

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SERGIO OCHOA,
Petitioner-Appellant,

v.

RONALD DAVIS, Warden, California
State Prison at San Quentin,
Respondent-Appellee.

No. 18-99007

D.C. No.
2:02-cv-07774-
RSWL

OPINION

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

Argued and Submitted March 22, 2022
Pasadena, California

Filed October 5, 2022

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

Opinion by Judge VanDyke

SUMMARY*

Habeas Corpus/Death Penalty

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

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

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

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

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

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

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

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

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

COUNSEL

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

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

OPINION

VANDYKE, Circuit Judge:

I. INTRODUCTION

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

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