- 23 reads *Saille*’s holding. *Saille* is referring to “in fact” as in, on the day of the crime, the defendant 24 had not formed the requisite mens rea—as opposed to a defense where the defendant claims he 25 did not have the capacity to ever form the requisite mens rea.

26 Second, Frye argues the magistrate judge committed factual error by mistaking testimony 27 by Garth Lavallee for testimony by Ron Wilson. Objs. at 53 (citing RT at 5818:14-17, 28 6001:5-11).

This objection is overruled.

The magistrate judge cites to both Lavallee's testimony 1 as well as Wilson's. See Am. F&Rs at 62. The court also disagrees with Frye that the magistrate 2 judge took Jennifer Warsing's testimony out of context as it finds the magistrate judge's analysis 3 of Warsing's testimony to be proper and supported by the record. See id. 4 In sum, the court adopts the magistrate judge's overall conclusion as to Claim 2 and 5 denies an evidentiary hearing.

As Frye admits, he was tried under a first-degree felony murder 6 theory of liability. See Pet'r's Objs. at 53. Under that theory, a jury would have needed only to 7 find Frye had the specific intent "to commit robbery and/or burglary." RT at 9291.

The 8 prosecution had multiple people testify Frye told them he wanted to rob the Brandts. See Am. 9 F&Rs at 62. A reasonable jurist could have found this testimony compelling enough to show 10 Frye had the requisite mens rea even if presented with more evidence of Frye's mental health and 11 substance abuse problems. 12 2. Claims 3 and 7 13 In claim 3, Frye alleges ineffective assistance of his trial counsel during the guilt phase for 14 failure to develop and present a coherent trial strategy.

See 2d Am. Pet. ¶¶ 253–267. In claim 7, 15 Frye alleges ineffective assistance of counsel at the guilt phase for failure to object to various 16 instances of prosecutorial misconduct. See 2d Am. Pet. ¶¶ 372–415. The magistrate judge 17 recommends denying an evidentiary hearing on claim 3.

Having reviewed the file, the court finds 18 the findings and recommendations to be supported by the record and by the proper analysis. 19 3. Claims 4 and 5 20 In claims 4 and 5, Frye makes various allegations of ineffective assistance of counsel by 21 one of his trial lawyers, Richard Hawke. See 2d Am. Pet. ¶¶ 268–325.

The magistrate judge 22 recommends denying claims 4 and 5. See Am. F&Rs at 122. The court in its 2006 order had 23 previously denied these claims but had permitted Frye to present evidence of the factual 24 allegations supporting them in support on claim 2. See Order (Dec. 1, 2006) at 24–25, 52 n.23. 25 // 1 Because the court has denied an evidentiary hearing on claim 2, it now denies claims 4 and 5 in 2 full.

3 4. Claim 25 4 In claim 25, Frye alleges his jailors deprived him of his right to counsel by taking Frye off 5 of his anti-anxiety medication prior to the start of the penalty phase of his trial. See 2d Am. Pet. 6 ¶¶ 663–78.

The magistrate judge recommends denying relief on this claim. See Am. F&Rs at 7 87–100. Frye objects that the magistrate judge incorrectly believed Frye was relying on a 8 "constitutional right to be medicated claim." Pet'r's Objs. at 60. Instead, Frye claims he is 9 relying on *Drope v.*

Missouri, 420 U.S. 162 (1975), and *Pate v. Robinson*, 383 U.S. 375 (1966), 10 which Frye claims provide a state court must observe procedures to ensure a defendant is 11 competent to stand trial.

See *id.* The court overrules this objection. The magistrate judge's 12 analysis is supported by the record and by the proper analysis. A special jury—independent from 13 the one that decided Frye's guilt and punishment—determined that Frye was competent to stand 14 trial. See Court Transcript (CT) 4400. Frye's trial counsel then asked the presiding judge for an 15 independent finding on Frye's competence to stand trial.

See *id.* 4400–4406. The judge granted 16 the request and also ruled Frye was competent to stand trial. See RT 9461. Given the record 17 here, a reasonable jurist could conclude the trial court applied procedural safeguards to ensure 18 Frye was competent before proceeding with the penalty phase of the proceeding. 19 5. Claims 28 and 29 20 In claims 28 and 29, Frye argues he received ineffective assistance of counsel at the 21 penalty phase because his trial lawyers failed to put on mitigating mental health evidence and 22 mitigating evidence from his social history to humanize him before the jury.

See 2d Am. 23 Pet. ¶¶ 717–746. The magistrate judge recommends granting an evidentiary hearing on claims 28 24 and 29. See Am. F&Rs at 78–87. California objects, arguing the magistrate judge failed to apply 25 the deferential standard of review under AEDPA, and she should instead have found that a 26 reasonable jurist could conclude Frye's trial counsel did investigate his mental health issues, and 27 then, like defense counsel in *Pinholster*, strategically decided not to present a mental health or 1 mitigation case to the jury in the penalty phase.

See Resp't's Objs. at 21. As explained below, 2 the court sustains California's objections and declines to adopt the magistrate judge's 3 recommendation to hold an evidentiary hearing on claims 28 and 29. 4 As noted above, the court reviews Frye's claims for ineffective assistance of counsel at the 5 penalty phase under the highly deferential standard of review imposed by § 2254.

See *Richter*, 6 562 U.S. at 786–87 (petitioner must show “the state court's ruling on the claim being presented in 7 federal court was so lacking in justification that there was an error well understood and 8 comprehended in existing law beyond any possibility for fairminded disagreement”).

To 9 overcome this high bar, Frye needs to show “there was no reasonable basis for the state court to 10 deny relief.” Am. F&Rs at 13 (quoting *Walker*, 709 F.3d at 939). This deferential standard is 11 applied to the already deferential standard for ineffective assistance of counsel found in 12 *Strickland v. Washington*, which requires Frye to show his counsel's performance “fell below an 13 objective standard of reasonableness” and that “there is a reasonable probability that, but for 14 counsel's professional errors, the result of the proceeding would have been different.” 466 U.S. 15 668, 687–88, 694 (1984).

Under the first prong of Strickland, there is a “strong presumption that 16 counsel’s conduct falls within the wide range of reasonable professional assistance....” Id. at 17 689. 18 Under this double-deferential standard, the court finds a reasonable jurist could conclude 19 Frye’s trial counsel did not fall below an objective standard of reasonableness in the penalty 20 phase of the trial.

For example, a jurist could find Frye’s trial counsel decided not to introduce 21 more mitigating mental health evidence and social history evidence as part of a strategic choice to 22 emphasize instead the testimony of Frye’s loved ones. Frye’s mother as well as childhood friends 23 testified that Frye had redeeming qualities, and his life should be spared.

See Am. F&Rs at 10. 24 Arguably, putting on a different case that focused on Frye’s mental health struggles, might have 25 distracted from these personal, emotional appeals. Moreover, Frye had just given the jury good 26 reason to find him quite unsympathetic, as he had opened the penalty phase by providing a 27 disastrous allocution in which he harangued the jury for finding him guilty.

See Am. F&Rs at 9– 28 10. Counsel did put on witnesses who pointed out some of Frye’s challenges as a teenager, 1 including being involved in a devastating car accident and the personal difficulties he experienced 2 after his mother left his father. See id. at 10. Given the circumstances, the deference afforded 3 counsel’s judgment regarding how to handle the trial dynamic at the time is, appropriately, 4 especially great.

5 Most importantly, as California points out, Frye’s trial counsel did not neglect Frye’s 6 mental health or social history in their investigations. Frye’s counsel had a psychiatrist, 7 Dr. James Peal, and a neurologist, Dr. Stephen McGuire, testify during the guilt phase of the trial. 8 Counsel also had neuropsychologist Dr. Linda Wagner and psychiatrist Dr. Doug Anderson 9 interview Frye before the guilt phase of the trial commenced, although they did not end up 10 testifying.

See Am. F&Rs at 42–51. Finally, it appears Frye’s counsel had contacted another 11 doctor, one Dr. Craig Haney, who they were considering having testify during the penalty phase 12 but ultimately decided not to put on the stand. See RT 9615. Frye’s counsel also made a trip to 13 Indiana to investigate his social history background. See Am. F&Rs at 79.

Thus, Frye’s 14 counsel’s actions were not analogous to those of the counsel in *Porter v. McCullom*, whose 15 performance was found to be deficient because he did literally nothing to investigate his client’s 16 mental health social history background. See 558 U.S. 30, 39–40 (2009) (holding defendant’s 17 counsel not obtaining any of defendant’s records or interviewing his family members prior to the 18 penalty phase constituted deficient performance under prong one of Strickland).

Here, as in 19 *Pinholster*, Frye’s trial counsel conducted investigatory work even if they did not present all they 20 found to the jury in the penalty phase. 21 In hindsight, Frye’s trial counsel may not have adopted the best strategy at the penalty 22 phase, but as the Supreme Court has noted in *Pinholster*, “there are countless ways to provide 23 effective assistance in any given case” and “those decisions are due ‘a heavy measure of 24 deference.’” 563 U.S. at 197 (quoting *Strickland*, 466 U.S. at 689, 691).

The court finds that a 25 reasonable jurist could have applied heavy deference to the choices Frye’s trial counsel made in 26 the penalty phase and, accordingly, have denied relief. The court does not find California’s 27 denial of Frye’s ineffective assistance of counsel claims to be unreasonable according to clearly 28 established federal law and thus denies Frye relief for claims 28 and 29.

1 6. Claim 37 2 In claim 37, Frye alleges California’s death penalty scheme is unconstitutional because it 3 fails to prevent the death penalty from being administered in an arbitrary and capricious way. See 4 2d Am. Pet. ¶¶ 817–826.

The magistrate judge recommends denying an evidentiary hearing on 5 claim 37. See Am. F&Rs at 94–100. Frye has objected on various grounds, but the court 6 overrules his objections. The court is particularly convinced that the Ninth Circuit’s holding in 7 *Karis v. Calderon*, 283 F.3d 1117, 1141 n.11 (2002), which found California’s statutory scheme 8 to be facially constitutional, effectively forecloses Frye’s claim for relief under claim 37.

The 9 court thus finds the findings and recommendations to be supported by the record and by the 10 proper analysis in this respect. 11 7. Claim 42 12 The crux of claim 42 is that Frye’s constitutional rights were violated because one of the 13 jurors—Juror Fairfield—spoke with her minister in between the trial and penalty phase about 14 what the bible had to say about the death penalty.

See 2d Am. Pet. ¶¶ 971–85. As noted above, 15 the court previously held an evidentiary hearing on this claim in 2008. Given the subsequent 16 change in law, the parties have now briefed whether the California Supreme Court’s denial of this 17 claim should be upheld in applying the new controlling federal law.

In reviewing the findings 18 and recommendations, the court may use only the evidence before the California Supreme Court 19 at the first step. See *Pinholster*, 563 U.S. at 180–83. If Frye shows California’s decision was 20 unreasonable under § 2254, then, and only then, can the court evaluate Frye’s claim *de novo* 21 taking account of the evidence presented at the 2008 evidentiary hearing.

See *Frantz*, 533 F.3d at 22 737 (if ¶ 2254 is satisfied, “then federal habeas courts must review the substantive 23 constitutionality of the state custody *de novo*”). 24 The magistrate judge

recommends granting relief based on § 2254(d)(2) and deciding 25 Claim 42 on the merits based on the evidence presented at the 2008 evidentiary hearing; she then 26 recommends denying Frye's claims on the merits.

See Am. F&Rs at 100–14. For the reasons 27 stated below, the court adopts the magistrate judge's conclusion that the evidentiary hearing 28 record may be considered, but decides Frye should be granted relief on this claim. 1 First, the court sustains Frye's objection to the magistrate judge's application of the law to 2 this claim as described below. See Pet'r's Objs. at 80–84.

The court, with the benefit of the 3 Ninth Circuit's en banc holding in *Godoy v. Spearman*, 861 F.3d 956 (2017), which was not 4 available to the magistrate judge, employs the two-part framework for evaluating a jury 5 misconduct claim as clearly established by the United States Supreme Court in *Mattox v. United 6 States*, 146 U.S. 140 (1892), and in *Remmer v. United States*, 347 U.S. 227 (1954).^{4 7} At step one the court determines if contact by a juror with an outside party was “possibly 8 prejudicial.” *Godoy*, 861 F.3d at 966–67 (citing *Mattox*, 146 U.S. at 150).

The defendant must 9 surpass only a “low threshold” to meet this burden and provide “evidence of an external contact 10 that has a ‘tendency’ to be ‘injurious to the defendant.’” *Id.* at 967 (quoting *Tarango v. 11 McDaniel*, 837 F.3d 936, 936, 947 (9th Cir. 2016)).

The contact must raise a credible risk of 12 influencing the verdict in order to trigger a presumption of prejudice. See *id.* When determining 13 if the contact raises a credible risk, courts consider the identity of the outside party and the nature 14 of the contact. Communications “about the matter pending before the jury,” for example, “greatly 15 increase the risk of prejudice.” *Godoy*, 861 F.3d at 967 (quoting *Remmer*, 347 U.S. at 229).

The 16 presumption may be triggered “even when [w]e do not know from the record... what actually 17 transpired, or whether the incidents that may have occurred were harmful or harmless.” *Id.* at 968 ⁴ Specifically, the Ninth Circuit in *Godoy* disavowed dicta in cases like *United States v. Dutkel*, 192 F.3d 893 (9th Cir. 1999) and *United States v. Rosenthal*, 454 F.3d 943 (9th Cir.

2006), see 861 F.3d at 968 n.6, on which the magistrate judge relied, see Am. F&Rs at 104–05. The magistrate judge also incorrectly, however understandably, relied upon *Brecht v. Abramson*, 507 U.S. 619 (1993) for its harmless error standard. See Pet'r's Objs. at 84–88. It is clear, for example, that for extrinsic evidence juror misconduct cases, the *Brecht* standard for harmlessness applies.

See *Kipp v. Davis*, 971 F.3d 866, 876 (9th Cir. 2020). However, the *Mattox/Remmer* standard as enunciated in *Godoy* applies in evaluating third party contact juror misconduct claims such as Frye's. See *Espinoza v. Montgomery*, 816 Fed. App'x 217, 218 n.2 (9th Cir. 2020) (enunciating

distinction between extrinsic evidence juror misconduct cases and third party contact juror misconduct cases); *Clark v. Chappell*, 936 F.3d 944, 971 (9th Cir.

2019) (applying *Mattox/Remmer* presumption to third party contact case); *Von Tobel v. Benedetti*, 975 F.3d 849, 857 (9th Cir. 2020) (applying standard for prejudice as outlined in *Godoy* and not *Brecht* to third party juror misconduct case); see also *Clark v. Broomfield*, No. 97-20618, 2022 WL 1450538, at *2 (N.D. Cal. May 9, 2022) (applying distinction between third party contact juror misconduct claims and extrinsic evidence juror misconduct claims); see also *Bonfiglio v. Montgomery*, No. 16-2349, 2024 WL 2093650, at *10–11 (C.D.

Cal. Mar. 12, 2024) (same). 1 (quoting *Remmer*, 347 U.S. at 229). Ultimately the court must take “the surrounding 2 circumstances into consideration,” to determine if the contact “interferes with the juror’s role as a 3 juror.” *Clark v. Chappell*, 936 F.3d 944, 971 (9th Cir. 2019), amended on denial of r’hg en banc, 4 948 F.3d 1172 (9th Cir. 2020). 5 If the presumption of prejudice attaches, “the burden shifts to the state to prove the contact 6 was harmless.” *Godoy*, 861 F.3d at 968.

As the Ninth Circuit held in *Godoy*, the state has a 7 “heavy burden” at this stage. *Id.* at 970. Indeed, to overcome the presumption of prejudice, the 8 state must show “there is no reasonable possibility that the communication... influenced the 9 verdict.” *Godoy*, 861 F.3d at 968 (quoting *Caliendo v. Warden of Cal. Men’s Colony*, 365 F.3d 10 691, 697 (9th Cir.

2004)). When the presumption arises but the prejudicial effect of the contact is 11 unclear from the existing record, the court must hold a hearing to “determine the circumstances 12 [of the contact], the impact thereof upon the juror, and whether or not it was prejudicial.” *Id.* 13 (quoting *Remmer*, 347 U.S. at 229–30) (alteration in original). 14 Here, the court adopts the magistrate judge’s recommendation that *Frye* has satisfied 15 ¶ 2254(d)(2) as to claim 42, albeit based on the legal standard described above and not upon the 16 magistrate judge’s recommended legal test for juror misconduct.

The evidence *Frye* proffered 17 before the California Supreme Court in *Frye*’s habeas petition, see *Am. F&Rs* at 100–01, was a 18 declaration from Juror Fairfield. Fairfield submitted she discussed the death penalty with her 19 minister before deciding upon the verdict in the penalty phase.

In her words, 20 Between the guilt and the penalty phase, I talked with a clergyman 21 because of the difficult decision I had just made in finding Mr. *Frye* 22 guilty and another difficult decision remaining about whether Mr. 23 *Frye* should be sentenced to death.

The clergyman reconfirmed my 24 own beliefs about the propriety of what I was doing. 25 *Pet’r’s Fairfield Decl.* ¶ 3 (Apr. 18, 2000).⁵ Based on the evidence submitted by *Frye* to the 26 California Supreme Court, the court finds no reasonable jurist could have found the contact was 27 not at least “possibly prejudicial.” *Godoy*, 861 F.3d at 959 (quoting *Mattox*, 146 U.S. at 150).

5 The court references here the copy of Fairfield’s declaration, submitted as exhibit 38 in the evidentiary hearing that took place from August 19–21, 2008. 1 The discussion between Juror Fairfield and her minister was about the criminal matter pending 2 before the jury. Further, one vote could have made all the difference as imposition of the death 3 penalty requires a unanimous jury.

Finally, the minister was at least possibly in a position of 4 spiritual and moral authority over Ms. Fairfield and his opinions may have put her at ease about 5 voting for the death penalty in what she says was a “difficult decision.” As another district court 6 put it, analyzing an almost identical fact pattern, Fairfield’s conversation with her minister “freed 7 [her] from the doubt that likely caused [her] to seek out [her] minister’s advice in the first place 8 and steeled [her] resolve to adhere to [her] prior opinion about the propriety of the death penalty.” 9 *Clark v. Broomfield*, No. 97-20618, 2022 WL 1450538, at *11 (N.D.

Cal. May 9, 2022). The 10 subject matter of her conversation and the identity of Fairfield’s conversant as her minister mean 11 no reasonable jurist could have found the contact was not possibly prejudicial to Frye. 12 California has submitted a competing declaration from Fairfield. See Am. F&Rs at 107. 13 In it, Fairfield stated, “I did speak to my minister around the time of the trial, but I do not 14 remember whether I did so before or after my vote for the death penalty.” Resp’t’s Fairfield 15 Decl. ¶ 3 (July 6, 2000).⁶ She also stated: 16 I did not discuss the details of Mr. Frye’s trial with my minister.

I 17 asked him what the Bible had to say about the death penalty. My 18 minister gave me a 1 ½ page[d] written response that basically said 19 the people voted and enacted laws to determine what crimes are and 20 what the penalties should be. 21 *Id.* ¶¶ 5–6 (reflecting hand annotations regarding length of response). No reasonable jurist could 22 find Fairfield’s second declaration clarifies matters to show the contact was harmless.

Indeed, 23 Fairfield tells largely the same story in her second declaration as she did in her first. She spoke 24 with a person of moral authority about the death penalty. In fact, he gave her a written 25 response—arguably an extrajudicial jury instruction—that, for the reasons stated above, appears 26 to have reassured her it was acceptable to vote for the death penalty.

The declaration did raise 27 sufficient doubt to justify an evidentiary hearing to allow California to show harmlessness given 6 The court references here the copy of Fairfield’s declaration, submitted as exhibit 39 in the evidentiary hearing that took place from August 19–21, 2008. 1 Fairfield’s saying she did not recall when she spoke to the minister about the death penalty.

See 2 *Godoy*, 861 F.3d at 959 (holding courts should hold evidentiary hearings “to determine the 3 circumstances [of the contact], the impact thereof upon the juror, and whether or not it was 4 prejudicial”). Thus, the court adopts the magistrate judge’s recommendation to find the 2008 5

evidentiary hearing was necessary. 6 California objects, arguing Frye had a burden to show what Fairfield's minister wrote to 7 Fairfield in his petition to the California Supreme Court.

Resp't's Objs. at 25. The court 8 overrules this objection as Remmer states the presumption may attach "even when [w]e do not 9 know from th[e] record... what actually transpired, or whether the incidents that may have 10 occurred were harmful or harmless." Remmer, 347 U.S. at 229. 11 As noted, the magistrate judge recommends denying Claim 42 on the merits based on the 12 evidence presented at the evidentiary hearing.

After reviewing the record, the court declines to 13 adopt this recommendation. The legal standard applicable to the evidentiary hearing means it was 14 held to determine "the circumstances [of Fairfield's misconduct], the impact thereof upon the 15 juror, and whether or not it was prejudicial." Remmer, 347 U.S. at 230. "If the state does not 16 present contrary evidence that rebuts the presumption of prejudice by showing 'there is no 17 reasonable possibility that [Fairfield's] communication[s]... influenced the verdict,' then the 18 court should grant Frye's petition for habeas corpus.

See Godoy, 861 F.3d at 970 (quoting 19 Caliendo, 365 F.3d at 697). 20 Here, for the same reasons reviewed above, based on the evidence in the record, the court 21 finds Fairfield's contact was at least possibly prejudicial. While Fairfield's memory during her 22 deposition—which took place on August 20, 2008, twenty years after trial had concluded—was 23 faulty, the evidence taken as a whole points to her having discussed the death penalty with her 24 minister between the trial phase and the penalty phase.

Her declaration closest in time to the 25 actual trial says that was the timeframe of her discussions with her minister. Pet'r's Fairfield 26 Decl. ¶ 3 (Apr. 18, 2000). Further, during redirect by Frye's habeas counsel, Fairfield stated as 27 much in this colloquy: 1 Q: Ms. Fairfield, do you recall when I asked you earlier whether you 2 went back to court after you got the document from your minister, 3 do you recall what your answer was?

4 A: I said we went back for the penalty phase. 5 Q: Is that what you believe happened? 6 A: That is what I believe happened, yes. 7 Fairfield Dep. at 37, ECF No. 421-1. 8 The record also supports the conclusion the minister was aware of Fairfield's role as juror 9 in Frye's case. While Fairfield stated she did not discuss the facts of the case with the minister, 10 she also said she did not need to because: 11 Everybody in Sutter Creek and Amador County knew I was on this 12 jury so I didn't have to, you know, mention [that she was on the case].

13 I did ask my minister what—and he knew, everybody knew, you 14 know that—what the nature of this trial. Was in the papers. And so 15 I asked him what the Bible had to say about the death penalty. 16 Id. at 10. Fairfield also stated the minister did not provide his own writings. He only provided 17 bible quotes. See id. at 17–18. But the quotes were selected and curated and

designed to answer 18 what the bible says about the death penalty—that was relevant to Frye’s case.

19 Fairfield’s best recollection of the overall message she took from the minister’s written 20 response to her question about the death penalty is in her second declaration: “My minister gave 21 me a written response that basically said the people voted and enacted laws to determine what 22 crimes are and what the penalties should be.” Resp’t’s Fairfield Decl. ¶ 6.

This overall message, 23 combined with the moral authority of the minister, on a topic directly related to Juror Fairfield’s 24 responsibilities and given that Fairfield’s decision could determine whether Frye lived or died, 25 was prejudicial to Frye as it interfered with Fairfield’s responsibilities as a juror.

In effect it 26 served as an improper third-party jury instruction. See RT 9380–81 (judge instructing jurors at 27 end of guilt phase “not to discuss the case with any other person or with the jurors outside the jury 28 room until the case is finally over.”); RT 9766–75 (judge providing instructions to jury regarding 29 determining the penalty and telling jurors not to follow any other instructions, including from the 30 guilt phase).

1 California has not rebutted the presumption of prejudice. The evidentiary hearing 2 memorialized more prejudicial evidence about Fairfield’s contact. The hearing supports the 3 conclusion the minister was aware of the facts of the trial and Fairfield’s role as juror and could 4 have curated the quotes to send a message advocating a certain result at the penalty phase.

A 5 reasonable possibility exists Fairfield’s contact with her minister took place between the trial 6 phase and the penalty phase, at the critical time Fairfield was thinking about the moral 7 implications of her impending decision and was most vulnerable to being swayed by a third party. 8 Thus, the government cannot show the contact was harmless under the Mattox/Remmer 9 framework as outlined in Godoy.

See 861 F.3d at 968. 10 Because California has not met its heavy burden to overcome the presumption of 11 prejudice, the court grants Frye’s writ of habeas corpus for Claim 42. 12 8. Claim 44 13 The court declines to adopt the magistrate’s findings and conclusion regarding Claim 44 14 and instead adopts the Ninth Circuit’s holding in Frye, 115 F.4th at 1155.

The court accordingly 15 denies Frye relief on Claim 44. 16 E. Certificate of Appealability 17 Pursuant to Rule 11(a) of the Federal Rules Governing Section 2254 Cases, the court has 18 considered whether to issue a certificate of appealability.

Before petitioner can appeal this 19 decision, a certificate of appealability must issue. See 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). 20 Where the petition is denied on the merits, a certificate

of appealability may issue under 21 28 U.S.C. § 2253 “only if the applicant has made a substantial showing of the denial of a 22 constitutional right.” 28 U.S.C. § 2253(c)(2).

The court must either issue a certificate of 23 appealability indicating which issues satisfy the required showing or must state the reasons why 24 such a certificate should not issue. See Fed. R. App. P. 22(b). Where the petition is dismissed on 25 procedural grounds, a certificate of appealability “should issue if the prisoner can show: (1) ‘that 26 jurists of reason would find it debatable whether the district court was correct in its procedural 27 ruling’; and (2) ‘that jurists of reason would find it debatable whether the petition states a valid 1 claim of the denial of a constitutional right.’” *Morris v. Woodford*, 229 F.3d 775, 780 (9th Cir.

2 2000) (quoting *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 1604 (2000)). 3 The court provides Frye the opportunity to request a certificate of appealability on any of 4 the denied claims. Any request must be filed within seven days of the filed date of this order. 5 IV. CONCLUSION 6 As explained more fully above: 7 Frye’s motion to withdraw evidence is granted (ECF No. 706).

8 The magistrate judge’s findings and recommendations, ECF No. 658, are adopted 9 in part. 10 Frye’s claims 2, 3, 4, 5, 7, 25, 28, 29, and 44 are denied because the California 11 Supreme Court’s rejection of those claims was not contrary to law or unreasonable 12 as defined in 28 U.S.C. § 2254(d). 13 Frye’s motion to expand the record and for an evidentiary hearing on Claim 37 is 14 denied (ECF No. 549).

15 Any request for a certificate of appealability must be filed within seven (7) days of 16 the filed date of this order. 17 Frye’s claim 42 is granted. The court grants a writ of habeas corpus on this 18 ground and grants partial judgment to Frye.

The sentence of death against Frye is 19 vacated, effective ninety days from the filed date of this order. It is further 20 ordered that the State of California shall, within ninety days from the filed date of 21 this order, either initiate a new penalty phase trial or resentence Frye in accordance 22 with California law and the United States Constitution. 23 This order resolves ECF Nos. 549, 658, 706.

24 IT IS SO ORDERED. 25 DATED: September 19, 2025.