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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ERNEST DEWAYNE JONES,
Petitioner,

v.

KEVIN CHAPPELL, Warden of California State Prison at San Quentin,
Respondent.

Case No. CV-09-2158-CJC

DEATH PENALTY CASE

PETITIONER'S REPLY BRIEF REGARDING THE APPLICATION OF 28 U.S.C. § 2254(D)

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I. INTRODUCTION

Pursuant to this Court's Order of January 9, 2014, Mr. Jones submits this brief on the application of 28 U.S.C. section 2254(d) to the claims in his habeas corpus petition. Order Granting Petitioner's Third Ex Parte Application for an Extension of Time to File A Reply Brief, ECF No. 99. As set forth in previous briefing in the Court and this Reply Brief, Mr. Jones is entitled to merits review of each of the claims contained in the Petition for Writ of Habeas Corpus. *See* ECF Nos. 62, 68, 71, 74, & 84.

II. THE LEGAL FRAMEWORK FOR DECIDING WHETHER THE STATE COURT DENIAL OF MR. JONES'S CLAIMS SATISFIES 2254(D) EXCEPTIONS.[1]

This Court's merits review of Mr. Jones's constitutional claims, following their summary denial by the California Supreme Court, is not barred by 28 U.S.C. section 2254(d) if the state decision either (1) is contrary to or an unreasonable application of clearly established Federal law, or (2) resulted in a decision that was based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d). The state court issued an opinion in Mr. Jones's direct appeal that addressed some

[1] As discussed throughout this Reply, the determination whether the state court decision comes within 2254(d) exceptions entails an examination of the facial sufficiency of Mr. Jones's prima facie showing and the applicable law before the state court at the time it summarily denied Mr. Jones's claims. This preliminary inquiry is substantially distinct from a proceeding in which Mr. Jones has an opportunity to conduct discovery and further develop the factual basis for his claims for relief and engage in full, formal merits briefing – a process that has not yet occurred in any court. Thus, although respondent's Opposition raises numerous issues that may affect this Court's ability to grant relief, apart from 28 U.S.C. section 2254(d), including *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) – the applicable prejudice standard governing this Court's review of certain claims – such issues are not relevant and therefore not addressed in this Reply.

aspects of the claims Mr. Jones has presented to this Court, *People v. Jones*, 29 Cal. 4th 1229, 1254-55, 131 Cal. Rptr. 2d 468 (2003), and the general application of section 2254(d) to that opinion is set out in section IV, *infra*. The primary state court decision this Court must evaluate under section 2254(d), however, is the summary denial of Mr. Jones state habeas claims for relief.[2]

A. Discerning the Basis for the State Court's Summary Denial Must Be Guided by Applicable State Law and Procedures.

In Mr. Jones's Opening 2254(d) Brief on Evidentiary Hearing Claims, filed Dec. 10, 2012 (Doc. 84) ("Opening Br."), and in the sections that follow, Mr. Jones establishes that "there was no reasonable basis" for the state court to summarily deny the claims of constitutional error Mr. Jones presented in his state habeas petitions, and thus no bar to this Court's merits review of those claims. *Harrington v. Richter*, __ U.S. __, 131 S. Ct. 770, 784, 178 L. Ed. 2d 624 (2011); *see also* 28 U.S.C. § 2254(d). Because the state court provided no explanation for its summary denial, this Court must assess the reasonableness of the state court's legal or factual conclusions by determining "what arguments or theories supported, or could have supported, the state court's decision." *Id*. at 786. This review is based on an examination of the state court decision "at the time it was made," and on what the state court "knew and did," or, in this case, what the state court knew and *could have done*. *Cullen v. Pinholster*, __ U.S. __, 131 S. Ct. 1388, 1398-99, 179 L. Ed. 2d 557 (2011); *see also Frantz v. Hazey*, 533 F.3d 724, 737 (9th Cir. 2008) (ruling that review under section 2254(d) demands that federal courts "determine the rule that *actually* governed the state court's analysis") (emphasis in original).

[2] Order Denying Case No. S110791, filed Mar. 11, 2009, Notice of Lodging, filed Apr. 6, 2010, ECF No. 29 ("NOL") at C.7.; Order Denying Case No. 159235, filed Mar. 11, 2009, NOL at D.6. Throughout this brief, these state court orders are referred to as the state court's "summary denial."

This Court's review of the state court decision therefore must be based on "the record in existence" at the time the state court decision was made, *Pinholster*, 131 S. Ct. at 1398, which in California, includes the allegations in the state habeas petition, the supporting exhibits, and the trial record, *id*. at 1403 n.12.[3] Review also must be constrained by the state law and procedures governing the state court decision. As the Ninth Circuit has explained,

> to evaluate analysis a state court did not conduct is inconsistent with AEDPA deference. Such an approach would require us to ignore rather than respect the state court's analysis, and it would effectively require us to defer to states in their role as respondents in habeas actions rather than as independent adjudicators. Such a presumption in favor of a state party is distinct in both purpose and effect from respect afforded to state courts.

Frantz, 533 F.3d at 738 (ruling that "if we were to defer to some *hypothetical* alternative rationale when the state court's *actual* reasoning evidences a § 2254(d)(1) error, we would distort the purpose of AEDPA") (emphasis in original).

Given these requirements, the starting point for assessing the state court decision is an understanding of how state law and procedures affect what the state court could have done, and could *not* have done, in summarily denying Mr. Jones's

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[3] All of the legal bases, factual allegations, and materials in support of Mr. Jones's claims before this Court have been exhausted in the California Supreme Court. *See* Answer to Petition for Writ of Habeas Corpus, filed April 6, 2010 (Doc. 28) at 2 n.3 (noting that "Respondent is not asserting that any claims in the instant federal Petition are unexhausted"); Response to Application to Defer Informal Briefing on Petition for Writ of Habeas Corpus, filed Mar. 25, 2010, *In re Jones*, California Supreme Court Case No. S180926 (stating "respondent has examined the federal petition and has determined that all claims therein appear to be exhausted. . . . Respondent will therefore be filing an answer to the federal petition and will not be asserting that any claims are unexhausted.").

claims. "Under California law, the California Supreme Court's summary denial of a habeas petition on the merits reflects that court's determination that the claims made in the petition do not state a prima facie case entitling the petitioner to relief." *Pinholster*, 131 S. Ct. at 1403 n.12 (internal quotation omitted). State law and procedures that dictate whether a prima facie showing successfully has been made are therefore central to evaluating whether there is any reasonable basis for the state court's summary denial. The following sections discuss this state law framework in greater detail and provide the basis for Mr. Jones's showing in section IV, *infra*, that summary denial of his claims satisfies section 2254(d).

1. The State Court Evaluates a Prima Facie Showing for Facial Sufficiency.

Under California law, the petition for a writ of habeas corpus serves a "limited function." *People v. Romero*, 8 Cal. 4th 728, 743, 35 Cal. Rptr. 2d 270 (1994). A state habeas petitioner has the burden "initially to *plead* sufficient grounds for relief, and then later to *prove* them." *People v. Duvall*, 9 Cal. 4th 464, 474, 37 Cal. Rptr. 2d 259 (1995) (emphasis in original). To make a prima facie showing that he is entitled to relief, Mr. Jones was obligated to "state fully and with particularity the facts on which relief is sought" and provide "reasonably available" documentary support for his allegations. *Duvall*, 9 Cal. 4th at 474. Conclusory allegations are those "made without any explanation of the basis for the allegations" and do not warrant relief. *People v. Karis*, 46 Cal. 3d 612, 656, 250 Cal. Rptr. 659 (1988).

In evaluating whether a prima facie showing has been made, the state court determines "whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief." *Duvall*, 9 Cal. 4th at 474-75; *see also Pinholster*, 131 S. Ct. at 1403 n.12 (recognizing that a California state court "generally assumes the allegations in the petition to be true, but does not accept wholly conclusory allegations."); *Nunes v. Mueller*, 350 F.3d 1045, 1054 (9th Cir.

2003) (ruling state court evaluating a prima facie showing purports to take claims "at face value" and evaluate claims "for sufficiency alone").

The determination whether a habeas petitioner has stated a prima facie case for relief is therefore one of facial sufficiency, a standard analogous to a demurrer in a state civil action. *Romero*, 8 Cal. 4th at 742 n.9; *see also Nutmeg Sec., Ltd. v. McGladrey & Pullen*, 92 Cal. App. 4th 1435, 1441, 112 Cal. Rptr. 2d 657 (2001) (ruling that a demurrer may not be sustained without leave to amend if, "liberally construed, it states a cause of action under any conceivable theory").[4] When "a habeas corpus petition is sufficient on its face (that is, the petition states a prima facie case on a claim that is not procedurally barred), the court is obligated by statute to issue a writ of habeas corpus" or an order to show cause. *Romero*, 8 Cal. 4th at 737-38.

2. The State Court Expressly Indicates Any Deficiencies in Pleading and Proof by Citation.

A state court denial of allegations as vague or conclusory is not a merits ruling, but a pleading deficiency. *See, e.g.*, *Cross v. Sisto*, 676 F.3d 1172, 1177 (9th Cir. 2012) (ruling that California state court denial for lack of particularity is made

[4] The state standard is similar to the federal standard applicable to a motion to dismiss brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. "[A] federal court may not dismiss a complaint for failure to state a claim unless it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief. The allegations of the complaint must be taken as true for purposes of a decision on the pleadings." *Hoover v. Ronwin*, 466 U.S. 558, 587, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984); *see also Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974) ("When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims").

without prejudice to re-plead). The California Supreme Court expressly indicates when denial of a petition is made on this basis by citing to *In re Swain*, 34 Cal. 2d 300, 303-04, 209 P.2d 793 (1949). *See Kim v. Villalobos*, 799 F.2d 1317, 1319 (9th Cir. 1986) ("*Swain* is cited by the California Supreme Court to indicate that claims have not been alleged with sufficient particularity. That deficiency, when it exists, can be cured in a renewed petition."). Similarly, when the state court denies allegations because of a lack of supporting documentation, it must so indicate in its order and afford the petitioner an opportunity to cure the defect. *See Gamez v. Curry*, No. C 09-1229 PJH PR, 2010 WL 330210, *2 (N.D. Cal. Jan. 20, 2010) ("If a petition is dismissed for failure to state the facts with particularity – that is, with a cite to *Duvall* or *Swain* – the petitioner may file a new petition curing the defect;" there is "no reason the result should be any different when the defect in the state petition was failure to attach documents.").

3. The State Court Does Not Make Factual Findings or Credibility Determinations Without Holding an Evidentiary Hearing.

As Mr. Jones previously has detailed, unless an order to show cause issues there is no opportunity to present evidence in support of allegations in the petition,[5] access court processes for factual development, and obtain a reasoned resolution of issues. *See* Petitioner's Supplemental Brief on the Effect of *Cullen v. Pinholster* on the Court's Power to Grant an Evidentiary Hearing, filed July 18, 2011 (Doc. 68)

[5] The exhibits to the state petition are not evidence; their sole purpose is to support or supplement the allegations in the petition. *See In re Rosencrantz*, 29 Cal. 4th 616, 675, 128 Cal. Rptr. 2d 104 (2002) (explaining that the "various exhibits that may accompany the petition, return, and traverse do not constitute evidence, but rather supplement the allegations to the extent they are incorporated by reference"); *cf. In re Fields*, 51 Cal. 3d 1063, 1070 n.2, 275 Cal. Rptr. 384 (1990) (ruling that "[d]eclarations attached to the petition and traverse may be incorporated into the allegations, or simply serve to persuade the court of the bona fides of the allegations").

("Supp. Br. on *Pinholster*") at 14-15. An order to show cause "both sets into motion the process by which the issues are framed for judicial determination and affords the petitioner the opportunity to present additional evidence in support of the truth of the allegations in the petition." *In re Serrano*, 10 Cal. 4th 447, 456, 41 Cal. Rptr. 2d 695 (1995) (internal citation omitted).

Initiating a proceeding with an order to show cause and completing formal briefing are the procedural precursors to the state court determining whether the petitioner's entitlement to relief hinges on the resolution of factual disputes. *See, e.g.*, *Romero*, 8 Cal. 4th at 739-40; *Duvall*, 9 Cal. 4th at 478-79. The order to show cause "is an intermediate but nonetheless vital step in the process of determining whether the court should grant the affirmative relief that the petitioner has requested. The function of the writ or order is to institute a proceeding in which issues of fact are to be framed and decided." *Romero*, 8 Cal. 4th at 740 (internal quotation omitted). Only after an order to show cause has issued, and "factual and legal issues are joined for review" in formal briefing – through the return and traverse – does the state court determine whether there are "disputed factual questions as to matters outside the trial record." *Duvall*, 9 Cal. 4th at 478; *see also Romero*, 8 Cal. 4th at 739 (ruling that "once the issues have been joined" through the return and traverse, "the court must determine whether an evidentiary hearing is needed").

If the state court identifies factual disputes or credibility concerns after conducting these proceedings, it must hold an evidentiary hearing to resolve them. *See, e.g.*, *Duvall*, 9 Cal. 4th at 486 (holding that even when the respondent's return was deficient, apparent factual disputes required evidentiary hearing prior to resolution of issues); *In re Serrano*, 10 Cal. 4th at 455-56 (holding that "although the court may properly *accept* the petitioner's allegations as true in the absence of an evidentiary hearing when [there is no dispute], with limited exception, the court should not *reject* the petitioner's undisputed factual allegations on credibility

grounds without first conducting an evidentiary hearing") (emphasis in original).[6]

4. The State Court May Not Summarily Deny Allegations on the Basis of Issues the Petitioner Has Not Had a Chance to Address.

In contrast to the formal proceedings that are necessary to identify and resolve legal and factual issues about the petitioner's entitlement to relief, the informal response merely performs a "screening function," analogous to demurrer, in which the respondent "may demonstrate, by citation to legal authority and by submission of factual materials, that the claims asserted in the habeas corpus petition may lack merit and that the court therefore may reject them summarily." *Romero*, 8 Cal. 4th at 742 & n.9. The informal response may not "serve as a substitute for the formal return and traverse," because it "is not a pleading, does not frame or join issues, and does not establish a 'cause' in which the court may grant relief." *Romero*, 8 Cal. 4th at 741.

If the issues raised by the informal response do not justify summary denial, the state court must issue an order to show cause. State law provides that,

> If the petitioner successfully controverts the factual materials submitted with the informal response, or if for any other reasons the informal response does not persuade the court that the petitioner's claims are lacking in merit, then the court must proceed to the next stage by issuing an order to show cause or . . . writ of habeas corpus.

Romero, 8 Cal. 4th at 742. The California Supreme Court has made it clear that state courts may not summarily deny a petition for reasons other than those contained in the informal response, holding not only that a state court must issue an

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[6] *See also Nunes*, 350 F.3d at 1056 (holding state court decision satisfied 2254(d)(2) because it "made factual findings (that is, it drew inferences against Nunes where equally valid inferences could have been made in his favor, and it made credibility determinations) when it rather claimed to be determining prima facie sufficiency").

order to show cause if the informal response is not persuasive on summary denial, but also that "[d]eficiencies in the informal response do not provide a justification for short-cutting this procedural step." *Romero*, 8 Cal. 4th at 742.

This limitation on the allowable bases for summary denial flows from the recognition that a petitioner must be allowed to address challenges to the facial sufficiency of his allegations. Indeed, state procedures specifically were altered to protect this opportunity. Observing that a practice had developed among some state courts of soliciting an informal response without allowing the petitioner an opportunity to respond to it, the California Supreme Court "remarked that denial of a petition based on factual assertions in an informal response might violate due process if the petitioner was afforded no opportunity to challenge the assertions." *Romero*, 8 Cal. 4th at 741. Accordingly, state rules were amended to authorize an informal response only when the petitioner was served with the informal response and given an opportunity to reply. *Id*.; *cf*. Cal. R. Ct. 8.516(b)(1) (when ruling on appellate petitions for review, "[t]he Supreme Court may decide any issues that are raised or fairly included in the petition or answer"); Cal. R. Ct. 8.516(b)(2) (providing that "[t]he court may decide an issue that is neither raised nor fairly included in the petition or answer if the case presents the issue and the court has given the parties reasonable notice and opportunity to brief and argue it").[7]

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[7] In recognition of this principle, when the California Supreme Court intends to consider legal theories or facts not briefed by the parties its practice is to order supplemental briefing. *See, e.g.*, *People v. Edwards*, No. S073316, Order (Cal. Dec. 19, 2012), available at http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1805048&doc_no=S073316; *In re Reno*, No. S124660, Order (Cal. May 2, 2012), available at http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1856339&doc_no=S124660; *People v. Dungo*, No. S176886, Order (Cal. June 20, 2012), available at http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1922094&doc_no=S176886; *id.*, Order (Cal. July 13, 2011); *In re Martinez*, No. S141480, Order (Cal. June 18, 2008), available at http://appellatecases.

continued…

These limitations and procedures also are consistent with the well-established principle that the adversarial process can function effectively only when both parties have notice and an opportunity to be heard. *See, e.g.*, *Gardner v. Florida*, 430 U.S. 349, 362, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) (holding that "petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain"); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950) (holding a "fundamental requisite of due process of law is the opportunity to be heard," which "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest").

Throughout the Opposition to Petitioner's Opening 2254(d) Brief on Evidentiary Hearing Claims, filed June 14, 2013 (Doc. 91) ("Opp."), respondent repeats some of the factual and legal arguments that were contained in the Informal Response in this case but also raises numerous additional factual and legal assertions in support of summary denial that never were presented to the state court. In keeping with state procedures that prohibit summary denial on the basis of issues not addressed by the petitioner, and the requirement of examining the state court decision "at the time it was made," and on the basis of what the state court "knew and did," *Pinholster*, 131 S. Ct. at 1398-99, these new contentions must be rejected.

courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1873158&doc_no=S141480; *In re Freeman*, No. S122590, Order (Cal. Feb. 14, 2006), available at http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1854269&doc_no=S122590.

B. This Court Has a Constitutional Duty to Independently Review the Merits of Mr. Jones's Claims Notwithstanding 28 U.S.C. Section 2254(d).

The Constitution separates the governmental powers into three defined categories – legislative, executive, and judicial – in order to "assure, as nearly as possible, that each branch of government [will] confine itself to its assigned responsibility." *INS v. Chadha*, 462 U.S. 919, 951, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983). This "doctrine of separation of powers . . . is at the heart of our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 119, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). Article III of the Constitution therefore vests the "judicial Power of the United States" in the Supreme Court and inferior federal courts and "extend[s]" the "judicial Power" to "all Cases, in Law and Equity, arising under [the] Constitution [and] the Laws of the United States." U.S. Const. art. III, §§ 1, 2.

Under this constitutional authority, it is the fundamental responsibility of the Judicial Branch to interpret the Constitution and maintain its supremacy:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule . . . This is of the very essence of judicial duty.

Marbury v. Madison, 5 U.S. 137, 177-78, 2 L. Ed. 60 (1803); *Cooper v. Aaron*, 358 U.S. 1, 18, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958) (affirming the "basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected . . . as a permanent and indispensable feature of our constitutional system").

Although Congress has the power to grant or withdraw Article III courts' jurisdiction to decide cases arising under the Constitution, U.S. Const. art. III, § 2, it may not encroach upon the Judicial Branch's power to interpret and maintain the supremacy of the Constitution. *See City of Boerne v. Flores*, 521 U.S. 507, 536,

117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997) (declaring that "[w]hen the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is" and that any contrary expectations from the legislative branch "must be disappointed."); *Lindh v. Murphy*, 96 F.3d 856, 872 (7th Cir. 1996) (en banc) (ruling that "Once the judicial power is brought to bear by the presentation of a justiciable case or controversy within a statutory grant of jurisdiction, the federal courts' independent interpretive authority cannot constitutionally be impaired."), *rev'd on other grounds*, 521 U.S. 320 (1997).

These principles apply to this Court's assessment of whether section 2254(d) is a bar to its review of the merits of Mr. Jones's claims. *See, e.g.*, *Wright v. West*, 505 U.S. 277, 305, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992) (O'Connor, J., concurring) ("We have always held that the federal courts, even on habeas, have an independent obligation to say what the law is."). Indeed, in evaluating the limitations imposed by section 2254(d), Justice Stevens, who authored the opinion for the Supreme Court in *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), and writing for four members of the Court, recognized the critical role that the Judiciary has in interpreting the Constitution:

> If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody – or, as in this case, his sentence of death – violates the Constitution, that independent judgment should prevail. Otherwise the federal "law as determined by the Supreme Court of the United States" might be applied by the federal courts one way in Virginia and another way in California. In light of the well-recognized interest in ensuring that federal courts interpret federal law in a uniform we are convinced that Congress did not intend the statute to produce such a result.

Williams, 529 U.S. at 389-90; *see also Lindh*, 96 F.3d at 872 ("Congress lacks

power to revise the meaning of the Constitution or to require federal judges to 'defer' to the interpretations reached by state courts.").[8]

Although Justice O'Connor's concurring opinion in *Williams* accepted the possibility that in some circumstances under section 2254(d)(1) a state court's incorrect ruling on federal law might stand, it also recognized that in many cases it will be difficult to distinguish when those circumstances appropriately occur. *Williams*, 529 U.S. at 408 (O'Connor, J., concurring) (ruling that the definition of a "unreasonable application" does not reach "extension of legal principle" circumstances and that the two are difficult to distinguish). Given this Court's constitutional duty to "say what the law is," and particularly given the limitations and ambiguity expressed in *Williams* regarding this obligation, this Court must independently review the merits of Mr. Jones's claims of constitutional error. This approach reinforces the notion that Article III courts' primary functions are to enforce the supremacy of federal law and to maintain a "unitary system of law." *Ornelas v. United States*, 517 U.S. 690, 697, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996) (holding that independent review of mixed questions is "necessary if

[8] In addition to constitutional protection of judicial authority to rule on federal law, the Suspension Clause of the Constitution safeguards the writ of habeas corpus in its modern form. U.S. Const., Art. I, § 9, cl. 2; *Felker v. Turpin*, 518 U.S. 651, 663-64, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996). The Supreme Court interprets the Suspension Clause to guarantee a prisoner in postconviction proceedings one adequate and effective opportunity to demonstrate the illegality of his detention, including a "full and fair opportunity to develop the factual predicate of his claim." *Boumediene v. Bush*, 553 U.S. 723, 729, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008). As Mr. Jones has detailed in prior briefing, and incorporates here in full, because the California state process fails to provide a forum for the full and fair factual development of his constitutional claims, he is entitled to de novo review in this Court to avoid an unconstitutional suspension of the writ. *See* Supp. Br. on *Pinholster* at 17-23.

appellate courts are to maintain control of, and to clarify, the legal principles").[9]

C. Respondent Concedes That Mr. Jones Set out the Proper Legal Framework for Assessing Whether His Prima Facie Showing for Relief Satisfies Section 2254(d)(1).

Respondent's Opposition focuses almost exclusively on proposing possible bases for the state court's summary denial and nowhere contests Mr. Jones's legal framework for assessing whether the state court's summary denial of his prima facie showing for relief in the state habeas corpus proceedings satisfies section 2254(d)(1). In his Opening Brief, Mr. Jones argued that the California Supreme Court's refusal to hear Mr. Jones's adequately pled claims of constitutional error is contrary to clearly established federal law that prohibits state courts from creating "unreasonable obstacles" to the resolution of federal constitutional claims that are "plainly and reasonably made." *Davis v. Wechsler*, 263 U.S. 22, 24-25, 44 S. Ct. 13, 14, 68 L. Ed. 143 (1923); *see also* Opening Br. at 7-11. More specifically, given Mr. Jones's extensive factual allegations and supporting materials in the state habeas corpus proceedings–which the state court was obligated to accept as true–the state court's ruling that Mr. Jones failed to make any prima facie showing of entitlement to relief, and refusal to initiate proceedings to take evidence and assess

[9] The application of similar principles dictates that this Court may not be bound by a limitation in its review to clearly established federal law "as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). Such a limitation deprives federal circuit courts' decisions of their precedential effect and runs afoul of the doctrine of separation of powers. As the Supreme Court has observed, "it is indisputable that stare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (quoting The Federalist, No. 78 at 490 (H. Lodge ed. 1888) (A. Hamilton)).

his claims, constitutes an unreasonable application of the federal constitutional law applicable to those claims. "With the state court having purported to evaluate [state habeas] claims for sufficiency alone," its rejection of a sufficiently pled claim of constitutional error constitutes an unreasonable application of federal law that satisfies section 2254(d)(1). *Nunes*, 350 F.3d at 1054-55 (holding state court summary denial of ineffective assistance of counsel claim an unreasonable application of federal law; because petitioner established a facially sufficient violation under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984), the state court ruling unreasonably appears to demand more).

Mr. Jones also argued throughout his Opening Brief that the existence of state court precedent that is contrary to clearly established federal law and that could have resolved Mr. Jones's claims also satisfies section 2254(d)(1). The only way in which the state court may correct its previous, published misapplications of federal law is to issue a published opinion. As the United States Supreme Court has explained, "Courts are as a general matter in the business of applying settled principles and precedents of law to the disputes that come to bar," and the state court is presumed to apply already decided legal principles and precedents when ruling. *Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991). When the state court corrects its previous misapplication of the law by announcing a new rule of law or modifying an existing rule, state rules demand that the state court issue a published opinion. *See Schmier v. Supreme Court*, 78 Cal. App. 4th 703, 710–11, 93 Cal. Rptr. 2d 580 (2000). Indeed, there are numerous examples of the state court following this practice. *See, e.g.*, *Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Ass'n*, 55 Cal. 4th 1169, 151 Cal. Rptr. 3d 93 (2013) (overruling exception to the parol evidence rule because it conflicted with the law of the majority of jurisdictions); *People v. Doolin*, 45 Cal. 4th 390, 87 Cal. Rptr. 3d 209 (2009) (attempting to harmonize state and federal standards for evaluating conflict-of-interest claims and disapproving of

earlier California cases to the extent that they may be read to hold that the state conflict-of-interest standard differs from the federal standard).

By failing to address these arguments in the Opposition, respondent concedes that this legal framework should guide this Court's inquiry, and that the Court may rule in favor of Mr. Jones on those bases. As this Court has ruled, "failure to respond in an opposition brief to an argument put forward in an opening brief constitutes waiver or abandonment in regard to the uncontested issue." S*tichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011) (holding issue waived upon failure to address it in opposing papers and citing Local Rule 7-9); *see also In re Teledyne Def. Contracting Derivative Litig.*, 849 F. Supp. 1369, 1373 (C.D. Cal. 1993) (ruling that "failure to respond to an argument may be deemed consent to ruling against the non-opposing party, see Local Rule 7.9"); United States District Court, Central District of California, Local Civil Rules, L.R. 7-9 Opposing Papers (requiring opposing paper to "contain a statement of *all the reasons* in opposition") (emphasis added). Accordingly, respondent has consented to a ruling in favor of Mr. Jones on his arguments that summary denial of a prima facie showing for relief in the state habeas corpus proceedings satisfies section 2254(d)(1).

D. Respondent's Assumption That Section 2254(d)(2) Cannot Be Satisfied by Summary Denial Is Without Merit.

In the Opposition respondent states, without citation to any authority, "It is generally not possible to conclude that a state court made 'an unreasonable determination of the facts' when it denies a claim without explaining the basis for its denial. As most of Petitioner's claims were summarily denied by the California Supreme Court on habeas corpus, § 2254(d)(2) is generally not applicable." Opp. at 3 n.3. This argument ignores Ninth Circuit authority regarding the application of section 2254(d)(2) to summary denials, which holds that when the factual basis for a claim of constitutional error "was adequately proffered to the state court, [a

petitioner] is entitled to an evidentiary hearing if he has not previously received a full and fair opportunity to develop the facts of his claim and he presents a 'colorable claim' for relief.'" *Earp v. Ornoski*, 431 F.3d 1158, 1169 (9th Cir. 2005).

The Ninth Circuit has described the proper inquiry for allegations that the state court's failure to hold an evidentiary hearing was unreasonable under section 2254(d)(2), holding that a federal court "may first consider whether a similarly situated district court would have been required to hold an evidentiary hearing," but the ultimate question "is whether an appellate court would be unreasonable in holding that an evidentiary hearing was not necessary in light of the state court record." *Hibbler v. Benedetti*, 693 F.3d 1140, 1148 (9th Cir. 2012), *cert. denied*, __ U.S. __, 133 S. Ct. 1262, 185 L. Ed. 2d 204 (2013); *see also Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004) (holding that state court ruling satisfies 2254(d)(2) when "the state court should have made a finding of fact but neglected to do so") (citing *Wiggins*, 539 U.S. 529).

III. THERE ARE NO VALID STATE PROCEDURAL RULES THAT BAR THIS COURT FROM REVIEWING MR. JONES'S CLAIMS FOR RELIEF.

Throughout its Opposition, respondent argues that portions or all of a number of Mr. Jones's claims are procedurally defaulted, because the California Supreme Court rejected those claims, at least in part, on procedural grounds. Although Mr. Jones presents some specific arguments in the following sections of this brief concerning the inapplicability of procedural defaults asserted as to the individual claims, below are universal grounds establishing that the procedural rules the state court cited are not adequate and/or independent, and therefore may not preclude federal review.

A. General Principles Governing the Validity of State Procedural Rules

A state court's rejection of a federal claim on a state procedural law ground bars federal habeas review only if that procedural rule is independent of federal law and adequate to preclude consideration of the issue. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 730-35, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). A procedural rule is independent if application of the bar is not dependent on an antecedent ruling on federal law. *See, e.g.*, *Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S. Ct. 1087, 84 L. Ed. 2d. 53 (1985). "To qualify as an 'adequate' procedural ground, a state rule must be 'firmly established and regularly followed.'" *Walker v. Martin*, ___ U.S. ___, 131 S. Ct. 1120, 1127, 179 L. Ed. 2d 62 (2011) (quoting *Beard v. Kindler*, 558 U.S. 53, 60, 130 S. Ct. 612, 175 L. Ed. 2d 417 (2009)); *see also Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994) ("In order to constitute adequate and independent grounds sufficient to support a finding of procedural default, a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default.") (citations omitted). A "discretionary rule can be 'firmly established' and 'regularly followed'—even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." *Kindler*, 558 U.S. at 60-61.

"The question whether a state procedural ruling is adequate is itself a question of federal law." *Kindler*, 558 U.S. at 60 (citing *Lee v. Kemna*, 534 U.S. 362, 375, 122 S. Ct. 877, 151 L. Ed. 2d 820 (2002)). The respondent has the initial burden of pleading an adequate and independent procedural bar as an affirmative defense. *See Insyxiengmay v. Morgan*, 403 F.3d 657, 665-66 (9th Cir. 2005); *Bennett v. Mueller*, 322 F.3d 573, 585 (9th Cir. 2003). The burden then shifts to the petitioner to place that defense in issue. *See Bennett*, 322 F.3d at 586. The petitioner can meet this burden with factual allegations and citations to case authority that demonstrate inadequacy of the state procedure. *Bennett*, 322 F.3d at 586. The burden shifts back to the respondent to prove the bar is applicable.

Bennett, 322 F.3d at 586. "Thus, it is the law of this circuit that the ultimate burden is on the state, not the petitioner, to show that a procedural state bar was clear, consistently applied, and well-established at the time the party contesting its use failed to comply with the rule in question." *Insyxiengmay*, 403 F.3d at 666 (citing *Bennett*, 322 F.3d at 583).

Even if the state procedural rule is found to be independent and adequate, a petitioner overcomes the procedural bar by showing (1) cause for the default and prejudice as a result of the alleged violation of federal law or (2) that failure to consider the claims will result in a fundamental miscarriage of justice. *See, e.g.*, *Coleman*, 501 U.S. at 749-50. Ineffective assistance of trial, appellate, and habeas counsel each have been recognized to provide sufficient cause to excuse a procedural default. *See, e.g.*, *Dretke v. Haley*, 541 U.S. 386, 394, 124 S. Ct. 1847, 158 L. Ed. 2d 659 (2004) (trial counsel's failure to object to constitutional violation may provide cause to excuse procedural default); *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000) (counsel's ineffectiveness in failing to preserve a claim for review in state court may constitute sufficient cause to excuse default); *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309, 1317, 182 L. Ed. 2d 272 (2012) ("an attorney's errors during an appeal on direct review may provide cause to excuse procedural default"); *id.* at 1315 ("inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial").

In the sections that follow, Mr. Jones places the adequacy and/or independence of each of the affirmative defenses in issue.

B. The *Seaton* and *Dixon* Rules Are Not Adequate to Preclude Federal Habeas Review.

1. The *Seaton* and *Dixon* Rules, as Applied in Capital Cases, Fail to Serve a Legitimate State Interest.

In its summary denial of the State Habeas Petition, the California Supreme

Court cited procedural bars under *In re Waltreus*, 62 Cal. 2d 218, 225, 397 P.2d 1001 (1965),[10] *In re Dixon*, 41 Cal. 2d 756, 759, 264 P.2d 513 (1953), *In re Seaton*, 34 Cal. 4th 193, 17 Cal. Rptr. 3d 633 (2004), and *In re Lindley*, 29 Cal. 2d 709, 723, 177 P.2d 918 (1947) as to portions or the entirety of certain claims for relief. Order Denying Case No. S110791, filed Mar. 11, 2009, Notice of Lodging, filed Apr. 6, 2010, ECF No. 29 ("NOL") at C.7.

The United States Supreme Court recently reiterated that "federal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights." *Martin*, 131 S. Ct. at 1130. It is "settle[d]" that "a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest." *Henry v. Mississippi*, 379 U.S. 443, 447, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965). Even a state procedural rule that is "unassailable in most instances" can in unusual situations "disserve any perceivable interest" and thus be inadequate to bar federal habeas review. *Lee*, 534 U.S. at 379-80. Here, the *Seaton* and *Dixon* rules were purportedly designed to protect legitimate state interests. But, as noted above, the question of whether those rules actually do advance these interests so as to preclude federal habeas review of federal claims is a separate question, one for the federal courts alone. *See Kindler*, 558 U.S. at 60; *Cone v. Bell*, 556 U.S. 449, 465-66, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009) ("We have recognized that the adequacy of state procedural bars to the assertion of federal questions is not within the State's prerogative finally to decide; rather, adequacy is itself a federal

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[10] The state court's reliance on the rule in *Waltreus* (i.e., an error raised and decided on direct appeal ordinarily cannot be raised anew in state habeas corpus) does not preclude federal habeas corpus review of the barred claim. *See, e.g.*, *Hill v. Roe*, 321 F.3d 787, 789 (9th Cir. 2003); *Carter v. Giurbino*, 385 F.3d 1194, 1198 (9th Cir. 2004).

question.") (quotation marks and citations omitted). Careful analysis of that question compels the conclusion that the manner in which the California Supreme Court has invoked its procedural rules dating back to 2000 in capital habeas cases has rendered those rules inadequate to preclude federal habeas review of federal claims, and any preclusion of federal habeas corpus review based on such procedural defaults would violate the Constitution.

Since January 1, 2000, the California Supreme Court has invoked procedural bars to dispose of ripe, cognizable claims in some 267 capital habeas petitions, and as to every claim procedurally defaulted in 262 of those petitions, that court also ruled that the defaulted claim lacked merit. *See* Exhibit A, attached to this brief.[11]

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[11] The only exceptions are *In re Reno*, No. S124660 (Cal. Aug. 30, 2012), and five cases decided since that decision. In *Reno*, an order to show cause was issued in that case so that the California Supreme Court could refine its successor petition rules. Unlike in 262 other cases since January 1, 2000, the California Supreme Court declined to reach the merits of some of the claims in the petition. The court subsequently has adopted this practice in four additional cases: *In re Anderson*, No. S134525 (Cal. May 15, 2013); *In re Marlow*, No. S178102 (Cal. May 22, 2013); *In re Alfaro*, No. S170966 (Cal. June 12, 2013); and *In re Wilson*, No. S161435 (Cal. Dec. 11, 2013). Notably, all of these cases were decided several years after the Court denied Mr. Jones's petition citing procedural defaults, and all of the cases have involved successor petitions.

In *In re Carrera*, No. S141324 (Cal. Jan. 13, 2010), a case not counted by petitioner, the California Supreme Court denied a single-claim habeas petition on the sole basis of a procedural default, with no mention of the merits. Mr. Carrera had filed his petition on February 23, 2006, when he was under sentence of death and had a capital habeas petition pending in federal district court. *See Carrera v. Brown*, No. 1:90-cv-00478-AWI (E.D. Cal.). On March 13, 2008, however – after the filing of Carrera's state habeas petition but before the California Supreme Court ruled on it – the federal court granted Carrera habeas relief as to the special circumstance that had made him death eligible, *see Carrera v. Ayers*, 2008 WL 681842 (E.D. Cal. Mar. 13, 2008), and the Warden did not appeal. Thus, by the time Carrera's state habeas petition was denied by the California Supreme Court, Mr. Carrera was no longer subject to a death judgment, and the California

continued…

This practice stands in stark contrast to the California Supreme Court's practice in non-capital habeas cases, where a procedural default routinely results in the forfeiture of merits review.

The California court's practice of uniformly considering and rejecting the merits of procedurally barred claims in capital cases significantly limits, if it does not undermine entirely, any state interests that the court says it is seeking to advance. As the data in Exhibit A shows, procedurally defaulted claims received the same merits review by the California Supreme Court that they would have gotten in the absence of the defaults. No state interests could be advanced by imposing procedural defaults under circumstances such as these, in which, for all but six capital habeas petitioners in California since January 2000, any procedural shortcomings in their state habeas petitions produced no adverse consequences with respect to merits review of their claims.

The only conceivable way in which a state interest arguably could be advanced by the California Supreme Court's systematic pattern of also rejecting the merits of claims it has found to be procedurally barred is that this practice at least has the effect, if not the stated purpose, of precluding federal habeas review of the merits of the petitioner's federal claims. It could be argued that by precluding federal habeas review through the invocation of procedural defaults, the state court is promoting finality of the death judgment, shortening the time to execution of the state court judgment, and lessening the ultimate burden on the State to defend the judgment. But neither this effect nor this method of advancing the State's interests is a legitimate one. Congress has expressly given individuals convicted of state crimes in violation of the Constitution a right to have their convictions reviewed in federal habeas corpus proceedings, 28 U.S.C. § 2254, and under the Supremacy

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Supreme Court's denial order followed the court's usual pattern of not reaching the merits when defaulting claims in non-capital habeas cases.

Clause, states are forbidden from using local procedures to negate that right. *See, e.g.*, *Haywood v. Drown*, 556 U.S. 729, 736, 129 S. Ct. 2108, 173 L. Ed. 2d 920 (2009) ("although States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies").

It is long and well established that "under the Supremacy Clause, . . . 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" *Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 108, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992) (quoting *Felder v. Casey*, 487 U.S. 131, 138, 108 S. Ct. 2302, 2306, 101 L. Ed. 2d 123 (1988) (further internal quotation marks and citations omitted). A state law "interferes with" federal law when it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hillsborough Cnty. v. Automated Med. Lab.*, 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)). "[W]hen state law touches upon the area of federal statutes enacted pursuant to constitutional authority, it is 'familiar doctrine' that the federal policy 'may not be set at naught, or its benefits denied' by the state law," and "[t]his is true, of course, even if the state law is enacted in the exercise of otherwise undoubted state power." *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 479-80, 94 S. Ct. 1879, 40 L. Ed. 2d 315 (1974) (quoting *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176, 63 S. Ct. 172, 173, 87 L. Ed. 165 (1942)).

Given that no legitimate state interest is actually advanced by the California Supreme Court's practice of giving full merits review to defaulted claims raised in capital habeas petitions, and given, moreover, that the court is fully aware of the

effect its default rulings can have on federal habeas claims,[12] the most reasonable inference is that the court's true purpose in imposing defaults on top of merits review is to foreclose federal habeas review.[13] Such a purpose obviously runs afoul of the Supremacy Clause, which prohibits a state from unilaterally negating Congress's decision to make federal habeas corpus review available to state prisoners with federal constitutional claims.

Moreover, any disavowal by the California Supreme Court of an express purpose to preclude federal review of capital habeas corpus claims by denying those claims both on the merits and for procedural deficiencies is irrelevant to the question of whether the Supremacy Clause has been violated. It does not matter whether negating a federal right is the purpose of a state procedure or merely the effect; the Supremacy Clause is violated in either instance. The United States Supreme Court long ago rejected the "'aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration.'" *Gade*, 505 U.S. at 105-06 (quoting *Perez v. Campbell*, 402 U.S. 637, 651-52, 91 S. Ct. 1704, 29 L. Ed. 2d 233 (1971)). "In assessing the impact of a state law on the federal scheme, we have refused to rely solely on the [enacting body's] professed purpose and have looked as well to the effects of the law." *Gade*, 505 U.S. at 105. Thus, "'any state [law] which frustrates the full effectiveness of federal law is rendered invalid by

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[12] *See, e.g.*, *In re Robbins*, 18 Cal. 4th 770, 814 n.34, 77 Cal. Rptr. 2d 153 (1998) (citing *Harris v. Reed*, 489 U.S. 255, 264 n.10, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989)); *In re Hamilton*, 1999 WL 311708, at *1 (Cal. 1999); *In re Anderson*, 1996 WL 14022, at *1 (Cal. 1996).

[13] *See In re Clark*, 5 Cal. 4th 750, 802, 21 Cal. Rptr. 2d 509 (1993) (Mosk, J., concurring and dissenting) ("at least one of the majority's purposes [in attempting to clarify its procedural rules is] to prevent federal courts from reviewing federal constitutional claims, especially in capital cases").

the Supremacy Clause.'" *Id.* at 106 (quoting *Perez*, 402 U.S. at 652). As the Supreme Court noted in *Walker v. Martin*, "a state procedural ground would be inadequate if the challenger shows a 'purpose *or pattern* to evade constitutional guarantees.'" 131 S. Ct. at 1131 (emphasis added) (quoting *Kindler*, 558 U.S. at 65 (Kennedy, J., concurring).

Because the California Supreme Court virtually never refuses to address the merits of claims when it finds defaults in capital habeas cases, the defaults do not further any legitimate state interest. What the defaults would effectively accomplish, though, is to preclude the federal habeas review that Congress has expressly authorized state prisoners to receive. This result–whether it is the unarticulated purpose of the court's practice or is merely the effect of that practice–plainly "interferes with" federal habeas law and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting 28 U.S.C. section 2254. The defaults thus serve to "nullify" and "negate" the federal right to federal habeas review of unconstitutional state judgments. The Supremacy Clause forbids states from implementing procedural rules that have this effect. Consequently, California's *Seaton* and *Dixon* rules are inadequate to prevent federal review of habeas claims in this Court.[14]

Mr. Jones recognizes that ordinarily a federal court will honor a state procedural default that has been used as an alternative ground for denying a constitutional claim that is also rejected on the merits. *See, e.g.*, *Harris v. Reed*, 489 U.S. 255, 264 n.10, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989). This approach

[14] It thus does not matter, for Supremacy Clause purposes, that the California Supreme Court treats state claims in capital petitions the same as federal claims. "Ensuring equality of treatment is . . . the beginning, not the end, of the Supremacy Clause analysis." *Haywood*, 556 U.S. at 739. "A [state law] rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear." *Id.*

makes sense in individual cases because it honors the state's "interests in finality, federalism, and comity." *Id.* But where the state court invariably denies the merits of the claims it defaults, it has not promoted any interest in finality or expedience (because it has given the claim the full review to which the claim would be entitled in state court even without the default), and it has flipped the comity and federalism issues around backwards: the defaults preclude the federal court from implementing the federal interests in allowing petitioners to obtain federal habeas review of their constitutional claims. If federalism and comity require federal courts to honor case-by-case state court decisions to invoke alternative grounds for disposing of a habeas claim, then federalism and comity also require the states not to deploy alternative grounds so as to nullify federal interests. Or, more precisely put for present purposes, federal courts should not, and constitutionally cannot, honor state defaults that produce that result.

2. The *Seaton* Rule Was Not Firmly Established and Regularly Followed at the Relevant Time in This Case.

Respondent raises two distinct rules in arguing that the absence of an objection at trial resulted in a procedural default. The first rule bars consideration of arguments on direct appeal where trial counsel failed to make a necessary objection (commonly called the "contemporaneous objection rule," which is addressed further below). *See, e.g.*, *People v. Saunders*, 5 Cal. 4th 580, 589-90, 20 Cal. Rptr. 2d 638 (1993). The second rule precludes petitioners from raising unobjected to instances of constitutional error for the first time in a state habeas petition unless the facts underlying the claim were not reasonably available at the time of trial. *In re Seaton*, 34 Cal. 4th 193, 17 Cal. Rptr. 3d 633 (2004). Because the *Seaton* rule was not in existence at the time of Mr. Jones's trial, it is not adequate to preclude federal review of his claims.

Mr. Jones's trial ended in 1995, long before the California Supreme Court issued an order to show cause in the *Seaton* case to resolve whether or not a

constitutional claim that was barred from consideration on direct appeal due to the absence of a timely objection by trial counsel could be raised for the first time in a state habeas petition.[15] It was not until 2004 that the California Supreme Court ruled for the first time that such a claim could not be considered on habeas review. *Seaton*, 34 Cal. 4th 193. Because Mr. Jones's trial occurred many years before the California Supreme Court announced this procedural rule, it is not an adequate rule that precludes federal habeas review.

To qualify as an "adequate" procedural ground, a state rule must be "firmly established and regularly followed," *Kindler*, 558 U.S. at 60, "at the time the claim should have been raised." *Calderon v. U.S. Dist. Court (Hayes)*, 103 F.3d 72, 75 (9th Cir. 1996). Because the *Seaton* rule did not exist at the time that trial counsel could have complied with it, it is not adequate to bar federal review of the claims found by the state court to be in violation of the rule.

3. The *Dixon* Rule Was Not Firmly Established and Regularly Followed at the Relevant Time in This Case.

The *Dixon* rule is a discretionary rule under California law. Subject to exceptions, the rule "generally prohibits raising an issue in a postappeal habeas corpus petition when that issue was not, but could have been, raised on appeal." *In re Harris*, 5 Cal. 4th 813, 824 n.3, 21 Cal. Rptr. 2d 373 (1993); *Dixon*, 41 Cal. 2d at 759. The "relevant point of reference" for assessing the adequacy of the *Dixon* rule is the date on which Mr. Jones should have raised the issues in his direct appeal. *Fields v. Calderon*, 125 F.3d 757, 760-61 (9th Cir. 1997) ("Because the *Dixon* rule precludes collateral review of a claim that could have been brought on direct appeal, the procedural default, though announced by the California Supreme

[15] The order to show cause in *In re Seaton*, No. S067491, was issued on October 24, 2001. *See* http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1799228&doc_no=S067491.

Court when the habeas petition is denied, technically occurs at the moment the direct appeal did not include those claims that should have been included for review."). Appellant's Opening Brief in Mr. Jones's automatic appeal was filed on June 19, 2001.

The Ninth Circuit Court of Appeals "has held that *Dixon* was not firmly established and consistently applied at least prior to 1993," *Cooper v. Calderon*, 255 F.3d 1104, 1111 (9th Cir. 2001) (citing *Fields*, 125 F.3d at 765), and has not opined further on its adequacy. Two district courts have found in published decisions that in the years after 1993, the *Dixon* bar remained inadequate. *Carpenter v. Ayers*, 548 F. Supp. 2d 736, 756-57 (N.D. Cal. 2008) (finding that respondent could not show *Dixon* was adequate as of November 1996); *Dennis v. Brown*, 361 F. Supp. 2d 1124, 1125, 1135 (N.D. Cal. 2005) (same; 1995 appeal). Recently, in *Carter v. Chappell*, 2013 WL 1120657, at *39 (S.D. Cal. Mar. 18, 2013) (July 2, 1999 direct appeal), the district court found that, "[b]ased on Petitioner's allegations and case citations, as well as the prior decision from this district finding the state court's application of the *Dixon* rule inadequate during the relevant time period," the petitioner met his interim burden on inadequacy under *Bennett* and respondent did not satisfy the ultimate burden. *See also Ayala v. Ayers*, 2008 WL 1787317, at *4-7 (S.D. Cal. Apr. 16, 2008) (finding *Dixon* rule inadequate at the time of the direct appeal in 1997); *Rodriguez v. Scribner*, 2008 WL 1365785, *1, *12-13 (E.D. Cal. Apr. 9, 2008) (non-capital case; state failed to meet burden under *Bennett* to show *Dixon* bar was adequate as of 2002-03 appeal); *Monarrez v. Alameda*, 2005 WL 2333462, *4-6 (C.D. Cal. Sept. 22, 2005) (non-capital case; state failed to meet burden of showing *Dixon* bar consistently applied as of January 2000 filing of direct appeal brief). In meeting his interim burden under *Bennett*, Mr. Jones incorporates and relies on the data and facts submitted by these petitioners as described in the published opinions and unpublished orders, as well as the factual determinations made by the district courts.

Respondent's reliance on *Sanchez v. Ryan*, 392 F. Supp. 2d 1136, 1138-39 (C.D. Cal. 2005), and *Protsman v. Pliler*, 318 F. Supp. 2d 1004, 1008-09 (S.D. Cal. 2004), as support for the alleged adequacy of the *Dixon* bar is unavailing. Opp. at 49. In *Sanchez*, the petitioner did nothing to satisfy his interim burden under *Bennett*. *Sanchez*, 392 F. Supp. 2d at 1139 ("Petitioner offers nothing in response to respondent's allegation, much less any specific factual allegations demonstrating inconsistent application of the *Dixon* rule. Because he has not placed the adequacy of the *Dixon* rule in issue, his federal claim is defaulted.") Similarly, in *Protsman*, the respondent prevailed–and the district court found the *Dixon* bar adequate–because petitioner made no effort to meet his burden under step two of *Bennett*. *Protsman*, 318 F. Supp. 2d at 1014.

For the foregoing reasons, none of the *Dixon* bars in Mr. Jones's case is entitled to enforcement in these proceedings.

C. The Contemporaneous Objection Rule Is Not Adequate or Independent and Does Not Preclude Federal Review

Respondent raises trial counsel's failure to object and the state court's subsequent finding that claims of error were not properly preserved for appellate review as a bar to federal habeas review. *See, e.g.*, Opp. at 79-81, 94-95, 112-13.

California's contemporaneous objection rule regarding non-evidentiary issues is summarized in *People v. Williams*, 17 Cal. 4th 148, 161 n.6, 69 Cal. Rptr. 2d 917 (1998):

> An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party. (*E.g.*, *Canaan v. Abdelnour* (1985) 40 Cal. 3d 703, 722, fn. 17; see, *e.g.*, People v. Berryman (1993) 6 Cal. 4th 1048, 1072-1076 [passing on a claim of prosecutorial misconduct that was not preserved for review]; *People v. Ashmus* (1991) 54 Cal. 3d 932, 975-976.) Indeed, it has the authority to do so. (See, *e.g.*, *Canaan v. Abdelnour*, *supra*,

> 40 Cal. 3d at p. 722, fn. 17.) True, it is in fact barred when the issue involves the admission (Evid. Code, § 353) or exclusion (*id*., § 354) of evidence. Such, of course, is not the case here. *Therefore, it is free to act in the matter.* (See, *e.g*., *Canaan v. Abdelnour*, *supra*, 40 Cal. 3d at p. 722, fn. 17.) Whether or not it should do so is entrusted to its discretion. (*Ibid*.)

Id. (emphasis added).

California appellate courts have discretion to reach unpreserved non-evidentiary issues for a number of reasons, or no reason at all. *See, e.g.*, *People v. Black*, 41 Cal. 4th 799, 810-12, 62 Cal. Rptr. 3d 569 (2007) (trial counsel could not have foreseen change in law); *In re Sheena K.*, 40 Cal. 4th 875, 881 & n.2, 55 Cal. Rptr. 3d 716 (2007) (failure to challenge facially unconstitutional probation condition in the trial court did not forfeit the claim on appeal); *People v. Smith*, 24 Cal. 4th 849, 852, 102 Cal. Rptr. 2d 731 (2001) (challenge to sentence imposed in excess of jurisdiction or unauthorized sentence); *People v. Williams*, 21 Cal. 4th 335, 341, 87 Cal. Rptr. 2d 412 (1999) (expired statute of limitations shown on face of charging document may be raised at any time); *People v. Hill*, 17 Cal. 4th 800, 820, 72 Cal. Rptr. 2d 656 (1998) (prosecutorial misconduct where court had already overruled similar objection, making further objections futile); *People v. Vera*, 15 Cal. 4th 269, 276-77, 62 Cal. Rptr. 2d 754 (1997) (where certain fundamental, constitutional rights are involved, lack of objection does not result in forfeiture); *People v. Cox*, 53 Cal. 3d 618, 682, 280 Cal. Rptr. 692 (1991) (counsel failed to object to alleged prosecutorial misconduct; timely admonition would have cured the defect, therefore defendant waived the objection; "To forestall any later charge of ineffective assistance of counsel, we will nevertheless address the substance of defendant's contentions"); *People v. Malone*, 47 Cal. 3d 1, 38, 252 Cal. Rptr. 525 (1988) (addressing prosecutorial misconduct issue with no explanation for why court addresses the issue despite failure to object); *People v.*

Silva, 45 Cal. 3d 604, 638, 247 Cal. Rptr. 573 (1988) (same); *Canaan v. Abdelnour*, 40 Cal. 3d 703, 722 n.17, 221 Cal. Rptr. 468 (1985) (constitutional issue was not raised at trial, but it was "but one aspect of the larger constitutional question" raised on appeal); *People v. Smith*, 103 Cal. 563, 566, 37 P. 516 (1894) (charging instrument failed to state an offense, a defense "which went to the very essence of the cause of action," and may be raised at any time); *People v. Perkins*, 109 Cal. App. 4th 1562, 1567, 1 Cal. Rptr. 3d 271 (2003) (prejudicial judicial misconduct not curable by admonition); *People v. Bryden*, 63 Cal. App. 4th 159, 182, 73 Cal. Rptr. 2d 554 (1998) (misconduct material to the verdict in a closely balanced case); *In re Khonsavanh S.*, 67 Cal. App. 4th 532, 536-37, 79 Cal. Rptr. 2d 80 (1998) (lack of opportunity to object when counsel blind-sided by unexpected ruling); *CNA Casualty of Cal. v. Seaboard Sur. Co.*, 176 Cal. App. 3d 598, 618, 222 Cal. Rptr. 276 (1986) (court may consider previously unraised matter affecting "public interest or the due administration of justice"); *Hale v. Morgan*, 22 Cal. 3d 388, 394, 149 Cal. Rptr. 375 (1978) (review permitted where pure question of law involved); *People v. Truer*, 168 Cal. App. 3d 437, 441, 214 Cal. Rptr. 869 (1985) (same); *People v. Norwood*, 26 Cal. App. 3d 148, 153, 103 Cal. Rptr. 7 (1972) (issue reviewable absent objection to avoid a subsequent habeas corpus issue raising the same point); *People v. Ross*, 198 Cal. App. 2d 723, 730, 18 Cal. Rptr. 307 (1961) ("The fact that counsel has not presented the specific point upon which this decision turns cannot deter us from seeing that justice is done"); *People v. Najera*, 138 Cal. App. 4th 212, 224, 41 Cal. Rptr. 3d 244 (2006) (ordinarily, defendant must object to prosecutorial misconduct and request and admonition, but is excused from doing so if either would have been futile).

Thus, the "rule" regarding non-evidentiary errors is not a rule at all. It is so riddled with exceptions as to be swallowed by them. The rule, if there is a rule, is that an appellate court may reach unpreserved errors.

In addition, a defendant may raise for the first time on appeal a claim

asserting the deprivation of certain fundamental, constitutional rights. *See Vera*, 15 Cal. 4th at 276-77; *People v. Holmes*, 54 Cal. 2d 442, 443-44, 5 Cal. Rptr. 871 (1960) (constitutional right to jury trial); *Saunders*, 5 Cal. 4th at 589-92 (plea of once in jeopardy). Appellate courts "typically have engaged in discretionary review only when a forfeited claim involves an important issue of constitutional law or a substantial right." *Sheena K.*, 40 Cal. 4th at 887 n.7 (citations omitted). *Accord People v. Belmares*, 106 Cal. App. 4th 19, 27, 130 Cal. Rptr. 2d 400 (2003), *overruled on other grounds in People v. Reed*, 38 Cal. 4th 1224, 45 Cal. Rptr. 3d 353 (2006) (defendant could assert for the first time on appeal the portion of his argument that claimed that an instruction had impinged on his constitutional right to have the jury determine a certain fact); *People v. Santamaria*, 229 Cal. App. 3d 269, 279, n.7, 280 Cal. Rptr. 43 (1991) (errors of great "magnitude" are cognizable on appeal in absence of objection); *People v. Mills*, 81 Cal. App. 3d 171, 176, 146 Cal. Rptr. 411 (1978) ("The Evidence Code section 353 requirement of timely and specific objection before appellate review is available . . . 'is, of course, subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law'"). As such, the contemporaneous objection rule is not independent of federal law in that it is interwoven with federal constitutional principles.

Any delineation of which evidentiary issues may be considered on appeal in the absence of an objection, and which will not, is quite unclear under California Supreme Court precedent. "Special circumstances" appear to exist that will excuse non-compliance with the contemporaneous objection rule. *See, e.g.*, *People v. Flores*, 68 Cal. 2d 563, 567, 68 Cal. Rptr. 161 (1968) (noting absence of special circumstances); *People v. De Santiago*, 71 Cal. 2d 18, 23, 76 Cal. Rptr. 809 (1969) (overruling *Flores* in part, noting exception to contemporaneous objection rule where counsel could not have anticipated unforeseen changes in the law); *People v. Chavez*, 26 Cal. 3d 334, 350 n.5, 161 Cal. Rptr. 762 (1980) (same); *People v.*

Kitchens, 46 Cal. 2d 260, 262, 294 P.2d 17 (1956) (same); *People v. Johnson*, 5 Cal. App. 3d 851, 863, 85 Cal. Rptr. 485 (1970) (referring to existence of special circumstance exception); *People v. Robinson*, 62 Cal. 2d 889, 894, 44 Cal. Rptr. 762 (1965) (referring to "certain circumstances not present here."); *see also In re Shipp*, 62 Cal. 2d 547, 552, 43 Cal. Rptr. 3 (1965); *Dixon*, 41 Cal. 2d at 759 (mentioning "special circumstances" in context of habeas corpus litigation but without clarifying what those circumstances might be). California case law does not clarify or list the "special circumstances" that excuse the lack of an objection. Thus, while it is clear that certain circumstances undermine the contemporaneous objection rule, it seems impossible to tell what they are, or to what extent they impinge on the rule.

Accordingly, the contemporaneous objection rule was not regularly or consistently applied or defined at the time of Mr. Jones's trial, and it should not operate to preclude this Court from reviewing the merits of claims for which the state court applied this procedural bar. *See Carter*, 2013 WL 1120657, at *41 (finding that petitioner met his interim burden of demonstrating inconsistent application of the contemporaneous objection rule, and that respondent did not meet the ultimate burden of proving the adequacy of the procedural bar).

IV. MR. JONES'S CLAIMS SATISFY 28 U.S.C. SECTION 2254(D)

A. Claim One: Mr. Jones Received Ineffective Assistance of Counsel During the Guilt Phase of His Trial.

Mr. Jones satisfied state pleading requirements by presenting this claim in state court with sufficient detail and supporting factual material to establish a prima facie showing that he was entitled to relief. *See, e.g.*, *Duvall*, 9 Cal. 4th at 474. Among other things, Mr. Jones demonstrated that trial counsel unreasonably failed to investigate and present evidence in support of the sole defense during the guilt phase – that Mr. Jones lacked the specific intent necessary for a capital conviction

due to his mental health problems and substance use before the crime – and that this failing was prejudicial. Mr. Jones also demonstrated that trial counsel was ineffective for failing to investigate and present evidence to support his theory that Mr. Jones did not have pre-mortem sexual contact with the Mrs. Miller – a defense to rape charges that provided the basis for first-degree murder and a special circumstance that made Mr. Jones eligible for the death penalty. Mr. Jones's state pleading further established that trial counsel provided ineffective assistance by failing to investigate a prior conviction and reasonably defend against it. Individually and cumulatively, these and other violations of Mr. Jones's right to the effective assistance of counsel entitled Mr. Jones to relief.

This claim was not procedurally defaulted, and respondent did not present factual materials or legal argument in state court to establish that Mr. Jones's prima facie showing should not be taken as true or that it otherwise lacked merit. Under these circumstances, the state court was required to issue an order to show cause and allow Mr. Jones access to state processes to develop and present evidence to prove his claim. *See, e.g. Duvall*, 9 Cal. 4th at 475; *Romero*, 8 Cal. 4th at 742. By instead summarily denying Mr. Jones's claim, the California Supreme Court's decision satisfies section 2254(d) as set forth in Mr. Jones's prior briefing and in the sections that follow.

In this Court, respondent does not reasonably contend that Mr. Jones failed to present a prima facie case to the state court. Indeed, respondent concedes that the state court's summary denial of Mr. Jones's prima facie case for relief, as set forth in Mr. Jones's Opening Brief, satisfies section 2254(d). *See* section II.C., *supra*. Respondent instead asserts that, at the initial pleading stage of the state habeas process, the state court properly rejected this claim by making a variety of determinations about trial counsel's actions and omissions, tactical decisions, and the weight, credibility, and impact of evidence that should have been presented during the guilt phase of Mr. Jones's trial but was not. Opp. at 3-36. These

contentions defy clearly established federal law, state court procedures, and the record before the state court and must be rejected. Respondent has not provided any legal or factual basis–in the state court or this Court–upon which the state court reasonably could have rejected Mr. Jones's showing that trial counsel was ineffective during the guilt phase of trial.

1. There Is No Reasonable Basis for the State Court Ruling That Mr. Jones Failed to Make a Prima Facie Showing for Relief.

a. Mr. Jones Made a Prima Facie Showing That Trial Counsel Was Ineffective for Failing to Investigate and Adequately Present a Mental State Defense.

Mr. Jones's allegations and supporting factual material in state court established that although trial counsel recognized "that Mr. Jones's obvious mental illness had to be the crux of the defense," Ex. 12 at 107, he was constitutionally ineffective because he did not investigate this defense and failed to present expert and lay witness testimony to support it. *See, e.g.*, State Pet. at 92-158; Inf. Reply at 86-103; Opening Br. at 16-27. Instead, trial counsel decided to base the mental state defense solely on Mr. Jones's testimony about his mental health problems, and presented the one expert he retained who could have testified about Mr. Jones's mental state, Claudewell Thomas, M.D., only during the penalty phase. Ex. 12 at 107; Ex. 150 at 2731. Because trial counsel did not offer any expert testimony to support the mental state defense during the guilt phase, the trial court severely curtailed Mr. Jones's testimony on this topic. In the words of trial counsel, "The ruling gutted my only defense to the charge of capital murder," and prevented trial counsel from presenting evidence that Mr. Jones was unable to form the requisite intent for the first-degree felony murder. Ex. 12 at 109-10.

Respondent asserts that the state court's summary denial of this aspect of Mr. Jones's claim was reasonable because trial counsel "may have had several valid tactical reasons" for not presenting expert testimony from Dr. Thomas to support a

mental state defense during the guilt phase of trial. Opp. at 5. Respondent states that the state court also reasonably could determine that this aspect of the claim was "conclusory" because declarations by trial counsel did not more fully explain his reasons for not presenting testimony by Dr. Thomas during the guilt phase. Opp. at 6. These contentions, and the others offered by respondent, are without merit.

1) Trial counsel decided to rely exclusively on Mr. Jones's testimony for the mental state defense without conducting a reasonable investigation.

Trial counsel's "strategic choices made after less than complete investigation" are reasonable only to the extent that limitations on investigation are reasonable. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984). Furthermore, when "assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527, 123 S. Ct. 2527, 2538, 156 L. Ed. 2d 471 (2003). Before a state court may defer to alleged tactical decisions made by trial counsel, it therefore must have conducted an assessment of whether trial counsel's investigation "demonstrated reasonable professional judgment" and not have "merely assumed that the investigation was adequate." *Wiggins*, 539 U.S. at 527.

Respondent has never contested Mr. Jones's allegations that counsel was obligated to investigate the mental state defense and failed to do so. *See* Inf. Resp. at 14-15; Opp. at 5-10. Indeed, it is well established that at the time of Mr. Jones's trial, trial counsel had a duty to fully investigate Mr. Jones's mental state defense

before deciding how to present it.[16] *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 385, 125 S. Ct. 2456, 2464, 162 L. Ed. 2d 360 (2005) (holding trial counsel in 1988 case had a duty to "make all reasonable efforts" to learn about key prosecution evidence and rebut it); *Williams v. Taylor*, 529 U.S. 362, 396, 120 S. Ct. 1495, 1514, 146 L. Ed. 2d 389 (2000) (recognizing trial counsel in 1986 case had an "obligation to conduct a thorough investigation of the defendant's background); *In re (Troy Lee) Jones*, 13 Cal. 4th 552, 566, 917 P.2d 1175 (1996) (holding "reasonably competent counsel would have investigated thoroughly all the evidence" relevant to petitioner's involvement in the crime); *In re Marquez*, 1 Cal. 4th 584, 602, 822 P.2d 435 (1992) (holding that "before counsel undertakes to act, or not to act," counsel must make an informed decision "founded upon adequate investigation and preparation"); *People v. Ledesma*, 43 Cal. 3d 171, 222, 729 P.2d 839 (1987) (holding that trial counsel is obligated to investigate "all defenses of fact and of law that may be available to the defendant"); *In re Hall*, 30 Cal. 3d 408, 427, 637 P.2d 690 (1981) (holding trial counsel is obligated to conduct investigation of other available witnesses before deciding to rely on client testimony); *see also* America Bar Association, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) ("ABA Guidelines"), Guidelines 11.4.1.3.A, 11.4.1.3.B.

Mr. Jones demonstrated that contrary to this prevailing professional standard, trial counsel did not investigate the mental state defense before deciding to rely exclusively on Mr. Jones's testimony. The investigation that trial counsel did conduct into Mr. Jones's background was delegated to the defense paralegal and was for the penalty phase rather than the mental state defense at the guilt

[16] The state court ruled on Mr. Jones's petition in March of 2009. *See* Supreme Court Order, *In re Ernest DeWayne Jones*, Case No. S110791, filed Mar. 11, 2009.

phase. Ex. 12 at 105-06; Ex. 19 at 203-05. The investigator assigned to the case periodically made contact with potential penalty phase witnesses, but this was limited to locating them and determining if they were willing to be interviewed. Ex. 12 at 105-06; Ex. 19 at 204. Other than this task, the investigator was responsible for serving subpoenas, researching publicity on the case, interviewing witnesses related to the robbery/burglary charges, and investigating forensic issues. Ex. 105-06; Ex. 19 at 203. The paralegal was responsible for conducting interviews with potential penalty phase witnesses and for determining what, if any, follow up was necessary with those witnesses. Ex. 12 at 105-06; Ex. 19 at 203.

The paralegal did not know what guilt defenses trial counsel planned to present, did not perform any tasks in preparation for the guilt phase, and trial counsel did not provide her any direction regarding the scope, purpose, or content of the interviews she conducted with family members. Ex. 19 at 203-05. Trial counsel did not think that he legally was required to present evidence other than Mr. Jones's testimony to establish a mental state defense, and did not consider using lay witness testimony to describe Mr. Jones's background and previous instances of dissociation. Ex. 12 at 107-08. Furthermore, although the interviews the paralegal conducted with family members were not conducted as part of guilt phase preparations, even those interviews "were limited in scope and detail," and "failed to elucidate the problems [in Mr. Jones's home environment] in much detail or discuss Mr. Jones with much specificity." Ex. 154 at 2750. Trial counsel confirmed that no one on the defense team interviewed extended family members, neighbors, and other witnesses who provided background information for the mental state defense in the state habeas petition, and stated that he did not have a

strategic reason for failing to do so. Ex. 150 at 2733-34.[17]

Trial counsel's failure to investigate and decision to rely instead on Mr. Jones's testimony were all the more unreasonable because trial counsel had been informed by the expert he retained to evaluate Mr. Jones that "Mr. Jones was gravely mentally ill," and "was not mentally fit to testify on his own behalf." Ex. 154 at 2752.

Taken as true, as required under state law, Mr. Jones's allegations made a prima facie showing that trial counsel was objectively unreasonable when he decided to rely solely on Mr. Jones's testimony to establish a mental state defense without conducting a reasonable investigation into Mr. Jones's background. *See, e.g.*, *Wiggins*, 539 U.S. at 529 (holding that trial counsel was ineffective for failing to conduct an adequate investigation before deciding not to introduce additional evidence); *Porter v. McCollum*, 558 U.S. 30, 40, 130 S. Ct. 447, 453, 175 L. Ed. 2d 398 (2009) (holding counsel ineffective when he "ignored pertinent avenues for investigation of which he should have been aware" prior to petitioner's 1988 trial); *Daniels v. Woodford*, 428 F.3d 1181, 1206 (9th Cir. 2005) (noting that the circuit court has "repeatedly held that defense counsel in a murder trial was ineffective where there was some evidence of the defendant's mental illness in the record, but counsel failed to investigate it as a basis for a mental defense to first degree murder"); *Lopez v. Schriro*, 491 F.3d 1029, 1041 (9th Cir. 2007) (holding facial claim of failure to investigate established by showing of improper delegation to a subordinate); *Jennings v. Woodford*, 290 F.3d 1006, 1016 (9th Cir. 2002) (holding trial counsel ineffective for failing to investigate mental health and drug-related issues "more thoroughly" in order to defend against capital murder "for which

[17] For a summary of the background information that was available to trial counsel had he conducted a reasonable investigation, see the Opening Brief at pages 66 to 75.

raising a reasonable doubt as to intent could be crucial"); *Seidel v. Merkle*, 146 F.3d 750, 755 (9th Cir. 1998) (holding that counsel performed deficiently at 1991 trial where he was on notice of client's mental illness but did not investigate mental state defense); *In re Hall*, 30 Cal. 3d at 427 (holding trial counsel ineffective for failing to present evidence to support client's testimony during guilt phase, because "petitioner's credibility was obviously suspect *ab initio*").[18]

Respondent's contention that the state court reasonably could deny Mr. Jones's claim because of trial counsel's possible tactical decisions is not supported by federal law or state court procedures. Clearly established federal law requires a state court to assess whether trial counsel's decisions were based upon reasonable investigations. *Wiggins*, 539 U.S. at 527. Because respondent never contested Mr. Jones's allegations that trial counsel's investigation was unreasonable, Inf. Resp. at 14-15, respondent's contentions about trial counsel's possible tactical decisions would not have provided a legal basis for the state court to reject Mr. Jones's claim. *See, e.g.*, *Wiggins*, 539 U.S. at 528 (holding state court's deference to counsel's alleged strategic decision, despite the fact that it was based on an unreasonable investigation, was objectively unreasonable under section 2254(d)). Furthermore, as discussed in the following section, the tactical decision that respondent asserts could have supported the state court's summary denial–that trial counsel may have decided not to present Dr. Thomas's testimony during the guilt phase because it would have elicited damaging evidence, Opp. at 6–is nothing more than speculation by respondent that plainly is refuted by the post-conviction record before the state court. At most, respondent's effort to attribute tactical reasons to

[18] Mr. Jones also made a prima facie showing that trial counsel was objectively unreasonable for failing to investigate and present testimony from lay witnesses to support a mental state defense. *See, e.g.*, State Pet. at 93-152, 160-62; Opening Br. at 22-23.

trial counsel's failure to investigate and present evidence in support of the mental state defense merely created factual disputes about the reasonableness of trial counsel's investigation, and the strategy, if any, behind his decisions–neither of which could have been resolved by the state court without issuing an order to show cause. *Duvall*, 9 Cal. 4th at 475; *Romero*, 8 Cal. 4th at 742.

2) Trial counsel did not retain, adequately prepare, or present any mental expert to testify in support of the mental state defense.

Mr. Jones's allegations and supporting factual material established that trial counsel believed that expert testimony about Mr. Jones's mental state "was critical to the jury's understanding of the crime," Ex. 150 at 2731, and that trial counsel wanted to have two mental health experts testify at trial, Ex. 150 at 2732. In spite of these views, trial counsel did not retain any mental health expert until very close to the start of trial, at which point he retained Dr. Thomas. State Pet. at 152-58; Inf. Reply at 97-101. Dr. Thomas did not have sufficient time to complete his evaluation of Mr. Jones before the completion of the guilt phase, however, Inf. Reply at 99, and trial counsel did not have a second mental health expert ready or available to testify during the guilt phase, Ex. 150 at 2732. Trial counsel stated that "I had no strategic reason for failing to have a second mental health expert ready to testify in the guilt phase." Ex. 150 at 2732. Once the trial court ruled that mental state evidence from Mr. Jones would be severely curtailed without accompanying expert testimony, trial counsel did not attempt to seek a continuance, present Dr. Thomas's incomplete assessment, or employ another mental health expert to support what trial counsel viewed as Mr. Jones's "critical testimony," even though trial counsel correctly predicted that the prosecution successfully would use the absence of a defense expert to argue that Mr. Jones's

mental state defense was fabricated. Ex. 12 at 110.[19]

Mr. Jones alleged that trial counsel was ineffective for failing to adequately investigate, prepare, and present Dr. Thomas's or another mental health expert's testimony in support of the mental state defense. State Pet. at 92-158; Inf. Reply at 86-103. Mr. Jones's allegations and supporting factual material established that, after he was retained by trial counsel, Dr. Thomas requested information related to Mr. Jones's "medical, mental health, educational, and other social history." Ex. 154 at 2750; *see also* Ex. 12 at 108 (trial counsel confirming that Dr. Thomas requested background material for his evaluation of Mr. Jones). In spite of this request, trial counsel provided Dr. Thomas with meager information about Mr. Jones's upbringing and background and did not give him readily available and relevant school, medical, social service, court, or military records. Ex. 154 at 2750. Dr. Thomas also advised counsel that additional testing was necessary to adequately evaluate Mr. Jones, but trial counsel failed to ensure that such testing was conducted in accordance with prevailing standards. Ex. 12 at 108.

Mr. Jones alleged that trial counsel also was ineffective for failing to retain and utilize the results of a qualified neuropsychological examination in support of the mental state defense. State Pet. at 156-57; Inf. Reply at 197-99. Trial counsel stated that he believed it was necessary to investigate the possibility that Mr. Jones suffered from brain damage. Ex. 150 at 2731. Trial counsel also explained that

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[19] Respondent contends that the state court reasonably could have rejected this claim as conclusory because trial counsel's declarations did not specifically explain why trial counsel did not call Dr. Thomas to testify during the guilt phase. Opp. at 6. If the state court had deemed this aspect of Mr. Jones's claim conclusory, however, its procedures dictate that Mr. Jones would have been given notice of this pleading defect and an opportunity to correct it. *See* section II.A.2., *supra*. The absence of any such indication from the state court forecloses this possibility, as does preceding discussion of trial counsel's statements and Mr. Jones's other detailed showings.

although he retained a neuropsychologist, the neuropsychologist did not conduct the testing trial counsel requested and the work the neuropsychologist did perform was factually inaccurate and therefore not likely to be reliable. Ex. 150 at 2732. Trial counsel stated that he did not have a strategic reason for failing to retain another neuropsychologist, and simply ran out of time because trial was starting. Ex. 150 at 2732-33.

In state court, respondent contended that "there was a plausible tactical reason" why trial counsel did not call Dr. Thomas to testify during the guilt phase of trial, speculating that the prosecution could elicit damaging information about Mr. Jones's prior assault of Kim Jackson and his prior statements about having consensual sex with Mrs. Miller. Inf. Resp. at 15. Respondent repeats that contention before this Court. Opp. at 6. As discussed in the prior section, trial counsel could not have made a reasonable tactical decision about whether to present testimony from Dr. Thomas or another mental expert during the guilt phase without conducting a reasonable investigation into the potential evidence available to support a mental state defense. *See, e.g.*, *Wiggins*, 539 U.S. at 527. In light of Mr. Jones's showing that trial counsel did not retain Dr. Thomas or any other expert in time to present expert testimony during the guilt phase, respondent's assertion that trial counsel nonetheless strategically forfeited this testimony is plainly unfounded and could not have provided a basis for rejecting this claim. Moreover, trial counsel stated that his plan during the guilt phase was to have Mr. Jones testify about the Kim Jackson incident; trial counsel wanted Mr. Jones to testify about his psychological history and dissociative states pertaining to "his past two prior crimes, [which] all occurred long before 1992." Ex. 12 at 109. Trial counsel's statement that he did not have a strategic reason for not having a second mental health expert available to testify during the guilt phase, Ex. 150 at 2732, further precludes respondent's speculative and factually incorrect tactical justification. Any tactical reasoning offered by respondent at most presented a

factual dispute about trial counsel's actions that could not be considered by the state court, without issuing an order to show cause. *Duvall*, 9 Cal. 4th at 475; *Romero*, 8 Cal. 4th at 742.

Respondent also asserts before this Court that the state court reasonably could have concluded that trial counsel did not have a duty to investigate and provide Dr. Thomas with adequate background material for his assessment of Mr. Jones. Opp. at 9. Respondent cites to *Hendricks v. Calderon*, 70 F.3d 1032, 1038-39 (9th Cir. 1995), for the proposition that trial counsel does not have a duty to acquire sufficient background information to assist their experts absent a request. Opp. at 9. This argument would not have provided a legal basis for the state court to reject Mr. Jones's claim, however, because respondent did not raise it in the state court. *See* section II.A.4., *supra*. At any rate, Mr. Jones's factual allegations establish that Dr. Thomas *did* request such material, Ex. 12 at 108; Ex. 154 at 2750, and respondent did not provide the state court with any reason why those allegations should not be accepted as true, *Duvall*, 9 Cal. 4th at 475; *Romero*, 8 Cal. 4th at 742.[20]

Taken as true, Mr. Jones's allegations made a prima facie showing that trial counsel's failure to present any expert testimony to support Mr. Jones's mental state defense during the guilt phase of trial was objectively unreasonable. *See, e.g.*, *Daniels*, 428 F.3d at 1207 (holding trial counsel was ineffective for failing to

[20] Similarly, respondent asserts that the state court could have rejected Mr. Jones's claims because trial counsel did not have a duty to seek another expert to conduct neuropsychological testing. Opp. at 8-9 (citing cases for the proposition that trial counsel need not continue to seek expert assistance to find a more helpful opinion). This does not provide a basis for rejecting Mr. Jones's claims, because Mr. Jones's factual allegations established that trial counsel was dissatisfied with the neuropsychologist for failing to complete a competent evaluation of Mr. Jones, yet trial counsel nonetheless failed to seek out a qualified expert to conduct a competent evaluation. Ex. 150 at 2732-33.

present evidence of Daniels's mental illness or brain damage in guilt phase mental state defense); *Bloom v. Calderon*, 132 F.3d 1267, 1278 (9th Cir. 1997) (holding trial counsel ineffective for failing to adequately prepare and present expert testimony to support mental state defense; "[e]ven the third-year law student [assisting counsel] knew the defense needed a psychiatric expert witness"); *In re Hall*, 30 Cal. 3d at 427 (holding trial counsel ineffective for failing to present evidence to support client's testimony during guilt phase); *cf. Ake v. Oklahoma*, 470 U.S. 68, 81, 105 S. Ct. 1087, 1095, 84 L. Ed. 2d 53 (1985) (holding assistance of a mental health expert may be "crucial to the defendant's ability to marshal his defense;" "[b]y organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them").

3) Trial counsel's failure to investigate and present expert and lay witness testimony to support a mental state defense was prejudicial.

Mr. Jones's allegations and supporting factual material established that there was a wealth of information crucial to a mental state defense that could have been provided to qualified mental health experts and presented through lay witness testimony to make a compelling defense.[21] Among other things, a reasonable investigation would have revealed that Mr. Jones exhibited symptoms of severe mental impairment throughout his childhood, including auditory and visual hallucinations, paranoid tendencies and irrational fears, heightened anxieties,

[21] In addition to the description of this information that follows, see the Opening Brief at pages 66 to 75 for a more complete summary of relevant background information presented to the state court.

constant and terrifying nightmares, and dissociative episodes. State Pet. at 129-34. Dissociative episodes continued and worsened through Mr. Jones's teenage years, and he also began to suffer from deepening depression and to display increasingly bizarre behavior. State Pet. at 141-46. After an incident in which Mr. Jones assaulted Kim Jackson, a family friend, during a trance-like state, he was distraught and initially wanted to be admitted for psychiatric treatment but turned himself into the police instead. State Pet. at 146-47. Auditory hallucinations continued to trouble Mr. Jones, and precipitated another blackout and assault of his girlfriend's mother Doretha Harris. Following this episode, Mr. Jones asked Mrs. Harris to kill him. State Pet. at 147. After his release from prison for assaulting Mrs. Harris, and in the time leading up to Mrs. Miller's death, Mr. Jones's mental condition was markedly deteriorating. He was severely depressed and suicidal, could not hold down a job, began talking to himself and taping his phone conversations, and continued to have dissociative episodes in which his behavior was bizarre. State Pet. at 147-50.

A reasonable investigation would have provided compelling insight into and corroboration for Mr. Jones's mental deterioration. Among other things, adequate investigation of Mr. Jones's background would have revealed that he was sexually abused by his mother and experienced persistent, terrifying trauma and other abuses throughout his life. State Pet. at 107-11. In addition to sexual abuse, Mr. Jones suffered regular, severe physical abuse from both of his parents and other adult relatives, and routinely witnessed terrifying violence between his parents. State Pet. at 108-17. Sex and sexual infidelities provoked much of the physical violence between Mr. Jones's parents, and their increasingly debilitating alcoholism exacerbated the frequency and violence of their attacks on each other. State Pet. at 117-26. In addition to the trauma and other mental health problems, Mr. Jones struggled with significant cognitive impairments. He scored in the range of intellectual disability at the end of the first grade and entered Educably Mentally

Retarded classes, and was placed in Special Education classes throughout his turbulent and unstable time in school. State Pet. at 135-41. Dysfunction between Mr. Jones's parents that left Mr. Jones and his siblings without adequate food, clothing, or a stable home further undermined his functioning. State Pet. at 126. Chronic danger and violence as well as rioting in Mr. Jones's community, and the murder of his older brother were tipping points in Mr. Jones's life that accelerated his mental decline. State Pet. at 120-23.

Qualified mental health experts could have provided significant insight into Mr. Jones's mental functioning had they been given the results of a reasonable investigation and adequate time to prepare. Mr. Jones submitted a declaration from Dr. Thomas, who, after reviewing information developed for the state habeas proceedings, stated:

> All of this material was critical to explain the full effect that Mr. Jones's life experiences, especially his cruelly dysfunctional family dynamics, had on his behavior and functioning. Mr. Jones's multiple impairments affected his judgment and his actions throughout his life, and had particularly insidious effects on his behavior and thought processes on the evening of the incident. Against this backdrop of domestic, sexualized violence, and in particular the demonization of his mother by his father, Mr. Jones's childhood memory of his mother in bed at a moment of great stress with Mrs. Miller makes even more sense to me, and I would have done a much better job conveying that connection to the jury.

Ex. 154 at 2761.[22]

[22] In Mr. Jones's factual allegations, Dr. Thomas also explained that trial counsel's decision to have Mr. Jones testify about having a flashback of his mother in a sexually provocative image

continued…

In addition to demonstrating the effect additional information would have had on Dr. Thomas's evaluation and testimony, Mr. Jones submitted the declaration of another mental health expert, Zakee Matthews, M.D., who conducted a comprehensive evaluation of Mr. Jones to identify the psychiatric, psychological, and developmental impact on Mr. Jones of his family history, social and educational environment, and life experiences. Ex. 178 at 3090. Based on his independent evaluation, Dr. Matthews concluded that Mr. Jones's mental condition at the time of the crimes was severely diminished and that he was not able to form an intent to kill or rape Mrs. Miller. Ex. 178 at 3156-57. Mr. Jones also submitted the declaration of Natasha Khazanov, Ph.D., a clinical psychologist who specializes in neuropsychological assessment. Ex. 175 at 3057. Dr. Khazanov conducted a comprehensive neuropsychological examination of Mr. Jones and concluded that he suffered from significant brain damage that contributed substantially and adversely to his behavior and functioning for most of his life, and certainly prior to his arrest in August 1992. Ex. 175 at 3060-76.

In the state court, respondent asserted that Mr. Jones was not prejudiced by trial counsel's failure to investigate and develop lay witness testimony to support the mental state defense. Inf. Resp. at 15. Respondent argued that the trial court would have excluded lay witness testimony because there was no mental health expert explain it. Inf. Resp. at 15. Respondent also stated that trial counsel's

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> did Mr. Jones a great disservice. Without the benefit of a mental health expert's explanation of his recollections and his mental state, the jury had no context within which to understand that testimony. The reason for the flashback, its historical origins, and its nexus to the incident all were crucial aspects of a life story that [Mr. Jones] was not equipped to tell. With no corroboration and not context, Mr. Jones's clipped memory of a flashback would make little sense to the jury.

Ex. 154 at 2753.

failure to call Dr. Thomas during the guilt phase was not prejudicial because the prosecutor would have elicited damaging evidence from Dr. Thomas that Mr. Jones initially claimed to have consensual sex with Mrs. Miller and had assaulted Ms. Jackson. Inf. Resp. at 15.

Respondent's contention that the trial court would have excluded lay witness testimony without a foundational expert witness only highlights the prejudice to Mr. Jones from trial counsel's failure to retain a mental health expert for the guilt phase of the trial and does not provide a basis for rejecting Mr. Jones's claim. Furthermore, the trial court's ruling to exclude testimony about Mr. Jones's mental state was the result of trial counsel's failure to prepare for the defense and make an adequate proffer to the court. As the California Supreme Court pointed out, trial counsel's proposed testimony about Mr. Jones's background, "was jumbled deep inside an extraordinary grab bag of a proffer that included such disparate allegations as that defendant 'attended many schools' and that 'Aunt Jackie shot herself to death.'" *People v. Jones*, 29 Cal. 4th 1229, 1252-53, 64 P.3d 762 (2003). Competent counsel would have conducted a reasonable investigation into Mr. Jones's background, and would have been prepared to make a coherent proffer about the extent and relevance of Mr. Jones's history of mental disturbance, and mental condition shortly before the crime, and lay witness testimony on those topics was admissible under state law. *See, e.g.*, Cal. Penal Code § 28; Cal. Evid. Code § 800; *People v. Webb*, 143 Cal. App. 2d 402, 412, 300 P.2d 130, 137 (1956) (ruling lay witness testimony admissible on specific intent).

Respondent's contentions also ignore Mr. Jones's allegations that trial counsel also was ineffective for failing to conduct an adequate investigation and provide information from lay witnesses to Dr. Thomas after he requested it, or to other experts, in order to receive a competent expert assessment. *See, e.g.*, State Pet. at 157; Ex. 154 at 2750. The state court never allowed Mr. Jones to present any evidence to demonstrate the expert testimony or lay witness accounts that

could have been presented if trial counsel reasonably had prepared for the mental state defense. Respondent did not provide any factual material to support his argument in the Informal Response, and the state court never received or considered any evidence about the allegedly damaging testimony that respondent contends would have outweighed expert testimony or other additional support for the mental state defense. The state court therefore had no basis upon which to evaluate the weight and credibility of evidence going to the question of prejudice and could not have rejected the claim on that basis. *See, e.g.*, *Hoffman v. Arave*, 236 F.3d 523, 536 (9th Cir. 2001) (ruling that "[w]ithout the benefit of an evidentiary hearing, it is impossible to evaluate the strength of Hoffman's defense at trial" or "conclude as a matter of law that there is no reasonable possibility that offering expert testimony and a thorough history of Hoffman's educational, medical, and psychological problems at the time of the murder" might have affected the jury's determination); *In re Serrano*, 10 Cal. 4th 447, 456, 895 P.2d 936 (1995) (ruling that a court may not reject post-conviction claims on credibility grounds in the absence of an evidentiary hearing).

Taken as true, Mr. Jones's allegations and supporting factual material established that he was prejudiced by trial counsel's deficient performance. The prosecutor's closing argument during the guilt phase focused on the absence of expert testimony to support Mr. Jones's mental state defense. 27 RT 3969-72. Even with extremely limited evidence about Mr. Jones's mental state, and undisputed evidence that he was the perpetrator, the jury deliberated for four days before reaching a guilty verdict. 2 CT 247-48, 251, 377. The jury's question about the intent instructions indicated that it was grappling with this issue. 27 RT 4013. Mr. Jones demonstrated that a qualified mental health professional adequately prepared with the results of a reasonable investigation into Mr. Jones's background, and lay witness testimony to provide accounts about Mr. Jones's background and functioning, would have made a difference in the jury's determination. *See, e.g.*,

Daniels, 428 F.3d at 1205 (holding ineffective assistance prejudicial at guilt phase; had counsel undertaken a thorough investigation of Mr. Daniels's mental state, the jury would have heard evidence that he suffered from a mental disorder at the time he committed the murders); *Jennings*, 290 F.3d at 1019 (concluding counsel's failure to investigate and present mental state defense was prejudicial where evidence of guilt was overwhelming, yet the jury deliberated for two days); *Karis v. Calderon*, 283 F.3d 1117, 1140 (9th Cir. 2002) (holding trial counsel ineffective for failing to present evidence, finding it "noteworthy" that even with the weak evidence that was presented, the jury was out for three days before rendering its verdict).

b. Mr. Jones Made a Prima Facie Showing That Trial Counsel Was Ineffective for Failing to Investigate and Adequately Defend Against the Rape Charges.

Mr. Jones's allegations and supporting factual material in state court established that trial counsel initially moved to strike the rape special circumstance on the basis that postmortem sexual contact did not legally establish a crime of rape. II Supp. 1 CT 83; *see also People v. Kelly*, 1 Cal. 4th 495, 524, 526, 3 Cal. Rptr. 2d 677 (1992). Mr. Jones further alleged that in spite of identifying this central defense to the crime, trial counsel unreasonably failed to investigate or raise it at trial. State Pet. at 84-88; Inf. Reply at 76-80. In support of this claim, Mr. Jones presented a declaration from a forensic pathologist who evaluated the autopsy report and other evidence. *See generally* Ex. 177. The pathologist determined that available medical evidence demonstrated that it was *as likely* that sexual intercourse occurred after death as before, and that postmortem sexual intercourse was *more consistent* with the circumstantial evidence, such as the arrangement of Mrs. Miller's clothing. Ex. 177 at 3086. The absence of bruising

or other marks around the binding on Mrs. Miller's wrists and ankles indicated that she was not struggling at the time she was bound. Ex. 177 at 3086.[23] The physical impossibility of sexual intercourse occurring while Mrs. Miller's ankles were bound, Inf. Reply at 78-79, further supported Mr. Jones's allegations that trial counsel could have established a reasonable doubt whether sexual contact and binding occurred after Mrs. Miller's death. Mr. Jones established that presenting evidence of postmortem sexual contact would have been in keeping with trial counsel's mental state defense, and trial counsel would have presented the evidence as part of the guilt phase defense if he had obtained it. Ex. 181 at 3161. These allegations therefore established that trial counsel was unreasonable to concede the rape charge.

In state court respondent suggested that trial counsel may have determined that such a defense was not viable. Inf. Resp. at 11. Respondent also asserted that the prior assault of Mrs. Harris created a strong inference to support the prosecution's rape charge and that Mr. Jones's allegations failed to show that a defense based on evidence of postmortem sexual contact would have been believed by the jury. Inf. Resp. at 12-13. Respondent's speculation about trial counsel's thinking may not serve as a basis for rejecting the claim, particularly when Mr. Jones established that trial counsel would have presented the defense. Ex. 181 at 3161. Furthermore, respondent's alternate interpretations of the physical evidence–*e.g.*, that Mrs. Miller's nightgown was pulled up for a different reason and that the absence of bruising may have been due to softer binding materials–did not provide a basis for the state court to determine that Mr. Jones's allegations

[23] Mr. Jones's allegations also established that testimony by a prosecution expert, that there was bruising around Mrs. Miller's left wrist, was not supported by the original autopsy report, which clearly documented a finding of no bruising, and that trial counsel therefore also was ineffective for failing to present expert testimony to rebut this false testimony. Inf. Reply at 80-81.

should not be taken as true. At most these were factual disputes that could not have been resolved by the state court without issuing an order to show cause. *Duvall*, 9 Cal. 4th at 475; *Romero*, 8 Cal. 4th at 742.

Taken as true, Mr. Jones's allegations and supporting factual materials made a prima facie showing that trial counsel's failure to present evidence of postmortem sexual contact was prejudicial. The prosecutor's closing argument during the guilt phase emphasized that trial counsel conceded that a rape occurred. 26 RT 3927-28; 27 RT 3963; *see also* Ex. 138 at 2690. Even with extremely limited evidence about Mr. Jones's mental state, and undisputed evidence that he was the perpetrator, the jury deliberated for four days before reaching a guilty verdict. 2 CT 247-48, 251, 377. Evidence of postmortem sexual contact would have supported the defense and made a difference in the jury's determination. *See, e.g.*, *Duncan v. Ornoski*, 528 F.3d 1222, 1236 (9th Cir. 2008) (holding that counsel had a duty to seek expert's advice given the "central role" that "potentially exculpatory" evidence could have played in the defense at 1986 trial); *Schell v. Witek*, 218 F.3d 1017, 1028-29 (9th Cir. 2000) (holding that counsel was ineffective for failing to present expert testimony to refute key evidence on which the prosecution relied); *Lord v. Wood*, 184 F.3d 1083, 1096 (9th Cir. 1999) (holding trial counsel's omission of "potentially exculpatory evidence" prejudicial); *Ledesma*, 43 Cal. 3d at 222 (holding trial counsel ineffective for failing to investigate defenses in spite of confession and stating, "Criminal defense attorneys have a duty to investigate carefully all defenses of fact and of law that may be available to the defendant").

c. Mr. Jones Made a Prima Facie Showing That Trial Counsel Was Ineffective for Failing to Investigate and Defend Against a Prior Conviction.

Mr. Jones's allegations and supporting factual materials established that trial counsel unreasonably withdrew his opposition to the admission of Mr. Jones's 1986 conviction for the rape of Mrs. Harris during the guilt phase of his trial and

was unprepared to address it once it was introduced. State Pet. at 55-65, 158-59; Inf. Reply at 26-51, 105-06. Although the prosecution sought to introduce the prior crime to establish identity and intent to commit rape, by the time trial counsel withdrew his opposition, he had decided to concede both issues. Opening Br. at 31-32. Mr. Jones demonstrated that trial counsel's actions were unnecessary in light of the evidence and unreasonable, in part because trial counsel had not conducted investigation into the prior crime and was unprepared to counter it. *See, e.g.*, State Pet. at 55-61; Inf. Reply at 30-40.

As detailed in section IV.A.1.a.1, *supra*, investigation on the case was conducted by an investigator and paralegal. Mr. Jones's showing in the state court established that the paralegal did not conduct any interviews in preparation for the guilt phase of trial and the investigator's tasks were limited and did not include investigation of the Harris prior. Ex. 19 at 203-05. Ex. 12 at 105-06. Trial counsel did not consider using lay witness testimony to describe Mr. Jones's background and previous instances of dissociation, such as the Harris crime. Ex. 12 at 107-08. In response to the prosecution's introduction of the prior crime, trial counsel conducted minimal cross-examination of Mrs. Harris and presented Mr. Jones's direct testimony to confirm the incident. Opening Br. at 32-33.

Mr. Jones's allegations and factual materials also established that the failure to exclude the Harris prior or effectively demonstrate that it was in keeping with Mr. Jones's mental deterioration and impairment, was highly prejudicial. *See, e.g.*, Ex. 23 at 239 (describing the emotional impact of Mrs. Harris's testimony); 1 RT 688 (trial court acknowledging, "there's no question the prejudicial effect [of the Harris prior] is quite high."). Among other things, Mr. Jones demonstrated that if trial counsel had been adequately prepared, he could have presented evidence that Mr. Jones's mental health had been deteriorating prior to the Harris crime, he was essentially homeless, and he was in a trance-like state and hearing voices when he entered her residence. Inf. Reply at 105-06; *see also* section IV.A.1.a.3, *supra*.

Following the incident, law enforcement officials documented Mr. Jones's symptoms of dissociation and their belief that Mr. Jones was mentally ill; one official recommended that Mr. Jones be committed to a private mental health care facility. Ex. 87; Ex. 104 at 2180.

In the state court, respondent contended that trial counsel made a reasonable strategic decision to withdraw his objection to the Harris prior. Inf. Resp. at 16. Respondent did not respond to Mr. Jones's allegations that trial counsel failed to investigate and unreasonably was not prepared to mitigate the prior crime once it was introduced. Instead, respondent asserted that Mr. Jones's allegations were conclusory and that he failed to specify what course of action trial counsel should have followed. Inf. Resp. at 16. In this Court, respondent repeated the assertion that Mr. Jones's claim was conclusory. Opp. at 22.[24] Respondent's additional contentions before this Court, that the state court could have reasonably decided that trial counsel had other tactical reasons for conceding the prior crime or that the prior crime was not prejudicial, would not have provided a legal basis for the state court to reject Mr. Jones's claim because respondent did not raise them in the state court. *See* section II.A.4., *supra*. Any proffered tactical decision by trial counsel, in light of Mr. Jones's showing that trial counsel failed to investigate the prior crime, could not have provided a basis for the state court to reject the claim. *See, e.g.*, *Wiggins*, 539 U.S. at 527 (holding state court deference to tactical decisions is unreasonable without assessment of whether trial counsel's failure to investigate "demonstrated reasonable professional judgment").

Taken as true, Mr. Jones's allegations and supporting factual materials made

[24] As previously described, if the state court had deemed this aspect of Mr. Jones's claim conclusory, its procedures dictate that Mr. Jones would have been given notice of this pleading defect and an opportunity to correct it. *See* section II.A.2., *supra*.

a prima facie showing that trial counsel was objectively unreasonable when he decided to face the Harris prior in the guilt phase of trial without conducting an investigation into the circumstances of the crime and that this deficient performance was prejudicial. *See, e.g.*, *Rompilla*, 545 U.S. at 386 (holding trial counsel ineffective for failing to investigate prior conviction; without such investigation trial counsel "could have had no hope of knowing" whether there were "circumstances extenuating the behavior described by the victim" of the prior crime); *In re Jones*, 13 Cal. 4th 552, 581-82, 54 Cal. Rptr. 2d 52 (1996) (holding trial counsel ineffective for allowing introduction of his client's involvement in an unrelated felony at 1980s trial); 1989 ABA Guidelines 11.4.1(D)(2)(B), (D)(2)(C), & (D)(3)(B) (identifying obligation to investigate client's prior crimes, client's mental state, and lay witnesses with mitigating information).

d. Mr. Jones Was Prejudiced by the Cumulative Effect of Trial Counsel's Errors.

In addition to the aspects of trial counsel's performance detailed above and in Mr. Jones's Opening Brief on Claim One, Mr. Jones made a prima facie showing in state court that trial counsel was ineffective for failing to challenge the admissibility of DNA evidence in Mr. Jones's trial, State Pet. at 72-84, Inf. Reply at 65-75; enter a plea of not guilty by reason of insanity, State Pet. at 162-63, Inf. Reply at 111-14; advise Mr. Jones of the ramifications of testifying, State Pet. at 159-60, Inf. Reply at 108-11; conduct constitutionally adequate voir dire, State Pet. at 67-70, Inf. Reply at 55-59; impeach prosecution witness Pamela Miller, State Pet. at 90-91, Inf. Reply at 85-86; request necessary jury instructions, State Pet. at 164, Inf. Reply at 115-19; and object to prejudicial prosecutorial misconduct, State Pet. at 164-66, Inf. Reply at 119-27.

> In ruling on an ineffectiveness claim, courts must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings

> that were affected will have been affected in different ways. . . . Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.

Strickland v. Washington, 466 U.S. at 695-96. The state court therefore was obligated to evaluate the effect of all of trial counsel's errors by considering the totality of evidence in the trial and habeas proceedings. Mr. Jones also established a prima facie case for relief according to this assessment. Although it was undisputed that Mr. Jones was the perpetrator, the jury deliberated for four days before reaching a guilty verdict. 2 CT 247-48, 251, 377. In addition to the evident prejudicial effect of trial counsel's errors on the outcome of the guilt phase, the jury's determination was more likely to have been affected by those errors because of the weak evidence before them to convict Mr. Jones of capital murder.

2. Section 2254(d) Is Satisfied by the State Court's Summary Denial of Mr. Jones's Adequately Pled Claim That Trial Counsel Was Ineffective During the Guilt Phase of Trial.

In his Opening Brief, Mr. Jones detailed the ways in which the state court's summary denial of Mr. Jones's prima facie showing of ineffective assistance of counsel during the guilt phase satisfies section 2254(d). Opening Br. at 5-13, 37-43. As a general matter, the California Supreme Court's refusal to hear Mr. Jones's adequately pled claims of constitutional error is contrary to clearly established federal law that prohibits state courts from creating "unreasonable obstacles" to the resolution of federal constitutional claims that are "plainly and reasonably made." *Davis v. Wechsler*, 263 U.S. 22, 24-25, 44 S. Ct. 13, 14, 68 L. Ed. 143 (1923); *see also* Opening Br. at 7-11. Specifically, in light of Mr. Jones's extensive factual allegations and supporting materials in the state court–which the state court was obligated to accept as true–the state court's ruling that Mr. Jones failed to make any prima facie showing of entitlement to relief, and refusal to initiate proceedings to

take evidence and assess the claim, constitutes an unreasonable application of *Strickland*. *See, e.g.*, *Wiggins*, 539 U.S. at 527 (holding state court application of *Strickland* unreasonable under section 2254(d)(1) for failing to assess factual elements of the claim); *Peoples v. Lafler*, 734 F.3d 503, 513-14 (6th Cir. 2013) (holding state court ruling satisfied section 2254(d)(1) for unreasonably failing to consider "all the circumstances" of the guilt phase evidence in rejecting claim of ineffective assistance of counsel); *Mosley v. Atchison*, 689 F.3d 838, 848 (7th Cir. 2012) (holding state court summary ruling on limited record was unreasonable application of *Strickland*).

Although the California Supreme Court summarily denied Mr. Jones's claim without issuing a reasoned opinion, its precedent provides a framework for adjudicating prejudice in ineffective assistance of counsel claims that is contrary to clearly established federal law. Opening Br. at 40-42. Among other things, the California Supreme Court relies on an additional prejudice requirement derived from *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993), an approach that repeatedly has been rejected. *See, e.g.*, *Williams v. Taylor*, 529 U.S. at 393; *Lafler v. Cooper*, __ U.S. __, 132 S. Ct. 1376, 1386, 182 L. Ed. 2d 398 (2012).[25] Finally, because an evidentiary hearing is usually required to adjudicate ineffectiveness claims, the California Supreme Court's rejection of a prima facie ineffectiveness claim without fact-finding also may be considered an unreasonable determination of the facts under § 2254(d)(2). *See, e.g.*, *Hurles v. Ryan*, 706 F.3d

[25] Under state law, issuance of an order to show cause and a reasoned opinion to correct erroneous state law applications of federal law are necessary to remedy this erroneous precedent. *See, e.g.*, *Romero*, 8 Cal. 4th at 740 (holding issuance of an order to show cause is the means by which issues are joined and decided; an OSC triggers the state constitutional requirement that the cause be resolved "in writing with reasons stated"); *Schmier v. Supreme Court*, 78 Cal. App. 4th 703, 710 (2000) (the publication of written opinions is the manner in which this Court determines "the evolution and scope of this state's decisional law").

1021, 1038 (9th Cir. 2013) (explaining that the Ninth Circuit has "held repeatedly that where a state court makes factual findings without an evidentiary hearing or other opportunity for the petitioner to present evidence the fact-finding process itself is deficient and not entitled to deference.").

Respondent's failure to respond to these arguments constitutes consent to a ruling in favor of Mr. Jones on these bases. *Stichting*, 802 F. Supp. 2d at 1132; *In re Teledyne*, 849 F. Supp. at 1373; Local Civil Rules, L.R. 7-9. Given Mr. Jones's showing before the state court, he is entitled to an evidentiary hearing in this Court in which he has an opportunity, for the first time, to develop and present evidence to prove his claim and obtain relief.

B. Claim Two: Mr. Jones Was Deprived of His Right to Conflict-Free Representation.

In state court, Mr. Jones established that his convictions and sentence of death were unconstitutionally obtained because an irreconcilable conflict arose with his court-appointed counsel. App. Opening Br. at 96-108; App. Reply Br. at 33-39. Although the trial court and trial counsel were aware that Mr. Jones and trial counsel had been unable to communicate effectively from the onset of the case, neither took any action to inquire into the extent of the conflict until Mr. Jones formally raised the issue on April 14, 1993. Without conducting an adequate inquiry, the trial court perfunctorily dismissed Mr. Jones's request for the appointment of new counsel. Because an irreconcilable conflict did in fact exist, which led counsel to render deficient performance that prejudiced Mr. Jones at trial, he was denied the right to a fair trial, due process, the effective assistance of counsel, and reliable guilt and penalty phase verdicts.

In the months leading up to the hearing at which he moved the court for new counsel pursuant to *People v. Marsden*, 2 Cal. 3d 118, 84 Cal. Rptr. 156 (1970), Mr. Jones unequivocally expressed to the trial court deeply-rooted problems with trial counsel. The record reveals a severe disruption in the attorney-client

relationship from the outset of the criminal proceedings to the extent that no effective attorney-client relationship was ever formed. In a court appearance on January 25, 1993, approximately three months prior to the *Marsden* hearing, Mr. Jones expressed his distrust of trial counsel to the court, indicating ongoing and potentially fatal problems with the attorney-client relationship:

> Mr. Manaster: . . . There are some pretrial matters that have to be disposed of. And I think the ruling on the 995 might be helpful -
>
> The Defendant: Leave me alone. Leave me alone.
>
> The Court: All right. You waive time for trial, Sir, Monday, February
>
> The Defendant: I said no.
>
> Mr. Wojdak: Has the defendant been arraigned? I have copies of the information here. But I thought we arraigned him last time.
>
> The Court: He was arraigned in my absence on the 24th.
>
> Mr. Wojdak: Does the Court have an information?
>
> The Court: Yes, I do.
>
> Mr. Wojdak: All right. That's what I had thought.
>
> The Court: All right. I'll try once more. Mr. Jones, do you waive time for trial until -
>
> The Defendant: No.
>
> The Court: All right. I'm going to set this matter for pretrial February 22nd, if that's satisfactory with you, Mr. Manaster?

1 RT 6.

This dialogue made clear that Mr. Jones was not able to communicate with his counsel, and that the judge was unconcerned about this obvious breakdown in the attorney-client relationship. His protests were ignored by both his counsel and the court.

At the pretrial conference on April 14, 1993, Mr. Jones again refused to waive time and made a demand to be heard on the conflict issue. Mr. Jones

declared a conflict of interest between himself and trial counsel and attempted to inform the court of his concerns. 1 RT 18. Mr. Jones told the judge that he was unable to communicate with his attorney, and that the two were "[getting] into it" at the jail. 1 RT 18. Mr. Jones further informed the court that the officers at the county jail could verify the arguments between the two of them. 1 RT 18.

Mr. Jones stated that his attorney had not been visiting him to keep him informed of case developments nor had trial counsel visited him prior to the preliminary hearing. 1 RT 19. He further explained that trial counsel had refused to address a long list of his concerns. 1 RT 19. Mr. Jones went further to arrange for the presence of another attorney who was willing to accept the appointment as replacement counsel. 1 RT 19.

These grievances would be sufficient to trigger a proper hearing in the most basic of criminal cases, and especially in a potentially capital case. Instead, the trial court arbitrarily dismissed Mr. Jones's concerns, stating merely that "He's not a mouthpiece. He's your attorney." 1 RT at 19-20. Given the court's unwilling to permit Mr. Jones the opportunity to state his grievances, trial counsel was forced to suggest to the court that Mr. Jones was making a *Marsden* motion and that it was inappropriate for the prosecutor to be present. 1 RT 20. Once trial counsel's request triggered a *Marsden* hearing, at a minimum the court was required to make appropriate inquiries of Mr. Jones so that it could determine the nature of, and resolve, the conflict of interest.

What actually occurred fell far short of a constitutionally adequate inquiry to ensure Mr. Jones was receiving effective representation. The judge began by asking, "What else is wrong with Mr. Manaster's representation . . . ?" 1 RT 21. Mr. Jones started to explain that counsel made a statement to him about his guilt and innocence, and "hinted around to me taking a 15 to life deal." 1 RT 21. The judge interrupted immediately, berating Mr. Jones for getting "mad at him because he's the messenger" of the plea offer, and then refused to allow Mr. Jones to

explain further. 1 RT 21.

Trial counsel then explained to the court his position on Mr. Jones's concerns. Counsel first explained that, in fact, no plea bargain had been offered; he merely attempted to discuss a range of sentencing options with Mr. Jones. 1 RT 22. Trial counsel explained that he had visited Mr. Jones, and continued the preliminary hearing in order to do so. 1 RT 22. Counsel expressed his opinion that he saw no reason why he could not continue to represent Mr. Jones despite their prior disagreements. 1 RT 23.

After this exchange, the trial court "most emphatically denied" the *Marsden* motion. 1 RT 23. The sealed transcript of the hearing consists of eighty-one lines of dialogue: only five and one half of these lines were spoken by Mr. Jones. 1 RT 21-23. After the motion was denied, Mr. Jones repeatedly informed the judge that he absolutely could not communicate with his lawyer. The judge ignored his protests, and again denied him the opportunity to explain the nature of the conflict and how that conflict was adversely affecting trial counsel's representation. 1 RT 23-24.[26]

As a result of the trial court's failure to conduct an adequate inquiry, and indeed depriving Mr. Jones of the opportunity to speak, the court failed to ascertain the nature and extent of the conflict between counsel and Mr. Jones. Although Mr. Jones was not permitted to present his concerns and grievances, regarding his attorney's representation, in any meaningful sense that would have allowed the

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[26] The judge continued to be dismissive of Mr. Jones's concerns following the denial of the *Marsden* motion. In another display of the court's willful disregard with respect to the existence of a conflict between petitioner and trial counsel, the judge commented, "I can't get a rational time waiver from defendant, who appears to be not too happy this morning . . ." 1 RT 26. The judge then added: "Mr. Jones, you are in a spot. I don't want to hear any more talk from you this morning. You want to rap next time, we'll do a little bit of rapping. We're not rapping anymore this morning. I'm cool, you be cool." 1 RT at 27.

court to evaluate the merits of the conflict, the breakdown of the attorney-client relationship was acute and irreconcilable. As a result, trial counsel labored under a conflict of interest that severely and adversely prejudiced Mr. Jones because it prevented trial counsel from presenting adequately investigated guilt and penalty defenses at trial.

Mr. Jones's representations to the court, that his attorney was visiting infrequently and was not engaging with him about his case, are confirmed by trial counsel. During his representation, trial counsel admits he not only retained his full felony caseload, but was assigned new cases up until the time he announced ready for trial. Ex. 150 at 2730. Trial counsel unreasonably failed to adequately investigate Mr. Jones's case before deciding upon a trial defense. *See* Claim One, *supra*. Similarly, trial counsel unreasonably failed to investigate and present compelling penalty phase evidence. *See infra* Claim Sixteen.

Soon after the *Marsden* hearing, the trial court knew, or reasonably should have known, that Mr. Jones might not be competent. 1 RT 14 (court agreed to appoint mental health experts to determine Mr. Jones's competence); 1 RT 26-27 (court noted Mr. Jones's irrational behavior). In light of their knowledge of Mr. Jones's compromised functioning, the trial court and trial counsel had a duty to ensure that he was afforded the necessary accommodations to ensure that his Sixth Amendment right to counsel was fully protected. Instead, the trial court's failed to give Mr. Jones an adequate opportunity to raise his concerns regarding trial counsel's competence, diligence, and their deteriorating working relationship and replace counsel, in light of the irreconcilable breakdown in the attorney-client relationship and trial counsel's apparent conflicting interests.

The Sixth Amendment's right to counsel includes that the defendant has the right for substitute counsel should an irreconcilable conflict arise between him and his assigned counsel, as representation by a counsel so burdened by conflict deprives a criminal defendant of effective representation. *See, e.g.*, *Wood v.*

Georgia, 450 U.S. 261, 273-74, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981); *Schell v. Witek*, 218 F.3d 1017, 1023 (9th Cir. 2000); *Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970). Clearly established federal law requires that, in order to safeguard this right, the defendant be given an adequate opportunity to explain his reasons for desiring a substitution of counsel prior to the trial court ruling on the request. *See, e.g.*, *Wood*, 450 U.S. at 273 (trial court must hold "a hearing" to determine if the defendant can show that there has been a breakdown in the attorney-client relationship before ruling on the motion); *Hudson v. Rushen*, 686 F.2d 826, 829 (9th Cir. 1982) ("In evaluating a trial court's denial of a motion for new counsel, we consider a number of factors, including . . . the adequacy of the court's inquiry into the defendant's complaint . . ."); *Schell*, 218 F.3d at 1024-25 (holding that state trial court's failure to inquire into defendant's reasons for requesting substitute counsel constituted a violation of clearly established federal law, such that federal habeas corpus relief may lie); *cf. Plumlee v. Del Papa*, 465 F.3d 910, 919-20 (9th Cir. 2005) (collecting other-circuit cases and holding that it is clearly established federal law that a defendant is entitled to new counsel where there has been a breakdown in the attorney-client relationship). This requirement inheres to the standard employed by the California Supreme Court, as well. *See People v. Marsden*, 2 Cal. 3d at 123-24; *Hudson*, 686 F.2d at 829.

The trial court's inquiry is constitutionally infirm when the court does not inquire as to "what the defendant's defense was, that trial counsel had consulted sufficiently with the defendant, that trial counsel was prepared, and that his advice to the defendant . . . was not aberrational." *Hudson*, 686 F.2d at 829 (citing *Marsden*, 2 Cal. 3d at 123). The trial court conducts this inquiry by questioning the attorney or defendant "privately and in depth" and by examining available witnesses. *Daniels v. Woodford*, 428 F.3d 1181, 1200 (9th Cir. 2005) (citing *United States v. Nguyen*, 262 F.3d 998, 1004 (9th Cir. 2001), and *United States v. Moore*, 159 F.3d 1154, 1160 (9th Cir. 1998)). Plainly, a constitutionally adequate inquiry

necessarily requires consideration of facts not in the record or that would not be apparent to the trial judge simply from observing the defendant and his counsel during court proceedings. *See, e.g.*, *Daniels*, 428 F.3d at 1200 (finding trial court's inquiry inadequate where the trial court did not call any witnesses on the issue, did not provide the defendant an opportunity to detail his grievances, and did not question the defendant or his attorney individually after the assertion of conflict was raised); *Schell*, 218 F.3d at 1027-28 (remanding the case for evidentiary hearings on the nature and extent of the alleged conflict and whether the asserted conflict deprived the defendant of his Sixth Amendment rights, where the state court's fact finding about defendant's reasons for propounding a *Marsden* motion were inadequate); *see also Marsden*, 2 Cal. 3d at 123-24 ("'[w]hen inadequate representation is alleged, the critical factual inquiry ordinarily relates to matters outside the trial record: whether the defendant had a defense which was not presented; whether trial counsel consulted sufficiently with the accused, and adequately investigated the facts and the law; whether the omissions charged to trial counsel resulted from inadequate preparation rather than from unwise choice of tactics and strategy.'") (quoting *Brubaker v. Dickson*, 310 F.2d 30, 32 (9th Cir. 1962)).

As set forth on direct appeal, the trial court made none of the inquiries required under federal or state law. He asked minimal questions of Mr. Jones or his attorney and, on the few occasions when they were able to provide the court with information about the attorney-client relationship, the court interrupted with his own suppositions about that relationship based on his observation of other cases. *See* 1 RT 21; App. Opening Br. at 106-07. He asked no questions about the "defense[s] [trial counsel had] not presented" nor "whether trial counsel had consulted sufficiently with the accused." *See Marsden*, 2 Cal. 3d at 123; App. Opening Br. at 97-100. Although Mr. Jones informed the trial court that his counsel had not followed up on investigative leads Mr. Jones had provided, 1 RT

18, the trial court did not even follow up on that information and inquire "whether trial counsel . . . adequately investigated the facts and the law" and "whether the omissions charged to trial counsel resulted from inadequate preparation rather than from unwise choice of tactics and strategy." *See Marsden*, 2 Cal. 3d at 123-24; App. Opening Br. at 97-100. The trial court asked only a few questions of Mr. Jones and his counsel and never called any witnesses concerning Mr. Jones's allegations. *See Daniels*, 428 F.3d at 1200. Most importantly, aside from how truncated and brief the trial court's inquiry was, it reflected no effort to learn the facts necessary to the resolution of Mr. Jones's motion, which is the gravamen of a constitutionally sound inquiry. *See Hudson*, 686 F.2d at 829; *Schell*, 218 F.3d at 1024-25; *Marsden*, 2 Cal. 3d at 123-24.

The California Supreme Court unreasonably ignored these clearly established requirements when considering the trial court's decision on direct appeal. Instead of reviewing the adequacy of the trial court's inquiry into Mr. Jones's request for substitute counsel, as required by federal and state law, the court skipped this step of analysis entirely and held that the trial court was "entitled to accept counsel's explanation" for his choices while representing Mr. Jones, *People v. Jones*, 29 Cal. 4th 1229, 1245, 131 Cal. Rptr. 2d 468 (2003), and that the reasons that Mr. Jones was able to put into the record for wanting substitute counsel were inadequate under the law. *Id*. at 1246. By failing to conduct an essential step of its analysis – assessing whether the trial court had allowed Mr. Jones or other witnesses to describe all of the facts that indicated that an irreconcilable conflict between counsel and Mr. Jones had arisen – the California Supreme Court employed a method of resolving Mr. Jones's direct appeal claim that was contrary to clearly established federal law. *See, e.g.*, *Daniels*, 428 F.3d at 1200; *Schell*, 218 F.3d at 1027-28; *Hudson*, 686 F.2d at 829. As such, this Court must, under section 2254(d)(1), review Mr. Jones's claim de novo. *See Williams (Terry) v. Taylor*, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)

(holding a state court decision is "contrary to" clearly established federal law if the state court "applies a rule that contradicts the governing [federal] law"); *Penry v. Johnson*, 532 U.S. 782, 792, 121 S. Ct. 1910, 150 L. Ed. 2d 9 (2001) (same); *Ferndandez v. Roe*, 286 F.3d 1073, 1077 (9th Cir. 2002) (reviewing habeas petitioner's claims de novo because the state court relied on case law employing a standard different from the federal constitutional rule and holding "where the . . . court has applied the wrong legal standard, AEDPA's rule of deference does not apply").

The California Supreme Court's decision further violated clearly established federal law because it reflected a procedure for adjudicating *Marsden* claims that deviates, materially and without notice to Mr. Jones, from the announced state procedures. As described above, *Marsden* requires a detailed inquiry into facts outside of the trial record and outside of the trial court's observations during proceedings, including the nature of the defendant's relationship with counsel, what investigation and strategic choices counsel has undertaken, and what possible defenses counsel has foregone and why. *See Marsden*, 2 Cal. 3d at 123-24. At the time of his trial and his direct appeal, Mr. Jones had an expectation that the trial court would consider his motion using this announced rule and that the California Supreme Court would review the trial court in light of this rule; this expectation was guaranteed by Mr. Jones's federal due process rights as set forth by the United States Supreme Court. *See Hicks v. Oklahoma*, 447 U.S. 343, 346-47, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980) (holding that "[t]he defendant . . . has a substantial and legitimate expectation that he will be deprived of his liberty only" in accordance with due process of law, as defined by the state's own announced procedures in conducting criminal trials). Thus, by failing to adhere to California's established procedural requirements for adjudication of a *Marsden* motion, the California Supreme Court acted contrary to clearly established federal law and, pursuant to section 2254(d)(1), Mr. Jones is entitled to de novo review of this

claim.

Finally, the California Supreme Court's decision reflects an unreasonable determination of the facts in light of the record before it, further entitling Mr. Jones to de novo review under section 2254(d). A state court decision is unreasonable within the meaning of section 2254(d)(2) if the state court ignored facts that were relevant and necessary to the resolution of the claim. *See, e.g.*, *Miller-El v. Cockrell*, 537 U.S. 322, 347, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003); *Taylor v. Maddox*, 366 F.3d 992 1001 (9th Cir. 2004); *Ali v. Hickman*, 571 F.3d 902, 921 (9th Cir. 2009). As detailed, neither the trial court nor the California Supreme Court considered the panoply of facts nor made the requisite fact-finding necessary for resolution of Mr. Jones's claim. Where, as here, the petitioner has been given no opportunity to develop the factual record necessary to support his claim, and the state court relies on that failure as a reason for denying him relief, *see Jones*, 29 Cal. 4th at 1246, this Court may not defer to those factual findings but instead allow Mr. Jones the opportunity to prove the merits of his claim. *See Schell*, 218 F.3d at 1027-28.

C. Claim Three: The State Withheld Material Exculpatory Evidence.

Mr. Jones satisfied state pleading requirements by presenting his claim that the prosecutor unlawfully withheld exculpatory evidence in state court with sufficient detail and supporting factual material to establish a prima facie showing that he was entitled to relief. *See, e.g.*, *Duvall*, 9 Cal. 4th at 474. In the state court, Mr. Jones demonstrated that the prosecution suppressed material, exculpatory evidence during his trial in violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), that would have supported Mr. Jones's guilt and penalty phase defenses concerning his long-standing history of mental illness. Specifically, the prosecutor did not disclose (1) a 1984 emergency room report documenting Mr. Jones's history of memory loss; and (2) jail medical records detailing when and the reasons why medical personnel prescribed powerful,

antipsychotic medication to Mr. Jones following his arrest. State Pet. at 365-66; Inf. Reply at 232-33; Supplemental Allegations in Support of Petition for Writ of Habeas Corpus, NOL at D.1. ("Supp. Pet.") at 5-10; Reply to the Informal Response, NOL at D.5. ("Supp. Reply") at 9-16. As a result of withholding this information, the prosecution was permitted to disparage Mr. Jones's defenses by falsely asserting that Mr. Jones lied about having a mental illness to invent a "psychiatric defense" and avoid responsibility for the crimes. *See, e.g.*, 26 RT 3905-06; 27 RT 3969, 3971-72; 31 RT 4645, 4652-53.

This claim was not procedurally defaulted, and respondent did not present factual materials or legal argument in state court to establish that Mr. Jones's prima facie showing should not be taken as true or that it otherwise lacked merit. Under these circumstances, the state court was required to issue an order to show cause and allow Mr. Jones access to state processes to develop and present evidence to prove his claim. *See, e.g. Duvall*, 9 Cal. 4th at 475; *Romero*, 8 Cal. 4th at 742. By instead summarily denying Mr. Jones's claim, the California Supreme Court's decision satisfies section 2254(d) as set forth in Mr. Jones's prior briefing and in the sections that follow.

1. There Is No Reasonable Basis for the State Court Ruling That Mr. Jones Failed to Make a Prima Facie Showing for Relief.

a. Mr. Jones Made a Prima Facie Showing That the Prosecutor Unlawfully Withheld the 1984 Emergency Room Report.

During post-conviction discovery, counsel for Mr. Jones discovered the 1984 emergency room report in a prosecution's file labeled "privileged." Supp. Pet. at 7 ("At the August 20, 2004 hearing on the Discovery Motion, the deputy district attorney representing the state informed counsel that during counsel's review of the District Attorney's file of Mr. Jones's case some documents had erroneously been labeled privileged, thus preventing counsel from reviewing them. She [thereafter] disclosed the erroneously labeled documents to counsel."). The report was

prepared after police officers witnessed Mr. Jones exhibiting psychiatric symptoms while they arrested him for the sexual assault of Kim Jackson. Ex. 179. Dr. Storm examined Mr. Jones shortly after his arrest, noting that he had a two-year history of transient memory loss and diagnosing him as suffering from "transient lapse memory." Ex. 180.

Mr. Jones established a prima facie showing that the failure to disclose the report violated his federal constitutional rights. The report was favorable because it fully supported Mr. Jones's guilt phase defense that he lacked the requisite mental state to convict him of first-degree murder and to find true the special circumstance and provided compelling mitigating evidence. Opening Br. at 45-46. The report unquestionably was withheld by the prosecution, and indeed the prosecutor ensured that it would not be inadvertently disclosed by inaccurately labeling the report as "privileged." Opening Br. at 46-47, 48 n.19. Finally, the report was material because it provided independent support for Mr. Jones's testimony, buttressed the testimony of Claudewell Thomas, M.D., and would have prompted trial counsel to conduct a thorough investigation of Mr. Jones's long-standing mental impairments. Opening Br. at 47-50.[27]

1) The California Supreme Court could not reasonably reject the claim based on the inadmissibility of the record.

Respondent argues that the California Supreme Court may have rejected the

[27] In state court, respondent contended that Mr. Jones failed to state a prima facie case for relief because he failed to plead sufficient facts; in particular, respondent argued that Mr. Jones failed to produce a declaration from the doctor who prepared the report or any other documentation supporting the reliability of the report. Informal Response to Petition for Writ of Habeas Corpus, NOL at D4 ("Supp. Inf. Resp.") at 5. Respondent wisely abandoned that argument before this Court. The absence of any such indication from the state court forecloses the argument that it rejected the claim based on any purported lack of documentation. *See* section II.A.2., *supra*.

claim because the report contained inadmissible evidence and, therefore, was not material. Opp. at 41. In support of this proposition, respondent asserts that it "appears that the doctor's notation regarding Petitioner's history of transient memory loss was based on Petitioner's own statements to the doctor." Opp. at 41. The bases for Dr. Strom's conclusions about Mr. Jones's medical history require a factual determination, one that the California Supreme Court was unable to make prior to the issuance of an order to show cause. *See* section II.A.3, *supra*.

Respondent incorrectly asserts that the California Supreme Court reasonably could have determined that the report was non-material because it contained inadmissible hearsay.[28] The admissibility of the document is not the sole touchstone for whether it is material for *Brady* purposes. *See, e.g.*, *Carriger v. Stewart*, 132 F.3d 463, 481 (9th Cir. 1997) (en banc) ("The evidence revealed in Dunbar's file need not have been independently admissible to have been material."). Thus, withheld evidence that may otherwise be inadmissible may be material under traditional exceptions to the hearsay rule. *See, e.g.*, *United States v. Olsen*, 704 F.3d 1172, 1184 (9th Cir. 2013) ("'Evidence can be "used to impeach" a witness even if the evidence is not itself admissible, even to impeach'—a written statement, for instance, that contradicts a witness's testimony but is inadmissible as hearsay could still be used as a prior inconsistent statement to cross-examine the

[28] Respondent focuses this argument solely on the statement in the "History and Physical Examination" section report that Mr. Jones had a two year history of "transient memory loss." Ex. 180. The separate "Diagnosis" section unquestionably was completed by Dr. Storm and represents his medical opinion following his examination of Mr. Jones. Dr. Strom examined Mr. Jones for the purpose of securing evidence to be used by the police, at which time he made a diagnosis, based on his first-hand observation of Mr. Jones's condition, that Mr. Jones suffered from transient memory lapse. Ex. 180.

witness.") (quoting *Paradis v. Arave*, 240 F.3d 1169, 1179 (9th Cir. 2001)).[29] In addition, inadmissible evidence that could have led to the discovery of admissible evidence also may qualify as material under *Brady*. *See, e.g.*, *United States v. Price*, 566 F.3d 900, 911 (9th Cir. 2009); *Paradis*, 240 F.3d at 1178-79.

The statements in the Report would have been admissible pursuant to three well-established evidentiary theories. First, Mr. Jones's statements that he suffered from transitory memory loss for a two-year period prior to the 1984 examination and that he experienced such a condition during the Kim Jackson crime were admissible as prior consistent statements. *See, e.g.*, Cal. Evid. Code § 791(b) (prior consistent statements are admissible when an "express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen"). This rule consistently has permitted the admission of prior consistent statements in criminal

[29] The case cited by respondent, *Smith v. Baldwin*, 510 F.3d 1127, 1148 (9th Cir. 2007) (en banc), is inapplicable in this situation. In *Smith*, the court addressed whether the state's failure to disclose inconclusive results of a polygraph administered to Mr. Smith's co-defendant constituted "sufficient cause and prejudice to excuse the procedural default resulting from Smith's failure to exhaust his state remedies." *Id*. at 1130. Mr. Smith asserted that his no-contest plea was induced by his mistaken belief that the co-defendant has passed the polygraph examination. *Id*. at 1139. The court concluded that the polygraph examination results were not material given the circumstances of the case: "[I]t is not reasonably probable that the immediate disclosure of the polygraph results would have influenced Smith's decision to plead no contest rather than proceed to trial because Smith 'could have made no mention of them either during argument or while questioning witnesses' or at any other point in the trial." *Id*. at 1148 (quoting *Wood v. Bartholomew*, 516 U.S. 1, 6, 116 S. Ct. 7, 133, L. Ed. 2d 1 (1995)). Given that Mr. Smith made no showing how his plea decision would have been different had the state disclosed the results or how he would have been able to use those results at his trial, he sustained no prejudice. *Id*.

proceedings. *See, e.g.*, *People v. Lopez*, 56 Cal. 4th 1028, 1066-68, 301 P.3d 1177 (2013) (holding capital murder victim's diary entry stating that defendant stabbed and kidnapped her, and victim's similar statement to a teacher, were admissible under the prior consistent statement hearsay exception); *People v. Gurule*, 28 Cal. 4th 557, 620-21, 51 P.3d 224 (2002) (holding testimony of interrogating officer recounting prior consistent statements of capital murder defendant's accomplice admissible to rebut defense claim of recent fabrication); *People v. Randle*, 8 Cal. App. 4th 1023, 1037-38, 10 Cal. Rptr. 2d 804 (1992) (holding prior consistent statement is admissible over hearsay objection if statement is offered after evidence of statement made by witness that was inconsistent with witness' testimony, or express or implied charge has been made that witness testimony is recently fabricated or influenced by bias or other improper motive).

The precondition in Evidence Code section 791(b) was satisfied as the prosecutor insinuated that Mr. Jones fabricated his testimony. During the guilt phase, Mr. Jones testified that he blacked out during the capital crime and awoke to find Mrs. Miller's dead body. 22 RT 3335-37. When trial counsel began to ask Mr. Jones about psychiatric treatment, the prosecutor objected, asserting that there was no evidence that "he had a psychiatric problem." 26 RT 3349.[30] The prosecutor continued, insinuating that Mr. Jones was fabricating his defense because "it makes sense that now when he commits this crime, it's because of a psychiatric problem." 22 RT 3354. During cross-examination, the prosecutor berated Mr. Jones for failing to recall the events during the crime. 23 RT 3482-85. In particular, the prosecutor questioned Mr. Jones's inability to remember killing

[30] Despite possessing the withheld Report, the prosecutor further insinuated that no such diagnoses existed: "If, in fact, it was diagnosed by somebody seeing him and there was a diagnostic study done which seems to suggest that there was a psychiatric problem or at least a question as to whether there was or not as to how much psychiatric care he got." 22 RT 3349.

Mrs. Miller. 23 RT 3482-85; *see also* 23 RT 3495-96. Had trial counsel possessed the withheld Report, he would have introduced it to rebut the prosecutor's insinuations that Mr. Jones had fabricated the defense to escape liability for the capital crime. Ex. 181 at 3162 ("Given the nature of the information contained in the Beverly Hills Medical Center emergency room record, I would have used it at Mr. Jones's trial. This medical record is strong evidence, which would have supported my guilt phase defense that Mr. Jones was unable to form the requisite intent to commit a felony murder or to commit any of the charged special circumstances.").[31]

Second, even assuming that Mr. Jones's statements contained in the "History and Physical Examination" section of the report that he had a two-year history of "transient memory loss" was objectionable, the remaining portions of the Report were admissible. The Report was a writing made in the regular course of business at or near the time of Ms. Jackson's assault, and as such qualified as an exception to the hearsay rule. Cal. Evid. Code § 1271; *People v. Moore*, 5 Cal. App. 3d 486, 492-93, 85 Cal. Rptr. 194 (1970) ("It is well established that hospital records are business records and as such are admissible if properly authenticated. The records here were admissible to show that defendant had in fact been committed to the

[31] Respondent cites to two cases that did not address the admissibility of the Mr. Jones's statements under Evidence Code section 791(b). *People v. Williams*, 187 Cal. App. 2d 355, 365, 9 Cal. Rptr. 722 (1960), was decided prior to the adoption of the California Evidence Code on May 18, 1965, effective January 1, 1967. Cal. Evid. Code. In *People v. Alexander*, 49 Cal. 4th 846, 867, 235 P.3d 873 (2010), the defendant argued that he was prejudiced in presenting a defense because destroyed optometrist records could have proved that he had not worn prescription glasses prior to 1981 or 1982. The Court held that "Defendant has not explained how the records otherwise could have led to admissible evidence on the issue" and cited general rules regard the admissibility of hearsay evidence. Thus, the Court was not presented with an issue of whether Evidence Code section 791(b) permitted the admissibility of the records.

mental institutions and, further, to show the fact that he had been diagnosed while there as mentally ill.") (citations omitted). At a minimum, the Record was admissible to show law enforcement personnel transported Mr. Jones for emergency medical care following his assault on Ms. Jackson, and that Dr. Strom examined him for a complaint of memory loss. Thus, Dr. Storm's conclusions about Mr. Jones's then-current transient memory loss are admissible under any circumstances. *See, e.g.*, *Moore,* 5 Cal. App. 3d at 493 (hospital records were admissible to establish that doctors had committed defendant upon a diagnosis that he was mentally ill).

Third, Dr. Thomas could have relied upon the entire Report in reaching his conclusions regarding Mr. Jones's mental state at the time of the crime and as mitigation.[32] *See, e.g.*, Cal. Evid. Code § 804(d); *People v. Campos*, 32 Cal. App. 4th 304, 307-08, 38 Cal. Rptr. 2d 113, 114 (1995) ("Psychiatrists, like other expert witnesses, are entitled to rely upon reliable hearsay, including the statements of the patient and other treating professionals, in forming their opinion concerning a patient's mental state."); *see also* Supp. Reply at 16. Trial counsel presented evidence, through Dr. Thomas, that Mr. Jones suffered from a major psychiatric disorder. 30 RT 4413-14. In forming his opinion, regarding Mr. Jones's mental condition, Dr. Thomas had relied on reports of Dr. Maloney and Dr. Vicary prepared in 1985. 30 RT 4417. Based on those reports, Dr. Thomas described Mr. Jones's mental illness as a progressive disorder getting worse over time. 30 RT 4418. Dr. Thomas also could have relied on the emergency room report, which was independent evidence of Mr. Jones's dissociative disorder dating back to at least 1982, as further evidence of the progressive nature of his illness. In addition, the report would have supported Dr. Thomas's testimony that it was possible for

[32] As counsel notes in his declaration, he would have provided the Report to Dr. Thomas. Ex. 181 at 3162.

Mr. Jones not to remember assaulting and killing Mrs. Miller (30 RT 4459), and that Mr. Jones had experienced this type of event on at least three occasions. 30 RT 4467.

Moreover, the Report would have played an important role in uncovering admissible evidence, aiding witness preparation, and corroborating testimony. The Report would have alerted trial counsel to the need to investigate Mr. Jones's history of dissociation, interview Dr. Strom, and to explore presenting Dr. Strom as a witness at Mr. Jones's trial. Supp. Pet. at 9-10; Supp. Reply at 9-10. Mr. Jones also furnished a declaration from trial counsel detailing how he would have used the Report at trial to support his guilt phase and penalty phase defenses. *See* Ex. 181 at 3163 (counsel would have used the Report to show that Mr. Jones was unable to form the requisite intent for felony murder and the charged special circumstances); Ex. 181at 3163 (counsel would have used it support his lingering doubt and general mental health defenses in the penalty phase).[33]

2) The California Supreme Court could not reasonably reject the claim based on a theory that Mr. Jones had personal knowledge of the record.

Respondent argues, for the first time in federal court, that the state had no duty to disclose the Report because Mr. Jones's memory loss was within his own personal knowledge. Opp. at 42. As the argument was not before the California Supreme Court, it could not have been the basis for its decision. *See* section II.A.4., *supra*. Moreover, even had respondent timely raised the issue, the California Supreme Court could not reasonably have relied upon it in rejecting the claim because – although Mr. Jones knew about his history of transient memory

[33] The manner by which trial counsel would have used the withheld report required a factual inquiry that the state court did not, and could not, conduct under its controlling law.

loss, and indeed testified about it – Mr. Jones was unaware that a report existed to substantiate his testimony. Supp. Pet. at 2, 10; Ex. 181 at 3161. In determining whether evidence has been suppressed under *Brady*, the inquiry is whether a defendant "has enough information to be able to ascertain the supposed *Brady* material on his own." If so, there is no *Brady* violation. *United States v. Aichele,* 941 F.2d 761, 764 (9th Cir. 1991); *see also United States v. Bracy,* 67 F.3d 1421, 1428-29 (9th Cir. 1995) (holding criminal history was not suppressed because the government "disclos[ed] ... all the information necessary for the defendants to discover the alleged *Brady* material"); *United States v. Dupuy,* 760 F.2d 1492, 1501 n.5 (9th Cir. 1985). On the other hand, where an individual does not have sufficient information to find the material with reasonable diligence, "the state's failure to produce the evidence is considered suppression." *Milke v. Ryan*, 711 F.3d 998, 1017-18 (9th Cir. 2013); *see also United States v. Howell,* 231 F.3d 615, 625 (9th Cir. 2000) ("[t]he availability of particular statements through the defendant himself does not negate the government's duty to disclose. . . . [defendants] cannot always remember all of the relevant facts or realize the legal importance of certain occurrences"). As there is no evidence whatsoever that Mr. Jones or his counsel were aware of the withheld emergency room report, his prima facie case may not have been rejected on that basis.

3) The California Supreme Court could not reasonably reject the claim based on a theory that Mr. Jones was not prejudiced by suppression of the Report.

Respondent cursorily argues that "the California Supreme Court reasonably could have determined that Petitioner was not prejudiced by the prosecution's alleged failure to disclose the report." Opp. at 42. In support of this assertion, respondent relies on the previously addressed argument that "the statements in the report were inadmissible" and a conclusion that "they would have not affected the jury's verdict or the outcome of the trial." *Id.* As noted above, respondent is

incorrect on both points.

The Report would have demonstrated that, in the past, Mr. Jones had experienced blackouts, which would have corroborated his testimony during the guilt phase regarding his dissociative episode during the encounter with Mrs. Miller. The Report also would have supported trial counsel's argument to the jury that Mr. Jones's inability to recall events was a symptom of his mental illness that prevented him from forming the specific intent for the felony murder-rape. 26 RT 3927-28. As such, the Report would have undermined the prosecution's theory that Mr. Jones formed the specific intent for the charged crimes and the special circumstance, and contradicted his argument that there was no other reasonable explanation of the evidence. 27 RT 3969. By withholding the Report, the prosecutor was permitted to urge the jury to reject the evidence that Mr. Jones had a mental disorder because it came from Mr. Jones's uncorroborated testimony. 26 RT 3905; 27 RT 3972. The prosecutor then argued that Mr. Jones's "story has been concocted" in order to obtain a lesser offense and avoid responsibility for the acts against Mrs. Miller. 26 RT 3906. The lack of corroborating evidence regarding Mr. Jones's mental state was a factor in a number of the jurors' minds during guilt phase deliberations. *See, e.g.*, Ex. 140 at 2694 ("I needed to hear evidence that corroborated [Mr. Jones's] account, but I never did."); Ex. 138 at at 2689-90 ("Mr. Jones testified that he did not remember committing the crimes . . . apart from [Mr. Jones's] testimony, we never heard any explanation of what could have happened."). During deliberations, the jury submitted a question to the judge on the issue of specific intent, an issue with which they clearly struggled.[34] 1 CT 249; 27 RT 4013.

The Report would have been equally important in the jury's penalty

[34] The jury deliberated for four days. 1 CT 247-48, 251; 2 CT 377.

determination. In the penalty phase, the prosecution introduced aggravating evidence, including Mr. Jones's assault on Kim Jackson. On cross-examination, Ms. Jackson testified that she had requested Mr. Jones get psychiatric treatment as a condition of his probation. 28 RT 4195-96; 30 RT 4414. Although Mr. Jones attended Kedren Community Mental Health Center, where he had been referred to by the probation department following his conviction for assaulting Ms. Jackson, the prosecutor argued that Mr. Jones did not have "mental problems" and that he went along with treatment at Kedren "to get a reduced sentence." 31 RT 4640. The prosecution was permitted to make such insinuations only by withholding the Report.

During the penalty phase, Dr. Thomas testified that Mr. Jones suffered from a dissociative disorder, and at the time of the crime, he dissociated and was unaware of and unable to control his actions. 30 RT 4435. Dr. Thomas opined that Mr. Jones's dissociation during the encounter with Mrs. Miller was consistent with his dissociation during the Jackson and Harris assaults. 30 RT 4466-67. During cross-examination, the prosecutor questioned Dr. Thomas's reliance on Mr. Jones as a source of information. *See, e.g.*, 30 RT 4469, 4509-10, 4534, 4538. The prosecutor recognized the importance of a contemporaneous or at least an examination close in time to these dissociative events. He asked Dr. Thomas "in terms of . . . talking about this progressive disease, wouldn't it have been helpful for you to have had the input of other doctors . . . right after it happened or as soon thereafter as possible? … [T]he further you get away from the actual incident, the more difficult it is to project back?" 30 RT 4539. Dr. Thomas responded affirmatively to both questions. *Id*. The Report was the only medical examination of Mr. Jones performed within hours of a dissociative episode, making it all the more critical as evidence of Mr. Jones's blackouts and the progressive nature of his mental illness. The Report also would have mitigated evidence that Mr. Jones had initially reported his encounter with Ms. Jackson as a consensual act (30 RT 4524,

4540; 31 RT 4648-49), and countered the prosecutor's suggestion that Mr. Jones was remorseless after the Jackson incident. 30 RT 4542.

In penalty closing arguments, the prosecutor returned to his theme that Mr. Jones was not mentally ill, but was a liar who conveniently invented a story about flash backs while on the stand to avoid criminal responsibility. 31 RT 4648, 4650-52. Had Dr. Thomas had the benefit of the Report, it would have lent support to his opinions regarding Mr. Jones's symptoms and illness, and provided independent evidence of both. The prejudice Mr. Jones suffered as a result of the suppression of the Report is clear from the California Supreme Court's opinion, in which the court joined in the prosecutor's characterization of Mr. Jones's illness as a "recent fabrication." *People v. Jones*, 29 Cal. 4th 1229, 1253, 131 Cal. Rptr. 2d 468 (2003). As the court stated, "if defendant had a history of flashbacks and blackouts, Dr. Thomas should have been aware of it." *Id.* Thus, the Report was evidence of Mr. Jones's history of dissociative episodes and mental disorder that provided independent mitigating evidence as well as a convincing basis for and critical corroboration of Dr. Thomas's conclusions. *See Cone v. Bell*, 556 U.S. 449, 475, 129 S. Ct. 1769, 1786, 173 L. Ed. 2d 701 (2009) (ruling that suppressed evidence of mental impairment might have been material to rebut prosecution suggestion that defendant manipulated expert into believing he was a drug addict and to jury's assessment of the proper punishment in capital case; holding that a full review of the suppressed evidence and its effect warranted); *Brown v. Borg*, 951 F.2d 1011, 1015 (9th Cir. 1991) (invalidating murder conviction where prosecutor advanced a robbery-murder theory due to the victim's missing wallet and jewelry while failing to disclose that hospital personnel had found these items and returned them to the victim's family).

Finally, it is significant that the prosecutor disclosed the arrest report (Ex. 179), but withheld the actual emergency room report. Ex. 180. Suppression of the Report itself is powerful evidence of its materiality. *See, e.g.*, *Silva v. Brown*, 416

F.3d 972, 987 (9th Cir. 2005) ("The prosecutor's actions can speak as loud as his words.").[35] In *Silva v. Brown*, the court held that the state's suppression of evidence regarding a deal was itself evidence that the state regarded such evidence as "material," and the court could rely thereon when assessing "materiality" of undisclosed evidence for *Brady* purposes. *Id*. at 990-91.[36] Given the importance of the mental state defense, the prosecutor's attacks on Mr. Jones's credibility, and the jury's lengthy deliberations, there is a reasonable probability had the Report been disclosed to the defense the result of the guilt phase of Mr. Jones's trial would have been different. *See, e.g*., *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

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[35] The prosecution also withheld exculpatory impeachment material regarding Shamaine Love, who rebutted Mr. Jones's veracity and the guilt and penalty phase defenses that relied on his significantly impaired mental state at the time of the crime as a result of his drug use. On June 11, 1993, Ms. Shamaine Love signed a statement for the prosecution, informing them that she would alter her testimony to ensure petitioner's conviction. Ex. 169. Ms. Love wrote and signed a statement for the prosecution that stated, in part, "if I'm wrong on any account which I don't think I am I'll add it during the testimony at court. Other than that he guilty [sic.]." Ex. 169. Trial counsel never received this statement, and it was disclosed by the prosecutor only in post-conviction proceedings. Fed. Pet. at 104-05. In addition, the state unlawfully excised portions of a December 7, 1994, interview with prosecution witness Mrs. Johnnie Anderson. 21 RT 3203. During the interview, Mrs. Anderson provided strong impeachment evidence against Pamela Miller, who also disputed Mr. Jones's testimony concerning his drug use. During her interview, Mrs. Anderson confessed to the prosecution that she "loves Pam very much, [but] Pam lies." 21 RT 3213; *see also* 21 RT 3199. Although the prosecution provided the defense with a police report that detailed the interview with Mrs. Anderson, the exculpatory statement was omitted from the police report. State Pet. at 262-63.

[36] Respondent does not address Mr. Jones's claim that the prosecution's false assertions on cross-examination and in argument constituted the knowing presentation of false evidence in violation of controlling federal law. Opening Br. at 48 n.18.

b. Mr. Jones Made a Prima Facie Showing That the Prosecutor Unlawfully Withheld the Los Angeles County Jail Medical Records.

Following his arrest, Mr. Jones received mental health treatment after admission to the Los Angeles County Jail in September 1992. While Mr. Jones was in the custody of the Los Angeles County Sheriff's Department, the prosecutor obtained his medical records, including those relating to Mr. Jones's psychiatric treatment. Ex. 33. Critical information regarding when Mr. Jones first received anti-psychotic medication and the clinical indications for its prescription, however, were missing from the records produced at the time of trial. Inf. Reply at 232-33.

Mr. Jones established a prima facie showing that the failure to disclose the jail medical records violated his federal constitutional rights. The records were favorable because they supported Mr. Jones's guilt phase defense that he lacked the requisite mental state to convict him of first-degree murder and to find true the special circumstance, and his penalty phase defense that compelling mitigating evidence warranted mercy. Opening Br. at 50-54. Given the importance of Mr. Jones's mental functioning, trial counsel twice issued a subpoena and submitted a release for the medical records, but was unable to obtain – and the prosecution did not provide – the critical documents that demonstrated that jail medical personnel observed his impaired mental functioning and determined that Mr. Jones's psychiatric condition required treatment with powerful psychotropic medication. Opening Br. at 51.[37] Finally, the complete medical records were material because

[37] At the evidentiary hearing, and following the issuance of an order protecting the confidentiality of trial counsel's files, Mr. Jones will demonstrate his diligence in attempting to obtain the records. Defense counsel issued a subpoena for jail medical records on February 23, 1993, and then again on June 15, 1994. He subsequently submitted a third request for the records on December 2, 1994, using Mr. Jones's authorization. The documents supporting these requests are contained in the trial file.

they would have disproved the prosecutor's characterization of Mr. Jones's mental state defense at the guilt and penalty phases as a sham. Opening Br. at 51-54. Absent the prosecution's unlawful failure to disclose the complete set of jail records, trial counsel would have demonstrated that Mr. Jones continued to exhibit active symptoms of psychosis on his admission to the county jail, which were consistent with those he described on the night of the crime, the testimony of Claudewell Thomas, M.D. would have been fully supported by the opinions of state medical personnel, and trial counsel would have been prompted to conduct a thorough investigation of Mr. Jones's long-standing mental impairments. Opening Br. at 47-50.

1) The California Supreme Court could not reasonably reject the claim based on a theory that prosecution was not obligated to disclose the medical records.

Respondent argues that "the California Supreme Court reasonably could have determined that the prosecutor's duty of disclosure did not extend to information possessed by doctors who were treating Petitioner in jail." Opp. at 43. As the argument was not before the California Supreme Court, it could not have been the basis for its decision.[38] *See* section II.A.4., *supra*. Moreover, even had

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[38] In the state court, respondent's only arguments for why Mr. Jones did not state a prima facie case of a *Brady* claim was as follows:

> Finally, petitioner contends the prosecution failed to disclose his medical records from the Los Angeles County Jail. (Pet. at 265-66.) Petitioner, however, fails to identify the medical records. Further, petitioner's own medical records were presumably available to him if he had made reasonable efforts to acquire them. (See *United States v. Wilson* (4th Cir. 1990) 901 F.2d 378,380, and cases cited therein [*Brady v. Maryland* (1963) 373 U.S. 83 [83 S. Ct. 1194, 10 L. Ed. 2d 215] does not apply to evidence readily available to defense].) Finally, any such medical records only related to petitioner's mental condition in jail, not his mental condition at the time of the crime.

continued…

respondent timely raised the issue, the California Supreme Court could not reasonably have relied upon it in rejecting the claim because the prosecution possessed at least some of the jail records and the prosecution's relationship with the Los Angeles County Sheriff's Department made it responsible for obtaining the complete set of records. Opening Br. at 51.

Counsel for Mr. Jones requested the jail medical records on three occasions, but the prosecutor suppressed records detailing the initial evaluation of Mr. Jones's mental health symptoms requiring the prescription of Haldol. State Pet. at 265; Inf. Reply at 232. A prosecutor's duty to disclose evidence extends to "any favorable evidence known to others acting on the government's behalf, including the police." *Kyles v. Whitley*, 514 U.S. at 437; Opening Br. at 51. The Ninth Circuit in interpreting *Kyles* observed that "[b]ecause the prosecution is in a unique position to obtain information known to other agents of the government, it may not be excused from disclosing what it does not know but could have learned." *Carriger v. Stewart,* 132 F.3d 463, 480 (9th Cir. 1997) (finding *Brady* violation although it was unclear whether prosecutors had possession of the withheld corrections file). The Los Angeles District Attorney's Office was responsible for ensuring these records were disclosed because of its unique relationship with the county jail. The Los Angeles County District Attorney regularly has used the jail as a source of information for aggravating evidence in the penalty phase of capital trials. *See*, *e.g.*, *People v. Lewis*, 43 Cal. 4th 415, 442, 181 P.3d 947 (2008) (prosecution presented evidence of shank found concealed inside the mattress of defendant's single-person cell while awaiting trial); *People v. Morrison*, 34 Cal. 4th 698, 707,

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> Therefore, petitioner cannot show that the records would have affected the result of the proceeding.

Inf. Resp. at 30. In this Court, respondent has abandoned the argument that the records were unrelated to his mental condition at the time of the crime.

101 P.3d 568 (2004) (prosecution introduced aggravating evidence of defendant's assault on a deputy sheriff during an inmate riot at a Los Angeles County jail); *People v. Nakahara*, 30 Cal. 4th 705, 719, 68 P.3d 1190 (2003) (prosecutor introduced evidence that defendant hid a metal "shank" in the corner of his jail cell). In addition, for many years, Los Angeles County prosecutors had a policy of relying on the testimony of jailhouse informants, and continued to use these informants even though they knew the testimony was perjured. *See, e.g.*, *People v. Williams*, 44 Cal. 3d 1127, 1141, 751 P.2d 901 (1988); *People v. Gonzalez*, 51 Cal. 3d 1179, 1240, 800 P.2d 1159 (1990). In Mr. Jones's case, the prosecutor noted that the set of jail records the court had at the time Mr. Jones was testifying contained information only up to September 1994, and did not show the medications Mr. Jones was taking in January 1995. 22 RT 3367.

The unique relationship between the prosecutor and the jail is evidenced by the prosecutor's statement that he was willing to stipulate to the medication Mr. Jones was receiving once he had talked "to the people over there." 22 RT 3367-68. As this comment indicates, the prosecutor's supervisory relationship with the jail permitted him to discuss confidential medical information with jail officials without a signed release from Mr. Jones or issuance of a subpoena. *See, e.g.*, Cal. Civil. Code § 56.10 (West 1995) (limiting disclosure of medical information without authorization to specified circumstances).[39] At the very least, the prosecution's relationship with the jail officials and the role of those officials in the prosecution of Mr. Jones raise factual issues that California Supreme Court could

[39] Despite post-conviction counsel's best efforts in state court, the medical records remain undisclosed. With limited discovery in state court, Mr. Jones has not been afforded the opportunity to use well-established discovery mechanisms, including deposing prosecution personnel and jail record custodians and subpoenaing records, that will more fully demonstrate the prosecutor's actual and constructive access to Mr. Jones's complete medical files.

not properly have resolved by summary adjudication. *See* section II.A.3., *supra*.

2) The California Supreme Court could not reasonably reject the claim based on a theory that Mr. Jones could have discovered the medical records.

Respondent next argues that "the California Supreme Court reasonably could have determined that the prosecutor had no duty to disclose the information because Petitioner was aware that he was receiving medical treatment in jail and could have obtained his medical records himself with reasonable diligence." Opp. at 43. As the Opening Brief explained, respondent's assertions concerning Mr. Jones's diligence in attempting to obtain the jail medical records created a factual dispute that could not have been summarily resolved. Opening Br. at 54; *see also* section II.A.3., *supra*. Moreover, Mr. Jones unquestionably established that he was diligent in attempting to obtain the complete jail medical records. Although trial counsel was not aware of the course of some of Mr. Jones's psychiatric treatment while in custody, he requested the complete jail medical record on three occasions to document Mr. Jones's profound psychiatric condition and to corroborate his testimony. Ex. 150 at 2733.

Respondent cites to *Raley v. Ylst*, 470 F.3d 792, 804 (9th Cir. 2006), in support of his contention that the prosecutor had no duty to disclose the jail medical records because Mr. Jones knew of their existence. Opp. at 43. *Raley* is distinguishable because Mr. Raley made no effort to obtain his jail medical records despite possessing the "salient facts" regarding their existence. 470 F.3d at 804. In addition, the prosecutor in this case had a long history of working with jail officials in their prosecution of defendants, expressly informed the court and trial counsel that he had the ability to obtain information from the jail medical staff, and obtained records from the jail. *See, e.g.*, 22 RT 3367-68.

3) The California Supreme Court could not reasonably reject the claim based on a theory that Mr. Jones failed to produce sufficient documentation of his claim.

Respondent finally asserts that Mr. Jones's claim was defective in the state proceedings "because Petitioner failed to produce the medical records in question, failed to allege any facts concerning the content of those medical records, and failed to allege any facts indicating that the medical records would have been exculpatory or material." Opp. at 44 (citing *Duvall*, 9 Cal. 4th at 474). Respondent failed to make these arguments in state court, and thus they could not be the bases for the California Supreme Court's decision. *See* section II.A.4., *supra*. Moreover, the California Supreme Court did not deny the claim for failing to provide detailed allegations, as it did not cite *In re Swain*, 34 Cal. 2d at 303-04, or for Mr. Jones's failure to provide the unavailable record as it did not so indicate in that ground in its order, *see, e.g.*, *In re Curtis Price*, No. S018328, Order (Cal. Jan. 29, 1992) (rejecting claim because petitioner failed to provide copy of competency report generated at trial).

c. Mr. Jones Made a Prima Facie Showing That the Prosecutor's Unlawful Withholding of Exculpatory Material Cumulatively Deprived Him of a Fair Trial.

Respondent does not address the cumulative prejudice of the prosecutor's multiple *Brady* violations. In tandem, the Report and complete jail medical records would have provided compelling counter-evidence to the prosecutor's arguments that Mr. Jones had, in anticipation of his capital trial, manufactured a mental illness to avoid responsibility for the crimes. To the contrary, they demonstrated that Mr. Jones suffered from a severe mental disorder, which manifested itself many years before the capital crime, and was becoming progressively worse over time. As the California Supreme Court did not correctly apply well-established law developed by *Brady* and its progeny, it similarly failed to consider the cumulative effect of the

undisclosed evidence, and section 2254(d) is satisfied. *Kyles,* 514 U.S. at 419, 436–37 & n.10, (holding that the State's disclosure obligation under *Brady* turns on the cumulative effect of the withheld evidence, not an item-by-item analysis).

2. Section 2254(d) Is Satisfied by the State Court's Summary Denial of Mr. Jones's Adequately Pled Claim That the State Withheld Material Exculpatory Evidence.

In his Opening Brief, Mr. Jones detailed the ways in which the state court's summary denial of Mr. Jones's *Brady* claim satisfies section 2254(d). Opening Br. at 5-13, 43-58. As a general matter, the California Supreme Court's refusal to hear Mr. Jones's adequately pled claims of constitutional error is contrary to clearly established federal law that prohibits state courts from creating "unreasonable obstacles" to the resolution of federal constitutional claims that are "plainly and reasonably made." *Davis*, 263 U.S. at 24-25; *see also* Opening Br. at 7-11. Specifically, in light of Mr. Jones's extensive factual allegations and supporting materials in the state court – which the state court was obligated to accept as true – the state court's ruling that Mr. Jones failed to make any prima facie showing of entitlement to relief constitutes an unreasonable application of *Brady*. *See, e.g.*, *Milke v. Ryan*, 711 F.3d 998 (9th Cir. 2013) (concluding that state court's focus on discoverability of impeachment evidence, rather than disclosure requirements under *Brady* and *Giglio*, was contrary to clearly established law as determined by the Supreme Court of the United States; state court's decision was based on an unreasonable determination of the facts; and prosecutor's failure to disclose impeachment evidence violated *Brady*); *Simmons v. Beard*, 590 F.3d 223, 232-33 (3rd Cir. 2009) (holding that even under the deferential standard of 2254(d) the district court was correct in rejecting the state court's overall conclusion based on its assessment of the cumulative effect of the Commonwealth's Brady violations); *Browning v. Trammell*, 717 F.3d 1092, 1108 (10th Cir. 2013) (affirming district court's conditional grant of habeas relief under 2254(d) based on a *Brady* violation

arising from prosecution's failure to disclose indispensable prosecution witness's mental health records).

D. Claim Four: Mr. Jones's Due Process Rights Were Violated Because No Hearing Was Held to Determine His Competence and He Was Incompetent to Stand Trial.

Mr. Jones satisfied state pleading requirements by presenting the California Supreme Court with sufficient detail and supporting factual material to establish a prima facie showing that he was entitled to relief on Claim Five. *See, e.g.*, *Duvall*, 9 Cal. 4th at 474. In his habeas corpus proceedings, Mr. Jones presented evidence that the trial court failed to conduct a hearing to determine his competence despite substantial evidence that it was warranted, including Mr. Jones's treatment at the county jail with antipsychotic and antidepressant medication; psychiatrists' conclusion that Mr. Jones suffered from a psychotic disorder and opinion that Mr. Jones was not competent to stand trial; Mr. Jones's bizarre and irrational behavior; and Mr. Jones's history of irrational and disturbed behavior before, during, and after the capital crime, including his suicide attempts. *See, e.g.*, *Drope v. Missouri*, 420 U.S. 162, 172, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975). Mr. Jones also made a prima facie showing that he was, in fact, incompetent to stand trial, supporting his allegations with numerous declarations from a defense psychiatrist and lay witnesses who observed his mental functioning and behavior at the time of the trial and additional experts and lay witnesses confirming and corroborating the contemporaneous observations and conclusions. *See, e.g.*, *Cooper v. Oklahoma*, 517 U.S. 348, 354, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996). Finally, Mr. Jones presented the California Supreme Court with a prima facie showing of ineffective assistance of counsel, alleging that, as a result of trial counsel's failure to declare a doubt as to Mr. Jones's competence to stand trial, he was tried while incompetent. *See, e.g.*, *Newman v. Harrington*, 726 F.3d 921, 929-32 (7th Cir. 2013) (holding trial counsel ineffective for failing to investigate client's fitness and request a

hearing).

This claim was not procedurally defaulted, and respondent did not present factual materials or legal argument in state court to establish that Mr. Jones's prima facie showing should not be taken as true or that it otherwise lacked merit. Under these circumstances, the state court was required to issue an order to show cause and allow Mr. Jones access to state processes to develop and present evidence to prove his claim. *See, e.g. Duvall*, 9 Cal. 4th at 475; *Romero*, 8 Cal. 4th at 742. By instead summarily denying Mr. Jones's claim, the California Supreme Court's decision satisfies section 2254(d) as set forth in Mr. Jones's prior briefing and in the sections that follow. *See, e.g.*, *Newman*, 726 F.3d at 935 (holding state court's decision, made without a hearing, denying claims alleging ineffective assistance of counsel for failing to raise fitness was not entitled to 2254(d) deference).

1. There Is No Reasonable Basis for the State Court Ruling That Mr. Jones Failed to Make a Prima Facie Showing for Relief on His Procedural and Substantive Competence to Stand Trial Claims.[40]

a. The Trial Court Violated Mr. Jones's Due Process Rights by Failing to Conduct a Competency Hearing.

[40] Respondent conflates Mr. Jones's procedural and substantive due process claims, and apparently addresses only the claim that the trial court's failure to conduct a hearing. Opp. at 59 ("Based on the above, the trial court neither held, nor reasonably should have held, a bona fide doubt as to Petitioner's competence to stand trial. Thus, the trial court did not violate Petitioner's due process rights when it did not *sua sponte* hold a hearing to determine Petitioner's competence, and there was a reasonable basis for the California Supreme Court's summary denial of relief on this claim."); *see also* Opp. at 60 ("there is nothing in the record to suggest that the trial court held, or reasonably should have held, a bona fide doubt as to Petitioner's competence"). Respondent does not clearly address Mr. Jones's prima facie showing of a substantive due process claim that he was in fact incompetent or on what bases the California Supreme Court summarily denied that claim.

Mr. Jones established a prima facie showing that the trial court's failure to conduct a competency hearing violated his federal constitutional rights. From at least as early as March 1993, the trial court was on notice that Mr. Jones's competence to stand trial was in question when counsel requested the appointment of two experts to assess Mr. Jones's competence to proceed. 1 RT 14-15. Opening Br. at 112-14. Over the course of the trial, the court additionally learned of Mr. Jones's treatment at the jail with antidepressant and anti-psychotic medication for complaints of auditory hallucinations, delusions and paranoia; his diagnosis as suffering from a major psychiatric disorder of a psychotic nature; and the results of neuropsychological testing, which supported a diagnosis of chronic schizophrenia. Opening Br. at 112. In addition, the court was aware of Mr. Jones's severe psychiatric impairments through Mr. Jones's behavior and demeanor in court, including his conflicts with counsel.[41] *See generally* Opening Br. at 112-14.[42]

Although the trial court possessed evidence, pretrial through sentencing, that the symptoms of Mr. Jones's psychiatric condition impaired his understanding of the proceedings and his interactions with trial counsel, the court failed to hold a hearing to determine his competency to proceed in violation of his due process rights. *See, e.g.*, *Odle v. Woodford,* 238 F.3d 1084, 1087 (9th Cir. 2001) ("a trial judge must conduct a competency hearing whenever the evidence before him raises

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[41] On November 6, 1992, the Municipal Court entered an order directed to the "Sheriff of the County of Los Angeles and Medical Services of Los Angeles County Jail" that Mr. Jones was "suffering from extreme stress and need[ed] to be examined by a psychologist or psychiatrist." 1 CT 116. The trial court also found Mr. Jones's conduct noteworthy when it informed him that in a capital case every proceeding was recorded "including your outbursts." 1 RT 25.

[42] A complete summary of the facts supporting both the procedural and substantive due process claims was presented in the Motion for an Evidentiary Hearing, filed Feb. 17, 2011, at 96-113 (Doc. 59), which Mr. Jones incorporates by reference to avoid unduly lengthening this pleading.

a bona fide doubt about the defendant's competence to stand trial, even if defense counsel does not ask for one"); *McMurty v. Ryan,* 539 F.3d 1112, 1119 (9th Cir. 2008) ("If a reasonable judge would have had such a [bona fide] doubt, [defendant] was entitled to a competency hearing, and the failure to hold such a hearing violated his right to due process"); *De Kaplany v. Enomoto,* 540 F.2d 975, 980-81 (9th Cir. 1976) (en banc) ("'Under the rule of *Pate v. Robinson* (1966) 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815, a due process evidentiary hearing is constitutionally compelled at any time that there is 'substantial evidence' that the defendant may be mentally incompetent to stand trial.'") (quoting *Moore v. United States,* 464 F.2d 663, 666 (9th Cir. 1972)); *Moore,* 464 F.2d at 666 ("Evidence is 'substantial' if it raises a reasonable doubt about the defendant's competency .... Once there is such evidence from any source, there is doubt that cannot be dispelled by resort to conflicting evidence.").

In response to Mr. Jones's claim that the trial court should have held a hearing to determine whether he was competent, respondent asserts that "both counsel and the trial court reasonably relied on the competency findings of Dr. Stalberg[43] and Mead." Inf. Resp. at 27 n.15; *see also* Opp. at 55. To the extent that the California Supreme Court relied on this argument in concluding that Mr. Jones did not establish a prima facie case, it was an unreasonable application of controlling federal law and an unreasonable determination of the facts presented. *See, e.g.*, *Torres v. Prunty*, 223 F.3d 1103, 1109 (9th Cir. 2000) (holding state court's findings to be unreasonable, in part because "the fact finding procedure by the judge was clearly inadequate"). Contrary to respondent's suggestion, which the California Supreme Court apparently adopted, the competency reports "did not

[43] Although the record reflects that Dr. Stalberg's appointment was vacated on April 14, 1993 (1 RT 17-20), Dr. Stalberg, in fact, performed the evaluation. 1 CT 138; State Pet. at 247.

stand alone" as the only evidence the trial court should have considered. *Moore v. United States,* 464 F.2d 663, 666 (9th Cir. 1972). The doctors reports, evaluating Mr. Jones in 1993, did not obviate the need for a hearing in light of the additional evidence before the court regarding Mr. Jones's competence. *See Moore,* 464 F.2d at 666 (holding that records showing defendant's history of mental illness and instability raised reasonable doubt even though psychiatric report before his guilty plea found him competent). Assuming arguendo that the court's reliance on the evaluations was reasonable because Mr. Jones was competent in 1993, "a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Drope*, 420 U.S. at 181; *United States v. Ives*, 574 F.2d 1002, 1005-06 (9th Cir. 1978) (finding error when court did not consider evidence of possible change in defendant's ability to stand trial following four alternating determinations of competency and incompetency in less than a year). Once the trial court received the initial request for appointment of experts to evaluate Mr. Jones's competence, it was aware that his competence could be in issue, and ought to have been alert to changes in Mr. Jones's condition that would render him unable to meet the standards of competence to stand trial. As Dr. Thomas explained "Mr. Jones's psychiatric condition waxes and wanes, and can be more or less apparent or active at any given time." Ex. 154 at 2751; *see also* Ex. 144 at 2707 ("During the penalty phase of the trial, I noticed a difference in Mr. Jones's demeanor. . . . he rarely moved, his face was expressionless, and his shoulders drooped. He rarely reacted to the testimony or anything else that was going on in the courtroom. He acted as if he were in a trance."). Moreover, Drs. Stalberg and Mead received virtually no information "regarding the case except a little summary of it. . . . and they wrote very brief reports." 28 RT 4088; *see also* State Pet. at 247-48.

In these circumstances, and given the other evidence before the trial court, its reliance on representations from counsel that these doctors found Mr. Jones

competent did not obviate the need for a hearing.[44] The evidence as to competence must be taken together as a whole; in determining whether a substantial doubt has been raised, a trial judge must evaluate the probative value of each piece of evidence and view it in light of the others. *Chavez v. United States*, 656 F.2d 512, 517-18 (9th Cir 1981). In determining whether a constitutionally required hearing is required, "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but . . . even one of these factors standing alone may, in some circumstances, be sufficient" to raise a genuine doubt as to competency. *Drope*, 420 U.S. at 180. The factors known to the trial court individually and cumulatively created a doubt as to Mr. Jones's competence, including his ongoing psychiatric treatment; his need for antipsychotic medication; confused and bizarre behavior; his prior suicide attempts and suicidal ideation. *See, e.g.*, *Pate* 383 U.S. at 386 (holding that a hearing was required because the

[44] In the state court and this Court, respondent asserted that the Mr. Jones's testimony at trial, his receiving psychiatric treatment and antipsychotic medication, and his diagnosis of schizophrenia "does not mean that petitioner was incompetent to stand trial." Inf. Resp. at 27; *see also* Opp. at 56-60. To the extent that the California Supreme Court accepted these arguments, its summary denial of the claim was an unreasonable application of clearly established federal law. Respondent confuses the showing necessary to trigger a competency hearing with the facts necessary to sustain a finding – following a proper hearing – that Mr. Jones was, in fact, incompetent. Mr. Jones's burden before the state court was whether there was "'substantial evidence' that the defendant *may* be mentally incompetent to stand trial." *Moore,* 464 F.2d at 666 (emphasis added); *Chavez*, 656 F.2d at 519 (holding that "indicia of incompetence" that does not rise to the level of establishing incompetence in fact nonetheless may be "sufficient to require an evidentiary hearing"). To the extent that respondent's argument may relate to the substantive due process claim – that Mr. Jones was in fact incompetent to stand trial, *see* n.40, *supra* – his assertions fail to address whether a petitioner has made a prima facie showing entitling him to the issuance of an order to show cause and an evidentiary hearing.

trial court knew of Mr. Robinson's prior psychiatric treatment and "history of pronounced irrational behavior"); *Chavez*, 656 F.2d at 519 (holding that a hearing was required where defendant had a history of mental health treatment, emotional outbursts, prior evaluations of impaired mental functioning, and poor relationship with his attorney); *Maxwell v. Roe,* 606 F.3d 561, 571 (9th Cir. 2010) ("Maxwell's attempted suicide – taken in the context of his pre-trial behavior, strained communication with defense counsel, mental health history, antipsychotic medications, and subsequent psychiatric detentions – would have raised a doubt in a reasonable judge."); *McMurtrey v. Ryan,* 539 F.3d at 1125 (holding that evidence of defendant's behavior, medications, and memory problems was sufficient to raise a reasonable doubt as to defendant's competence); *Miles v. Stainer,* 108 F.3d 1109, 1112 (9th Cir. 1997) (finding that state court's failure to ask defendant whether he had been taking his psychotropic medication before accepting his guilty plea raised reasonable doubt about defendant's competence to plead guilty, and therefore competency hearing should have been held); *Moran v. Godinez,* 972 F.2d 263, 265 (9th Cir. 1992), (holding that the trial court's failure to inquire about the four psychiatric medications defendant was taking, among other factors, raised reasonable doubt about competence); *overruled on other grounds*, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993). Thus, to the extent that the California Supreme Court determined that the evidence did not require a competency hearing under *Pate*, it was an unreasonable determination of the facts within the meaning of 28 U.S.C. § 2254(d)(2). *See, e.g.*, *Torres v. Prunty,* 223 F.3d at 1105; *Maxwell*, 606 F.3d at 568.

b. Mr. Jones Was Incompetent to Stand Trial.

Mr. Jones alleged facts before the state court that, if true, would show he was incompetent to stand trial, that is, that he was unable effectively to communicate with or assist trial counsel, comprehend key aspects of the trial and defense, or attend to and recall the proceedings of the trial from day to day. *See Dusky v.*

United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960); *Drope*, 420 U.S. at 171. Dr. Thomas who evaluated Mr. Jones at the time of trial opined that Mr. Jones's lacked the ability "to cooperate with counsel and rationally assist in the preparation of his case for trial":

> I never had the opportunity to testify about Mr. Jones's competency to stand trial. I noted the necessity of his medication regimen at the County Jail and cautioned Mr. Manaster in my report of December 7, 1994, about the serious competency issues: "In order to be sure that [Mr. Jones] is competent to stand trial under the provisions of 1368 P.C., he should be treated until he is free of hallucinations and delusional thought." I had genuine doubts that Mr. Jones was able to cooperate with counsel and rationally assist in the preparation of his case for trial. I was not asked about Mr. Jones's competency during my testimony. If Mr. Manaster had asked me, I would have opined that Mr. Jones was not competent to stand trial.

Ex. 154 at 2754; Inf. Reply at 205. In addition, the abrupt change in Mr. Jones's medication regime by jail medical personnel further impaired his ability to comprehend the nature of the proceedings and assist in his defense. Dr. Thomas's declaration submitted to the state court explained the debilitating consequences resulting from the medical staff's inappropriate treatment:

> Mr. Jones's current attorneys obtained additional medical records from the Los Angeles County Jail, which showed that Mr. Jones's prescription of Haldol was abruptly discontinued right before the beginning of his trial, in November 1994, with no apparent clinical basis for the change. I was further surprised to learn that one day after Mr. Jones finished his testimony in the "guilt" phase of his trial, his Haldol prescription was just as abruptly renewed. Thus, when Mr. Jones testified in mid-January, he may have gone over two

> months without anti-psychotic medication. Had I known about this at trial, I could have testified more accurately about his medication and the possible effect of its abrupt discontinuation. The lack of appropriate medication not only distorted Mr. Jones's appearance and demeanor, but also adversely affected his ability to attend, concentrate, assist his attorneys, and testify.

Ex. 154 at 2761-62.

Expert evaluations conducted at the request of post-conviction counsel confirmed and corroborated Dr. Thomas's findings. Opening Br. at 116-17. In addition, those who came in contact with Mr. Jones at the time of trial observed the effects his psychiatric impairments had on his functioning. Opening Br. at 117-18. The trial paralegal, who was the defense team member with most contact with Mr. Jones, "understood that he was very mentally ill" (Ex. 144 at 2706); noted that Mr. Jones "had difficulty recalling events in his life" (Ex. 19 at 206); and was struck by Mr. Jones's difficulties processing and understanding information about his case (Ex. 19 at 207). Critically, as the case progressed Ms. Cameron observed that Mr. Jones "exhibited severe dissociative symptoms" (Ex. 19 at 206), and entered dissociative states during the guilt and penalty phases of his trial, at which time he exhibited a "blank expression and faraway look in his eyes that reminded [her] of a closed curtain" (Ex. 144 at 2707); *see also* Ex. 12 at 109 (trial counsel recounts Mr. Jones's history of dissociative states).[45]

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[45] Mr. Jones also presented the state court with numerous declarations from lay witnesses that confirm the severity of his longstanding mental health problems and their effect on his functioning, particularly during stressful situations. *See, e.g.*, Ex. 178 at 3118-19, 3129, 3137, 3144, 3145-46, 3148-49, 3152-56; Ex. 124 at 2508, 2509, 2529-30, 2539-40, 2544 (describing Mr. Jones's history of hallucinations, sleep disturbances, dissociation, and disorganized thinking); Ex. 16 at 146-48, 168 (describing history of dissociation, hallucinations, altered states of consciousness, and sleep disturbances); Ex. 131 at 2609-10 (describing history

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The facts presented to the state court unquestionably stated a prima facie case of a due process violation. *See Dusky*, 362 U.S. at 402; *Drope*, 420 U.S. at 171; *Odle v. Woodford*, 238 F.3d 1084, 1089 (9th Cir. 2001) (ruling that competence to stand trial "requires the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense") (citing *Dusky*, 362 U.S. at 402).

1) The California Supreme Court could not reasonably reject the claim based on Mr. Jones's testimony during the guilt phase or his interactions with the court.

In federal proceedings, respondent asserts for the first time that Mr. Jones was "coherent and lucid," and points to instances in the record where Mr. Jones interacted with the court. Opp. at 56. Respondent cites to Mr. Jones's *Marsden* motion (1 RT 19-24) as evidence that Mr. Jones had a different view of the case from his counsel, which, according to respondent, indicated that he could rationally participate in his defense. Opp. at 56. In addition, respondent points to instances in the record where Mr. Jones interacted with the court regarding getting to court on time and requesting a shower and haircut. Opp. at 56.

This argument would not have provided a legal basis for the state court to reject Mr. Jones's claim, however, because respondent did not raise it in the state court. In state court, respondent asserted, without any citations or explanation, that Mr. Jones's testimony "belies the contention that petitioner was unable to

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of mood changes and altered states of consciousness/blackouts); Ex. 14 at 137 (describing Mr. Jones's history of decompensation, mood changes, altered affect, and "hearing . . . voices"); Ex. 10 at 99-100 (describing history of dissociation, paranoia, disorganized thinking, depression, suicidality, delusions, auditory hallucinations, and disorganized thinking); Ex. 21 at 227 (describing Mr. Jones as "literally talking nonsense" and exhibiting symptoms of depression and psychosis).

understand the nature of the proceedings and assist in his defense." Inf. Resp. at 27. *See* section II.A.4., *supra*.

Had respondent presented such arguments, Mr. Jones would have provided the state court with additional declarations from experts concerning the consistent nature of Mr. Jones's mental illness. Indeed, Mr. Jones did provide the state court with evidence that "Mr. Jones's psychiatric condition waxes and wanes, and can be more or less apparent or active at any given time." Ex. 154 at 2751. Critically, Mr. Jones presented evidence in state court that at the time of his trial, "[he] was not mentally fit to testify on his own behalf." Ex. 154 at 2752. As Dr. Thomas explained:

> The unique characteristics and manifestations of his mental disorders made him a poor candidate for testimony. Because of Mr. Jones's frank dissociation at the time of the events in question, the Mr. Jones in the courtroom was not the same person as the Mr. Jones who had acted that evening. Anything he could remember, he would remember as a spectator, watching as if from outside his body, with no emotions to call upon to seem credible to the jury.

Ex. 154 at 2752. Furthermore, the interruption in Mr. Jones's medication regimen, which was critical to ensure that he was "free of hallucinations and delusional thought" (Ex. 154 at 2754), also "adversely affected his ability to attend, concentrate, assist his attorneys and testify" (Ex. 154 at 2762). Any evidence that Mr. Jones was "able to assist his attorney at trial in minor ways" does not mean that he was competent. *See, e.g.*, *Torres v. Prunty*, 223 F.3d at 1110 (holding evidence that defendant was able to assist his attorney in minor ways did not obviate the need for a competency hearing). Competence to stand trial "requires the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense." *Odle*, 238

F.3d at 1089 (citing *Dusky*, 362 U.S. at 402). Finally, respondent's argument – that Mr. Jones's "coherent and lucid" interactions with the court – raises at best a factual dispute that the California Supreme Court could not have resolved without conducting an evidentiary hearing. *See* section II.A.3., *supra*. Any inquiry into the persuasiveness and weight to be given to the evidence of Mr. Jones's competence should be made at a hearing. *See, e.g.*, *Deere v. Woodford*, 339 F.3d 1084, 1086-87 (9th Cir. 2003) (remanding for competency hearing because court improperly resolved credibility of experts' opinions).

2) The California Supreme Court could not reasonably reject the claim based on a theory that Mr. Jones's diagnosed mental illness alone did not make him incompetent.

Respondent urged the state court to conclude that Dr. Thomas's determination that Mr. Jones suffered from schizophrenia "does not mean that petitioner was incompetent to stand trial. . . . Indeed, the administration of antipsychotic medications may have improved petitioner's mental condition." Inf. Resp. at 27; *see also* Opp. at 57.[46] Although the diagnosis of a mental illness may not per se render a defendant incompetent to stand trial, evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on his competence to stand trial are all relevant in determining whether a defendant is

[46] Respondent states that neither Dr. Spindell or Dr. Thomas offered an opinion on Mr. Jones's competence to stand trial, but were retained to explore his ability to form the specific intent for the charged crimes. Opp. at 57. The referral question counsel posed to Dr. Thomas was "whether you believe that [Mr. Jones] was legally insane at the time of the offense. If you do not believe he was legally insane or even if you do, whether he is suffering from some mental condition or defect which he could not control and which might help explain his behavior" (Ex. 154 at 2748); nonetheless, Dr. Thomas informed counsel about his concerns regarding Mr. Jones's competence (*Id*. at 2754), although he was not asked to testify about this issue.

competent. *Drope*, 420 U.S. 162, at 180. However, "[n]one of these factors is determinative. Any one of them may be sufficient to raise a reasonable doubt about competence." *Miles v. Stainer*, 108 F.3d 1109, 1112 (9th Cir. 1997) (citing *Drope*, 420 U.S. at 180).

Respondent did not present any evidence in state court to support his contention that medication rendered Mr. Jones competent; and the resolution of his assertion would have required the California Supreme Court to resolve facts without a hearing. Moreover, it fails to take into account evidence that Mr. Jones was not in fact receiving his anti-psychotic medication from November 1, 1994, through January 23, 1995, during critical stages of his trial and his testimony. *See*, *e.g.*, Ex. 33 at 596, 600, 602, 603, 604, 606, 608, 610, 613, 616, 61 E, 620, 622, 624, 625, 628, 630, 632, 634; Ex. 34 at 678, 680, 682, 685; State Pet. at 246-47. Mr. Jones, however, presented evidence in state court that "without a proper medication regimen . . . Mr. Jones was [not] competent to stand trial, much less testify on his own behalf."[47] Ex. 154 at 2754.

[47] Respondent urges this Court to view with skepticism Dr. Thomas's findings regarding Mr. Jones's competency because his declaration was signed nine years after trial and after having reviewed additional materials provided by post-conviction counsel. Opp. at 57 n.24. Contrary to respondent's contention, Dr. Thomas first advised counsel that he had serious doubts about Mr. Jones's competence in a report dated December 7, 1994. Dr. Thomas advised, "In order to be sure that [Mr. Jones] is competent to stand trial under the provisions of 1368 P.C., he should be treated until he is free of hallucinations and delusional thought." Ex. 154 at 2754. Hence, his opinion that Mr. Jones was incompetent was contemporaneous with the trial. *See Moran v. Godinez*, 57 F.3d 690, 696 (9th Cir.1994) ("medical reports contemporaneous to the time of the initial hearing greatly increase the chance for an accurate retrospective evaluation of a defendant's competence"); *Deere v. Woodford*, 339 F.3d 1084, 1086–87 (9th Cir. 2003) (pointing to a doctor's examination of petitioner within several days of guilty plea as particularly probative of his mental status at trial). Moreover, expert evaluations obtained during post-conviction corroborate and are consistent

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Respondent also argues the mere fact Mr. Jones was on medication does not mean he was incompetent, and suggests that Mr. Jones was required to present additional evidence as to how the medication affected his thought processes and rendered him incompetent. Inf. Resp. at 27; Opp. at 58. Respondent cites to *Sturgis v. Goldsmith*, 796 F.2d 1103, 1109-10 (9th Cir. 1986),[48] *Corsetti v. McGrath*, C 03-084 SI (PR), 2004 WL 724951 (N.D. Cal. Mar. 26, 2004), [49] and *People v. Medina*,[50] 11 Cal. 4th 694, 47 Cal. Rptr. 2d 165 (1995), as support for his contention that failure to present evidence of how the medication affected his competence failed to raise a bona fide doubt as to petitioner's competence to stand trial. In contrast to these cases, Mr. Jones presented testimony at trial and evidence to the state court regarding the exact medications prescribed, the importance of

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with Dr. Thomas's findings from the time of trial. *See, e.g.*, Ex. 178 at 3154-55, 3156-57; Ex. 175 at 3064, 3065-66, 3072, 3075-76.

[48] In *Sturgis*, the petitioner testified at his state trial that he was on medication. However, he presented no evidence to the district court as to what drugs he took or how they might have affected his competence at trial. 796 F.2d at 1110.

[49] In *Corsetti*, the district court concluded that Mr. Corsetti was competent to enter a no-contest plea in 2000. 2004 WL 724951 at *8. Mr. Corsetti submitted a 1998 medical record indicating that he was diagnosed with intermittent explosive disorder and a borderline personality disorder, neither of which he demonstrated were diseases of a sort that actually precluded him from consulting with his lawyer with a reasonable degree of rational understanding or that caused him not to have a rational as well as factual understanding of the proceedings against him. *Id*. Corsetti also had not shown that at the time he entered the plea he was actually taking any particular psychotropic medication. *Id*. Absent any additional support, the court concluded that Mr. Corsetti had failed to establish his entitlement to relief. *Id*. at *10

[50] In *People v. Medina* the record failed to support Mr. Medina's assertion that he became incompetent to stand trial after his Thorazine medication ceased. The court found that Medina's assertions to the contrary were based solely on "unsupported speculation." 11 Cal. 4th at 733.

proper titration of the medication to ensure treatment of the psychosis and to avoid harmful side effects; and the effects of an insufficient dosage of those medications. *See* 23 RT 3547-51, 3565; State Pet. at 252; Ex. 154 at 2754 (describing Mr. Jones' mental functioning and medication), 2762 ("the lack of appropriate medication not only distorted Mr. Jones's appearance and demeanor, but also adversely affected his ability to attend, concentrate, assist his attorneys and testify").

3) The California Supreme Court could not reasonably reject the claim based on Mr. Jones's history of disturbed behavior, history of suicidal ideation or his attempted suicide prior to the homicide, individually not supporting a finding of incompetence.

Finally, respondent argues in federal court that Mr. Jones's history of disturbed behavior, his history of suicidal ideation and his attempted suicide prior to the homicide, each "standing alone" do not support his claim of competence because they do not bear upon his mental status at the time of trial. Opp. at 58. This argument would not have provided a legal basis for the state court to reject Mr. Jones's claim, however, because respondent did not raise it in the state court. *See* section II.A.4., *supra*. In any event, as stated above, evidence of Mr. Jones's incompetence must be viewed in its entirety, including evidence of his long-standing history of mental illness. *See, e.g.*, *McMurtrey v. Ryan*, 539 F.3d at 1125 (holding that records showing defendant's history of mental illness and instability raised reasonable doubt even though psychiatric report before his guilty plea found him competent).

Mr. Jones presented sufficient facts to create a "real and substantial doubt as to his competency" to stand trial and was entitled to a hearing "even if those facts were not presented to the trial court." *Deere v*, 339 F.3d at 1086. Finally, to the extent that the California Supreme Court denied the claim on any one of these proffered bases, its decision is an unreasonable application of clearly established

federal law. *See, e.g.*, *Chavez*, 656 F.2d at 517-18 (9th Cir 1981) (holding that probative value of each piece of evidence must be viewed in light of the others).

c. Section 2254(d) Is Satisfied by the State Court's Summary Denial of Mr. Jones's Adequately Pled Claim That His Due Process Rights Were Violated Because No Hearing Was Held to Determine His Competence and He Was Incompetent to Stand Trial.

In his Opening Brief, Mr. Jones detailed the ways in which the state court's summary denial of Mr. Jones's competency claim satisfies section 2254(d). Opening Br. at 5-13, 119-21. The state court's summary denial of Mr. Jones's claim was both contrary to and an unreasonable application of Supreme Court precedent. As a general matter, the California Supreme Court's refusal to hear Mr. Jones's adequately pled claims of constitutional error is contrary to clearly established federal law that prohibits state courts from creating "unreasonable obstacles" to the resolution of federal constitutional claims that are "plainly and reasonably made." *Davis v. Wechsler*, 263 U.S. at 24-25; *see also* Opening Br. at 7-11.

Specifically, in light of Mr. Jones's extensive factual allegations and supporting materials in the state court – which the state court was obligated to accept as true – the state court's ruling that Mr. Jones failed to make any prima facie showing of entitlement to relief constitutes an unreasonable application of *Dusky*, *Drope*, and *Pate*. *See, e.g.*, *Maxwell v. Roe*, 606 F.3d 561 (holding that state trial court's conclusion that evidence was insufficient to raise bona fide doubt as to defendant's competency to stand trial and require a second competency hearing, was unreasonable determination of facts and unreasonable application of Supreme Court's clearly established law, where defendant had history of mental illness, frequently refused to take prescribed antipsychotic medications, was unable to verbally or physically control himself in courtroom, exhibited increasingly

paranoid and psychotic behavior that impaired his communication with defense counsel and reasoning regarding his defense, attempted suicide in midst of trial, and spent substantial portion of trial involuntarily committed to hospital psychiatric ward as danger to others, himself, or gravely disabled,); *Watts v. Yates*, 387 F. App'x 772 (9th Cir. 2010) (holding state court's decision affirming trial court's redetermination that defendant was competent to stand trial was based on unreasonable factual finding, because the trail court overlooked evidence developed after first competency proceeding); *Burton v. Cate*, 913 F. Supp. 2d 822 (N.D. Cal. 2012) (holding state appellate court's finding that reasonable judge in position of trial judge would not have expressed doubt about petitioner's competency to stand trial was unreasonable determination of facts where Court of Appeal discounted value of expert report probative of petitioner's competence to stand trial and recommended competency hearing, and Court of Appeal, like trial judge, apparently gave no weight to petitioner's recent mental health records).

Moreover, as the Opening Brief sets forth, the California Supreme Court's decision was contrary to clearly established federal law because the California Supreme Court consistently has conditioned relief on incompetence to stand trial claims upon a showing of "a diagnosed mental illness." *People v. Taylor*, 47 Cal. 4th 850, 864, 220 P.3d 872 (2010);[51] *see also* Opening Br. at 119-20. The test set

[51] *See also People v. Rodrigues*, 8 Cal. 4th 1060, 1110, 36 Cal. Rptr. 2d 235, 258 (1994) (rejecting defendant's claim due to the lack of a disorder or disability and stating that "A defendant is mentally incompetent 'if *as a result of a mental disorder or developmental disability*, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.'" (quoting Cal. Penal Code § 1367; italics added by *Rodrigues* court). *Rodrigues* quoted from and relied on *People v. Stankewitz*, 32 Cal. 3d 80, 92, 184 Cal. Rptr. 611, 617 (1982), for the proposition that a defendant's incompetence must be rooted in a diagnosed mental illness. In *People v. Taylor*, the California Supreme Court incorrectly described the standard set forth in California Penal Code section 1367–including the requirement of a

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forth and explained in *Dusky*, *Drope*, and *Godinez* does not require a diagnosed mental illness or disorder. This modification or addition to the standard enunciated in *Taylor* and its predecessors is contrary to clearly established federal law. Although a defendant who is incompetent to stand trial may suffer from a diagnosed mental illness or developmental disability, there is no requirement that he or she do so. Symptoms indicative of or consistent with a possible mental or medical condition, without rising to the level of a diagnosis of a specific disorder, equally may interfere with one's "mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense." *Odle v. Woodford*, 238 F.3d 1084, 1089 (9th Cir. 2001). As a result, this modification or addition to the standard is contrary to clearly established federal law. *Williams (Terry)*, 529 U.S. at 405-06 (state court decision was contrary to clearly established law by improperly adding to prejudice requirement of *Strickland*); *Kennedy v. Lockyer*, 379 F.3d 1040, 1052 (9th Cir. 2004) (addition of "substantial compliance" doctrine as a method of satisfying constitutional obligation to provide a transcript to indigent defendant rendered state court decision contrary to clearly established federal law).

Respondent argues that "there is no evidence, and Petitioner points to none, suggesting that the California Supreme Court applied any rule of law other than the federal standards for competence in denying Petitioner relief." Opp. at 59. Notably, respondent urged the California Supreme Court to continue with this deviation from controlling federal law by repeating the provision in California Penal Code section 1367 that limits incompetent to stand trial claims those resulting from "mental disorder or developmental disability." Inf. Resp. at 26. Moreover, respondent cited to *People v. Medina*, 11 Cal. 4th 694, 906 P.2d 2

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diagnosis–as equivalent to the test enunciated by the Supreme Court. *Taylor*, 47 Cal. 4th at 861.

(1995), Inf. Resp. at 27, which held that "a defendant is mentally incompetent 'if, *as a result of mental disorder or developmental disability*, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.'" 11 Cal. 4th at 733 (quoting *People v. Danielson*, 3 Cal. 4th 691, 727, 13 Cal. Rptr. 2d 1 (1992) (emphasis in original)); see also Inf. Resp. at 26 (citing *Danielson*). As explained above, the California Supreme Court is bound to follow its precedents, unless it issues an order to show cause and modifies those decisions in a published decision; its failure to do so in Mr. Jones's case is binding authority on this Court that it continued to limit incompetence to stand trial claims to those in which the incompetency results from a mental disorder or developmental disability. *See* section II.C., *supra*.

2. There Is No Reasonable Basis for the State Court Ruling That Mr. Jones Failed to Make a Prima Facie Showing for Relief on His Ineffective Assistance of Counsel Claim.

a. Trial Counsel Unreasonably and Prejudicially Failed to Investigate and Declare a Doubt as to Mr. Jones's Competence to Stand Trial.

The two-pronged inquiry of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and its related precedents discussed in Petitioner's Opening Brief are the controlling law for this claim. Because "judges must depend to some extent on counsel to bring these issues into focus," *Drope v*, 420 U.S. at 176-77, protection of a client's substantive and procedural due process rights is part of counsel's duty to provide effective representation within the meaning of *Strickland v. Washington*. The Ninth Circuit has held that "Counsel's failure to move for a competency hearing violates the defendant's right to effective assistance of counsel when "there are sufficient indicia of incompetence to give objectively reasonable counsel reason to doubt the defendant's competency, and there is a reasonable probability that the defendant would have been found

incompetent to stand trial had the issue been raised and fully considered." *Stanley v. Cullen*, 633 F.3d 852, 862 (9th Cir. 2011) (quoting *Jermyn v. Horn,* 266 F.3d 257, 283 (3d Cir. 2001).); *see also Newman*, 726 F.3d at 929-32 (holding trial counsel ineffective for failing investigate client's fitness and request a hearing).

Trial counsel knew, or reasonably should have known that, notwithstanding the preliminary determination of Mr. Jones's competence in the spring of 1993, it was critical to monitor Mr. Jones's competence. *See Burt v. Uchtman*, 422 F.3d 557, 565-70 (7th Cir. 2005) (counsel ineffective for failing to request a second competency hearing where defendant's mental status had changed, including that his medications changed significantly between the time of his competency evaluation and his trial). By counsel's own admission, the competency evaluations that were conducted were based on minimal information about the case, and resulted in only brief reports from the doctors.[52] 28 RT 4088. Nonetheless, counsel unreasonably failed to consult with a mental health expert from the spring of 1993, until he retained Dr. Thomas in August 1994. Ex. 154 at 2748-49. During this intervening period, Mr. Jones received treatment at the jail "for "nerves" with Atarax, an anti-anxiety medication (Ex. 33 at 596, 600, 602, 603, 604, 606, 608, 610, 613, 616, 618, 620, 622; Ex. 34 at 678, 685), and Haldol because he was hearing voices (Ex. 33 at 622, 647, 669).[53] *See also* State Pet. at 244-47.

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[52] Counsel's failure to provide Drs. Mead and Stalberg with adequate materials to assess Mr. Jones's competence was in itself unreasonable and prejudicial. *See, e.g*., *Brown v. Sternes*, 304 F.3d 677 (7th Cir. 2002) (holding trial counsel ineffective for failing to investigate defendant's mental illness and in permitting court appointed experts to evaluate defendant with inadequate data; prejudice was shown, in part, because the medical records counsel neglected to obtain showed defendant suffered from chronic schizophrenia and raised a "bona fide doubt" regarding his competence).

[53] On June 30, 1993, Mr. Jones began taking 10 milligrams of Haldol two times a day. Ex. 33 at 622. On August 3, 1993, Dr. Kunzman continued the prescriptions for Haldol and Cogentin because Mr. Jones was hearing "voices,"

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After an initial review of the materials and interviews with Mr. Jones, Dr. Thomas cautioned counsel about Mr. Jones's competence. Ex. 154 at 2752. Counsel proceeded to ignore Dr. Thomas's warnings regarding Mr. Jones's competence; failed to investigate further the issue of Mr. Jones's competence; and failed to alert the court regarding those findings; thereby rendering prejudicially deficient performance within the meaning of *Strickland*. *See, e.g.*, *Newman*, 726 F.3d at 929-32 (holding trial counsel ineffective for failing to investigate client's fitness and request a hearing); *United States v. Howard*, 381 F.3d 873, 881 (9th Cir. 2004) ("When counsel has reason to question his client's competence to plead guilty, failure to investigate further may constitute ineffective assistance of counsel."); *see also Bouchillon v. Collins*, 907 F.2d 589, 595 (5th Cir. 1990) (same).

Trial counsel's failure to request the trial court to declare a doubt as to petitioner's competence to stand trial was professionally unreasonable in light of Dr. Thomas's advice that he:

> noted the necessity of [Mr. Jones's] medication regimen at the County Jail and cautioned Mr. Manaster in my report of December 7, 1994, about the serious competency issues: "In order to be sure that [Mr. Jones] is competent to stand trial under the provisions of 1368 P.C., he should be treated until he is free of hallucinations and delusional thought."

Ex. 154 at 2754, Inf. Reply at 209.

Dr. Thomas "had genuine doubts that Mr. Jones was able to cooperate with

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but changed the dosage of Haldol to 5 milligrams once a day, and the dosage of Cogentin to 2 milligrams once a day. Two weeks later, Dr. Kunzman noted Mr. Jones's erratic behavior and the need to further evaluate him for a possible underlying mental disorder. Ex. 33 at 641.

counsel and rationally assist in the preparation of his case for trial." Ex. 154 at 2754. Because counsel did not pose the question of competency to Dr. Thomas, he never had the opportunity to present this information to Mr. Jones's jury during the penalty phase. Dr. Thomas's professional medical opinion is clear, however: "If Mr. Manaster had asked me, I would have opined that Mr. Jones was not competent to stand trial." Ex. 154 at 2754. In addition to the above instances of deficient performance, trial counsel further unreasonably failed to:

- Conduct a thorough investigation into petitioner's life history and lifelong mental impairments, which also would have placed him on notice of the need to monitor closely Mr. Jones's competence, and would have alerted him to Mr. Jones's fluctuating mental conditions. *See, e.g.*, Ex. 154 at 2751 (discussing Mr. Jones's psychosis, which can be more or less apparent at any given time);
- Adequately request and/or review Mr. Jones's medical records revealing the inappropriate medication regimen petitioner received from jail medical staff. *See* Ex. 150 at 2733 ("I was not aware that the jail medical staff had discontinued Mr. Jones's prescription for his anti-psychotic medication Haldol as of November 1, 1994, when his trial was about to begin, and did not renew his medication until the day after he finished testifying in the guilt phase of his trial. I mistakenly believed that Mr. Jones was medicated throughout both phases of his capital trial.");
- Alert his own expert to this problem, and accordingly failed to present this information to the jury through Dr. Thomas. *See* Ex. 154 at 2761-62 ("I was surprised to learn . . . that I had been misled by the information given to me by Mr. Jones's trial counsel regarding Mr. Jones's medication regimen. . . . medical records from the Los Angeles County Jail, [ ] showed that Mr. Jones's prescription of

Haldol was abruptly discontinued right before the beginning of his trial, in November 1994, with no apparent clinical basis for the change. I was further surprised to learn that one day after Mr. Jones finished his testimony in the 'guilt' phase of his trial, his Haldol prescription was just as abruptly renewed. Thus, when Mr. Jones testified in mid-January, he may have gone over two months without anti-psychotic medication. Had I known about this at trial, I could have testified more accurately about his medication and the possible effect of its abrupt discontinuation.");

- Adequately interview or prepare Dr. Kunzman, the jail psychiatrist, to testify on Mr. Jones's behalf, as any minimally competent witness preparation would have revealed that Mr. Jones's medication had been discontinued after the defense paralegal had spoken to Dr. Kunzman, and would have precluded any misleading and inaccurate testimony on the topic. *See* Ex. 150 at 2733 (" I called a Los Angeles County jail psychiatrist, Dr. Kunzman, expressly for the purpose of putting into evidence the fact of Mr. Jones's medication regimen and the nature and side effects of those medications. I obtained some medical records for Mr. Jones prior to his trial, but I did not obtain the medical records that revealed this significant interruption of Mr. Jones's medication regimen. I had no strategic reason for not doing so"); and,
- Monitor Mr. Jones's courtroom demeanor at any time other than during his testimony. Ex. 150 at 2733 ("I did notice that Mr. Jones was very fatigued during his testimony, especially during the district attorney's cross-examination. He seemed more than normally tired, and had more trouble responding to the district attorney's questions than one would expect."); *see also* Ex. 13 at 206

(defense paralegal explaining Mr. Jones's dissociative states); (Ex. 144 at 2707) (explaining that Mr. Jones entered dissociative states during the guilt and penalty phases of his trial, at which time he exhibited a "blank expression and faraway look in his eyes that reminded [her] of a closed curtain").

Dr. Thomas's opinion regarding Mr. Jones's competence, along with Mr. Jones's treatment at the county jail with antidepressants, antipsychotics, and anti-anxiety medication were sufficient to trigger an inquiry into his competence to stand trial unless counsel possessed some other knowledge suggesting that Mr. Jones was competent. *See, e.g.*, *United States v. Howard*, 381 F.3d 873, 881 (9th Cir. 2004); *Douglas v. Woodford*, 316 F.3d 1079, 1085 (9th Cir. 2003) ("Trial counsel has a duty to investigate a defendant's mental state if there is evidence to suggest that the defendant is impaired.").

To satisfy *Strickland's* prejudice prong, Mr. Jones must allege that but for counsel's errors he would have been found incompetent to stand trial. *See, e.g.*, *Stanley v. Cullen*, 633 F.3d at 862. Mr. Jones presented substantial evidence in state court that he was incompetent to stand trial. *See* State Pet. at 242-50; Inf. Reply at 203-07; *see also* Opening Br. at 115-18; section IV.D.1.b.. *supra.* There is a reasonable probability that, had counsel raised the additional facts known to him regarding Mr. Jones's lack of competence, Mr. Jones would have been found incompetent to stand trial.

Moreover, in Mr. Jones's case, despite the strong evidence of his incompetence, counsel offered to stipulate to petitioner's competence immediately preceding the testimony of Dr. Thomas. (30 RT 4404-05.) Counsel's "agreement" that petitioner was competent to stand trial amounts to "constructive denial of the assistance of counsel altogether[, which] is legally presumed to result in prejudice." *Hull v. Kyler* 190 F.3d 88, 112 (3rd Cir. 1999) (internal citation omitted). Counsel's compete failure to apprise the trial court of numerous facts

demonstrating Mr. Jones's incompetency to stand trial constitutes prejudice.

b. Section 2254 Does Not Bar Relief on This Claim.

The state court summarily denied Mr. Jones's ineffective assistance of counsel claim as failing to state a prima facie case for relief. To the extent the state court's ruling reflects its determination that Mr. Jones failed to plead sufficient facts that, if proved, would entitle him to relief, the state court's decision is (1) contrary to clearly established federal law, and (2) an unreasonable application of *Strickland* under section 2254(d)(1). In the alternative, the state court unreasonably determined the facts under section 2254(d)(2) by finding facts and resolving disputes without any adjudicative procedure.

a) Section 2254(d)(1) is satisfied.

Taken as true, Mr. Jones's allegations established a prima facie case that trial counsel's performance was deficient in failing to declare a doubt as to Mr. Jones's competence to stand trial. Mr. Jones also made a prima facie showing that he was prejudiced by trial counsel's deficient performance, demonstrating in detail the lay witness testimony, documentary evidence, and expert testimony that could have been presented that would have shown that he was incompetent to stand trial.

The state court's summary denial of this claim was contrary to federal law requiring a state court to ascertain facts reliably before denying adequately presented federal claims. *See* Opening Br. at 6-13. The state court's decision also was contrary to federal law because it addressed facts that were "materially indistinguishable" from United States Supreme Court decisions and nevertheless arrived at a result that differed from the Court's precedents. *Williams*, 529 U.S. at 406. In spite of sufficiently pleading a materially indistinguishable basis for relief as that found meritorious in the Court's cases, Mr. Jones's claim was summarily denied without a hearing. This also satisfies section 2254(d)(1).

Finally, the state court's summary denial also constitutes an unreasonable application of *Strickland*. Although Mr. Jones made detailed factual allegations,

which, taken as true, would entitle him to relief, the state court did not require respondent to respond formally to Mr. Jones's allegations or present evidence to support respondent's factual contentions. The state court ruling also denied Mr. Jones the opportunity to present evidence, subpoena witnesses, and prove his allegations. See Opening Br. at 86. The state court therefore declined to engage in any assessment of the factual allegations and fact finding before denying Mr. Jones's claims, thus satisfying section 2254(d)(1). *See, e.g.*, *Wiggins v. Smith*, 539 U.S. at 527 (holding that state court application of *Strickland* was unreasonable when it did not conduct an assessment of whether counsel's limited penalty phase investigation was reasonable); *Mosley v. Atchison*, 689 F.3d at 848.

b) Section 2254(d)(2) is satisfied.

Alternatively, the state court's summary denial could be based on its resolution of key factual disputes and mixed questions of fact and law, such as the effect of trial counsel's performance on the jury's verdict and whether trial counsel:

- Was objectively unreasonable in failing to request the trial court to declare a doubt as to Mr. Jones's competence to stand trial;
- Fell below an objective standard of reasonableness in failing to investigate and present evidence of Mr. Jones's incompetence to stand trial;
- Failed to adequately prepare and present expert testimony;
- Had tactical reasons for his actions and omissions; or
- Prepared and presented witnesses according to prevailing professional norms.

If the state court denied Mr. Jones's claim on these or other factual bases at the pleading stage, it unreasonably determined the facts under section 2254(d)(2) by failing to provide Mr. Jones either with process to develop and present supporting

evidence; or notice of and an opportunity to be heard on the factual issues that the state court intended to resolve. *See* Opening Br. at 6-13.[54]

E. Claim Five: Mr. Jones's Constitutional Rights Were Violated When the State Inappropriately and Involuntarily Medicated Him.

Mr. Jones satisfied state pleading requirements on his claim that he was inappropriately and improperly medicated by presenting the California Supreme Court with sufficient detail and supporting factual material to establish a prima facie showing that he was entitled to relief. *See, e.g.*, *Duvall*, 9 Cal. 4th at 474. Mr. Jones demonstrated that that he was involuntarily under the medical treatment of Los Angeles County Jail personnel, who prescribed powerful medication throughout his custody in the jail. During trial, he was medicated involuntarily with Atarax, Cogentin, Haldol, and Sinequan that had serious side effects, including psychosis, paranoia, slurred speech, drowsiness, stiff muscles, and restlessness. Mr. Jones also demonstrated that he tried to refuse the medication, and never consented to it being abruptly started and stopped for a significant period of time in the middle of trial, thus increasing the detrimental side effects. Mr. Jones established that this inappropriate medication regimen prejudicially interfered with his appearance during trial and his ability to participate in the trial and his defense, thereby entitling him to relief. Opening Br. at 105-10.

This claim was not procedurally defaulted, and respondent did not present factual materials or legal argument in state court to establish that Mr. Jones's prima

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[54] Respondent's only argument with respect to this claim is that trial counsel reasonably relied on the previous evaluations and Mr. Jones's courtroom behavior would not have alerted counsel to request an additional evaluation. Opp. at 60-61. Both of these issues are addressed above. To the extent that the California Supreme Court resolved the factual support for these assertions, including counsel's knowledge of Mr. Jones's deteriorating mental condition, its decision violated section 2254(d) because it did not afford Mr. Jones an opportunity to present evidence at a hearing.

facie showing should not be taken as true or that it otherwise lacked merit. Under these circumstances, the state court was required to issue an order to show cause and allow Mr. Jones access to state processes to develop and present evidence to prove his claim. *See, e.g. Duvall*, 9 Cal. 4th at 475; *Romero*, 8 Cal. 4th at 742. By instead summarily denying Mr. Jones's claim, the California Supreme Court's decision satisfies section 2254(d) as set forth in Mr. Jones prior briefing and in the sections that follow.

1. There Is No Reasonable Basis for the State Court Ruling That Mr. Jones Failed to Make a Prima Facie Showing for Relief on His Inappropriate and Involuntary Medication Claim.

In this Court, respondent argues, "Petitioner's allegations that by medicating him the state violated his constitutional rights to counsel and to confront witnesses under the Sixth Amendment, to a reliable death judgment and to be free of cruel and unusual punishment under the Eighth Amendment, to present witnesses and defenses, and to compulsory process are barred by *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L .Ed. 2d. 334 (1989)." Opp. at 61. The *Teague* doctrine limits this Court's ability to grant relief apart from 28 U.S.C. section 2254(d) and thus it is not relevant to this stage of the proceedings. *See* n.1, *supra*. To the extent that respondent contends that Mr. Jones seeks the application of federal law that was not clearly established at the time of the California Supreme Court's summary denial of this claim, respondent is incorrect.[55]

At the time that Mr. Jones filed his state petition, his claim regarding

[55] Respondent concedes that there was "clearly established Supreme Court precedent existing during the relevant time" addressing "whether involuntary medication violated a petitioner's due process rights under the Fourteenth Amendment." Opp. at 61. Thus, respondent's sole argument is that Mr. Jones's rights under the Sixth and Eighth Amendments were not clearly established. Opp. at 61.

inappropriate and involuntary medication was grounded on the controlling Supreme Court law enunciated in *Riggins v. Nevada*, 504 U.S. 127, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992).[56] *See* Opening Br. at 106-07; State Pet. at 257 (citing *Riggins*); Inf. Reply at 211-15 (discussing and applying *Riggins*). The Supreme Court held that a potential deprivation of due process of law occurs when a defendant involuntarily is prescribed antipsychotic medication during criminal proceedings, and that once the defendant moves to terminate the administration of such medication, the state becomes obligated to establish that the medication is needed and medically appropriate. *Riggins*, 504 U.S. at 134–35. In his informal reply, Mr. Jones cited to *Sell v. United States*, 539 U.S. 166, 179-81, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003),[57] in which the Supreme Court set substantive limits defining the standard to be used for determining when an individual could be involuntarily administered medication for the purpose of being able to stand a trial. Inf. Reply at 212.

Respondent asserts that, based on a "survey of relevant case law," there is no controlling federal law regarding a defendant's Sixth Amendment rights not to be forcibly medicated. Opp. at 61. Respondent's survey failed to account for the Supreme Court's reasoning in *Riggins* and subsequent interpretations of it. In *Riggins*, the Court granted certiorari to decide "whether forced administration of antipsychotic medication during trial violated rights guaranteed by the Sixth and Fourteenth Amendments." *Riggins*, 504 U.S. at 132–33. In *Riggins,* Justice

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[56] The Court's reasoning in *Riggins* relied upon its previous decision in *Washington v. Harper*, 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990), which recognized that a mentally ill state prisoner possessed a significant liberty interest in avoiding unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.

[57] *Sell* was decided on June 16, 2003, four months before Mr. Jones's conviction became final. *Id*. 539 U.S. 166.

Kennedy recognized that concerns about medication extend to a defendant's Sixth Amendment right to counsel.

> The defendant must be able to provide needed information to his lawyer and to participate in the making of decisions on his own behalf. The side effects of antipsychotic drugs can hamper the attorney-client relation, preventing effective communication and rendering the defendant less able or willing to take part in his defense.

Riggins, 504 U.S. at 144. Furthermore, Justice Kennedy observed that fundamental to the adversary system is "that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table. This assumption derives from the right to be present at trial, which in turn derives from the right to testify and rights under the Confrontation Clause." *Riggins,* 504 U.S. at 142 (Kennedy, J., concurring). Thus, "the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial." *Id.* Subsequent case law confirms that the Supreme Court's decision rested on Sixth Amendment and Fourteenth Amendment principles. *See, e.g.*, *Benson v. Terhune*, 304 F.3d 874, 880-81 (9th Cir. 2002) ("In *Riggins*, the Supreme Court held that the forced administration of antipsychotic drugs to control the behavior of a pretrial detainee—absent overriding justification and proof of medical appropriateness—is impermissible because it may violate the defendant's constitutional right to due process, including *her right to a fair trial*.") (emphasis added); *Smith v. Moore*, 137 F.3d 808, 818 n.6 (4th Cir. 1998) ("In *Riggins*, the Supreme Court held that the defendant's Sixth and Fourteenth Amendment rights were violated by the *forced* administration of Mellaril during trial.") (emphasis in original).

Similarly, the reasoning in *Riggins* that forced medication affects the

reliability of the proceedings necessarily implicates Eighth Amendment concerns in capital cases. "Although the Supreme Court in *Harper*, *Riggins* and *Sell* addressed due process challenges and not Eighth Amendment claims, the logical inference from these holdings is that subjecting a prisoner to involuntary medication when it is not absolutely necessary or medically appropriate is contrary to the 'evolving standards of decency' that underpin the Eighth Amendment." *Thompson v. Bell*, 580 F.3d 423, 440 (6th Cir. 2009).[58]

a. Mr. Jones Made a Prima Facie Showing That His Federal Constitutional Rights Were Violated When the State Inappropriately and Involuntarily Medicated Him.

Mr. Jones presented evidence in state court that he was prescribed Sinequan, an antidepressant; Haldol, an antipsychotic medication; Cogentin, an anticholinergic medication used to control extrapyramidal disorders caused by neuroleptic drugs; Atarax, an antianxiety medication; and Theodrine, an antiasthmatic. The state court record also demonstrates that Mr. Jones refused medication on a number of occasions and, without any clinical basis, shortly before trial, jail medical staff discontinued his medication but reinstated it the day after his testimony in the guilt phase concluded. Opening Br. at 107-08. Mr. Jones also presented evidence that the improper and inconsistent administration of his medication by county jail medical staff prejudicially interfered with his appearance during trial. Opening Br. at 108. Counsel noted Mr. Jones's fatigue and difficulty responding to the district attorney's questions during cross examination. Ex. 150 at 2733; *see also* Ex. 144 at 2707 (describing Mr. Jones as quite agitated in the guilt

[58] In his opposition, respondent also asserted that "to the extent Petitioner is arguing that he was not permitted to refuse antipsychotic medication, and the evidence demonstrates that without such medication he would have been incompetent to stand trial, his claims fail." Opp. at 62. Mr. Jones did not raise such a claim.

phase and noticing a change in his demeanor during the penalty phase, describing him as "expressionless").

Mr. Jones's allegations before the California Supreme made a prima facie showing that his constitutional rights were violated. State Pet. at 254-61. In *Riggins*, 504 U.S. at 138, the Supreme Court held that the forced administration of antipsychotic medication during trial violated a defendant's right to due process, unless the trial court made findings that the medication was necessary for the sake of the defendant's safety or the safety of others and that there were no other reasonable alternatives available. No such findings were made in Mr. Jones's case. Moreover, Mr. Jones presented substantial evidence that the forced medication as well as the abrupt cessation of the medication during trial had profound effects on his functioning and appearance. The state's unpredictable and abrupt changes in Mr. Jones's medication regimen included the abrupt discontinuation of antipsychotic medications immediately after jail psychiatric staff consulted with a member of the defense team, and the equally abrupt reinstating of these medications immediately following Mr. Jones's testimony in the guilt phase. Opening Br. at 105-08; *see also* Ex. 33 at 640, 663; Ex. 34 at 690; Ex. 154 at 2754.

b. Respondent's Proffered Rationales for the California Supreme Court's Decision Are Unavailing.

1) The California Supreme Court could not reasonably reject the claim based on a theory that Mr. Jones voluntarily took the medication or consented to the inappropriate medication regimen.

In state court, respondent contended that there was no evidence that Mr. Jones "was ever given the medications against his will." Inf. Resp. at 28. Respondent also asserted that Mr. Jones requested the medication. Inf. Resp. at 28. In federal court as well, respondent found it significant that "Petitioner *requested* Haldol." Opp. at 63 (emphasis in original). However, Mr. Jones testified that he

did not specifically request any particular type of medication. 24 RT 3586-87. In fact on June 8, 1993, jail medical records indicate Mr. Jones asked Dr. Kunzman for vitamins, and that Dr. Kunzman determined that Mr. Jones required Atarax for "nerves." Ex. 33 at 648, 670. Respondent's arguments, thus, raise factual disputes that could not have been resolved by the state court without issuing an order to show cause. *See* section II.A.3, *supra*.

In federal court, respondent acknowledges that Dr. Kunzman testified to gaps in Mr. Jones's medication, although Dr. Kunzman could not explain the reason for change in the medication regime. Opp. at 63. Respondent then asserted that nothing in the record shows that Mr. Jones was forced to take medication, having refused them, "as was the case in *Riggins.*" Opp. at 63. This argument would not have provided a legal basis for the state court to reject Mr. Jones's claim, however, because respondent did not raise it in the state court. *See* section II.A.4., *supra*.

Respondent argues that *Riggins* and *Harper* were the only clearly established Supreme Court authority at the relevant time Mr. Jones's conviction became final and because neither addressed the "voluntary ingestion of psychotropic medications" the state court did not unreasonably apply them. Mr. Jones's claim is that he was involuntarily and inappropriately medicated, not that he was voluntarily medicated. Opening Br. at 105-06. Respondent further argued that the California Supreme Court's denial of relief was not inconsistent with *Riggins* or *Harper* because the facts of Mr. Jones's case are significantly different from those cases. Opp. at 64. In *Benson v. Terhune*, 304 F.3d 874 (9th Cir. 2002), the Ninth Circuit did not find distinctions between facts in a habeas petitioner's case and those in *Riggins* as dispositive. That case involved a claim that the defendant's due process rights were violated when she was medicated by jail personnel without "informed consent." The court stated that even if the facts of the case differed from *Riggins*, "the question still remains whether the California court unreasonably

applied *Riggins* and other Supreme Court authority to this new factual situation." *Id.* at 882.[59]

2) The California Supreme Court could not reasonably reject the claim that Mr. Jones was not prejudiced by his appearance and demeanor as observed by the jury.

In state court, respondent asserted that Mr. Jones's claim that the medications "negatively affected his appearance before the jury is speculative and unsupported." Inf. Resp. at 28. In federal court, respondent stated that the only support Mr. Jones offers for this argument "are biased declarations from defense team members." Opp. at 64 (citing to the declarations of trial counsel and the trial paralegal). This argument would not have provided a legal basis for the state court to reject Mr. Jones's claim, however, because respondent did not raise it in the state court. *See* section II.A.4., *supra*. In any event, respondent's attack on the credibility of Mr. Jones's declarants involves weighing evidence and making credibility findings that could not have been resolved by the state court without issuing an order to show cause. *Duvall*, 9 Cal. 4th at 475; *Romero*, 8 Cal. 4th at 742; *see also* section II.A.3., *supra*.

In state court, respondent asserted additionally that "[n]othing indicates that petitioner received an improper dosage of the medications, that that his mental state was impaired rather than improved by the medications, or that the medications adversely rather than beneficially affected his demeanor." Inf. Resp. at 28. In

[59] In *Benson v. Terhune*, the Ninth Circuit reviewed an appeal of denial of a writ of habeas corpus by a prisoner convicted of second-degree murder. Ms. Benson claimed she was medicated with psychotropic and other drugs during trial without her informed consent. Ms. Benson challenged her original conviction on these grounds before the California state courts. The California Supreme Court issued an order to show cause and Judge David Herrick, conducted a ten-day evidentiary hearing in Lake County Superior Court. *Id*. at 879.

federal court, respondent has abandoned most of these arguments, asserting instead that Mr. Jones has not shown that the treatment "was not medically appropriate." Opp. at 64 (citing *Riggins*, 504 U.S. at 135). Respondent is mistaken. At trial, Dr. Kunzman testified that if medication was not properly titrated, an individual "would have slurred speech, would be drowsy, would appear to be stiff, sleepy" or "might demonstrate the paranoia and suspiciousness and may not be able to attend to what is going on and appear to responding [sic] to voices from someplace else." 23 RT 3550. Notwithstanding Dr. Kunzman's testimony regarding the proper titration of medication, jail medical staff, with no apparent clinical basis for the change, abruptly discontinued Mr. Jones's prescription for Haldol and Cogentin from November 2, 1994, until January 24, 1995, the day that Mr. Jones concluded his testimony in the guilt phase of the trial. State Pet. at 255; Ex. 33; Ex. 34. At best, respondent's arguments raise factual disputes that could not have been resolved by the state court without issuing an order to show cause. *Duvall*, 9 Cal. 4th at 475; *Romero*, 8 Cal. 4th at 742; *see also* section II.A.3, *supra*.

3) The California Supreme Court could not reasonably reject the claim based on a theory that the medications did not adversely affected his ability to understand the proceedings or assist in his defense.

Mr. Jones presented evidence in state court that the improper and inconsistent administration of his medication by county jail medical staff prejudicially interfered with his ability to consult with counsel at trial. In state court, respondent asserted that Mr. Jones failed to show that the "medications adversely affected his ability to understand the proceedings or assist in his defense." Inf. Resp. at 29. Respondent correctly abandons this argument in this Court, as Mr. Jones presented evidence in state court that "it was extremely important for someone with Mr. Jones's mental impairments to receive regular and proper medications, particularly to decrease psychotic symptoms as much as

possible. Haldol is a difficult drug to take, and often has significant side effects." Ex. 154 at ¶ 25.

2. Section 2254(d) Is Satisfied by the State Court's Summary Denial of Mr. Jones's Adequately Pled Claim That His Constitutional Rights Were Violated When the State Inappropriately and Involuntarily Medicated Him.

The state court's summary denial of Mr. Jones's claim was both contrary to and an unreasonable application of Supreme Court precedent. As a general matter, the California Supreme Court's refusal to hear Mr. Jones's adequately pled claims of constitutional error is contrary to clearly established federal law that prohibits state courts from creating "unreasonable obstacles" to the resolution of federal constitutional claims that are "plainly and reasonably made." *Davis v. Wechsler*, 263 U.S. at 24-25; *see also* Opening Br. at 7-11. Specifically, in light of Mr. Jones's extensive factual allegations and supporting materials in the state court – which the state court was obligated to accept as true – the state court's ruling that Mr. Jones failed to make any prima facie showing of entitlement to relief is contrary to *Riggins*. As explained in the Opening Brief, Mr. Jones's allegations that his rights were violated by the unwanted and medically inappropriate regimen of drugs he received during trial are "materially indistinguishable" from those set out in *Riggins* and *Sell*, but the state court determined that he did not sufficiently plead a claim for relief. *See, e.g.*, *Williams*, 529 U.S. at 405 (O'Connor, J., concurring). By failing to engage in any fact finding or adversarial proceeding to resolve Mr. Jones's claim, the state court decision also was an unreasonable application of *Riggins* and *Sell*. *See Panetti v. Quarterman*, 551 U.S. 930, 954, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007). To the extent that the state court settled these questions or other factual questions, its decision was an unreasonable determination of facts. *See Hurles v. Ryan*, 650 F.3d 1301, 1312 (9th Cir. 2011).

F. Claim Six: Mr. Jones's Constitutional Rights Were Violated by the Conduct and Rulings of Former Judge George Trammell.

In state court, Mr. Jones alleged that his death sentence and confinement were unlawfully obtained in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights guaranteed by the United States Constitution because the judge who ruled on virtually all of the pretrial motions and empanelled petitioner's jury had a conflict of interest and disabling psychological condition that prevented him from being an unbiased decision-maker. State Pet. at 378-82; Inf. Reply at 355-58. Specifically, former Judge Trammell was tried and convicted in federal court for coercing a defendant to have sex with him in exchange for a more lenient sentence for her husband, conduct which occurred soon after petitioner's trial. Ex. 137 at 2674-80. Judge Trammell's rulings on questions relating to sexual assault, such as his ruling preventing defense counsel from asking jurors whether evidence of a prior sexual assault would cause them automatically to vote for death (2 RT 726-28), casts doubt on the fairness of the proceedings in Mr. Jones's trial. *See Tumey v. State of Ohio*, 273 U.S. 510, 532, 47 S. Ct. 437 (1927). The judge's conduct and impairments denied Mr. Jones access to "a fair trial in a fair tribunal." *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955).

The California Supreme Court's summary denial of this claim was an unreasonable application of controlling federal law because Mr. Jones stated a prima facie case for relief. *See, e.g.*, *Bracy v. Gramley*, 520 U.S. 899, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997) (Constitutional floor established by Due Process Clause of Fourteenth Amendment requires fair trial in fair tribunal before judge with no actual bias against defendant or interest in outcome of his particular case.); *Hurles v. Ryan*, 706 F.3d 1021, 1036-37 (9th Cir. 2013) ("We do not ask whether Judge Hilliard actually harbored subjective bias. Rather, we ask whether the average judge in her position was likely to be neutral or whether there existed an unconstitutional potential for bias." (citing C*aperton v. A.T. Massey Coal Co.,* 556

U.S. 868, 881, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009)); *Harrison v. McBride*, 428 F.3d 652 (7th Cir. 2005) (granting habeas relief on judicial bias claim and holding that the state court's adjudication of the claim was contrary to clearly established federal law where the state court standard required an "undisputed claim of prejudice"); *Franklin v. McCaughtry*, 398 F.3d 955 (7th Cir. 2004) (holding that the state court judicial bias standard is contrary to clearly established federal law and granting habeas relief where judge found to be actually biased).

G. Claim Seven: The Trial Court Violated Mr. Jones's Rights to a Fair Trial by Precluding Inquiry Into Prospective Jurors Biases.

In state court, Mr. Jones alleged that his convictions and sentence of death were rendered in violation of his rights to a fair trial, an impartial jury, and a reliable, rational, and non-arbitrary determination of penalty, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, because the trial court permitted an inadequate and one-sided voir dire of the jurors and failed to ensure that the prospective jurors' biases were revealed. State Pet. at 282-84; Inf. Reply at 261-64. Specifically, the trial court refused to permit trial counsel to ask prospective jurors whether a prior conviction for sexual assault would cause them automatically to vote for death (2 RT 725-26); misstated the law regarding the consideration of mitigating and aggravating evidence (s*ee, e.g.*, 11 RT 2036); and failed to correct misstatements of law offered by trial counsel. *See, e.g.*, 5 RT 1250; 8 RT 1638. The trial court's curtailment of voir dire denied Mr. Jones "a fair trial by a panel of impartial, indifferent jurors." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 1642, 6 L. Ed. 2d 751 (1961). Moreover, it did not enable the court to select an impartial jury or assist counsel in exercising peremptory challenges. *See, e.g.*, *Rosales-Lopez v. United States*, 451 U.S. 182, 188, 101 S. Ct. 1629, 1634, 68 L. Ed. 2d 22 (1981). To determine whether potential jurors should be excused for cause, the trial court must permit sufficient questioning to test the individuals' ability to set aside their personal beliefs and

follow the judge's instructions. *See, e.g.*, *Uttecht v. Brown*, 551 U.S. 1, 20, 127 S. Ct. 2218, 167 L. Ed. 2d 1014 (2007) (directing that a trial court's discretion to grant a challenge for cause is entitled to deference "where [ ] there is lengthy questioning of a prospective juror and the trial court has supervised a diligent and thoughtful voir dire").

The California Supreme Court's summary denial of this claim was an unreasonable application of controlling federal law because Mr. Jones stated a prima facie case for relief. *See, e.g.*, *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (stating "part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors"); *Darbin v. Nourse*, 664 F.2d 1109, 1113 (9th Cir. 1981) ("The trial court must conduct voir dire in a manner that permits the informed exercise of both the peremptory challenge and the challenge for cause. Questions which merely invite an express admission or denial of prejudice are, of course, a necessary part of voir dire because they may elicit responses which will allow the parties to challenge jurors for cause. However, such general inquiries often fail to reveal relationships or interests of the jurors which may cause unconscious or unacknowledged bias. For this reason, a more probing inquiry is usually necessary.").[60]

H. Claim Eight: The Trial Court Violated Mr. Jones's Rights to a Fair and Impartial Jury When It Unreasonably Denied Cause Challenges.

In the state court, Mr. Jones alleged that his death sentence was rendered in violation of the his right to a reliable, rational, non-arbitrary determination of guilt and penalty as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the trial court unreasonably sustained and

[60] Respondent's assertion that merits review of this claim is barred by the procedural default doctrine is foreclosed for the reasons stated in Section III, *supra*.

denied for-cause challenges, thus ensuring a death-prone jury. Specifically, the judge excused prospective jurors Rich and Uzan for cause that were pro-life (9 RT 1792 (prospective juror Rich), 11 RT 2200 (prospective juror Uzan)) and denied for-cause challenges for prospective jurors Labbee and Okamuro who were pro-death (7 RT 1346 (prospective juror Labbee, 7 RT 1460 (prospective juror Okamuro)). The trial judge employed his unique, arbitrary, unreviewable, and wholly unconstitutional method of determining fitness to find that the body language of pro-death prospective jurors indicated their pro-death views would not "substantially impair the performance of [their] duties as a juror in accordance with [their] instructions and [their] oath." *Wainwright v. Witt*, 469 U.S. 412, 433, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985) (internal citation omitted). The trial court's unreasonable decisions were apparent from the prospective jurors' questionnaires and the record on appeal. App. Opening Br. at 35-61; App. Reply Br. at 2-10; State Pet. at 282-84; Inf. Reply at 261-67; II Supp. 7 CT 1827-51, 2003-27; II Supp. 10 CT 2905-29; II Supp. 14 CT 3907-31.

The California Supreme Court did not review Mr. Jones's claim that the trial court employed an incorrect standard in denying the cause challenges for jurors Labbee and Okamuro and failed to employ consistent standards in granting the prosecution's challenges. Fed. Pet at 140-42. This claim was presented in the state petition filed contemporaneously with the federal petition, but Mr. Jones withdrew that petition and the California Supreme Court did not review the claim because respondent expressly waived the exhaustion defense as to all claims in the federal petition. *See* Answer to Petition for Writ of Habeas Corpus, filed April 6, 2010 (Doc. 28) at 2 n.3 (noting that "Respondent is not asserting that any claims in the instant federal Petition are unexhausted"); Response to Application to Defer Informal Briefing on Petition for Writ of Habeas Corpus, filed Mar. 25, 2010, *In re Jones*, California Supreme Court Case No. S180926 at 1 (stating "respondent has examined the federal petition and has determined that all claims therein appear to

be exhausted. . . . Respondent will therefore be filing an answer to the federal petition and will not be asserting that any claims are unexhausted.").[61]

Therefore, review of this claim is not barred by 28 U.S.C. section 2254(d). Section 2254(d) applies only to claims that were "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d); *see also Cullen v. Pinholster*, ___ U.S. ___, 131 S. Ct. 1388, 1398, 179 L. Ed. 2d 557 (2011) (explaining that section 2254(d) applies to claims previously "adjudicated on the merits in state court proceedings") (quoting 28 U.S.C. § 2254(d)); *Harrington v. Richter*, ___ U.S. ___, 131 S. Ct. 770, 780, 178 L. Ed. 2d 624 (2011) (same).

I. Claim Nine: Mr. Jones's Federal Constitutional Rights Were Violated When He Was Held to Answer and Convicted of Crimes for Which There Was Insufficient Evidence.

In state court, Mr. Jones alleged that his death sentence was rendered in violations of his right to a reliable, rational non-arbitrary determination of guilt and penalty as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because he was held to answer and convicted of crimes for which the prosecution failed to marshal sufficient or any evidence of his guilt on key charges and a critical special circumstance. State Pet. at 279-81; Inf. Reply at 252-60. Specifically, Mr. Jones was charged with the crimes of murder, rape, burglary, and robbery, as well as special circumstance allegations of rape, burglary, and robbery. 1 CT 91-92. At the preliminary hearing on December 10, 1992, counsel successfully argued to have the rape and burglary special circumstance allegations struck. 1 CT 84. On September 1, 1993, the prosecution filed an amended information, re-charging the murder, with the rape, burglary, and robbery special circumstance allegations, as well as separate charges of rape,

[61] Thus, respondent's assertion of non-exhaustion in the Opposition is foreclosed. Opp. at 71.

robbery, and burglary. 1 CT 98-102. Despite the earlier ruling, trial counsel's motion to strike the information was denied by Judge Trammell. 1 RT 521-22. The prosecution relied on three facts to prove the victim was raped: (1) that Mr. Jones's semen was found inside her; (2) her wrists and ankles were bound; and (3) her lower body and torso was exposed. Inf. Reply at 255. In light of the totality of the evidence that the sexual assault occurred post-mortem, the mere presence of semen found inside the victim was insufficient to prove non-consensual sexual intercourse. Inf. Reply at 256-60; Ex. 171 at 3038 (no evidence of hemorrhaging or bruising to the victim's wrists); Ex. 171 at 3038 (no evidence of disturbance on skin at the site of ankle bindings); 17 RT 2777-78 (evidence victim was stabbed prior to nightgown being pulled up.). Thus the record evidence in Mr. Jones's case could not "reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979).

The California Supreme Court's summary denial of this claim was an unreasonable application of controlling federal law because Mr. Jones stated a prima facie case for relief. *See, e.g.*, *Juan H. v. Allen*, 408 F.3d 1262, 1277-79 (9th Cir. 2005) (evidence is insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the state's case), *see also Briceno v. Scribner,* 555 F.3d 1069, 1079 (9th Cir. 2009) (evidence insufficient to support a verdict where there is a "total failure of proof of the requisite specific intent").[62]

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[62] Respondent's assertion that merits review of this claim is barred by the procedural default doctrine is foreclosed for the reasons stated in Section III, *supra*.

Respondent's reliance on the purported procedural default based on *In re Lindley*, 29 Cal. 2d 709, 723, 177 P.2d 918 (1947), also is unavailing in light of the state-court application of the bar in this case. Although the Ninth Circuit has found, generally, that this bar is an independent and adequate state ground on which procedural default can be based, *see Carter v. Giurbino*, 385 F.3d 1194,

continued…

J. Claim Ten: Mr. Jones's Constitutional Rights Were Violated by the Introduction of Propensity Evidence During the Guilt Phase.

In state court, Mr. Jones alleged that his death sentence was rendered in violation of his right to a reliable, rational non-arbitrary determination of guilt and penalty as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because (1) the trial court erroneously admitted facts and circumstances surrounding Mr. Jones's prior rape conviction; and (2) the prosecutor used the evidence of the prior crime as improper propensity evidence to impermissibly alleviate the burden of proof on the state for the felony-murder charge and rape special circumstance. State Pet. at 54-65; Inf. Reply at 26-53. Specifically, the prosecutor argued that the 1986 prior crime and the capital crime were unique, distinctive crimes and admissible as identity, intent, and a common plan or scheme pursuant to California Evidence Code section 1101(b). 1 RT 681-82. Over Mr. Jones's objection, the court concluded that the 1986 crime was relevant to intent, common plan and design, and identity, but reserved ruling on whether to exclude it based on Evidence Code section 352. 1 RT 688; *see also* 14 RT 2377. When the trial court later refused to rule on the admissibility of the 1986 crime, trial counsel withdrew his objection. 14 RT 2382-83.

The 1986 prior crime involving Mrs. Harris demonstrated a chaotic and

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1196 (9th Cir. 2004), the application of the bar in this case demonstrates that the state-court application is unclear and inconsistent. In addition to citing these grounds to bar the claim, the California Supreme Court also denied the claim on the merits. Reviewing the claim on the merits signals that the state court, at least in some unknown circumstances, permits the filing of insufficiency claims on habeas corpus. Because California law does not clarify when or how such a filing is allowed, the bar is not sufficiently clear and regularly applied to constitute an adequate bar to federal review. Accordingly, the claim that the evidence against Mr. Jones was insufficient to sustain a conviction should not be dismissed as procedurally defaulted.

disturbed series of events, and evidenced Mr. Jones's inability to plan due to the symptoms of his mental illness, thus negating a common scheme or plan with the capital crime. *See* Ex. 8 at 88; Ex. 14 at 137; Ex. 104 at 2177, 2184; Ex. 178 at 3147; Inf. Reply at 34-36. The plan or scheme supposedly represented by the prior crime was not sufficiently similar to the facts of the capitally charged crime to be probative of the disputed issues at trial, including, among other things, Mr. Jones's friendly relationship with Mrs. Miller, and his being invited into Mrs. Miller's home. *See* 26 RT 3904; *see also* Inf. Reply at 32-33. The prior crime was not probative on the issue of whether petitioner did, or could have, formed the specific intent required for the counts charged in his capital trial. Inf. Reply at 36-39. Nor was it probative of motive (1 RT 688) and identity was not in issue (1 RT 686). Thus, the prior crimes evidence was irrelevant and its admission highly prejudicial; thereby rendering Mr. Jones's trial fundamentally unfair. *See Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

The California Supreme Court's summary denial of this claim was an unreasonable application of controlling federal law because Mr. Jones stated a prima facie case for relief. *See, e.g.*, *McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993) (defendant's possession of and fascination with knives did not support any permissible inference relevant to defendant's prosecution for the stabbing-murder of his mother, and violated due process); *Leavitt v. Arave*, 383 F.3d 809, 829 (9th Cir. 2004) (evidence of unconnected prior crimes is inadmissible if the only purpose is to show bad character or propensity to commit crimes.).[63]

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[63] Respondent's assertion that merits review of this claim is barred by the procedural default doctrine is foreclosed for the reasons stated in Section III, *supra*. To the extent that trial counsel waived this claim at trial, Mr. Jones presented a prima facie claim of ineffective assistance of counsel based on trial

continued…

K. Claim Eleven: Mr. Jones Was Deprived of the Right to Present a Defense When the Trial Court Refused to Permit Him to Testify About His Mental Health History.

In Claim Eleven, Mr. Jones alleged that the trial court unconstitutionally deprived him of his right to present a defense and testify in his own defense by denying him the right to testify on his own behalf and provide testimony in support of his defense that he was unable to form the specific intent for the crimes charged. Fed. Pet. at 154-61. Mr. Jones presented this claim to the state court on direct appeal. App. Opening Br. at 109-25; App. Reply Br. at 40-44.

1. Mr. Jones Established His Entitlement to Relief in the California Supreme Court.

"The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution." *Rock v. Arkansas*, 483 U.S. 44, 51, 107 S. Ct. 2704, 2708-09, 97 L. Ed. 2d 37 (1987). "It is one of the rights that 'are essential to due process of law in a fair adversary process.'" *Id*. at 51 (citing *Faretta v. California*, 422 U.S. 806, 819, n.15, 95 S. Ct. 2525, 2533 n.15, 45 L. Ed. 2d 562 (1975)). The right is further guaranteed by the Compulsory Process Clause of the Sixth Amendment and is a "necessary corollary" to the Fifth Amendment's guarantee against compelled testimony. *Rock*, 483 U.S. at 52-53. The United States Supreme Court has repeatedly held that this right cannot be arbitrarily abridged by state rules of evidence. *Id.* at 55; *Chambers v. Mississippi*, 410 U.S. 284, 290, 296-303, 93 S. Ct 1038, 35 L. Ed. 2d 297 (1973) (explaining that few rights are more fundamental than that of an accused to present witnesses in his own defense and that the hearsay rule and other state evidentiary rules cannot "be applied mechanistically to defeat the ends of justice"). Moreover, the right to offer

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counsel's unreasonable and prejudicial withdrawal of his objection to this evidence at trial.

the testimony of witnesses "is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense." *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019 (1967). The standard applicable to the state court's review of prejudice flowing was whether the court could "declare a belief that [the federal constitutional error] was harmless before a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705 (1967); *see also Cudjo v. Ayers*, 698 F.3d 752, 768 (9th Cir. 2012) (explaining that the *Chapman* harmless error standard is applicable on direct review).

During the guilt phase of the trial, Mr. Jones testified about his recollections of the night of the capital crime and provided testimony about the severe and debilitating mental health symptoms he suffered on the night of the offense. *See* App. Opening Br. at 109-15. He further sought to introduce testimony about his prior mental health history, which included hallucinations, psychiatric treatment in prison, flashbacks, blackouts, dizzy spells, and night screaming, to support his mental state defense. App. Opening Br. at 109-15; *see also* 22 RT 3347-69. The prosecution objected on the grounds of relevance and lack of foundation, arguing that such testimony was only admissible if presented through the testimony of a mental health professional. 22 RT 3349. Trial counsel requested a hearing[64] outside of the jury's presence, which the court held. 22 RT 3353-59. Trial counsel

[64] Appellant's Opening Brief contains a typographical error, labeling the hearing outside the jurors' presence as an "evidentiary hearing." App. Opening Br. at 111. No evidence was taken and no witnesses testified during the hearing; the court heard only argument. 22 RT 3352-59.

explained that he intended to introduce the testimony in support of a mental state defense. 22 RT 3353. The prosecutor argued that the testimony "about a history of hearing voices, of family history and things of that nature" was irrelevant without the testimony of a psychiatrist to explain the significance of such testimony to the jury. 22 RT 3355. Trial counsel explained that he did not seek to have Mr. Jones offer a diagnosis of his own mental illness, but rather to testify about the symptoms of mental illness he has suffered. 22 RT 3357. The prosecutor argued that such testimony was not relevant to "how [Mr. Jones] was feeling the night of the incident," and reiterated his argument that such testimony could not be elicited without the testimony of a psychiatrist to explain the significance of the testimony to the jury. 22 RT 3357-58. Based upon trial counsel's representation that he did not intend to call a mental health expert to testify about psychiatric symptoms Mr. Jones experienced throughout his life, the court excluded Mr. Jones's proffered testimony. 22 RT 3358-59; *see also People v. Jones*, 29 Cal. 4th 1229, 1253, 131 Cal. Rptr. 2d 468 (2003).

As Mr. Jones presented to the California Supreme Court in the automatic appeal, the trial court's exclusion of Mr. Jones's testimony arbitrarily abridged Mr. Jones's rights to testify and to present a defense. *See, e,g., Rock*, 483 U.S. at 55; *Chambers*, 410 U.S. at 290. The portions of Mr. Jones's testimony that the trial court excluded were relevant and probative on the issue of Mr. Jones's mental state at the time of the crime, a central issue in the case. *See, e.g.*, 26 RT 3922 (trial counsel arguing that "This whole case really depends on what is going on in someone's mind because the mental states are the most important things in this case."); *see also* 26 RT 3888-89 (prosecutor arguing that the mental state required to prove first-degree murder is express malice aforethought or willful, deliberate, and premeditated); 26 RT 3889 (prosecutor arguing that Mr. Jones had the specific intent to kill); 26 RT 3891 (prosecutor arguing that Mr. Jones acted "willfully, deliberately, and premeditatedly"); 26 RT 3892-94 (prosecutor explaining that

felony-murder requires a specific intent to rape, rob or steal). It is well-settled that "[u]nder California law, a criminal defendant is allowed to introduce evidence of the existence of a mental disease, defect, or disorder as a way of showing that he did not have the specific intent for the crime." *Patterson v. Gomez*, 223 F.3d 959, 965 (9th Cir. 2000); *see also People v. Hernandez*, 22 Cal. 4th 512, 520, 93 Cal. Rptr. 2d 509, 514 (2000) (explaining that a defendant may present evidence at the guilt phase to show that he lacked the mental state required to commit the charged crime); Cal. Penal Code § 28 (evidence mental disease, defect, or disorder is admissible "on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought."). That is, under California law, evidence of a defendant's prior mental health symptoms are expressly admissible to demonstrate mental disease, defect, or disorder, and such evidence is expressly admissible on the issue of mental state. This is so because "[t]he right of an accused in a criminal trial to due process is, in essence the right to a fair opportunity to defend against the State's accusations," *Chambers*, 410 U.S. at 294, and the state's burden of proof at the guilt phase included proof of Mr. Jones's mental state at the time of the crime.

The opportunity to present a complete defense that includes testimony by a defendant regarding his mental state "would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on [this issue] when such evidence is central to the defendant's [guilt phase] claim." *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 2147, 90 L. Ed. 2d 636 (1986). Mr. Jones's proffered testimony would have constituted competent, reliable evidence bearing on his mental illness, an issue central to his guilt phase defense. The exclusion of Mr. Jones's testimony on the ground that such testimony was not relevant unless preceded by testimony and a diagnosis from a mental health professional arbitrarily deprived Mr. Jones of his right to present a complete defense and his right to testify. Similarly, exclusion of such testimony on the arbitrary ground that it was

not relevant because Mr. Jones did not testify to hearing voices telling him to attack Mrs. Miller constituted an arbitrary deprivation of Mr. Jones's due process rights. Due process commands that "[j]ust as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony." *Rock*, 483 U.S. at 55. Because the excluded testimony was highly relevant to a critical issue in the guilt phase of the trial, regardless of whether the proffered testimony was admissible without an expert laying a foundation, its exclusion constituted a violation of due process. *See, e.g.*, *Green v. Georgia*, 442 U.S. 95, 95-97, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979). As the United States Supreme Court has recognized, foundation requirements "'may not be applied mechanistically to defeat the ends of justice.'" *Green*, 442 U.S. at 97 (quoting *Chambers*, 410 U.S. at 302).

The resultant prejudice is clear: the jury was deprived of information about Mr. Jones's mental state at the time of the crime, an error that cannot be said to be harmless beyond a reasonable doubt. Had Mr. Jones been permitted to corroborate his own testimony about his psychiatric symptoms on the night of the crime with testimony about his past mental health symptoms, the testimony would have set what appeared to be an isolated occurrence against the reality of what was, in fact, Mr. Jones's deteriorating mental illness. Without such corroboration, Mr. Jones's testimony that he blacked out on the night of the murder was likely viewed by the jury as self-serving; had they heard, however, that Mr. Jones had dissociated at other time of extreme stress throughout his life, it would have added to his credibility. *See, e.g.*, Ex. 140 at 2694 (hearing about the flashbacks occurring throughout Mr. Jones's life may have made a difference to the jury). Similarly, had the jury heard of Mr. Jones's prior history of hallucinations co-occurring with dissociative episodes, they would have given weight to his testimony that this was not a onetime occurrence and understood his mental state at the time of the crime.

See, e.g., Ex. 138 at 2690 (jury did not have a clue why Mr. Jones would have done such a thing); Ex. 9 at 94 (jury was "left still wondering why Mr. Jones had done the things he did."); *see also* Ex. 178 at 3142-50 (describing Mr. Jones's debilitating mental impairments and deteriorating mental state leading up to the crime, and how, at the time of the crime, his psychiatric symptoms prevented him from being able to modulate his behavior and resulted in spontaneous actions that involved no conscious thought that were the product of his distorted and impaired worldview and delusional thinking).

2. The State Court Decision.

The relevant decision in state court is the opinion on direct appeal. *People v. Jones*, 29 Cal. 4th 1229, 1253, 131 Cal. Rptr. 2d 468 (2003). The state court affirmed the trial court's ruling, concluding that "[t]here was no error," in the state court's exclusion of Mr. Jones's proffered testimony. *Id*. at 1253. As described above, the trial court excluded Mr. Jones's proffered testimony on the ground that, without any foundational testimony from a mental health professional, the testimony was irrelevant. *Id.* In addition, the state court concluded that because Mr. Jones testified he experienced auditory hallucinations after the offense, not that the voices told him to commit the offense, any prior history of hearing voices would have been irrelevant to his mental state.[65] *Id.*

Thereafter, the state court concluded, without any legal citation, that "any error . . . was harmless." *Id*. at 1253. Citing Respondent's Brief, the state court

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[65] The concurring state court opinion suggests that the majority "relies on a different ground than the trial court" in holding that the trial court properly excluded Mr. Jones's testimony. *Jones*, 29 Cal. 4th at 1268 (Kennard, J., concurring). The majority does not, however, eschew the trial court's holding; indeed, it recites the trial court's holding just before concluding, "There was no error." *Id*. at 1253. It follows that the state court adopted the trial court's reasoning as valid. Accordingly, Mr. Jones addresses both reasons in analyzing the state court decision.

concludes that court-appointed psychiatrist Claudewell Thomas, M.D., who was called by the defense to testify in the penalty phase of Mr. Jones's trial, "should have been aware" of any history of flashbacks and blackouts if such a history existed. *Id*. The state court concluded, "[T]he fact that Dr. Thomas, when called by the defense in the penalty phase, failed to mention any such history suggests that defendant's proposed testimony concerning such a history would have been a recent fabrication." *Id.*

3. Section 2254 Does Not Bar Relief on This Claim.

Section 2254(d) applies only to claims that were "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d); *see also Cullen v. Pinholster*, ___ U.S. ___, 131 S. Ct. 1388, 1398, 179 L. Ed. 2d 557 (2011) (explaining that section 2254(d) applies to claims previously "adjudicated on the merits in State court proceedings") (quoting 28 U.S.C. § 2254(d)); *Harrington v. Richter*, ___ U.S. ___, 131 S. Ct. 770, 780, 178 L. Ed. 2d 624 (2011) (same). Respondent acknowledges that the state court did not explicitly address Mr. Jones's federal constitutional claim that the exclusion of this testimony violated his right to present a defense. Opp. at 87; *see also Jones*, 29 Cal. 4th at 1252-53. Respondent is correct that, under these circumstances, the presumption arises that the state court denied the federal constitutional claim on the merits. Opp. at 87-88; *Johnson v. Williams*, 133 S. Ct. 1088, 1094-95, 185 L. Ed. 2d 105 (2013). Critically, however, where–as here–the state standard is less protective than the federal standard, the presumption that the state court adjudicated the federal claim on the merits may be rebutted. *Williams*, 133 S. Ct. at 1096.

The state court has long applied a standard far less protective than the federal standard, holding that the ordinary rules of evidence simply do not impermissibly infringe on the accused's right to present a defense. *Compare People v. Hall*, 41 Cal. 3d 826, 834, 226 Cal. Rptr. 112 (1986) ("As a general matter, the ordinary rules of evidence do not impermissibly infringe on the

accused's right to present a defense."); *People v. Mincey*, 2 Cal. 4th 408, 440, 827 P.2d 388, 6 Cal. Rptr. 2d 822 (1992) ("Application of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense."), *and People v. Fudge*, 7 Cal. 4th 1075, 1102-03, 31 Cal. Rptr. 2d 321 (1994) (same), *with Rock*, 483 U.S. at 55 (holding that a state "may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony."). In *Fudge*, the state court concluded that the issue presented by petitioner–the trial court's rulings limiting petitioner's right to present a defense–did not implicate federal constitutional principles, but was at most an error of state law. *Fudge*, 7 Cal. 4th at 1102-03. The state court went on to expressly decline to adjudicate the question of prejudice under federal law. *Fudge*, 7 Cal. 4th at 1103 (explicitly declining to apply the *Chapman* harmless error standard and instead adopting the less protective state law standard of prejudice as set forth in *People v. Watson*, 46 Cal. 2d 818, 836, 299 P.2d 243 (1956)); *see also Watson*, 46 Cal. 2d at 836 (adopting a standard that a miscarriage of justice should be declared only when the court, after an examination of the entire cause, is of the opinion that it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error").

Because courts are presumed to apply already decided legal principles and precedents when those principles and precedents predate the events on which the dispute turns, *see, e.g.*, *Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991); *see also* section II.C, *supra*, there is a presumption that the state court applied this existing state precedent to its evaluation of this claim. This presumption is further supported by the fact that the state court's opinion in this regard cites Respondent's Brief in support of its conclusion. *Jones*, 29 Cal. 4th at 1253 (beginning the prejudice analysis with the phrase, "As the Attorney General points out, . . ."). The state court opinion mirrors

Respondent's Brief, *compare* Resp. Br. at 84-85, *with Jones*, 29 Cal. 4th at 1253, which, in turn, cites existing state law rejecting the harmless error standard set forth in *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 282, 17 L. Ed. 2d 705 (1967), and adopting a more forgiving "reasonable probability" standard. Resp. Br. at 84-85 (citing *Fudge*, 7 Cal. 4th at 1102-03; *Watson*, 46 Cal. 2d at 836); *see also Richter*, 131 S. Ct. at 786 (explaining that § 2254(d) requires a habeas court to determine "what arguments or theories supported or . . . could have supported, the state court's decision.").

It is clear from the state court record that the arguments or theories that supported or could have supported the state court's decision are rooted in state law, not established federal law. The state court therefore did not adjudicate this claim the merits, and this Court may conduct the prejudice analysis de novo. *See Porter v. McCollum*, 558 U.S. 30, 130 S. Ct. 447, 452, 175 L. Ed. 2d 398 (2009) (holding that the state court's failure to decide whether Porter's counsel was deficient required court to review that element of petitioner's *Strickland* claim de novo); *Rompilla v. Beard*, 545 U.S. 374, 390, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) (same holding with respect to state court's failure to decide question of prejudice).

To the extent this Court concludes that the claim was adjudicated on the merits, Mr. Jones nevertheless satisfies § 2254(d) for the reasons below.

a. Section 2254(d)(1) Is Satisfied.

Mr. Jones satisfies section 2254(d)(1) for several reasons. First, to the extent this Court concludes that the state court applied the correct governing law, the state court's decision constituted an unreasonable application of clearly established federal law and was an "unreasonable refus[al] to extend . . . [a] principle to a new context where it should apply." *Williams (Terry) v. Taylor*, 529 U.S. 362, 407, 120

S. Ct. 1495, 1520, 146 L. Ed. 2d 389 (2000).[66] As set forth in detail above, *Rock*, *Chambers*, *Crane*, and *Washington* are directly applicable and command the conclusion that the trial court's exclusion of Mr. Jones's proffered testimony violated Mr. Jones's due process rights. *See Greene v. Lambert*, 288 F.3d 1081, 1091-92 (9th Cir. 2002) (holding that the trial court's preclusion of testimony by petitioner and the victim regarding petitioner's dissociative identity disorder "impermissibly curtailed Petitioner's right to tell his own story [and] . . . state of mind at the time of the attack" and concluding that the state court unreasonably applied *Rock* and *Washington*).

As explained above, there is ample evidence to support the conclusion that the state court applied its settled precedent, which is contrary to controlling federal authority. The state court's application of its precedent that a proper application of "ordinary rules of evidence" do not "impermissibly infringe on a defendant's right to present a defense;" that trial court error excluding testimony does not rise to the level of federal constitutional error; and that the appropriate prejudice test is one of reasonable probability, *Fudge*, 7 Cal. 4th at 1102-03, clearly contradicted controlling Supreme Court authority. The state court's "mistakes in reasoning" and "wrong legal rule or framework," *Frantz v. Hazey*, 533 F.3d 724, 734 (9th Cir 2008) (en banc), rendered the state court's decision "contrary to" clearly established federal law. *See Williams (Terry)*, 529 U.S. at 405 (holding state court's decision is contrary to clearly established federal law if it applies a rule that contradicts governing law); *Paulino v. Harrison*, 542 F.3d 692, 695 n.2 (9th Cir.

[66] A reviewing court need not wait for some nearly identical factual pattern before holding that a clearly established rule must be applied to a new context. *See, e.g.*, *Panetti v. Quarterman*, 551 U.S. 930, 953, 127 S. Ct. 2842, 2858, 168 L. Ed. 2d 662 (2007); *Carey v. Musladin*, 549 U.S. 70, 81, 127 S. Ct. 649, 656, 166 L. Ed. 2d 482 (2006) (Kennedy, J., concurring); *McQuillion v. Duncan*, 306 F.3d 895, 901 (9th Cir. 2002); *Bradley v. Duncan*, 315 F.3d 1091, 1101 (9th Cir. 2002).

2008) (confirming that the state court's use of the incorrect standard in evaluating a *Batson* challenge rendered the state court decision contrary to controlling federal law); *Goodman v. Bertrand*, 467 F.3d 1022, 1028 (7th Cir. 2006) (setting forth the wrong legal framework is "[o]ne of the most obvious ways a state court may render a decision 'contrary to' the Supreme Court's precedents").

In addition, the state court's application of its prejudice test resulted in it failing to reach the question of prejudice for federal constitutional error. This also renders the state court's decision contrary to clearly established federal law. *Cudjo*, 698 F.3d at 768 (holding that the California Supreme Court's application of the more lenient "reasonably probable" harmless error standard it applies to cases involving claims of abrogation of a defendant's right to present a defense is contrary to clearly established federal law and thus satisfies § 2254(d)(1)); *see also Williams*, 529 U.S. at 406 (explaining that a state court's application of a rule requiring the petitioner to meet a higher prejudice burden than the prejudice test set forth in clearly established Supreme Court prejudice would be "contrary to" clearly established federal law).

b. Section 2254(d)(2) Is Satisfied.

The state court made unreasonable determinations of the facts in reaching its holding; consequently, Mr. Jones satisfies section 2254(d)(2). The state court's conclusion that because Mr. Jones did not testify that he heard voices telling him to attack Mrs. Miller and instead only testified that he heard voices after the offense, any prior history of voices was irrelevant, *Jones*, 29 Cal. 4th at 1253, is flawed for several reasons. Preliminarily, it bears emphasis that at no point during the hearing in the trial court did the trial court require Mr. Jones to demonstrate that he heard voices before the crime to make his history of auditory hallucinations relevant. Rather, the trial court abrogated Mr. Jones's right to testify about his history of auditory hallucinations because trial counsel did not intend to present an expert to support his proffered testimony. Mr. Jones, consequently, had no notice that he

should make such a proffer to the court. For the state court to reach its conclusion that Mr. Jones did not experience auditory hallucinations before the offense on these grounds was therefore an unreasonable determination of the facts. A "state court determination of factual issues not supported by the record, without an evidentiary hearing on those issues, is per se unreasonable."[67] *Lor v. Felker*, No. CIV S-08-2985 GEB, 2012 WL 1604519, *11 (E.D. Cal. May 7, 2012). Moreover, the state court's opinion does not address the remaining information Mr. Jones wished to present, including testimony about flashbacks and blackouts. Mr. Jones testified that he blacked out and experienced a flashback immediately prior to the offense, 22 RT 3335-37, so following the state court's logic regarding the Mr. Jones's auditory hallucinations, Mr. Jones's proffered testimony about his prior history of flashbacks and blackouts would have been relevant, and the trial court's exclusion therefore violated Mr. Jones's rights to present a defense and testify. The flaws that render the state court's fact-finding process unreasonable are two-fold: the state court's finding is "unsupported by sufficient evidence," and, regarding the testimony about flashbacks and blackouts, "no finding was made by the state court at all." *Taylor v. Maddox*, 366 F.3d 992, 999-1000 (9th Cir. 2004).

Additionally, in its evaluation of the prejudice flowing from any error in the trial court's abridgement of Mr. Jones's right to testify, the state court concluded:

> Dr. Thomas, the court-appointed psychiatrist, interviewed defendant at least three times, and he reviewed reports on defendant's background prepared by defendant's relatives, as well as the reports of numerous experts who had examined defendant. Therefore, if

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[67] Had the trial court made this inquiry, or had the state court held an evidentiary hearing to make this factual determination, it would have learned that Mr. Jones did indeed enter a trance-like, dissociative state before he entered Mrs. Harris' house, and, as he stood outside the house, "[v]oices told him to go forward." Ex. 178 at ¶ 161.

> defendant had a history of flashbacks and blackouts, Dr. Thomas should have been aware of it. Accordingly, the fact that Dr. Thomas, when called by the defense in the penalty phase, failed to mention any such history suggests that defendant's proposed testimony concerning such a history would have been a recent fabrication.

Jones, at 29 Cal. 4th at 1253. Neither respondent nor the state court cited to any evidence in the record to support the state court's conclusion that Mr. Jones's proposed testimony would have been a recent fabrication or that Dr. Thomas should have been aware of Mr. Jones's history of flashbacks and blackouts merely because he interviewed Mr. Jones and reviewed reports. The state court, however, ignored two key facts. First, the state court ignored the fact that Dr. Thomas was a *penalty phase* expert, and thus his testimony has no bearing on Mr. Jones's proffered *guilt phase* testimony. *See Jones*, 29 Cal. 4th at 1269 (Kennard, J., concurring). The state court's conclusions in this regard reflect a plain misapprehension of the record, and because "the misapprehension goes to a material factual issue that is central to [Mr. Jones's] claim, that misapprehension . . . fatally undermine[d] the fact-finding process, rendering the resulting factual finding unreasonable." *Taylor*, 336 F.3d at 1001. Second, there is, in fact, no evidence in the state court record to support the conclusion that Dr. Thomas should have been aware of Mr. Jones's history after brief interviews and review of reports provided by trial counsel: the record before the state court on direct appeal did not reveal the content of those interviews or reports, nor did it reveal the nature of Dr. Thomas' communications with trial counsel.[68] The state court's denial rests on an

[68] Indeed, the record before the state court in post-conviction demonstrates that the state court's factual determination was incorrect and underscore the need for the state court to hold a hearing before determining factual issues not supported by the record. Dr. Thomas did not have knowledge of Mr. Jones's history of flashbacks and dissociation as a consequence of trial counsel's

continued…

unreasonable determination of the facts; the state court's failure to hold a hearing before engaging in this fact-finding renders its decision per se unreasonable. *See Lor*, 2012 WL 1604519, at *11.[69] "Where a state court makes factual findings without an evidentiary hearing or other opportunity for the petitioner to present

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ineffectiveness. Ex. 154 at 2752-53 (Dr. Thomas explaining that Mr. Jones's legal team neglected to inform Dr. Thomas about Mr. Jones's recollections of flashbacks and explaining that had he been asked to do so, he would have evaluated Mr. Jones in light of this information); *id*. at 2758 (Dr. Thomas explaining that he was not provided with a complete account of a critical family event or its long-lasting effects on Mr. Jones, which was critical to a complete understanding of his behavior and functioning); *see also* Claim Sixteen, *infra*. Moreover, numerous declarations refute the state court's conclusion that Mr. Jones's testimony about his history of mental health symptoms flashbacks and blackouts would have been a recent fabrication. *See, e.g.*, Ex. 178 at 3118-19, 3129, 3137, 3144, 3145-46, 3148-49, 3152-56; Ex. 124 at 2508, 2509, 2529-30, 2539-40, 2544 (describing Mr. Jones's history of hallucinations, sleep disturbances, dissociation, and disorganized thinking); Ex. 16 at 146-48, 168 (describing history of dissociation, hallucinations, altered states of consciousness, and sleep disturbances); Ex. 131 at 2609-10 (describing history of mood changes and altered states of consciousness/blackouts); Ex. 14 at 137 (describing Mr. Jones's history of decompensation, mood changes, altered affect, and "hearing . . . voices"); Ex. 10 at 99-100 (describing history of dissociation, paranoia, disorganized thinking, depression, suicidality, delusions, auditory hallucinations, and disorganized thinking); Ex. 21 at 227 (describing Mr. Jones as "literally talking nonsense" and exhibiting symptoms of depression and psychosis). Had the state court held an evidentiary hearing–as is required for AEDPA deference under these circumstances, *see, e.g. Lor*, 2012 WL 1604519, at *11–Mr. Jones would have presented then the facts he presented to the state court in post-conviction that demonstrate conclusively that Mr. Jones had a long history of flashbacks and blackouts and that his testimony would not have been a recent fabrication.

[69] Moreover, Supreme Court precedent makes clear that questions of credibility are for the jury to decide, *see, e.g.*, *United States v. Bailey*, 444 U.S. 394, 414, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980); accordingly, the state court's conclusion that any error was harmless because evidence suggests that Mr. Jones's testimony would have been a recent fabrication is irrelevant.

evidence, 'the fact-finding process itself is deficient' and not entitled to deference." *Hurles v. Ryan*, 706 F.3d 1021, 1038 (9th Cir. 2013) (quoting *Taylor*, 366 F.3d at 1001); *see also Perez v. Rosario,* 459 F.3d 943, 950 (9th Cir. 2006) ("In many circumstances, a state court's determination of the facts without an evidentiary hearing creates a presumption of unreasonableness.") (citing *Taylor,* 366 F.3d at 1000); *Nunes v. Mueller,* 350 F.3d 1045, 1055 (9th Cir. 2003) ("But with the state court having refused [the petitioner] an evidentiary hearing, we need not of course defer to the state court's factual findings–if that is indeed how those stated findings should be characterized–when they were made without such a hearing.").

Accordingly, the state court decision satisfies the provisions of sections 2254(d)(1) and (2), and there is no prohibition in the AEDPA to this Court reviewing Mr. Jones's claim de novo and granting relief.

L. Claim Twelve: The Guilt Phase Instructions Were Inaccurate, Incomplete, and Conflicting, in Violation of Mr. Jones Constitutional Rights.

In state court, Mr. Jones alleged that his convictions were unconstitutional because of flaws in jury instructions and verdict forms provided to the jury at the guilt phase of Mr. Jones's trial. State Pet. at 285-89; Inf. Reply at 268-75.

As discussed in argument concerning Claim Ten, *supra*, there was no permissible basis on which to allow the admission of prior-crime evidence. Having erred by admitting the prior-crime evidence, the trial court compounded the error by instructing the jury in a manner that failed to limit the use of the evidence. The trial court instructed the jurors, using CALJIC Instruction 2.50, that they were permitted to consider the prior crimes evidence in determining the issues of intent, identity, motive, and common plan or scheme. 26 RT 3830-32. At the time that the jury received the instructions, there was no disputed issue as to identity in the case, and the trial court never determined that the evidence was relevant to the issue of motive. 1 RT 688. Moreover, as discussed above, the prior crimes evidence was

not relevant to the resolution of *any* of these four issues. The instruction therefore was improperly given. This error was exacerbated by the court's elimination of a critical sentence from the end of the form instruction: "You're not permitted to consider such evidence for any other purpose." 26 RT 3831-32; CALJIC No. 2.50 (5th ed. 1988).

The California Supreme Court's summary denial of this claim of error amounts to an unreasonable application of clearly established federal law. Although the instruction in Mr. Jones's case – like the instruction in *Estelle v. McGuire*, 502 U.S. 62, 67 n.1, 75, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) – directed the jury not to consider the prior-crime evidence to prove bad character or a disposition to commit crimes, the inclusion of the above-noted irrelevant language on intent and motive introduced a reasonable likelihood that the jury would understand the instruction to allow for the prior-crime evidence to be as "propensity evidence" – infusing Mr. Jones's trial with unfairness as to deny him due process of law. This "reasonable likelihood" also is buttressed by the trial court's deletion of the limiting language at the end of the model instruction (*i.e.*, "You are not permitted to consider such evidence for any other purpose."), which was part of the instruction upheld by the Supreme Court in *Estelle v. McGuire*. *Compare Estelle v. McGuire*, 502 U.S. at 67 n.1 *with* 2 CT 270.

This constitutionally unacceptable instruction had a substantial and injurious effect or influence on the jury's determination of the verdicts. As discussed more fully in argument concerning Claim Ten, *supra*, the jury heard emotional, inflammatory testimony directly from the sixty-two year-old victim of the attack, Ms. Harris, who described for the jury in graphic detail how Mr. Jones choked and struck her, causing her nose to bleed, raped and sodomized her, and how she feared him. 20 RT 3164, 3167-70. It was apparent to the jurors that Ms. Harris was still frightened of Mr. Jones while she testified, and the jurors were heavily swayed by her testimony. Ex. 23 at 239; Ex. 139 at 2693. The prosecutor repeatedly

referenced the prior crime throughout his closing arguments, including mentioning the irrelevant identity issue. *See, e.g.*, 26 RT 3891, 3901, 3902, 3906; 27 RT 3969, 3976, 3977, 3978, 3991, 3992. Moreover, the prosecution's evidence on the disputed issues in the case was weak in the absence of the prior-crime evidence, and the jury only returned guilty verdicts on the rape charge and the related rape-murder special circumstance (not the robbery and burglary charges and special circumstances). Thus, section 2254(d) does not bar relief of Mr. Jones's claim.

M. Claim Thirteen: Unreliable DNA Evidence Unconstitutionally Affected the Jury's Verdicts.

In state court, Mr. Jones alleged that his death sentence was rendered in violation of his right to a reliable, rational non-arbitrary determination of guilt and penalty as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by the introduction of unreliable and prejudicial testimony regarding deoxyribonucleic acid (DNA) testing of semen found on the victim. State Pet. at 20-53; Inf. Reply at 9-26. Specifically, DNA testing performed by the prosecution linked Mr. Jones to sperm and semen samples found on the victim's body. 1 RT 501, 506. The parties litigated the admissibility of the testimony pursuant to *People v. Kelly*, 17 Cal. 3d 24 (1976), and *Frye v. United States*, 293 F. 1013-14 (D.C. Cir. 1923). After considering trial counsel's motion to exclude the introduction of the DNA evidence and taking judicial notice of documents, but without taking any testimony from witnesses, the trial court ruled that the prosecution would be permitted to present the results of the DNA analysis at trial. 1 CT 195; 1 RT 664-65. Tril ounsel moved to exclude the DNA evidence on the grounds that the statistical probabilities evidence using the modified ceiling principle was not generally accepted by the scientific community and that the procedures used by Cellmark in arriving at that statistical probability were flawed. II Supp. 2 CT 106-23. At several hearings on the motion to exclude the evidence, the judge acknowledged his unfamiliarity with DNA analysis and requested that

the parties present expert testimony to assist the court. *See, e.g.*, 1 RT 572-73, 632. The court repeatedly requested that the parties present witnesses at a hearing to allow the court properly to determine the admissibility of the DNA evidence and expressed its dissatisfaction with the process being used to litigate the issue. *See, e.g.*, 1 RT 573, 628-29, 632; *see also* 1 RT 664-65; 2 RT 722-23. Ultimately, the trial court ruled that the statistical calculation method met the *Kelly*/*Frye* standard of admissibility (1 CT 195; 1 RT 665) and denied counsel's motion for reconsideration (1 CT 201; 2 RT 722-23).

On January 8, 1995, without conducting an evidentiary hearing pursuant to *Kelly-Frye*, the court found the DNA modified ceiling principle generally accepted throughout the scientific community. 14 RT 2375; 1 CT 233. On January 17, 1995, pursuant to California Evidence Code section 402, the prosecution presented the testimony of Melisa Weber, an employee of Cellmark to establish that she followed "the correct protocols at the lab and applied the correct statistical analysis." 19 RT 3017; 1 CT 239;19 RT 2905-3038, 3042-47. At the conclusion of the testimony and argument, the court denied trial counsel's motion to exclude. 1 CT 239; 19 RT 3079. Thereafter, the prosecution presented the testimony of Melisa Weber to the jury. 20 RT 3091-130. Ms. Weber testified about the procedures used to analyze the blood samples and found that the "DNA banding pattern of Ernest Jones did match the bands in the sample from the vaginal swabs." 20 RT 3129. She concluded that the "chance that a random individual might have the same DNA banding pattern as Ernest Jones is approximately 1 in 78 million. 20 RT 3130.

As a general matter, the California Supreme Court's refusal to hear Mr. Jones's adequately pled claims of constitutional error is contrary to clearly established federal law that prohibits state courts from creating "unreasonable obstacles" to the resolution of federal constitutional claims that are "plainly and reasonably made." *Davis v. Wechsler*, 263 U.S. 22, 24-25, 44 S. Ct. 13, 14, 68 L.

Ed. 143 (1923); *see also* Opening Br. at 7-11. Specifically, in light of Mr. Jones's extensive factual allegations and supporting materials in the state court–which the state court was obligated to accept as true–the state court's ruling that Mr. Jones failed to make any prima facie showing of entitlement to relief constitutes an unreasonable application of controlling federal law. The trial court's failure to conduct a full and fair hearing on the admissibility of the DNA evidence, rendered Mr. Jones's trial fundamentally unfair. *See Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Moreover, trial counsel's unreasonably failed to investigate and challenge the DNA evidence. *See* Claim One, *supra*. The particular method (RFLP) used to test the samples in Mr. Jones's case has been controversial and has been held inadmissible for lack of compliance with procedures recommended by the National Research Council, *DNA Technology in Forensic Science* (1992) for determining the statistical probability of a random match. *See, e.g.*, Inf. Reply at 24-25. Had the DNA evidence been excluded, trial counsel would not have conceded the rape. Ex. 12 at 106.

N. Claim Fourteen: Mr. Jones Federal Constitutional Rights Were Violated by the Prosecutor's Presentation of False Testimony and Misleading and Prejudicial Arguments to the Jury.

Mr. Jones presented the California Supreme Court with a prima facie claim of prosecutorial misconduct, alleging that the prosecutor (1) presented false testimony regarding the wrist injuries to the victim; (2) made inflammatory statements that misled the jury regarding the stab wound to the pubic area of the victim; and (3) improperly argued in aggravation that Mr. Jones had failed to take advantage of psychiatric treatment. The prosecutor's misconduct infected the trial with unfairness and had a substantial and injurious effect in determining the jury's verdict. State Pet. at 267-71, 272-76, 320-25; Inf. Reply at 216-23, 237, 239, 242-43.

Respondent did not present factual materials or legal argument in state court

to establish that Mr. Jones's prima facie showing should not be taken as true or that it otherwise lacked merit. Under these circumstances, the state court was required to issue an order to show cause and allow Mr. Jones access to state processes to develop and present evidence to prove his claim. *See, e.g. Duvall*, 9 Cal. 4th at 475; *Romero*, 8 Cal. 4th at 742. By instead summarily denying Mr. Jones's claim, the California Supreme Court's decision satisfies section 2254(d) as set forth in Mr. Jones prior briefing and in the sections that follow.

1. There Is No Reasonable Basis for the State Court Ruling That Mr. Jones Failed to Make a Prima Facie Showing for Relief.

"[A] state may not knowingly use false evidence, including false testimony, to obtain a tainted conviction" without violating a defendant's due process right to a fair trial. *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 40, 79 L. Ed. 791 (1935). In *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), the Supreme Court held that "a conviction obtained through use of false evidence, known to be such by representatives of the State" violates the Fourteenth Amendment. The "same result obtains" when the state allows false evidence "to go uncorrected when it appears" as when it solicits false evidence directly. *Id*. "A claim under *Napue* will succeed when "'(1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) the false testimony was material.'" *Jackson v. Brown*, 513 F.3d 1057, 1071-72 (9th Cir. 2008) (quoting *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (en banc)). False testimony is material if "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976)). Under this materiality standard, "'[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'" *Hall v. Director of Corrections*, 343

F.3d 976, 983-84 (9th Cir. 2003) (per curiam) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)).

In determining whether a prosecutor has committed misconduct in the context of summation, the Supreme Court has held "The relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)). Under *Darden*, the first issue is whether the prosecutor's remarks were improper. If so, the question turns to whether the remark, considered in light of the entire record, deprived the defendant of a fair trial. *See Tak Sun Tan v. Runnels*, 413 F.3d 1101, 1112 (9th Cir. 2005). Factors relevant to considering whether a comment rendered a trial constitutionally unfair include "whether the comment misstated the evidence, whether the judge admonished the jury to disregard the comment, whether the comment was invited by defense counsel in its summation, whether defense counsel had an adequate opportunity to rebut the comment, the prominence of the comment in the context of the entire trial and the weight of the evidence." *Hein v. Sullivan*, 601 F.3d 897, 912-13 (9th Cir. 2010) (citing *Darden*, 477 U.S. at 182).

a. Mr. Jones Made a Prima Facie Showing That the Prosecutor Knowingly Presented False Testimony to the Jury.

1) The testimony presented to the jury regarding injuries to the victim's wrist was false.

Dr. Scholtz, a Deputy Medical Examiner for the Los Angeles County Coroner's Office, performed the autopsy on Mrs. Miller, and prepared a report detailing his findings. *See generally* Ex. 171. In his report, under the "Anatomical Summary," Dr. Scholz detailed that the victim's wrists and ankles were bound and she was gagged. Ex. 171 at 3030. Daniel T. Anderson, a senior criminalist with

the coroner's office, was present for the initial examination of the body. Mr. Anderson logged the ligatures on the victim's body, describing the wrist bindings: "[b]lack purse ligature around wrist - The right wrist had 2 strands around it with 2 strands connecting to the right and left wrist. Whereas the left wrist had 3 strands of the purse strap and also had a knot positioned there. - Telephone cord ligature around the wrists, underneath the black purse strap. The right wrist had 7 strands with the left wrist having 10 strands. There were 5 strands of the telephone cord connecting the two wrists. There were no knots, just the two male ends were tucked under all the strands on the left wrist." Following removal of the bindings, Dr. Scholtz reported, "The wrist bindings leave crease marks *but no other disturbance on the skin*." Ex. 171 at 3038 (emphasis supplied); Inf. Reply at 220.

At trial, Dr. Scholtz testified that he received the victim's body wrapped in covering and clothed as she had been found at the crime scene. Her feet and hands had been bound and she was gagged. 17 RT 2774. The prosecutor specifically asked Dr. Scholtz whether he had noted "any injuries to wrists or the ankles or the face as a result of the binding." *Id*. at 2775. Dr. Scholtz responded "the only area that I could attribute injury from binding was the left wrist area in which there was a bruising and abrasion which could have been caused by the bindings." *Id*. at 2775-76; *see also* Ex. 177 at 3086.[70] Although this testimony was contradicted by Dr. Scholtz's observations at the autopsy and the written report, the prosecutor did not correct his testimony.

[70] In state court, respondent contended that Mr. Jones failed to explain how the testimony was false or provide proof to support his claim that the testimony was false. Inf. Resp. at 32. Respondent correctly abandoned that argument before this Court. The absence of any indication from the state court that it rejected the claim based on any purported lack of documentation forecloses that argument before this Court. *See* section II.A.2., *supra*.

2) The prosecutor knew the testimony was false.

The prosecutor knew or should have known that this evidence was false because he had reviewed the report and had numerous conversations with Dr. Schotz in preparation for his testimony. *See, e.g*., 17 RT 2782 (prosecutor showing Dr. Scholtz his autopsy report to refresh his recollection); *see also* 15 RT 2461 (prosecutor stating he had been speaking to his coroner regarding his opinion of the victim's wounds); *see also* 15 RT 2463 (prosecutor noting wounds depicted in photographs had been described in coroner's report); 15 RT 2465 (prosecutor informing court he would be talking to the coroner again). Despite his knowledge that this testimony was false, the prosecutor failed to correct it, breaching his duty under *Napue*. *See, e.g.*, *Blumberg v. Garcia*, 687 F. Supp. 2d 1074, 1126 (C.D. Cal. 2010). A prosecutor's duty under *Napue* to correct false evidence and elicit the truth "'requires a prosecutor to act when put on notice of the real possibility of false testimony. This duty is not discharged by attempting to finesse the problem by pressing ahead without a diligent and good faith attempt to resolve it.'" *Commonwealth of Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1118 (9th Cir. 2001) (quoting *Napue*, 360 U.S. at 269-70). Nor can a prosecutor "avoid this obligation by refusing to search for the truth and remaining willfully ignorant of the facts.'" *Morris v. Ylst*, 447 F.3d 735, 744 (9th Cir. 2006) (quoting *Bowie*, 243 F.3d at 1118); *see also Blumberg*, 687 F. Supp. 2d at 1126.

3) The false testimony was material.

It was crucial to the prosecution's theory of the case that Mrs. Miller was bound, gagged, raped, and then murdered because it undermined Mr. Jones's testimony and his mental state defense. State Pet. at 268; Inf. Reply at 218-25. The prosecutor argued in guilt-phase closing arguments. "What on earth can he say to get out from under the rape allegation? 'I blacked out.' He has no explanation. So his explanation is I can't remember. That's what he told you. . . . He remembers a couple [of] stab wounds. And think about that. It seemed like Mr.

Jones is kind of positing the theory that maybe I killed her first and then raped her." 26 RT 3902.

The lack of bruising and abrasion tended to prove that the rape occurred post-mortem. State Pet. at 268; Inf. Reply at 221. "Had the bindings been applied to the victim's wrists prior to her death, internal hemorrhaging could have been present at the site of the crease marks." Ex. 177 at 3086. As the forensic pathologist retained by post-conviction counsel noted, "if the victim were struggling, to the extent that she required subduing in order for the perpetrator to continue his attack, her wrists could have sustained abrasions or bruises from contact with the bindings." *id.*.

The jury convicted Mr. Jones under a felony murder theory, finding him guilty of first degree murder, committed while engaged in the commission of a rape. 2 CT 365. The jury found true the special circumstance that Mr. Jones committed a rape. 2 CT 367. Therefore a pivotal question for the jury was whether Mr. Jones formed the intent to rape Mrs. Miller before killing her. The defense's theory of the case was that Mr. Jones lacked the requisite mental state to convict him of first-degree murder and to find true the special circumstance. Thus, Dr. Scholtz's testimony that the victim sustained wounds caused by the wrist bindings was critical to prove that Mrs. Miller was alive when bound. This evidence was key to determining the sequence of the crime, particularly because the only other evidence admitted regarding the sequence of the crime was Mr. Jones's own testimony. That this evidence "could have affected the judgment of the jury" is clear. *Agurs*, 427 U.S. at 103; *see also Miller v. Pate,* 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967) (prosecutor's knowing use of false evidence likely to have important effect on jury's determination and warrants habeas relief); *Brown v. Borg*, 951 F.2d 1011 (9th Cir. 1991) (prosecutor's knowing introduction of and reliance on false evidence suggesting that murder had occurred during course of robbery violated due process, and required murder conviction be

reversed, rather than merely reduced from first to second degree murder).

4) Mr. Jones's claim is not procedurally barred.

Respondent argues that merits review is precluded because the state court procedurally defaulted this claim pursuant to *In re Seaton*, 34 Cal. 4th 193, 17 Cal. Rptr. 3d 633 (2004), on the grounds that Mr. Jones failed to raise it in the trial court. Opp. at 101. As explained in section III, *supra*, the state court's denial of this claim based on a *Seaton* bar does not preclude federal review. [71]

5) The California Supreme Court could not have reasonably rejected Mr. Jones's false testimony claim based on a theory that the witness "forgot" to include it in his report.

In federal court, respondent asserts "the fact the autopsy report does not indicate such bruising does not mean the coroner's testimony was false or the prosecutor knew it was false. The coroner may have simply forgotten to include it in his report." Opp. at 102. As this argument was not before the California Supreme Court, it could not have been the basis for its decision. *See* section II.A.4., *supra*. Furthermore, respondent's efforts to attribute innocent explanations for the false testimony create a factual dispute, and would have required the state court to make credibility findings regarding the coroner's testimony, the prosecutor's knowledge that the evidence was false, and the prosecutor's motivation for failing to correct it, which the California Supreme Court was unable to make prior to the issuance of an order to show cause. *See* section II.A.3, *supra.*

Respondent cites to *United States v. Croft*, 124 F.3d 1109 (9th Cir. 1997), as support for his contention that earlier prior inconsistent statement made by a witness does not establish that the witness's testimony at trial was false. Opp. at

[71] In addition, the claim is properly before this Court because Mr. Jones made a prima facie showing that trial counsel was ineffective for failing to investigate and adequately defend against the rape charges. *See* Opening Br. at 27-30.

102. *Croft* is distinguishable because in that case the court noted the district court's findings that the inconsistencies in the testimony in question related to "collateral matters." Citing to *United States v. Saadeh,* 61 F.3d 510, 523 (7th Cir. 1995), the court stated that perjured testimony cannot be cause for reversal if it was not "directly related to the defendant's guilt or innocence." Respondent contends that the prosecutor did not improperly use the evidence to establish that sexual intercourse occurred before death, and that the issue of when the sexual intercourse occurred "was never seriously a focus of the defense at trial. Therefore, the California Supreme Court reasonably could have concluded that the alleged misconduct did not affect the fairness of the trial." Opp. at 102-03. As respondent did not raise this argument in state court, it could not have been the basis for its decision. *See* section II.A.4., *supra*. Moreover, as set out above, whether the binding took place pre- or post-mortem was critical to Mr. Jones's mental state defense and when, and whether, he formed the intent to rape Mrs. Miller. Furthermore, respondent's argument would have required the state court to evaluate the weight and credibility of evidence going to the question of prejudice, which it could not have done without holding a hearing. *See* section II.A.3., *supra*.

b. Mr. Jones Made a Prima Facie Showing That the Prosecutor Committed Misconduct in His Summation to the Jury.

1) Improper argument regarding the vaginal wound.

In performing the autopsy on Mrs. Miller, Dr. Schotz recorded a stab wound to the peritoneum that penetrated the uterus. Ex. 171 at 3033-34. At trial, the prosecutor elicited testimony from Dr. Schotz that this wound to the pubic area, "penetrated into the left side of the vulva or the entrance to the vagina from the pubic area." 17 RT 2797. The prosecutor then showed People's Exhibit 7B to Dr. Scholtz to demonstrate the location of the stab wound. 17 RT 2798. The prosecutor's reason for including this photograph was "twofold." As the prosecutor previously had explained to the court, "what we have here is a rape-

murder, and the sexual aspect that accompanies it I think is shown by the fact that Mr. Jones – or the fact that there is a vaginal wound here. . . . because [ ] it is part and parcel to rape, and this was a sexual assault." 15 RT 2460.

In closing arguments, the prosecutor urged the jury to accept a theory of felony murder-rape by arguing: "During the course of that rape he has got knives there, and if you feel he didn't intentionally kill her for some reason, if you find that that killing was a direct result of his rape with the knives and – and, again, remember where these knives ended up. We had little poke wounds throughout the victim. There's a knife into the vaginal area. These knives are part and parcel of the *sexual assault*. So if you find that the killing was as a result, direct causal result of the rape, even if you don't believe it is premeditated and deliberate, even if you don't think there's express malice, but you do find he specifically intended to rape her, that is a first degree murder." 26 RT 3892 (emphasis added).

The prosecutor's argument misstated the evidence and was designed to mislead the jury into believing that Mr. Jones raped or "sexually assaulted" the victim with a knife. A prosecutor may not "make statements in closing argument unsupported by the evidence, . . . misstate admitted evidence, or . . . misquote a witness' testimony." *United States v. Watson,* 171 F .3d 695, 699 (D.C. Cir. 1999) (finding prosecutor's remarks were error to the extent that they misstated and misquoted witness' testimony). "A misstatement of evidence is error when it amounts to a statement of fact to the jury not supported by proper evidence introduced during trial, regardless of whether counsel's remarks were deliberate or made in good faith." *Id.* at 700; *see also Miller v. Pate*, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967) (prosecutor engaged in misconduct by seeking to connect defendant with the rape-murder of a young girl by arguing repeatedly that a pair of men's undershorts belonging to the defendant were stained with blood although the prosecutor knew they were stained with paint).

Moreover, the prosecutor's comments were calculated "to arouse passion

and prejudice" in the jury (*Viereck v. United States*, 318 U.S. 236, 247, 63 S. Ct. 561, 566, 87 L. Ed. 734 (1943)), and were especially prejudicial because no hemorrhaging was noted with regard to this wound, indicating that it was most likely inflicted post-mortem (Ex. 177 at 3087).

2) Mr. Jones's claim is not procedurally barred.

Respondent argues that this claim was denied in state court under *In re Seaton*, 34 Cal. 4th 193, 17 Cal. Rptr. 3d 633 (2004), on grounds that Mr. Jones had failed to raise it in the trial court.[72] Opp. at 101. As explained in section III, *supra*, the state court's denial of this claim based on a *Seaton* bar does not preclude federal review.

3) The California Supreme Court could not reasonably have rejected this claim based on a theory that no juror would have believed the rape charge was based on penetration with a knife.

In state court, respondent asserted that the prosecutor's argument was "intended to show only that the rape was forcible because it involved the use of knives." Inf. Resp. at 32. Respondent claimed the rape instruction required "sexual intercourse be proven, and the insertion of a knife is not sexual intercourse." *Id*. Evidence of semen found inside the victim, respondent argued, showed the prosecution was relying on a theory of rape based on sexual intercourse. *Id*. In federal court, respondent argued that it was "wholly proper for the prosecutor to describe the wound as a vaginal wound." Opp. at 101. Respondent contends that the prosecutor's argument was that "Petitioner's use of knives to stab Mrs. Miller to death was part and parcel of the rape." *Id*.

[72] In addition, the claim is properly before this Court because Mr. Jones made a prima facie showing that trial counsel was ineffective for failing to investigate and adequately defend against the rape charges. *See* Opening Br. at 27-30.

Respondent elaborates that "even if the prosecutor had argued that Mrs. Miller was raped with a knife, it would not have rendered the trial fundamentally unfair since it was clear that the basis of the rape charge and rape special circumstance was Petitioner's forcible sexual intercourse with Mrs. Miller." *Id*. Respondent's arguments create a factual dispute and would have required the state court to resolve whether the prosecutor's arguments misstated the evidence and the prejudicial impact of his argument on the jury's findings. The state court could not have resolved those issues prior to the issuance of an order to show cause. *See* section II.A.3., *supra.*

4) Failure to take advantage of psychiatric treatment.

Throughout the guilt and penalty phases, the prosecutor denigrated evidence of Mr. Jones's mental illness, and impugned his credibility. In penalty phase closing argument, the prosecutor argued that Mr. Jones had had several "wake up call[s]" to get help "if he truly had these mental problems." 31 RT 4640. The prosecutor urged the jury to accept Mr. Jones's perceived failure to take advantage of psychiatric treatment as a factor in aggravation, arguing:

> The doctor testified that he went to Kedren hospital a number of times. Now, either he refused to go along with the treatment, they couldn't treat him. He didn't really have a problem, and that this was something that he went along with in order to get a reduced sentence of a battery. And I want you to think about that, and his lack of participation in the program. Then the Doretha Harris incident takes place, and he goes to prison for six years. He's released from prison, and his father . . . tried to get his son interested in the Christian church, and the Christian learning that he did and asked him to participate with him in these programs. He went four or five times and quit and didn't continue with it. Another opportunity that he could have used to get himself together that he

> did not. And admittedly the parole psychiatrist didn't have the first meeting until June the 23rd, but if Mr. Jones is sincere in his statements of remorse, his protestations that "I want to learn about myself," why wasn't he talking to Sizemore from the outset, "I need some additional help?" and when Dr. Hazel did meet with him in June of '93 and there were some five meetings. The defendant didn't participate. Didn't open himself up. He had a chance again to get himself together, to try to deal with his problem, if, in fact, that is what it was, or was he just going through the motions knowing that there is really nothing wrong with him. And that there is another explanation for this conduct, and that is, he likes to rape.

31 RT 4640-42.

The prosecutor knew that Mr. Jones had not been in treatment at Kedren long enough for a complete evaluation[73] (Ex. 102 at 2045) and that Mr. Jones had not received any psychiatric treatment in state prison (*see* 22 RT 3353), a fact to which Mr. Jones was prohibited from testifying in the guilt phase (22 RT 3358). The prosecutor also was aware that Dr. Hazell had 100-125 people in her caseload, and that Mr. Jones received no meaningful treatment during his four or five fifteen-minute sessions with her. 30 RT 4426. The prosecutor's argument is particularly egregious because he suppressed a material, exculpatory emergency room report from 1984, which documented Mr. Jones's two-year history of transient memory loss. *See* Opening Brief at 48 n.18. A prosecutor who makes statements to the jury during closing argument that he knows are false or has strong reason to doubt, with

[73] In fact, the Kedren records show that Mr. Jones was offered merely six hours of counseling. Ex. 30 at 360, 375. Only two months elapsed between Mr. Jones's first counseling session and his arrest for the assault on Mrs. Harris. Ex. 30 at 360; Ex. 102 at 2047.

respect to material facts on which the defendant's defense relied, has committed misconduct. *See, e.g.*, *United States v. Reyes,* 577 F.3d 1069, 1078 (9th Cir. 2009) (finding prosecutor's harmful misconduct in making false assertion to jury in closing argument that corporation's finance department did not know backdating of stock options was occurring warranted a new trial); *United States v. Udechukwu,* 11 F.3d 1101 (1st Cir. 1993) (finding fatal taint from the prosecutor's persistent theme in closing argument that dealer who allegedly pressured defendant to transport drugs did not exist, where prosecutor knew existence of dealer had been confirmed prior to trial). As Mr. Jones's history of mental illness was the cornerstone of his defense in both the guilt and penalty phases, this misstatement and improper argument rendered Mr. Jones's trial unconstitutionally unfair.

Moreover, the jury's consideration of this "aggravating" evidence precluded it from fully considering all the evidence of Mr. Jones's mental illness as mitigating. [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina,* 428 U.S. 280, 304, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976). Restrictions on a jury's ability to consider and give appropriate weight to mitigating evidence consistently have been found to violate the Eighth Amendment. *See, e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) (Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death). Moreover, clearly established federal law requires close scrutiny of the import and effect of invalid aggravating factors on individualized sentencing determinations in death penalty cases. *See, e.g.*, *Stringer v. Black*, 503 U.S. 222,

112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992).

5) The California Supreme Court could not reasonably have rejected this claim based on a theory that the misconduct did not influence the jury's penalty verdict.

In state court, respondent argued "petitioner cannot demonstrate a reasonable possibility that the verdict was affected by the alleged misconduct. . . . It is apparent the jury chose the death penalty because of the brutal nature of petitioner's rape and murder . . . not because . . . [he] failed to seek psychiatric help" Inf. Resp. at 49. In federal court, respondent asserted that "Petitioner does not cite any Supreme Court law that establishes that such types of comments violated due process" and cited to *Gonzalez v. Wong*, 667 F.3d 965, 994-95 (9th Cir. 2011). Opp. at 114. As this argument was not before the California Supreme Court, it could not have been the basis for its decision. *See* section II.A.4., *supra*.

In *Gonzalez*, petitioner alleged that statements by the prosecutor (1) instructing the jurors that they should not consider sympathy; (2) discussing the jury's discretion to impose the death penalty if it found the aggravating circumstances outweighed the mitigating circumstances; and (3) suggesting the absence of a mitigating circumstance be treated as an aggravating circumstance, violated his due process rights. *Gonzalez*, 667 F.3d 965 at 994. The court noted that petitioner had not pointed to any clearly established federal law establishing that these statements deprived him of due process. *Id*. at 995. There, petitioner argued the statements were in violation of state law, "and that in making these statements the prosecutor violated his constitutional right to have the jury exercise its discretion in the manner authorized by state law." *Id*. at 995.

Gonzalez is inapplicable for several reasons. First, Mr. Gonzalez did not argue that any of the prosecutor's statements were a violation of federal law. Rather, Mr. Gonzalez "argued that the prosecutor's statements were in violation of state law and that in making these statements the prosecutor violated his

constitutional right to have the jury exercise its discretion in the manner authorized by state law." *Id*. at 995. Second, it has long been recognized that a state may not preclude jury's consideration of mitigating factors. In *Penry v. Lynaugh*, 492 U.S. 302, 327-28, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), described the constitutional limitation on a state's ability to preclude the consideration of mitigation:

> "In contrast to the carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline* to impose the death sentence." *McCleskey v. Kemp*, 481 U.S. 279, 304, 107 S. Ct. 1756, 1773, 95 L. Ed. 2d 262 (1987) (emphasis in original). Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a "'reasoned moral response to the defendant's background, character, and crime.'" *Franklin*, 487 U.S., at 184, 108 S. Ct., at 2333 (O'Connor, J., concurring in judgment) (quoting *California v. Brown*, 479 U.S., at 545, 107 S. Ct., at 841 (O'Connor, J., concurring)). In order to ensure "reliability in the determination that death is the appropriate punishment in a specific case," *Woodson*, 428 U.S., at 305, 96 S. Ct., at 2991, the jury must be able to consider and give effect to any mitigating evidence relevant

> to a defendant's background and character or the circumstances of the crime.[74]

Third, the Supreme Court explicitly has held that a state may not attach an aggravating label to the mitigating evidence presented here:

> In analyzing this contention it is essential to keep in mind the sense in which that aggravating circumstance is "invalid." It is not invalid because it authorizes a jury to draw adverse inferences from conduct that is constitutionally protected. Georgia has not, for example, sought to characterize the display of a red flag, *cf. Stromberg v. California*, the expression of unpopular political views, *cf. Terminiello v. Chicago*, 337 U.S. 1, 69 S. Ct. 894, 93 L. Ed. 1131 (1949), or the request for trial by jury, *cf. United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), as an aggravating circumstance. Nor has Georgia attached the "aggravating" label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant, *cf. Herndon v. Lowry*, 301 U.S. 242, 57 S. Ct. 732, 81 L. Ed. 1066 (1937), or *to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness. Cf. Miller v.*

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[74] Thus, to comply with the Eighth Amendment, California law prohibits a prosecutor from presenting evidence in aggravation that is not relevant to the statutory factors enumerated in Penal Code section 190.3. *See, e.g.*, *People v. Boyd*, 38 Cal. 3d at 762, 772-76, 215 Cal. Rptr. 1, (1985); *see also, e.g.*, *Hernandez v. Martel*, 824 F. Supp. 2d 1025, 1128 (C.D. Cal. 2011) (prosecutor may argue that petitioner failed to put on affirmative evidence of rehabilitation, but may not argue that the jury can consider the paucity of evidence on the subject as a positive aggravating factor) (citing *People v. Crittenden*, 9 Cal. 4th 83, 149, 36 Cal. Rptr. 2d 474 (1994)).

> *Florida*, 373 So.2d 882, 885–86 (Fla.1979). If the aggravating circumstance at issue in this case had been invalid for reasons such as these, due process of law would require that the jury's decision to impose death be set aside.

Zant v. Stephens, 462 U.S. 862, 885, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

The prosecutor's argument in this case violated both the well-established principle that a sentencer "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," *Lockett*, 438 U.S. at 604, and attached a aggravating label to Mr. Jones's mental illness, *Zant*, 462 U.S. at 885. In contrast, in *Gonzalez*, there was no mitigation for the jury to consider and thus the prosecutor's argument did not preclude it "from considering" mitigation that was presented. *Lockett*, 438 U.S. at 604. Nor did the prosecutor urge the jury to consider Mr. Gonzales's mental illness as aggravation.

2. Section 2254(d) Is Satisfied.

Taken as true, Mr. Jones's allegations established (1) a prima facie *Napue* violation, demonstrating that the prosecutor knowingly presented false testimony, (2) the prosecutor's improper arguments infected the trial with unfairness as to make the resulting conviction a denial of due process under *Darden v. Wainwright*, and (3) that the prosecutor improperly argued in aggravation that Mr. Jones had failed to take advantage of psychiatric treatment, in violation of *Woodson, Lockett, Eddings* and their progeny. By summarily denying the claim, the state court did not require respondent to respond formally to Mr. Jones's allegations or present evidence to support respondent's factual contentions. The state court ruling also denied Mr. Jones the opportunity to present evidence, subpoena witnesses, and prove his allegations. *See* Opening Br. Section I.B.2. The state court's summary denial of this claim therefore was contrary to federal law requiring a state court to ascertain facts reliably before denying adequately presented federal claims. *See*

Opening Br. at 1-13.

To the extent that the California Supreme Court determined that Mr. Jones did not state a prima facie case, its determination was contrary to or an unreasonable application of clearly established federal law. *See Williams v. Taylor,* 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). *See also, e.g*. *Goldstein v. Harris*, 82 F. App'x 592 (9th Cir. 2003) (upholding district court's finding of *Napue* violation that prosecution knew or should have known jailhouse informant falsely testified that he was not receiving any benefit from law enforcement for his testimony against petitioner, and that he had not received similar benefits for prior testimony in other cases.); *see also Shortt v. Roe*, 342 F. App'x 331 (9th Cir. 2009) (state court had unreasonably applied *Brady* and *Napue* when it found that the prosecution's failure to disclose that its witness had been given sentencing consideration in exchange for his testimony against petitioner, to disclose impeaching psychiatric opinions and reports and probation reports from prior cases, or to correct witness's false testimony regarding consideration received for his cooperation and testimony; *see also Lee v. Lewis*, 27 Fed. App'x 774 (9th Cir. 2001) (finding California Supreme Court unreasonably applied *Darden* and *Strickland* where prosecutor's detailed recitation of facts underlying shooting defendant's prior conviction during cross-examination of defendant, in violation of court's in limine ruling, rendered trial so unfair as to result in denial of due process; given weakness of state's case, there was reasonable likelihood that conviction was result of jury's perception of defendant as violent and dangerous person, and prosecutor's conduct invited such impermissible reasoning.)

Alternatively, the state court's summary denial could be based on its resolution of key factual disputes and mixed questions of fact and law, such as:

- whether the coroner's testimony was false;
- whether the prosecutor knew the evidence was false, and if so,
- why he failed to correct it;

- the effect the false testimony had on the jury's verdict;
- whether the prosecutor's argument characterizing the wound to the peritoneum as a vaginal wound was improper;
- whether his argument was designed to mislead the jury to believe that Mr. Jones had raped Mrs. Miller with a knife;
- the effect the prosecutor's argument had on the jury's verdict;
- whether the prosecutor's introduction of non-statutory aggravating evidence that Mr. Jones had failed to take advantage of psychiatric treatment had a substantial influence on the jury's determination to sentence Mr. Jones to death.

To the extent that the state court denied Mr. Jones's claim on these or other factual bases at the pleading stage, it unreasonably determined the facts under section 2254(d)(2) by failing to provide Mr. Jones either with process to develop and present supporting evidence, or notice of and an opportunity to be heard on the factual issues that the state court intended to resolve. *See* Opening Br. at 6-13.[75]

O. Claim Fifteen: Mr. Jones's Constitutional Rights Were Violated by the Prosecution's Failure to Provide Notice of Aggravators and the Introduction of Irrelevant and Highly Prejudicial Testimony in the Penalty Phase.

In state court, Mr. Jones alleged that his death sentence was rendered in violation of his right to a reliable, rational non-arbitrary determination of guilt and penalty as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the prosecution failed to provide

[75] Respondent's assertion that merits review of this claim is barred by the procedural default doctrine is foreclosed for the reasons stated in Section III, *supra*. Respondent also contends that the *Teague* doctrine limits this Court's ability to grant relief, which is not relevant to this stage of the proceedings. *See* n.1, *supra*.

constitutionally required notice of factors to be used in aggravation, and the trial court permitted the prosecution to introduce highly prejudicial and irrelevant testimony of petitioner's sister regarding a statement Mr. Jones allegedly made to her two and half years after the crime. State Pet. at 371-74; Inf. Reply at 330-31, 340-44. Specifically, on the day of the guilt verdict, the prosecutor orally informed counsel that he planned to call Pam Miller and Kim Jackson, "a prior rape victim of the defendant," to "testify to the circumstances" regarding that incident. 27 RT 4064-65. The prosecutor made no further oral or written proffer regarding Ms. Jackson's testimony. No more than five days, and only three business days, elapsed between the prosecution's notice of aggravation and Ms. Jackson's testimony. During her testimony, Ms. Jackson added additional damaging facts to her version of the events of the crime, and testified inconsistently with her testimony during the preliminary hearing of the prior crime. *See* 28 RT 4180-81; Ex. 102 at 2065-93. In addition, the prosecutor failed to provide timely notice of his intention to introduce testimony of Mr. Jones's sister Gloria Hanks (28 RT 4074, 4083-84) and the trial court, over objection, admitted Ms. Hanks's testimony regarding a highly prejudicial and irrelevant statement Mr. Jones made to her in a telephone call on New Year's Eve 1994 (28 RT 4115-16). Without notice, Mr. Jones did not have a reasonable opportunity to "deny or explain" the evidence against him. *Gardner v. Florida*, 430 U.S. 349, 362, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) (finding due process violation when death sentence imposed, at least in part, on basis of confidential information which was not disclosed to defendant or his counsel). Furthermore, the statement Mr. Jones made to his sister on New Year's Eve was irrelevant, taken out of context, had no probative value, was highly prejudicial, and inadmissible because Mr. Jones had not put remorse in issue. The admission of this irrelevant and overtly prejudicial evidence violated Mr. Jones's

right to a fair trial, rendering it fundamentally unfair. *See Jammal v. Van de Kamp,* 926 F.2d 918, 920 (9th Cir.1991).[76]

P. Claim Sixteen: Mr. Jones Received Ineffective Assistance of Counsel During the Penalty Phase of His Trial.

Mr. Jones satisfied state pleading requirements by presenting this claim in state court with sufficient detail and supporting factual material to establish a prima facie showing that he was entitled to relief. *See, e.g.*, *Duvall*, 9 Cal. 4th at 474. Mr. Jones's allegations established that trial counsel knew about several aspects of Mr. Jones's troubled history, but failed to conduct an adequate investigation into Mr. Jones's background. As a result of this and other failings, trial counsel did not present significant, mitigating evidence through expert and lay witness testimony - evidence that would have made a difference in the jury's penalty determination. State Pet. at 167-239; Inf. Reply at 129-89; Opening Br. at 58-87.

This claim was not procedurally defaulted, and respondent did not present factual materials or legal argument in state court to establish that Mr. Jones's prima facie showing should not be taken as true or that it otherwise lacked merit. Under these circumstances, the state court was required to issue an order to show cause and allow Mr. Jones access to state processes to develop and present evidence to prove his claim. *See, e.g. Duvall*, 9 Cal. 4th at 475; *Romero*, 8 Cal. 4th at 742. By instead summarily denying Mr. Jones's claim, the California Supreme Court's decision satisfies section 2254(d) as set forth in Mr. Jones's prior briefing and in the sections that follow.

In this Court, respondent does not reasonably contend that Mr. Jones failed to present a prima facie case to the state court. Indeed, respondent concedes that

[76] Respondent's assertion that merits review of this claim is barred by the procedural default doctrine is foreclosed for the reasons stated in Section III, *supra*.

the state court's summary denial of Mr. Jones's prima facie case for relief, as set forth in Mr. Jones's Opening Brief, satisfies section 2254(d). *See* section II.C., *supra*. Respondent instead asserts that the state court properly rejected this claim by making a variety of determinations about trial counsel's actions and omissions, possible tactical decisions, and the weight, credibility, and impact of evidence that should have been presented during the penalty phase of Mr. Jones's trial but was not. Inf. Resp. at 21-26; Opp. at 127-31. These contentions are contrary to federal law, state court procedures, and the record before the state court and therefore could not reasonably have formed the basis for the state court's summary denial.

1. There Is No Reasonable Basis for the State Court Ruling That Mr. Jones Failed to Make a Prima Facie Showing for Relief.

a. Mr. Jones Made a Prima Facie Showing That Trial Counsel Failed to Conduct a Reasonable Investigation.

Mr. Jones's allegations and supporting factual material in state court established that trial counsel recognized "Mr. Jones's obvious mental illness," Ex. 12 at 107, and had notice of several aspects of Mr. Jones's troubled history, including physical abuse, a lengthy history of mental disturbance, intellectual disability, and possible brain damage, Opening Br. at 61, but failed to conduct an adequate investigation into these and other aspects of Mr. Jones's history in advance of the penalty phase of trial. State Pet. at 170-75; Inf. Reply at 135-84.

At the time of Mr. Jones's trial, it was well understood that capital trial counsel was required to conduct a comprehensive investigation into the defendant's background, and that evidence about family dynamics; physical and sexual abuse; mental illness and suicidality; developmental delay; childhood neglect and deprivation; and socioeconomic status, among other things, constituted relevant, admissible mitigation. *See, e.g.*, Ex. 182 at 3168; Ex. 183 at 3177-78; *Wiggins*, 539 U.S. at 535 (holding evidence of mother's alcoholism, physical and sexual abuse, homelessness, and diminished mental capacities, "the kind of troubled

history [the Court has] declared relevant to assessing a defendant's moral culpability"); *In re Marquez*, 1 Cal. 4th at 600 (finding that "competent counsel would have undertaken in-depth interviews with petitioner's family, friends, and neighbors in an effort to uncover mitigating evidence."). This investigation included the collection of records related to the client's background and to the background of his parents, siblings, and other family members. Ex. 183 at 3179; *Rompilla*, 545 U.S. at 392 (holding school and medical records, among others, were source of mitigating evidence for 1988 trial); *Wiggins*, 539 U.S. at 516 (same). Experienced, knowledgeable investigators were required for this work; however, trial counsel was responsible for guiding the investigation and was not permitted to delegate strategic decision-making to the investigator or others. *See, e.g.*, Ex. 182 at 3168; Ex. 183 at 3181; *Bloom v. Calderon*, 132 F.3d 1267, 1277 (9th Cir. 1997) (holding counsel ineffective in 1983 trial for delegating defense preparation to a law clerk). Trial counsel's duty to investigate the aggravating evidence the prosecutor was likely to present was coextensive with the duty to investigate, develop, and present mitigating evidence. *See, e.g.*, Ex. 183 at 3185; *Rompilla*, 545 U.S. at 385-86 (holding trial counsel ineffective in 1988 case for failing to investigate aggravating evidence); *In re Marquez*, 1 Cal. 4th at 606 (same). In other words, as the Supreme Court held regarding a 1988 trial, "It is unquestioned that under the prevailing professional norms at the time . . . counsel had an 'obligation to conduct a thorough investigation of the defendant's background.' *Williams v. Taylor*, 529 U.S. 362, 396, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)." *Porter v. McCollum*, 558 U.S. 30, 39, 130 S. Ct. 447, 452-53, 175 L. Ed. 2d 398 (2009).

Mr. Jones established that, in spite of this duty, trial counsel delegated the penalty phase investigation to his paralegal, and did not provide her any direction regarding the scope, purpose, or content of the interviews she conducted with family members. Ex. 12 at 105-06; Ex. 19 at 203-05. The interviews that the

paralegal conducted were "limited in scope and detail," and "failed to elucidate the problems [in Mr. Jones's home environment] in much detail or discuss Mr. Jones with much specificity." Ex. 154 at 2750. Trial counsel confirmed that no one on the defense team interviewed extended family members, neighbors, and other witnesses who provided background information about Mr. Jones for the state habeas petition, and stated that he did not have a strategic reason for failing to do so. Ex. 150 at 2733-34.

The record before the state court demonstrates the limited extent of trial counsel's preparation for the penalty phase. Trial counsel presented the testimony of only five witnesses who knew Mr. Jones: Mr. Jones's youngest sister, his father, an aunt, a school friend, and an acquaintance. 29 RT 4236, 4251, 4345, 4354; 31 RT 4566. Trial counsel's questions and the witnesses' testimony were quite limited and only hinted at a few of the mitigating aspects of Mr. Jones's background – his parents' alcoholism, domestic violence, infidelity, and neglect and physical abuse of Mr. Jones and his siblings. Opening Br. at 79-81.

Mr. Jones's allegations therefore demonstrate that trial counsel was objectively unreasonable because despite well-defined norms requiring investigation "to discover *all reasonably available* mitigating evidence," trial counsel instead "abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Wiggins*, 539 U.S. at 524 (internal quotations omitted) (emphasis in original).

Respondent contends in this Court that the state court "reasonably could have concluded that counsel's investigation was sufficient in light of the extensive social history evidence that he presented at trial." Opp. at 127. This not only misrepresents the record of trial counsel's penalty phase presentation, but also conflicts with Mr. Jones's showing in state court that trial counsel did not interview many witnesses, and that the background interviews that were conducted were

limited in scope, lacked detail, and failed to discuss Mr. Jones specifically. Ex. 150 at 2733-34; Ex. 154 at 2750. The state court was obligated to take those factual allegations as true absent the presentation of legal authority or factual material by respondent to the contrary. *Romero*, 8 Cal. 4th at 742 (1994).

Respondent did not argue in state court that trial counsel's investigation was adequate, and instead made a number of contentions about tactical decisions that trial counsel may have made to forgo the development of mitigating evidence – arguments that respondent has abandoned before this Court. Inf. Resp. at 23-24; Opp. 127-29. Trial counsel's allegedly sufficient investigation therefore would not have provided a basis for the state court to reject Mr. Jones's claim, because respondent did not raise that issue in the state court. *See* section II.A.4., *supra*. Furthermore, the Supreme Court has made it clear that establishing ineffective assistance in the penalty phase of a capital trial does not turn on the mitigation that was or was not presented; rather, the proper inquiry is "whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the client's] background *was itself reasonable*." *Wiggins*, 539 U.S. at 523 (emphasis in original). Whether trial counsel's investigation is reasonable, is determined in part by prevailing professional standards, *Wiggins*, 539 U.S. at 524, and also by inquiring "whether the known evidence would lead a reasonable attorney to investigate further," *id*. at 527. Taken as true, Mr. Jones's prima facie showing satisfied these standards.

b. Mr. Jones Made a Prima Facie Showing That Trial Counsel Failed to Adequately Prepare and Present Expert Testimony.

Mr. Jones's allegations and supporting factual material in state court established that trial counsel retained a psychiatrist, Dr. Claudewell Thomas, very close to the start of trial and did not adequately prepare him to testify during the penalty phase. State Pet. at 238-39; Inf. Reply at 185-89. Trial counsel asked Dr. Thomas to determine whether Mr. Jones "was legally insane at the time of the

offense" or "is suffering from some mental condition or defect which he could not control and which might help explain his behavior." Ex. 154 at 2748. Dr. Thomas requested information related to Mr. Jones's medical, mental health, educational, and other social history in order to evaluate Mr. Jones's mental functioning, but received little information other than summaries from family interviews that were inadequate. Ex. 154 at 2750. Dr. Thomas also recommended neuropsychological testing of Mr. Jones to determine the nature and extent of his organic brain deficits, but only received incomplete testing that was not reliable. Ex. 150 at 2732; Ex. 154 at 2761.

Prior to Dr. Thomas's testimony, trial counsel asked him to discuss Mr. Jones's mental state on the night of the crime, but did virtually nothing to prepare him for that testimony. Ex. 154 at 2752. Dr. Thomas explained,

> By the time that I was retained, Mr. Manaster had very little time to prepare a mental state defense and thus did not have much time to direct or assist in my evaluation of Mr. Jones. I wanted to work on the case as best I could, but my limited contact with Mr. Manaster was very dissatisfying. The case apparently had caused Mr. Manaster a great deal of distress, which adversely affected his decision-making.

Ex. 154 at 2749. Trial counsel acknowledged that Dr. Thomas "was not adequately prepared to testify" and "did not adequately convey to the jury how mentally ill Mr. Jones really is." Ex. 12 at 110. During the cross-examination of Dr. Thomas, the prosecutor repeatedly undermined Dr. Thomas's testimony by highlighting the limited information upon which his conclusions were based. Opening Br. at 81-82.

Mr. Jones also demonstrated that although trial counsel considered Dr. Thomas the "cornerstone of the penalty phase defense," Ex. 12 at 110, he unreasonably failed to ask Dr. Thomas, or any other expert, to conduct a thorough evaluation of Mr. Jones's background in order to adequately develop and present

relevant mitigating evidence unrelated to his mental state at the time of the crime, State Pet. at 237-38; Inf. Reply 189-90; Ex. 154 at 2755. *See also, e.g.,* Ex. 183 at 3183 (explaining that standard practice as of the mid-1980s was to retain and present an expert qualified to testify about a capital defendant's psychosocial history); *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S. Ct. 2934, 2947, 106 L. Ed. 2d 256 (1989) (holding relevant in capital trial "evidence about the defendant's background and character"), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002); *Wiggins*, 539 U.S. at 516, 534 (holding trial counsel unreasonable for failing to develop "evidence of petitioner's life history or family background"). Because trial counsel did not even explain to Dr. Thomas the role of mitigation in a capital case, Dr. Thomas was unable to testify about the "the limited information I did have of the dysfunctional family life Mr. Jones had, and the impact it had on his growth and functioning." Ex. 154 at 2755.

Taken as true, these allegations established that trial counsel unreasonably failed to adequately prepare expert testimony on behalf of Mr. Jones. *See, e.g.*, *Caro v. Woodford*, 280 F.3d 1247, 1254-55 (9th Cir. 2002) (ruling that "counsel has an affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health"); *Bean v. Calderon*, 163 F.3d 1073, 1079 (9th Cir. 1998) (holding counsel ineffective for failing to provide requested information and testing to expert and presenting expert testimony with little preparation or foundation); *Clabourne v. Lewis*, 64 F.3d 1373, 1385 (9th Cir. 1995) (holding counsel ineffective for retaining expert with little time to prepare, failing to provide experts with records, and failing to prepare them to testify).

In state court, respondent contended that trial counsel may have made a strategic decision to limit Dr. Thomas's testimony because additional evidence about Mr. Jones's childhood could have had an adverse effect on the jury. Inf.

Resp. at 26. Respondent also complained that this aspect of Mr. Jones's claim was conclusory, because he did not explain what Dr. Thomas's testimony would have been regarding the additional evidence of childhood trauma or how it would have affected the verdict. Inf. Resp. at 26.[77] In this Court, respondent states that the state court could have rejected this claim because Dr. Thomas received "substantial information concerning Petitioner's background and mental health history," and because nothing in the record shows that trial counsel had reason to believe that Dr. Thomas's diagnosis was incorrect or incomplete. Opp. at 130.

Respondent's purely speculative theory that trial counsel made a strategic decision to withhold background information from Dr. Thomas could not have provided a basis for the state court to reject this claim. *See Romero*, 8 Cal. 4th at 742 (holding that respondent must demonstrate through legal authority or factual materials that claims lack merit). Furthermore, because trial counsel had not conducted a reasonable investigation to determine what additional evidence about Mr. Jones's childhood existed, he could not have made a tactical decision to withhold additional information from Dr. Thomas. *Wiggins*, 539 U.S. at 523. The state court therefore could not reasonably have relied on this justification as a legal basis for rejecting this claim.[78] Respondent's contentions in this Court that the state court reasonably could have rejected the claim by deciding that Dr. Thomas

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[77] Had the state court deemed this aspect of Mr. Jones's claim conclusory, it would have provided notice of this pleading defect and afforded Mr. Jones an opportunity to correct it. *See* section II.A.2., *supra*. Moreover, respondent's assertion ignores the extensive factual material that Mr. Jones submitted in support of this claim, including the additional information and corroboration that would have bolstered Dr. Thomas's testimony, Ex. 154 at 2756-61, and fully and adequately prepared expert evaluation by an independent psychiatrist, Ex. 178, and neuropsychologist, Ex. 175. *See also* section IV.P.1.c., *infra*.

[78] Apparently recognizing this, respondent has abandoned this argument in this Court.

received sufficient background material and did not provide incorrect or materially incomplete testimony, Opp. at 130, are not issues that were raised in the state court and therefore could not have provided a basis for its dismissal of the claim. *See* section II.A.4., *supra*. These arguments also are contrary to the state court procedures, which obligate the state court to accept Mr. Jones's allegations and factual materials – that Dr. Thomas did not receive sufficient background material and was not adequately prepared to testify effectively – as true. *Duvall*, 9 Cal. 4th at 474-75. At most, this contention created a factual dispute that the state court could not have resolved without issuing an order to show cause. *Duvall*, 9 Cal. 4th at 475; *Romero*, 8 Cal. 4th at 742.

c. Mr. Jones Made a Prima Facie Showing That Trial Counsel Was Ineffective for Failing to Investigate, Develop, and Present Compelling Mitigation Through Expert and Lay Witness Testimony.

Mr. Jones's allegations and supporting factual material in state court demonstrated in significant detail that trial counsel failed to discover and present critical, available mitigating background information about Mr. Jones. Although the jury at Mr. Jones's trial heard witnesses briefly mention his parents' alcoholism, domestic violence in the home, his parents' infidelity, and neglect and physical abuse of Mr. Jones and his siblings, it learned nothing about many other aspects of Mr. Jones's background that would have provided additional, compelling mitigation, including detailed accounts about the following topics, among others:

- Sexual abuse of Mr. Jones by his mother and a history in the family of inappropriate sexual behavior and sexual abuse;
- The extent and degree of physical abuse that Mr. Jones witnessed between his parents and the severity and frequency of physical abuse Mr. Jones experienced;

- Mr. Jones's reactions and behavior in response to the persistent and severe trauma he experienced, including "blank," dissociative behavior from an early age;
- Mr. Jones's intellectual and academic limitations, enrollment in Special Education classes, and inability even as he grew older to read and write;
- The effect on Mr. Jones of his parents' alcoholism and dysfunction, including the absence of a stable home, basic necessities, and Mr. Jones's homelessness at a young age;
- The history in Mr. Jones's family of mental illness, substance abuse, and intellectual impairment;
- Traumatic events in Mr. Jones's life such as the murder of his older brother and his aunt's suicide; and
- Mr. Jones's significant mental deterioration in the time leading up to the crime, including his increasingly bizarre behavior, frequent dissociative episodes, marked depression and suicidality, inability to work steadily, and the recognition among friends and family that he was in need of mental health treatment.

Opening Br. at 23-27, 66-75; *see also* State Pet. at 170-237; Inf. Reply at 129-84. Mr. Jones also demonstrated that with adequate preparation, Dr. Thomas would have identified these and several additional mitigating aspects of Mr. Jones's background and would have been able to explain, wholly apart from Mr. Jones's mental state at the time of the crime, the importance of mitigating factors in Mr. Jones's life. Ex. 154 at 2762-64.

Mr. Jones's allegations also established that, properly prepared, Dr. Thomas would have been able to provide much more complete and fully corroborated diagnoses and assessment of Mr. Jones's mental condition and could have "given a more persuasive account of his development and background leading up to the

night of the incident." Ex. 154 at 2757. Information from a reasonable investigation of Mr. Jones's background would have allowed Dr. Thomas to provide the jury with critical corroboration of the etiology and onset of Mr. Jones's mental illness. Ex. 154 at 2757. Among other things, Dr. Thomas could have provided affecting examples of how sexuality was a frequent trigger for brutal and violent domestic strife when Mr. Jones was a young child, and explained how this and other violent dysfunction and sexual abuse, mental illness, and substance abuse in Mr. Jones's childhood environment and family history significantly compromised Mr. Jones's opportunity for appropriate social adjustment and development. Ex. 154 at 2757-60. Access to information from a reasonable background investigation also would have allowed Dr. Thomas to support his clinical impressions of Mr. Jones's symptoms of psychosis with descriptions of Mr. Jones's behavior, and to explain how Mr. Jones's history was consistent with lifelong organic impairment. Ex. 154 at 2760-61.

Mr. Jones further supported his allegations that he was prejudiced by trial counsel's failure to adequately investigate, develop, and present mitigating evidence with a lengthy declaration summarizing available background history and mitigation from Zakee Matthews, M.D., an expert specializing in child and adolescent psychiatry and the effects of childhood trauma, *see generally* Ex. 178, educational professionals describing Mr. Jones's cognitive impairment and academic difficulties, *see* Exs. 125, 130, numerous declarations from friends, family, neighbors, *see, e.g.*, Exs. 1-25, 123-24, 126, 128-29, 131-32, 134-35, 143, 145, 147, 152, 155, and medical, educational, and other records routinely collected as part of a reasonable background investigation, *see, e.g.*, Exs. 26-120. *See also* Opening Br. at 66-79.

Taken as true, this showing plainly established that Mr. Jones was prejudiced by trial counsel's inadequate investigation and preparation – indeed, at the time of the state court's summary denial of Mr. Jones's claim, the Supreme Court

recognized the prejudicial effect of depriving a capital defendant of the sort of mitigating information that trial counsel failed to discover and present in Mr. Jones's penalty phase. *See* Opening Br. at 82-83. For example, in *Wiggins*, prejudicial omission of mitigation included counsel's failure to discover and present evidence that the client's mother had sex with men while her children slept in the same bed, sexual abuse of the client, and the client's homelessness and diminished mental capacities. 529 U.S. at 517, 535. In *Williams*, such evidence included abuse and neglect of the client and the client's low intellectual functioning, academic limitations, and organic mental impairment. Similarly, in *Rompilla*, evidence included the client's parents' severe alcoholism, neglect and physical abuse of the client, and the client's organic brain damage and low intellectual functioning. 545 U.S. at 391; *see also Porter*, 558 U.S. at 43 (holding prejudicial counsel's failure to present evidence of client's brain abnormality, difficulty reading and writing, and limited schooling).

In state court, respondent asserted that omission of the additional mitigating evidence was not prejudicial because it might have alienated the jury; evidence related to Mr. Jones's family history of mental illness was not "particularly helpful;" and that Mr. Jones's intellectual and academic impairment "would have had relatively little mitigating value." Inf. Resp. at 23-25. Respondent repeats these contentions before this Court. Opp. at 127-29.

Clearly established federal law foreclosed a ruling by the state court that additional mitigation established by Mr. Jones's allegations and factual material could have adversely affected his jury. The Supreme Court has acknowledged that some background information that is mitigating may have a "double edge." *Wiggins*, 539 U.S. at 535 (citing *Burger v. Kemp*, 483 U.S. 776, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987), and *Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986), as examples of such findings). In *Burger*, the Court ruled that evidence of petitioner's encounters with law enforcement authorities that were

not disclosed by his clean criminal record could have adversely affected the jury. 483 U.S. at 793. In *Darden*, the Court similarly ruled that trial counsel reasonably could have decided not to present evidence that would have revealed undisclosed prior convictions that were "particularly damaging." 477 U.S. at 186. The mitigating evidence that Mr. Jones's trial counsel failed to discover and present had none of the features of a double edge – it did not reveal undisclosed criminal activity, but instead revealed through "often poignant accounts," Ex. 150 at 2733, "the kind of troubled history" that is "relevant to assessing a defendant's moral culpability," *Wiggins*, 539 U.S. at 535.[79]

The state court could not reasonably have determined that evidence of mental illness, low intellectual functioning, and poor academic achievement had little mitigation value. The Supreme Court long has recognized that in capital cases the Eighth Amendment dictates that "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry*, 492 U.S. at 319. The Supreme Court's rulings in *Wiggins*, *Williams*, *Rompilla*, and *Porter*, as referenced above, plainly demonstrate that the type of mitigation that Mr. Jones's trial counsel failed to develop and present would have influenced the jury. *See Cauthern v. Colson*, 736 F.3d 465, 487 (6th Cir. 2013) (holding state court unreasonably

[79] The decision in *Cullen v. Pinholster*, __ U.S. __, 131 S. Ct. 1388, 1410, 179 L. Ed. 2d 557 (2011), cited by respondent, does not dictate a different result. Opp. at 128. In that case, the Court similarly pointed to further aggravating evidence as potentially damaging. 131 S. Ct. at 1410. A different interpretation of that decision, however, could not have provided a basis for the state court's summary denial of Mr. Jones's claim, because it was issued years after the state court ruling.

applied federal law in ruling that petitioner's "family-history evidence" was marginal to the case as mitigation in the penalty phase and therefore not prejudicial); *Johnson v. Mitchell*, 585 F.3d 923, 943 (6th Cir. 2009) (holding state court unreasonably applied federal law in ruling that petitioner was not prejudiced by trial counsel's failure to investigate and present mitigating evidence from "numerous family members" and information from a mental health expert about his "social and emotional development");

Mr. Jones's allegations demonstrated that trial counsel's omissions were prejudicial because the mitigation that trial counsel could have, but did not present to Mr. Jones's jury, "bears no relation to the few naked pleas for mercy actually put before the jury." *Rompilla*, 545 U.S. at 393. As the Court in *Rompilla* held, "although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [the defendant's] culpability." 545 U.S. at 393.

2. Section 2254(d) Is Satisfied by the State Court's Summary Denial of Mr. Jones's Adequately Pled Claim That Trial Counsel Was Ineffective During the Penalty Phase of Trial.

In his Opening Brief, Mr. Jones detailed the ways in which the state court's summary denial of Mr. Jones's claim of ineffective assistance of counsel during the penalty phase satisfies section 2254(d). Opening Br. at 55-58. As a general matter, the California Supreme Court's refusal to hear Mr. Jones's adequately pled claims of constitutional error is contrary to clearly established federal law that prohibits state courts from creating "unreasonable obstacles" to the resolution of federal constitutional claims that are "plainly and reasonably made." *Davis*, 263 U.S. at 24-25; *see also* Opening Br. at 7-11. In light of Mr. Jones's extensive factual allegations and supporting materials in the state court – which the state court was obligated to accept as true – the state court's ruling that Mr. Jones failed to make

any prima facie showing of entitlement to relief, and refusal to initiate proceedings to take evidence and assess the claim, constitutes an unreasonable application of *Strickland*. *See, e.g.*, *Wiggins*, 539 U.S. at 527 (holding state court application of *Strickland* unreasonable under section 2254(d)(1) for failing to assess factual elements of the claim); *Mosley*, 689 F.3d at 848 (holding state court summary ruling on limited record was unreasonable application of *Strickland*). The state court denial also is contrary to clearly established federal law because Mr. Jones's factual allegations about the mitigation that could have been, but was not, presented during the penalty phase of his trial, are "materially indistinguishable" from those omissions addressed by Supreme Court and held to be prejudicial. *Williams*, 529 U.S. at 406.

Although the California Supreme Court summarily denied Mr. Jones's claim without issuing a reasoned opinion, its precedent provides a framework for adjudicating prejudice in ineffective assistance of counsel claims that is contrary to clearly established federal law. Opening Br. at 40-42. Among other things, the California Supreme Court relies on an additional prejudice requirement derived from *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993), an approach that repeatedly has been rejected. *See, e.g.*, *Williams v. Taylor*, 529 U.S. at 393; *Lafler v. Cooper*, __ U.S. __, 132 S. Ct. 1376, 1386, 182 L. Ed. 2d 398 (2012).[80] Finally, because an evidentiary hearing is usually required to adjudicate

[80] Under state law, issuance of an order to show cause and a reasoned opinion to correct erroneous state law applications of federal law are necessary to remedy this erroneous precedent. *See, e.g.*, *Romero*, 8 Cal. 4th at 740 (holding issuance of an order to show cause is the means by which issues are joined and decided; an order to show cause triggers the state constitutional requirement that the cause be resolved "in writing with reasons stated"); *Schmier v. Supreme Court*, 78 Cal. App. 4th 703, 710 (2000) (the publication of written opinions is the manner in which this Court determines "the evolution and scope of this state's decisional law").

ineffectiveness claims, the California Supreme Court's rejection of a prima facie ineffectiveness claim without fact-finding also may be considered an unreasonable determination of the facts under § 2254(d)(2). *See, e.g.*, *Hurles v. Ryan*, 706 F.3d 1021, 1038 (9th Cir. 2013) (explaining that the Ninth Circuit has "held repeatedly that where a state court makes factual findings without an evidentiary hearing or other opportunity for the petitioner to present evidence the fact-finding process itself is deficient and not entitled to deference").

Respondent's failure to respond to these arguments constitutes consent to a ruling in favor of Mr. Jones on these bases. *See, e.g.*, *Stichting*, 802 F. Supp. 2d at 1132; *In re Teledyne*, 849 F. Supp. at 1373; Local Civil Rules, L.R. 7-9. Given Mr. Jones's showing before the state court, he is entitled to an evidentiary hearing in this Court in which he has an opportunity, for the first time, to develop and present evidence to prove his claim and obtain relief.

Q. Claim Seventeen: The Trial Court Violated Mr. Jones's Constitutional Rights When It Precluded Mr. Jones From Introducing Mitigating Evidence.

In Claim Seventeen, Mr. Jones alleged that the trial court unconstitutionally and prejudicially excluded constitutionally relevant and admissible mitigating testimony from defense expert James Park. Fed. Pet. at 339-43. Mr. Jones presented this claim to the state court on direct appeal. App. Opening Br. at 191-201; App. Reply Br. at 83-88.

1. Mr. Jones Established His Entitlement to Relief in the California Supreme Court.

The Eighth and Fourteenth Amendments permit virtually no limits on the presentation of relevant mitigating evidence by a capital defendant. *See, e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 604-05, 98 S. Ct. 2954, 2964-65, 57 L. Ed. 2d 973 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 113-14, 102 S. Ct. 869, 876-77, 71 L. Ed. 2d 1 (1982); *Hitchcock v. Dugger*, 481 U.S. 393, 398-99, 107 S. Ct. 1821,

1824, 95 L. Ed. 2d 347 (1987). More specifically, "evidence that a defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under *Eddings*, such evidence may not be excluded from the sentencer's consideration." *Skipper v. South Carolina*, 476 U.S. 1, 5, 106 S. Ct. 1669, 1671, 90 L. Ed. 2d 1 (1986).

A corollary to these principles is the principle that due process guarantees a capital defendant the right to mitigate, explain, or otherwise rebut evidence presented against him. *See, e.g.*, *Simmons v. South Carolina*, 512 U.S. 154, 161, 114 S. Ct. 2187, 2192, 129 L. Ed. 2d 133 (1994); *Gardner v. Florida*, 430 U.S. 349, 362, 97 S. Ct. 1197, 1207, 51 L. Ed. 2d 393 (1977) (holding "that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain."); *see also Skipper*, 476 U.S. 1, 5 n.1, 106 S. Ct. 1669, 1671 n.1, 90 L. Ed. 2d 1 (1986) (holding that where the prosecution relies on a prediction of future dangerousness in asking for the death penalty, "it is not only the rule of *Lockett* and *Eddings* that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" (quoting and citing *Gardner*, 430 U.S. at 362)).

Here, trial counsel presented in mitigation the testimony of James Park, a prison consultant, who testified that Mr. Jones would not pose a danger to others if he were sentenced to life without the possibility of parole. 29 RT 4270-85. The trial court permitted the prosecutor to cross-examine Mr. Park about Mr. Jones's disciplinary infractions while in prison. 29 RT 4219. In light of this, trial counsel sought to introduce testimony of conditions of confinement to rebut the prosecutor's cross-examination:

> . . . if the court does permit the District Attorney to go into each of these little tiny incidents, I think I then should have the right to show

> . . . the way he would be treated now and that tighter security would be imposed upon him because of the level of his incarceration.

29 RT 4217. The trial court denied counsel's request and precluded trial counsel from introducing such testimony on re-direct examination.

In the course of his cross-examination, the prosecutor repeatedly suggested that Mr. Jones was a future danger who could not be controlled within the prison environment. *See, e.g.*, 29 RT 4324 ("Well, sir, don't you think a person who has problems controlling their anger in stressful situations, who in the past has committed crimes based upon anger, where drug use is involved, that a person like that, if they are in a stressful prison facility and they get ahold of alcohol or drugs, that that person might in fact be violent in the future?");[81] 29 RT 4322 (prosecutor asking Mr. Park whether a person who committed first degree murder without special circumstances and was sentenced to twenty-five years to life would have the same propensity for violence in prison as a person sentenced to life without the possibility of parole for grand theft auto pursuant to Three Strikes legislation). The prosecutor's questions not only suggested that Mr. Jones was a future danger, but also misled the jury by implying that Mr. Jones, if sentenced to life without the possibility of parole, would be housed in the same facility and subject to the same level of security as individuals convicted of non-violent crimes. *See* 29 RT 4322. In light of this cross-examination, trial counsel again sought leave of the court to introduce testimony on re-direct regarding conditions of confinement, arguing that "at this point it becomes extremely important and relevant to show that there's a

[81] In response to this question, Mr. Park attempted to explain the reasons he believed Mr. Jones would adjust well to prison despite his criminal history and the few disciplinary infractions the prosecutor raised, which included the fact that prisoners sentenced to life without the possibility of parole are confined in Level IV prisons in response to this question, but the trial court's ruling precluded him from doing so. 29 RT 4324; *see also* 29 RT 4329.

different place that . . . [Mr. Jones] would be kept than a person that goes . . . [to prison] for 25 [years] to life for a third strike case." 29 RT 4329. Again, the trial court precluded the introduction of such testimony to rebut the prosecutor's suggestions. 29 RT 4330-31.

The trial court's preclusion of this testimony violated Mr. Jones' absolute right to present relevant mitigating evidence. The prosecutor's cross-examination made relevant Mr. Park's proffered testimony about the conditions under which Mr. Jones would be confined if sentenced to life without the possibility of parole, both as affirmative mitigation and, more critically, to rebut the prosecutor's improper suggestions and explain the basis of Mr. Park's opinion. *See Simmons*, 512 U.S. at 161; *Skipper*, 476 U.S. at 5 n.1; *Gardner*, 430 U.S. at 362. Because of the "qualitative difference" between the finality of a death sentence and a sentence of life imprisonment, there is a corresponding heightened "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) (plurality opinion); *see also Zant v. Stephens*, 462 U.S. 862, 884-85, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983); *Lowenfield v. Phelps*, 484 U.S. 231, 238-39, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988); *Lockett*, 438 U.S. at 604. The prosecutor's uncorrected suggestions that Mr. Jones would be confined in the same conditions and subjected to the same level of security as prisoners convicted on non-violent crimes such as grand theft auto presented an "intolerable danger" that the jury would sentence Mr. Jones to death based on incorrect, unreliable information. *See generally Caldwell v. Mississippi*, 472 U.S. 320, 333, 105 S. Ct. 2633, 2642, 86 L. Ed. 2d 231 (1985) (holding that the prosecutor's uncorrected suggestion that the responsibility for determination of death will rest with others presented an intolerable danger that the jury would choose to minimize the importance of its role).

This error prejudiced Mr. Jones and enabled the prosecutor to argue that "the

dangerousness that exists in this man" "in itself might be an aggravating factor." 31 RT 4644. Had Mr. Jones been able to present the precluded testimony, he would have been able to rebut the prosecutor's arguments regarding aggravation, his suggestions on cross-examination that Mr. Park's opinion was unfounded and speculative, and his improper suggestion to the jury that Mr. Jones would be confined under the same conditions as individuals convicted of non-violent crimes.

2. The State Court Decision.

The relevant decision in state court is the opinion on direct appeal. *People v. Jones*, 29 Cal. 4th 1229, 1260-62, 131 Cal. Rptr. 2d 468 (2003). The state court denied Mr. Jones's claim, relying on its prior holdings that evidence of conditions of confinement that a defendant will experience if sentenced to life without the possibility of parole is irrelevant because it does not relate to the defendant's character, culpability, or the circumstances of the offense. *Jones*, 29 Cal. 4th at 1261. The state court did not address Mr. Jones's specific argument that he should have been permitted to introduce such testimony to rebut the prosecutor's suggestions in cross-examination, simply stating, "We have been given no reason to reconsider our holdings in this regard." *Jones*, 29 Cal. 4th at 1262.

3. Section 2254 Does Not Bar Relief on This Claim.

Mr. Jones is entitled to relief because the state court was contrary to and an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1). The state court did not reach the question of whether such testimony was made admissible in light of the prosecutor's cross-examination and improper suggestions; rather, it relied on case law that holds that such testimony is not admissible as affirmative mitigation. In failing to reach this question, the state court "unreasonably refuse[d] to extend" the legal principles contained in the established federal law set forth above "to a new context where it should apply." *Williams (Terry) v. Taylor*, 529 U.S. 362, 407, 120 S. Ct. 1495, 1520, 146 L. Ed. 2d 389 (2000). The state court's ruling was also "in conflict with" established

Supreme Court precedent. *Williams (Terry)*, 529 U.S. at 388. In 2004, the Supreme Court explained that when it addressed directly the relevance standard applicable to mitigating evidence in 1990, it "spoke in the most expansive terms" and set forth a "low threshold" for relevance. *Tennard v. Dretke*, 542 U.S. 274, 284, 124 S. Ct. 2562, 2570, 159 L. Ed. 2d 384 (2004) (citing *McKoy v. North Carolina*, 494 U.S. 433, 440-41, 110 S. Ct. 1227, 108 L. Ed. 2d (1990)). That is, *Skipper*, *Lockett*, *Eddings*, and their progeny established that evidence should be considered by the sentence in mitigation so long as it falls under a category deemed relevant by the United States Supreme Court. Evidence proffered to rebut the prosecution's arguments in aggravation is clearly relevant under Supreme Court law. *Simmons*, 512 U.S. at 161; *Skipper*, 476 U.S. at 5 n.1; *Gardner*, 430 U.S. at 362. Accordingly, Mr. Jones satisfies section 2254(d) and is entitled to de novo review of this claim.

R. Claims Eighteen and Nineteen: Mr. Jones Was Denied His Right to an Impartial Jury and a Fair Trial.

Mr. Jones satisfied state pleading requirements by presenting his juror bias and misconduct claims in state court with sufficient detail and supporting factual material to establish a prima facie showing that he was entitled to relief. *See, e.g.*, *Duvall*, 9 Cal. 4th at 474. In the state court, Mr. Jones demonstrated that several jurors manifested bias by disregarding the court's repeated admonitions not to discuss the case prematurely and to refrain from forming opinions until all evidence had been presented. Contrary to these instructions, several jurors decided to impose the death penalty before the penalty phase began and regularly discussed their decisions with each other prior to penalty phase deliberations. The victim's daughters' courtroom outbursts further compromised the jury's impartiality. Jurors improperly considered extrinsic evidence, including (1) biblical teachings mandating imposition of the death penalty for murder; (2) one juror's specialized knowledge of evidence the defense presented about Mr. Jones's medications; and

(3) information that Mr. Jones would not likely be executed if sentenced to death. One juror slept during the critical testimony of the defense's only penalty phase mental health expert. As a result, Mr. Jones was deprived of his Sixth Amendment guarantee of "a fair trial by a panel of impartial, 'indifferent' jurors," *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961), and his jury trial and due process rights to a jury willing to decide the case solely on the evidence, *see, e.g.*, *McDonough Power Equip v. Greenwood*, 464 U.S. 548, 554, 104 S. Ct. 845, 849, 78 L. Ed. 2d 663 (1984); *Jordan v. Massachusetts*, 225 U.S. 167, 176, 32 S. Ct. 651, 56 L. Ed. 1038 (1912).

This claim was not procedurally defaulted, and respondent did not present factual materials or legal argument in state court to establish that Mr. Jones's prima facie showing should not be taken as true or that it otherwise lacked merit. Under these circumstances, the state court was required to issue an order to show cause and to allow Mr. Jones access to state processes to develop and present evidence to prove his claim. *See, e.g. Duvall*, 9 Cal. 4th at 475; *Romero*, 8 Cal. 4th at 742. The Supreme Court "has long held that the remedy for allegations of juror partiality is a hearing" to allow the defendant to prove actual bias; the hearing serves as "a guarantee of a defendant's right to an impartial jury." *Smith v. Phillips*, 455 U.S. 209, 215-16, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982) (O'Connor, J., concurring); *see also Dyer v. Calderon*, 151 F.3d 970, 974 (9th Cir.1998) (en banc) ("[a] court confronted with a colorable claim of juror bias must undertake an investigation of the relevant facts and circumstances"). This requirement applies with equal force when a juror has been exposed to extrinsic information. *See, e.g.*, *Tanner v. United States*, 483 U.S. 107, 120, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987) (ruling that "[t]he Court's holdings requir[e] an evidentiary hearing where extrinsic influence or relationships have tainted the deliberations"); *Remmer v. United States*, 347 U.S. 227, 230, 74 S. Ct. 450, 98 L. Ed. 654 (1954) (holding that to resolve a claim of exposure to extrinsic evidence, the court "should determine the circumstances, the

impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate").

A hearing is necessary to inquire into the "juror's memory, his reasons for acting as he did, and his understanding of the consequences of his actions," and permit the fact-finder "to observe the juror's demeanor under cross-examination and to evaluate his answers" in light of the facts. *Phillips*, 455 U.S. at 222 (O'Connor, J., concurring); *see also id.* (explaining that "in most instances a post-conviction hearing will be adequate to determine whether a juror is biased," but the implied bias doctrine is necessary where a hearing may not be sufficient to protect a defendant's rights). By instead summarily denying Mr. Jones's claim, the California Supreme Court's decision satisfies section 2254(d) as set forth in Mr. Jones prior briefing and in the sections that follow. *See, e.g.*, *Stouffer v. Trammell*, 738 F.3d 1205, 1219 (10th Cir. 2013) (holding that determination of prejudice resulting from juror misconduct requires a hearing and that section 2254(d) does not bar merits review when state court failed to conduct one).

1. There Is No Reasonable Basis for the State Court Ruling That Mr. Jones Failed to Make a Prima Facie Showing for Relief.

a. Mr. Jones Made a Prima Facie Showing That Jurors Improperly Prejudged the Case and Prematurely Discussed Penalty.

The trial court repeatedly instructed the jurors on four key obligations: (1) not to discuss the case outside of deliberations; (2) not to consider Mr. Jones's penalty until penalty phase deliberations; (3) not to seek out extrinsic information; and (4) to report misconduct promptly to the court. Opening Br. at 91-92. Several jurors blatantly disregarded these instructions, instead deciding to vote for a death sentence prior to the penalty phase, and discussing their decision well before penalty phase deliberations in their social interactions and while the guilt phase was occurring. *Id*. at 92.

Two male jurors were extremely vocal from the start of guilt phase

deliberations that Mr. Jones should be sentenced to death because he was guilty of the charged crimes. Opening Br. at 92-93. One male juror insisted on expressing his opinion during the trial that Mr. Jones was guilty and deserved the death penalty. Opening Br. at 93. After hearing the victim's daughters' outbursts during the guilt phase, another juror immediately resolved to vote for death; he shared his decision with the other jurors during guilt phase deliberations. Opening Br. at 93. Prior to penalty phase deliberations, some of the jurors discussed both their decisions to sentence Mr. Jones to death during their lunchtime conversations and their concerns that a fellow juror (who obeyed the court's instructions and refused to participate in this misconduct) was planning to vote for life without parole. Opening Br. at 93.

The jurors' widespread prejudgment of Mr. Jones's sentence made them view the defense's penalty phase presentation and their subsequent deliberations as essentially irrelevant. Juror Muhammad explained: "We talked about how the case was all about the guilt phase because once we decided that we knew we had to vote for death . . By the time the penalty phase came . . . our minds were already made up." Ex. 138 at 2690-91. Juror Ruotolo concurred: "[During penalty phase deliberations], [w]e all talked about how we already decided that he was guilty, and we did not understand how to view the [defense's penalty phase] evidence in light of our guilt verdicts." Ex. 9 at 95.

The California Supreme Court's determination that Mr. Jones failed to allege a prima facie case was an unreasonable application of controlling federal law. The jurors committed misconduct by prematurely deliberating and prejudging Mr. Jones's case. *See, e.g.*, *Irvin*, 366 U.S. at 724; *Green v. White*, 232 F.3d 671, 673, 678 (9th Cir. 2000) (applying Supreme Court precedent to grant relief on juror bias claim where, *inter alia*, one juror told others that he knew that petitioner was guilty from the moment that he saw him); *United States v. Resko*, 3 F.3d 684, 688-89 (3d Cir. 1993) (granting relief on juror bias claim where jurors prematurely discussed

the case). A juror who prejudges the facts is actually biased. *See, e.g.*, *Phillips*, 455 U.S. at 215, 221, (O'Connor, J., concurring); *Gibson v. Berryhill*, 411 U.S. 564, 578, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973). Regardless of the number of jurors affected, juror bias is structural constitutional error that renders the trial fundamentally unfair, and is thus not subject to harmless error analysis. *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 8-9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *Parker v. Gladden*, 385 U.S. 363, 366, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966). Similarly, the California Supreme Court's summary denial deprived Mr. Jones of his right to a hearing to establish his entitlement to relief. Clearly established federal law mandates that a defendant alleging juror bias is entitled to a hearing to prove actual bias. *See, e.g.*, *Phillips*, 455 U.S. at 215-16.

In state court, respondent challenged only the sufficiency of Mr. Jones's pleading:

> Petitioner next contends that jurors prematurely discussed the case. State Pet. at 305. The claim should be rejected because it is conclusory and unsupported, as there are no facts establishing that the case was actually discussed by jurors prematurely.

Inf. Resp. at 44 (footnote and citation omitted). As the California Supreme Court's order summarily denying the claim did not cite case law indicating that that it was inadequately alleged or lacked adequate documentary support, *see* section II.A.2., *supra*, respondent's assertions did not form the basis for its decision. In this Court, although respondent briefly mentions his claim that Mr. Jones failed to prove that "the case was actually discussed by jurors prematurely,"[82] he posits a

[82] Respondent's entire discussion of this rationale is confined to characterizing Virginia Surprenant's declaration as "vague." Opp. at 140-41 ("Surprenant did not directly state that she and other jurors discussed the case prior to deliberations; she only made a vague reference to her feelings."). Respondent misreads Ms. Suprenant's declaration; she unequivocally describes

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different justification for the summary denial of this claim: "because there was no evidence that any of Petitioner's jurors did not keep an open mind, the California Supreme Court reasonably concluded that Petitioner failed to demonstrate that the resulting prejudice was so severe so as to violate his right to a fair trial." Opp. at 141.

Respondent's assertion does not establish any basis for concluding that section 2254(d) bars the granting of relief on this claim. First, as respondent failed to raise this argument in the California Supreme Court, it could not form the basis for that court's decision. *See* section II.A.4., *supra*. Second, as set forth in the Opening Brief and above, Mr. Jones presented ample declaratory support for the propositions that several jurors prematurely discussed the case and resolved to vote for death prior to the start of penalty phase deliberations. *See* Opening Br. at 92-

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jurors discussing their views on the appropriateness of sentencing Mr. Jones to death during lunch prior to the deliberations. *See* Ex. 23 at 240. Moreover, Ms. Suprenant's statements that jurors had prejudged the sentence determination are confirmed by those of three other jurors, Donald Kay, Omar Muhammad, and Emil Ruotolo. Ex. 122 at 2475 (noting that one male juror "always wanted to talk during the trial and assert his opinion that Mr. Jones was guilty and deserved the death penalty"); Ex. 138 at 2690-91 ("We talked about how the case was all about the guilt phase because once we decided that we knew we had to vote for death … By the time the penalty phase came it was too late, our minds were already made up. We needed something to work with in the guilt phase, but there was nothing."); Ex. 9 at 93 (stating that a juror determined to vote for death after the victim's daughter had an outburst during the guilt phase in which she accused Mr. Jones of causing the death of her father); Ex. 9 at 95 ("We all talked about how we already decided that he was guilty, and we did not understand how to view the [penalty phase] evidence in light of our guilt verdicts."). To the extent that respondent disputes whether the jurors discussed and prejudged the appropriate sentence, the California Supreme Court's resolution of that dispute, without conducting an evidentiary hearing, satisfies section 2254(d). *See* section II.A.3., *supra.*

93; Ex. 9 at 93, 95; Ex. 23 at 240; Ex. 122 at 2475; Ex. 138 at 2690-91.[83] Third, factual determinations of whether the jurors kept "an open mind" or were so biased in their prejudgment of the case may be made only after affording Mr. Jones the opportunity to present evidence at a hearing. *See, e.g.*, *Phillips*, 455 U.S. at 215-16. To the extent that the California Supreme Court determined without an evidentiary hearing that jurors kept an open mind as to Mr. Jones's sentence and merely expressed opinions early in penalty phase deliberations, its decision satisfied section 2254(d)(2) as an unreasonable determination of the facts. *See, e.g.*, *Hurles v. Ryan*, 706 F.3d 1021, 1038-39 (9th Cir. 2013) (holding that state court's factual findings made without an opportunity for the petitioner to present evidence are not entitled to deference); *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004) (holding that state court ruling satisfies 2254(d)(2) by making evidentiary findings without "holding a hearing and giving petitioner an opportunity to present evidence").[84]

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[83] In this Court, respondent asserts that, because "Juror Virginia Surprenant was not a voting member on Petitioner's jury," "the California Supreme Court could reasonably deny the claim because any misconduct on her part in deciding on penalty during the guilt phase was clearly harmless." Opp. at 142. Respondent did not advance this argument in the state court proceedings, and in any event, it may not be used to justify the California Supreme Court's summary denial of Mr. Jones's claim. Mr. Jones does not contend that Ms. Surprenant's actions warrant relief; instead, Ms. Surprenant's observations of jurors' statements demonstrating their prejudgment forms the basis of his claim. *See* Ex. 23 at 240 (stating that jurors discussed their feelings about the penalty during lunch prior to deliberations).

[84] Respondent's reliance on *Davis v. Woodford*, 384 F.3d 628 (9th Cir. 2004), is misplaced. In *Davis*, after instructions were given but prior to the start of deliberations, a juror submitted a note to the trial court asking several questions concerning the legal process and the effect of the penalty verdict. 384 F.3d at 651. There was "no evidence" "that any of the jurors relied upon extrinsic evidence in reaching a death verdict, or that any of the jurors reached a sentencing determination prematurely." 384 F.3d at 653. The trial judge instructed the jury

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b. Mr. Jones Made a Prima Facie Showing That Jurors Were Improperly and Prejudicially Exposed to Extrinsic Evidence

The jurors were exposed to several extrinsic influences, including the victim's daughters' outbursts, biblical teachings, unsworn opinions about Mr. Jones's psychiatric medications, and factors that diminished their responsibility in sentencing Mr. Jones to death. Opening Br. at 94-100. In response to Mr. Jones's factual and legal bases demonstrating the unreasonableness of the California Supreme Court's decision, respondent abandons virtually all of the arguments that he presented in state court. *Compare* Inf. Resp. at 41-48, *with* Opp. at 141-45. Instead, respondent encourages this Court to adopt reasoning that could not have formed the basis for the state court's decision or which itself is an unreasonable application of clearly established federal law.[85]

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regarding the questions, which was "sufficient to cure any possible prejudice." 384 F.3d at 653. The record before the California Supreme Court and this Court is markedly different than that in *Davis*; Mr. Jones submitted sworn declarations that demonstrate that jurors not only discussed the case prior to deliberations, but also "reached a sentencing determination prematurely." 384 F.3d at 653.

[85] In describing the law governing this claim, respondent also asserts that Mr. Jones has "the burden of establishing that a juror's consideration of extrinsic material had a 'substantial and injurious effect or influence in determining the jury's verdict.'" Opp. at 135 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)). It is not clear whether respondent is arguing that the California Supreme Court used this standard in denying Mr. Jones's claim. The California Supreme Court was not presented with such an argument and had not previously adopted this limitation on the granting of relief for juror misconduct claims. Respondent also has a section on the admissibility of juror's impressions in adjudicating the merits of claims. Opp. at 136. To the extent that respondent is arguing the application of the *Brecht* standard to this Court's resolution of the merits of the claim or the admissibility of certain statements by the jurors, such arguments are premature, as this Court's briefing order was limited to whether 28 U.S.C. § 2254 bars consideration of the claims on the merits.

1) Victim's daughters' outbursts

The victim's daughters, Pamela Miller and Deborah Harris, were vocally hostile towards Mr. Jones in the jury's presence. Opening Br. at 94. Ms. Harris sat in the front row in clear view of the jury during a witness's testimony in the guilt phase. She was required to leave the courtroom by the judge, who explained, "[Y]ou keep gesturing with your head, shaking your head, nodding up and down and shaking your head back and forth and making comments." 22 RT 3272-73. Ms. Miller "called Mr. Jones names and screamed out that he had also caused the death of her father who died of a heart attack a few months after her mother was killed." Ex. 9 at 93.

The jurors found Ms. Miller's and Ms. Harris's outbursts highly influential. An alternate juror recalled that "the victim's daughters carried on constantly, screaming and yelling at Mr. Jones . . . and [were] unable to control themselves. The way they behaved, they could have been on television." Ex. 23 at 239. Another juror recalled that Ms. Miller was "extremely vocal throughout . . . the entire trial," and that Ms. Harris "yelled out in court many times." Ex. 9 at 93. The jurors were inevitably affected by their exposure to the daughters' anger and sadness. As one juror related, "[d]uring guilt deliberations, one of the jurors told us . . . he could understand how upset the daughter was . . . He said right then and there, after hearing the daughter, he knew he had to vote for death." *Id*.

The California Supreme Court's determination that Mr. Jones failed to allege a prima facie case was an unreasonable application of controlling federal law. The daughters' conduct denied Mr. Jones his right to a fair trial by a panel of impartial jurors unaffected by extraneous information. *See, e.g.*, *Parker*, 385 U.S. at 364; *Tanner*, 483 U.S. at 117; *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding a defendant is entitled to a jury verdict based solely on trial evidence, not on "other circumstances not adduced as proof at trial"). Where disruptions in the courtroom threaten the impartiality of the jury, "the

appropriate safeguard against such prejudice is the defendant's right to demonstrate that the [disruption] compromised the ability of the particular jury that heard the case to adjudicate fairly." *Phillips*, 455 U.S. at 217.

In state court, respondent urged the court to deny the claim for lack of sufficient specificity in the allegations or proof:

> First, there is no evidence as to the nature of Ms. Miller's comments or the testimony that prompted her to shake her head. There is also no evidence that the jurors heard Ms. Miller's comments or observed her head movements. Finally, Woodrow Brooks was a relatively unimportant witness and it is therefore unlikely that any spectator misconduct during his testimony was prejudicial.

Inf. Resp. at 40. As explained, *supra*, the California Supreme Court's lack of a citation to case law finding such curable deficiencies disproves any argument that it relied upon these reasons in denying the claim, and respondent abandons these arguments in this Court.

In federal court, respondent contends for the first time that no clearly established federal law establishes that spectator misconduct may be prejudicial reversible error. Opp. at 149. As set forth *supra*, if the state court considered reasons for denying the claim that were not presented by respondent, it would have afforded Mr. Jones the opportunity to respond to those grounds. Moreover, had the state court relied on respondent's reasoning to deny Mr. Jones's claim, its decision would have constituted an unreasonable application of the Supreme Court's precedents that establish that a juror's consideration of extrinsic evidence violates due process and is presumptively prejudicial. *See, e.g.*, *Tanner*, 483 U.S. at 117; *Remmer*, 347 U.S. at 229.[86]

[86] To the extent that respondent raises factual questions about what the jurors observed and heard, Opp. at 149-50, clearly established federal law required the

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Respondent similarly raises a new argument in this Court that the jury instructions ameliorated the prejudicial effect of the behavior. Opp. at 150. Respondent's failure to present this argument in state court precludes any conclusion that the California Supreme Court relied on it as the basis for its ruling. *See* section II.A.4., *supra*. Had respondent raised it, Mr. Jones would have alerted the California Supreme Court that presuming that his jurors "follow[ed] instructions," Opp. at 150, was unwarranted given the number of instances in which the jurors failed to heed other instructions. *See, e.g.*, Ex. 23 at 240 (stating that jurors discussed their feelings about the penalty during lunch prior to deliberations); Ex. 127 at 2565 (stating that a juror consulted his priest); Ex. 9 at 93 (stating that a juror determined to vote for death after the victim's daughter had an outburst during the guilt phase in which she accused Mr. Jones of causing the death of her father); *see also People v. Daniels*, 52 Cal. 3d 815, 865, 277 Cal. Rptr. 122 (1991) (holding that a "judge may reasonably conclude that a juror who has violated instructions to refrain from discussing the case . . . cannot be counted on to follow instructions in the future" and is unable to perform her duty as a juror). Moreover, given that Mr. Jones had established a prima facie case for relief, the California Supreme Court was required, "to determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Remmer*, 347 U.S. at 230. The failure to conduct a hearing satisfies section 2254(d).

2) Biblical teachings.

During penalty phase deliberations, "each of the jurors took turns speaking [their] mind." Ex. 127 at 2565. Juror Youssif Botros told the other jurors that he was "having a difficult time sentencing someone to death," so "he asked his priest

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California Supreme Court to resolve those questions by conducting an evidentiary hearing. *See, e.g.*, *Phillips*, 455 U.S. at 217.

for help."[87] Ex. 127 at 2565. His priest directed him to read the Bible for guidance. *Id*. Mr. Botros told the other jurors that he subsequently read the biblical teaching requiring an "eye for an eye" and as a result was able to vote for death. Ex. 127 at 2565.

The California Supreme Court's determination that Mr. Jones failed to allege a prima facie case was an unreasonable application of controlling federal law. Exposure to biblical death penalty teachings is particularly improper. "[D]elegation of the ultimate responsibility for imposing a sentence to divine authority undermines the jury's role in the sentencing process." *Sandoval v. Calderon*, 241 F.3d 765, 777 (9th Cir. 2000); *see also Jones v. Kemp*, 706 F. Supp. 1534, 1559 (N.D. Ga. 1989) ("To the average juror . . . the Bible is an authoritative religious document and is different not just in degree, although this difference is pronounced, but in kind" from other reference sources).

Mr. Botros's misconduct went to the central issue of whether Mr. Jones should be sentenced to death. He violated Mr. Jones's rights to a fair trial by impartial jury and to due process by exposing the jury to prejudicial extrinsic statements from the Bible and his priest. *Tanner*, 483 U.S. at 117; *see also Gardner*, 430 U.S. at 362; *Mattox*, 146 U.S. at 149. Jurors commit constitutional error when they consult the Bible for the appropriate penalty for murder during penalty phase deliberations. *See Oliver v. Quarterman*, 541 F.3d 329, 339-40 (5th Cir. 2008) (noting that the vast majority of circuits have consistently deemed the Bible an improper external influence on jury deliberations); *McNair v. Campbell*, 416 F.3d 1291, 1308 (11th Cir. 2005) (presuming prejudice where juror read aloud from Bible and led other jurors in prayer during deliberations); *Kemp*, 706 F. Supp.

[87] Mr. Botros's disregard for the trial court's repeated instructions to the jury not to rely on extrinsic sources also illustrates his actual bias. Opening Br. at 96 n.33.

at 1558-60 (jury obligated to apply state law, "not … its own interpretation of precepts of the Bible, in determining whether the petitioner should live or die"). Mr. Jones's allegations entitled him to a hearing to discover and present further details of Mr. Botros's misconduct and its prejudicial effect. *See, e.g.*, *Remmer*, 347 U.S. at 229; *Tanner*, 483 U.S. at 120.

The sole reason with which respondent presented the state court to deny this claim is that there "is no substantial likelihood of prejudice or bias from the juror's conduct," because the expression is commonly used outside of the biblical context, the reference "appears to have been isolated," "and the juror did not indicate that the priest endorsed that or any other biblical passage." Inf. Resp. at 44. In this Court, respondent correctly abandons the factual underpinnings of his argument, as these assertions would have required the California Supreme Court to conduct an evidentiary hearing to resolve them. Instead, respondent asserts in this Court that Mr. Botros's exposing the jury to biblical teachings mandating the death penalty for murder did not have a "substantial and injurious effect" where there was significant evidence of Mr. Jones's guilt. Opp. at 138. As noted above, the California Supreme Court has not adopted the *Brecht* standard for resolving juror misconduct claims and thus it is irrelevant for the purposes of section 2254(d). *See* n.80, *supra*. Moreover, had the state court been presented with respondent's reasoning with regard to the evidence of guilt, Mr. Jones would have alerted the court about the fact that jury deliberations in the guilt phase lasted four days (2 CT 247-48, 251, 377), and would have argued that a hearing was necessary to determine the extent of the prejudice from Mr. Botros's violation of the instruction not to discuss the case with third parties and the jury's subsequent consideration of extrinsic evidence that resulted from that discussion. *See, e.g.*, *Tanner*, 483 U.S. at 117; *Remmer*, 347 U.S. at 229.

Respondent presents several additional new contentions for the first time in this Court. As set forth *supra*, the California Supreme Court's decision was not

based on arguments respondent did not present in the Informal Response. Moreover, respondent's new theories satisfy section 2254(d) as set forth below.

First, respondent asserts that California Supreme "could reasonably conclude that there was no juror misconduct" because "[t]here is no clearly established Supreme Court law holding that references to the Bible is extrinsic evidence" "or holding that 'reading and sharing biblical passages constitutes juror misconduct.'" Opp. at 138. Regardless of whether a state court may exclude references to the Bible during deliberations from the definition of "extrinsic evidence," the California Supreme unquestionably considers such actions to constitute constitutionally prohibited misconduct. *See, e.g.*, *People v. Williams*, 40 Cal. 4th 287, 333, 148 P.3d 47 (2006) ("This court has held that reading aloud from the Bible or circulating biblical passages during deliberations is misconduct. … *The Attorney General concedes that bringing biblical passages into the jury room and reading them aloud during deliberation constitutes misconduct*.") (emphasis supplied); *People v. Danks*, 32 Cal. 4th 269, 308 n.12, 308, 82 P.2d 1249 (2004) ("Juror K.A.'s conduct in bringing Bible passages into the jury room was misconduct"); *People v. Mincey*, 2 Cal. 4th 408, 467, 827 P.2d 388 (1992) (holding that consideration of material extrinsic to the record, including a Bible, is misconduct); *see also People v. Wash*, 6 Cal. 4th 215, 261, 24 Cal. Rptr. 2d 421 (1993) ("The primary vice in referring to the Bible and other religious authority is that such argument may "diminish the jury's sense of responsibility for its verdict and ... imply that another, higher law should be applied in capital cases, displacing the law in the court's instructions") (quoting *People v. Wrest*, 3 Cal 4th 1088, 1107, 13 Cal. Rptr. 2d 511 (1992)). Thus, the California Supreme Court's denial of Mr. Jones's claim did not rest on any alleged ambiguity in controlling federal law. Second, respondent presents substantial factual speculation, imagining that Mr. Botros's contact with his priest was "likely" de minimis, asserting that there was no evidence that the contact related to a material aspect of the case or that the priest

commented on the specific evidence in the case. Opp. at 140. Resolution of Mr. Jones's juror misconduct claim thus "necessarily require[d] a credibility determination between competing factual assertions." *Fanaro v. Pineda*, No. 2:10-CV-1002, 2012 WL 1854313, *3 (S.D. Oh. May 21, 2012); *see also Bell v. Uribe*, ___ F.3d ___, 2014 WL 211814, *9 (9th Cir. Jan 21, 2014) ("Under Supreme Court precedent, the remedy for allegations of juror misconduct is a prompt hearing in which the trial court determines the circumstances of what transpired, the impact on the jurors, and whether or not the misconduct was prejudicial.") (citing *Smith*, 455 U.S. at 216–17). If the state court elected to "ignor[e] the factual dispute" and endorse respondent's speculation without an evidentiary hearing, it would have unreasonably applied clearly established federal law under section 2254(d)(1). *Fanaro*, 2012 WL 1854313, at *3. Moreover, it would also have unreasonably determined the facts under section 2254(d)(2). *See Plummer v. Jackson*, 491 F. App'x 671, 680-81 (6th Cir. 2012) (holding that the state court unreasonably denied petitioner's claim without an evidentiary hearing despite the parties' factual disputes).

Third, respondent contends that the state court correctly rejected the claim because Mr. Jones supported it with hearsay declarations. Opp. at 139. Had the California Supreme determined that Mr. Jones failed to produce sufficient detailed allegations or provide readily available documentary materials to support the claim, it would have so indicated in its order. *See* section II.A.2., *supra*. Moreover, absent the ordering of an evidentiary hearing, the California Supreme Court necessarily considers habeas corpus petitions with supporting declarations containing out-of-court statements in deciding whether a petitioner has presented a prima facie claim for habeas relief warranting the issuance of an order to show cause. *See In re Fields*, 51 Cal. 3d 1063, 1070 n.2, 275 Cal. Rptr. 384 (1990) ("Declarations attached to the petition and traverse may be incorporated into the allegations, or simply serve to persuade the court of the bonafides of the

allegations."). This is because the initial petition is a preliminary showing, and the court may ultimately require petitioner to prove his claim with admissible evidence at a hearing. *See, e.g.*, *In re Scott*, 29 Cal. 4th 783, 822, 129 Cal. Rptr. 2d 605 (2003) (describing hearsay declarations submitted by petitioner in support of habeas petition and holding that *after the issuance of an order to show cause and evidentiary hearing*, it then becomes proper for the fact-finder to consider the testimony and credibility of live witnesses rather than hearsay declarations); *see also In re Miranda*, 43 Cal. 4th 541, 574, 76 Cal. Rptr. 3d 172 (2008); *In re Marquez*, 1 Cal. 4th 584, 599, 3 Cal. Rptr. 2d 727 (1992) (permitting consideration of unopposed hearsay declarations even by referee conducting reference hearing). Indeed, respondent fails to explain how petitioner could present a prima facie claim for habeas relief prior to the granting of an evidentiary hearing, except through allegations supported by sworn declarations.

Critically, the California Supreme Court could not have relied on respondent's reasoning because California Evidence Code section 1150 permits jurors to testify about "statements made ... either within or without the jury room." Cal. Evid. Code § 1150. The California Supreme Court has held that such testimony is admissible so long as the "very making of the statement" would itself constitute misconduct and the statement is not a reflection of the juror's mental processes. *In re Stankewitz*, 40 Cal. 3d 391, 398, 220 Cal. Rptr. 382 (1985). "Thus, jurors may testify to 'overt acts' - that is, such statements, conduct, conditions, or events as are 'open to sight, hearing, and the other senses and thus subject to corroboration' - but may not testify to 'the subjective reasoning processes of the individual juror.'" *Stankewitz*, 40 Cal. 3d at 398 (quoting *People v. Hutchinson*, 71 Cal. 2d 342, 349-50, 78 Cal. Rptr. 196 (1969)); *see also id*. (Among the overt acts that are admissible and to which jurors are competent to testify are statements. Section 1150, subdivision (a), expressly allows proof of "statements made . . . either within or without the jury room"). Thus, parties may

submit declarations containing otherwise inadmissible hearsay when they relate to statements heard by jurors. *See, e.g.*, *People v. Pierce*, 24 Cal. 3d 199, 208, 155 Cal. Rptr. 657 (1979) ("The prosecution also presented investigative reports reciting that each of the 11 other jurors had signed declarations asserting that at no time during the trial or deliberations did Seymour mention he knew a police officer or had any information other than that presented in court. If the declarations themselves had been offered (*see* Evid. Code, § 1500), they would have been admissible under Evidence Code section 1150 to prove the fact asserted."); *People v. Hutchinson*, 71 Cal. 2d 342, 348, 78 Cal. Rptr. 196 (1969) (holding that juror affidavits may be used "to show that a juror was mentally incompetent at the time of trial and to show that a juror did not intend to follow the court's instructions on the law and had concealed that intention on voir dire") (citations omitted); *People v. Castaldia*, 51 Cal. 2d 569, 572, 335 P.2d 104 (1959) (holding that affidavit from juror Charles Eddy was "properly received in evidence to show that jurors Kennedy and Russell had given false answers to questions on their voir dire examination"; "Affidavits of jurors may be used to set aside a verdict where the bias or disqualification of a juror was concealed by false answers on voir dire examination."); *People v. Hord*, 15 Cal. App. 4th 711, 724, 19 Cal. Rptr. 55 (1993) ("Juror affidavits may be used to prove that one or more of the jurors concealed bias or prejudice on voir dire.").[88]

3) Mr. Jones's mental functioning.

The issue of Mr. Jones's need for psychiatric medication while in custody awaiting trial was a central feature of the defense presented at both phases of his

[88] Given this well-established case law, it is not surprising that respondent cites to no cases – published or unpublished – from any California court that prohibits the use of declarations from jurors containing hearsay statements from other jurors.

trial. During the guilt phase, Dr. Eugene Kunzman, a psychiatrist with the Los Angeles County Jail, testified about the antipsychotic and antidepressant medications that jail medical staff prescribed to Mr. Jones following his arrest for the capital crime. Dr. Kunzman testified about the therapeutic purposes and effects of the medication and various consequences on a person's functioning, behavior, and appearance while testifying if incorrect dosage levels were prescribed. Opening Br. at 97-98. Trial counsel presented the testimony to bolster a defense that Mr. Jones lacked the mens rea for the capital crime and to explain Mr. Jones's appearance and performance while testifying. Opening Br. at 98. The prosecutor disputed the Mr. Jones's defense, arguing that jail mental health staff would have prescribed antipsychotic medication to inmates if they had so requested, without any medical necessity. Opening Br. at 98, n.34. During the penalty phase, the defense presented Dr. Claudewell Thomas, who also discussed the effects of Mr. Jones's prescription medications to support his diagnosis and conclusions about Mr. Jones's mental functioning. Opening Br. at 98.

During trial, juror Omar Muhammad drew upon his medical training and experience as a physician's assistant at the Metropolitan Federal Prison in Los Angeles, to make conclusions about Mr. Jones's mental functioning and appearance. In the declaration that Mr. Jones submitted to the California Supreme Court, Mr. Muhammad concluded from his observations of Mr. Jones that he appeared to be "medicated with anti-depressants." Ex. 138 at 2689. Most importantly, Mr. Muhammad discussed his knowledge of "the anti-depressants that Mr. Jones was taking" with "other jurors." Ex. 138 at 2689; *see also* Ex. 122 at 2475 (the jurors discussed Mr. Jones's "possible mental illness" during penalty phase deliberations). Opening Br. at 98-99.

The California Supreme Court's determination that Mr. Jones failed to allege a prima facie case that the jury was improperly exposed to Mr. Muhammad's specialized knowledge of psychiatric medications and prison mental health

services was an unreasonable application of controlling federal law. The extraneous influence of Mr. Muhammad's training and experience tainted the jury's deliberations. *See, e.g.*, *Tanner*, 483 U.S. at 117, 120. When a juror "communicates objective extrinsic facts regarding the defendant or the alleged crimes to other jurors, the juror becomes an unsworn witness within the meaning of the Confrontation Clause." *Jeffries v. Wood*, 114 F.3d 1484, 1490 (9th Cir. 1997) (partially overruled on other grounds); *see also Mach v. Stewart*, 137 F.3d 630, 634 (9th Cir. 1997) (granting relief where potential juror with specialized experience in child sexual abuse cases stated before jury venire that she had never been involved in a case where a child made untrue accusations); *Kemp*, 706 F. Supp. at 1560. Given the undisputed facts that Mr. Muhammad shared his particularized knowledge with the other jurors in violation of the court's instructions and the constitutional requirements that the jurors consider only the evidence presented at trial, the California Supreme Court was obligated to order an evidentiary hearing. *See, e.g.*, *Tanner*, 483 U.S. at 117; *Remmer*, 347 U.S. at 229.

In the state court, respondent's sole argument was that Mr. Jones's showing was insufficient to establish a substantial likelihood of prejudice, because there was no evidence that Mr. Muhammad stated – or any juror considered – materially different information than what was presented at trial. Inf. Resp. at 46. Had the state court relied on this reasoning, it would have satisfied section 2254(d)(1), as an unreasonable application of clearly established federal law mandating that the court may not dismiss allegations of juror exposure to extrinsic evidence on the pleadings, but instead must hold an evidentiary hearing at which the government bears the "heavy burden" to establish the harmlessness of the exposure to the defendant. *Remmer*, 347 U.S. at 229; *see also Tanner*, 483 U.S. at 120. Perhaps in recognition of this, respondent abandoned such a contention before this Court.

Respondent presents two new arguments in federal court that it did not present to the state court. Respondent first contends that because a juror's past

personal experiences may be relevant to their deliberations, it was permissible for Muhammad to share his knowledge of Mr. Jones's medications even if it was "perhaps not ordinarily a matter of general knowledge." Opp. at 145. Had the state court relied on this reasoning, it would have satisfied section 2254(d)(1) as an unreasonable application of clearly established federal law mandating that jurors must not be exposed to extrinsic evidence. *See, e.g.*, *Tanner*, 483 U.S. at 117; *Gardner*, 430 U.S. at 362; *Irvin*, 366 U.S. at 722; *Parker*, 385 U.S. at 264-65. Moreover, the California Supreme Court did not rely upon this theory because it would have acted contrary to its own precedents. *See, e.g.*, *People v. Malone*, 12 Cal. 4th 935, 963, 50 Cal. Rptr. 2d 281 (1996) ("Jurors' views of the evidence . . . are necessarily informed by their life experiences, including their education and professional work. A juror, however, should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct.").

Respondent also speculates that Mr. Muhammad's comments may have been merely cumulative to the evidence that the jury heard from the defense's experts, rendering Mr. Jones's declaratory support insufficient to establish the substantial or injurious effect of Muhammad's misconduct. Opp. at 145. Respondent's speculation created a factual dispute between the parties. If the state court elected to "ignor[e] the factual dispute" and endorse respondent's speculation without an evidentiary hearing, it would have unreasonably applied clearly established federal law under section 2254(d)(1). *Fanaro*, 2012 WL 1854313 at *3. Moreover, it would also have unreasonably determined the facts under section 2254(d)(2). *See Plummer*, 491 F. App'x at 680-81.

c. Mr. Jones Made a Prima Facie Showing That Jurors Improperly Believed That Mr. Jones Would Not Be Executed.

The jurors voted for the death sentence "because regardless of our verdict,

we knew that Ernest would end up getting life. We talked about how his drug use would save him from ever being executed." Ex. 9 at 96. It is unclear whether the jurors considered Mr. Jones's medications in jail (including Mr. Muhammad's opinions), his substance use on the streets, or both, in improperly concluding based on extrinsic knowledge that Mr. Jones would be sentenced to life. Opening Br. at 99.

The jurors' discussion and consideration of the belief that Mr. Jones would not actually be executed if they sentenced him to death violated Mr. Jones's Sixth Amendment, Due Process, and Eighth Amendment rights. *See, e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 328-29, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985) ("it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere"); *Marino v. Vasquez*, 812 F.2d 499, 505 (9th Cir. 1987) ("When a jury considers facts that have not been introduced in evidence … [i]t is impossible to offer evidence to rebut it, to offer a curative instruction, to discuss its significance in argument to the jury, or to take other tactical steps that might ameliorate its impact.").

Respondent contended in state court that Mr. Jones's claim fails because it related to the jurors' mental or subjective reasoning processes and that the jurors' reliance on their belief that an execution would not be carried out is "not the kind of discussion that constitutes juror misconduct." Inf. Resp. at 47; *see also* Opp. at 147. However, had the state court relied on this reasoning, its decision would have satisfied section 2254(d)(1) as an unreasonable application of clearly established federal law: the jurors' consideration of extrinsic information was presumptively prejudicial. *See, e.g.*, *Remmer*, 347 U.S. at 229; *Marino*, 812 F.2d 499, 505 (9th Cir. 1987).

In federal court, respondent engaged in unsubstantiated speculation, contending that there was no evidence that the jurors failed to follow the court's

instructions and that the state court could reasonably have construed Mr. Ruotolo's declaration as an offhand remark that Mr. Jones would die from drug use before he could be executed. Opp. at 147. First, respondent did not present these contentions to the state court, and thus the state court did not deny Mr. Jones's claim for these reasons. The resolution of Mr. Jones's juror misconduct claim "necessarily require[d] a credibility determination between competing factual assertions." *Fanaro*, 2012 WL 1854313 at *3. If the state court elected to "ignor[e] the factual dispute" and endorse respondent's speculation without an evidentiary hearing, it would have unreasonably applied clearly established federal law under section 2254(d)(1). *Id.* Moreover, it would also have unreasonably determined the facts under section 2254(d)(2). *Plummer*, 491 F. App'x at 680-81.

Clearly established federal law provides that a presumption of bias exists as to each of the four above-described instances in which Mr. Jones's jurors were exposed to extrinsic evidence. A court may not dismiss such allegations of juror exposure to extrinsic evidence on the pleadings, but instead must hold an evidentiary hearing at which the government bears the "heavy burden" to establish the harmlessness of the exposure to the defendant. *Remmer*, 347 U.S. at 229; *see also Tanner*, 483 U.S. at 120. Instead, because the state court prematurely denied his petition, Mr. Jones was not able to access the fact-development mechanisms that would have fully developed his claim including juror depositions and subpoena power necessary to present each juror's testimony at an evidentiary hearing. *Cf. Wellons*, 130 S. Ct. at 729-30 (reversing where diligent petitioner was not permitted discovery and an evidentiary hearing to support his jury misconduct claim factually, either in state or federal court). Thus, as set forth in the Opening Brief, the state court's summary denial of Mr. Jones's prima facie juror misconduct claim satisfied section 2254(d) either because it was contrary to and an unreasonable application of Supreme Court precedent that requires fact development and an evidentiary hearing prior to resolving juror misconduct claims

or because the state court made factual findings at an inappropriate stage of the proceedings. Opening Br. at 102-05. Notably, respondent's Opposition does not dispute this conclusion. Opp. at 138-41.

d. Mr. Jones Made a Prima Facie Showing That a Juror Slept During the Defense's Penalty Phase Presentation.

Juror Emil Ruotolo slept during the testimony of the defense's sole mental health expert, Dr. Thomas: "His testimony was impossible to pay attention to, and I kept falling asleep." Ex. 9 at 95. Mr. Ruotolo's belief that the defense presented no relevant testimony on the critical issue of Mr. Jones's mental illness (Ex. 9 at 95), flows from his admission that he slept through substantial portions of Dr. Thomas's testimony in which addressed this precise issue. Opening Br. at 100.

Because litigants are constitutionally entitled to "complete, thoughtful consideration of the merits of their cases," the "duty to listen carefully during the presentation of evidence at trial is among the most elementary of a juror's obligations." *Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 410-11, 185 Cal. Rptr. 654 (1982) (finding prima facie improper conduct where some jurors did crossword puzzles and another read a book). Mr. Ruotolo's sleeping during the testimony of the sole mental health expert rendered him constructively absent, violating Mr. Jones's Sixth Amendment and Due Process rights. *See, e.g.*, *Jordan v. Massachusetts*, 225 U.S. at 176; *Peters v. Kiff*, 407 U.S. 493, 501, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972); *United States v. Barrett*, 703 F.2d 1076, 1082-83 (9th Cir. 1982) (finding abuse of discretion and remanding for evidentiary hearing where juror admitted to sleeping during trial, but trial court failed to hold hearing on misconduct). Mr. Ruotolo's inattention is further evidence of the prejudice that Mr. Jones suffered based on the jurors' prejudgment of Mr. Jones's penalty and resulting refusal to deliberate. Mr. Jones is entitled to an evidentiary hearing to establish Mr. Ruotolo's misconduct and the resulting prejudice. *See Remmer*, 347 U.S. at 229; *Tanner*, 483 U.S. at 120; *Barrett*, 703 F.2d at 1082-83.

Before the state court, respondent contended that evidence that Mr. Ruotolo was sleeping cannot be used to impeach the verdict because it relates to his mental processes. Inf. Resp. at 46-47; *see also* Opposition at 146 (contending that a sleeping juror is an internal rather than an improper external influence on the jury). Respondent is simply incorrect, and had the state court relied on this reasoning, it would have satisfied section 2254(d)(1) as being an unreasonable application of clearly established federal law providing that due process requires a "mentally competent" tribunal. *Jordan*, 225 U.S. at 176; *see also Petters v. Kiff*, 407 U.S. at 501. Because it defies reason that a "mentally competent" tribunal could be composed of jury members who are asleep as evidence is presented, it is an abuse of discretion for a court to deny an evidentiary hearing where a juror himself admits to sleeping during trial. *See Barrett*, 703 F.2d at 1082-83.

Respondent also contended that Mr. Ruotolo's declaration was vague because he did not state how long or how many times he slept, and there was no indication that he slept during favorable testimony. Inf. Resp. at 47; *see also* Opp. at 146-47. As set forth above, the state court did not deny the claim because it was inadequately alleged or lacked documentary support, or based on reasons or inferences that neither party presented to the state court. *See* sections II.A.2, II.A.4., *supra*. Moreover, to the extent that respondent urged the state court to draw the adverse inference that Ruotolo did not sleep during favorable testimony, the state court's reliance on this reasoning would have satisfied section 2254(d)(2). *See* section II.A.3., *supra*. This is particularly true because Mr. Ruotolo explicitly admitted to sleeping during the testimony of a critical defense expert, Ex. 9 at 95, so by definition, he slept through testimony that would have been favorable to the defense.

Clearly established federal law supports the conclusions that Mr. Jones (1) had a Sixth Amendment and due process right to a jury that was fully present and available to listen to the testimony he presented in his defense, *Jordan*, 225 U.S. at

176; *Peters*, 407 U.S. at 501; and (2) was entitled to an evidentiary hearing to establish Mr. Ruotolo's misconduct and the resulting prejudice, *Remmer*, 347 U.S. at 229; *Tanner*, 483 U.S. at 120. Accordingly, as set forth in the Opening Brief, the state court's summary denial of Mr. Jones's prima facie juror misconduct claim satisfies section 2254(d) either because it is contrary to and an unreasonable application of Supreme Court precedent that requires fact development and an evidentiary hearing prior to resolving juror misconduct claims or because the state court made factual findings at an inappropriate stage of the proceedings. Opening Br. at 102-05. Notably, respondent's Opposition does not dispute this conclusion. Opp. at 146-47.

Accordingly, the state court's summary denial of Mr. Jones's juror misconduct claim satisfies section 2254(d). None of respondent's contentions entitle the state court's decision to deference. Mr. Jones is entitled to an evidentiary hearing and to ultimate habeas relief.

2. Section 2254(d) Is Satisfied by the State Court's Summary Denial of Mr. Jones's Adequately Pled Claim That He Was Denied His Right to an Impartial Jury and Fair Trial.

In his Opening Brief, Mr. Jones detailed the ways in which the state court's summary denial of Mr. Jones's juror bias and misconduct claim satisfies section 2254(d). Opening Br. at 5-13, 87-105. As a general matter, the California Supreme Court's refusal to hear Mr. Jones's adequately pled claims of constitutional error is contrary to clearly established federal law that prohibits state courts from creating "unreasonable obstacles" to the resolution of federal constitutional claims that are "plainly and reasonably made." *Davis v. Wechsler*, 263 U.S. at 24-25; *see also* Opening Br. at 7-11. Specifically, in light of Mr. Jones's extensive factual allegations and supporting materials in the state court – which the state court was obligated to accept as true – the state court's ruling that Mr. Jones failed to make any prima facie showing of entitlement to relief

constitutes an unreasonable application of clearly established federal law and is based on state law that is contrary to clearly established federal law. *See, e.g.*, *Caliendo v. Warden of California Men's Colony*, 365 F.3d 691, 698 (9th Cir. 2004) (holding state court ruling satisfied section 2254(d) because California state law failure to presume prejudice is contrary to federal law).

S. Claim Twenty: Mr. Jones's Constitutional Rights Were Violated by the Introduction of Irrelevant and Inflammatory Photographs.

In state court, Mr. Jones alleged that his death sentence was rendered in violation of his right to a reliable, rational, non-arbitrary determination of guilt and penalty as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because of the introduction of irrelevant and highly inflammatory photographs of the victim. State Pet. at 277-78; Inf. Reply at 248-51. Specifically, the prosecution introduced numerous enlarged photographs of the crime scene and the victim. The most disturbing, prejudicial, and irrelevant photographs showed the victim lying on the ground with knives protruding from both sides of her neck. *See, e.g.*, III Supp. 1 CT 3, 5 (People's Exhibits 5A, 5C: photographs of victim with knives protruding from her neck); III Supp. 1 CT 8, 10 (People's Exhibits 5F, 5H: photographs of victim's body). The photographs were neither relevant to the crime charged nor an aid in proving an element of the crime. They shed no light on any factual issues relevant to the disputed issue of intent; and added nothing to the prosecution's case regarding the victim's cause of death that had not been testified to by Dr. Scholtz (*see* 17 RT 2774 *et seq*.) or the manner in which the victim had been found (s*ee* 17 RT 2682 *et seq*. (testimony of Detective Rosemary Sanchez); 18 RT 2837 *et seq*, testimony of coroner's investigator Dan Anderson).

Rather than form their decision based on a dispassionate review of the evidence, the jurors were induced to make a decision on a purely emotional basis. *See, e.g*, Ex. 9 at 94 ("[t]he crime scene photos were absolutely horrifying. . . .

[One photograph displayed] a close-up of the victim with knives sticking out of her neck; it was absolutely awful. The picture was directly in my line of vision and many times I had to close my eyes to escape it."); Ex. 138 at 2690 ("[t]he pictures were kept up on a bulletin board next to us. We talked about how horrifying those pictures were."); (Ex. 138 at 2690; Ex. 23 at 239 (alternate juror stated "[a]s soon as I saw the photographs of Mrs. Miller it was set in my mind that he deserved the death penalty."). "[T]he only conceivable reason for placing [the photographs] in evidence was to inflame the jury against" Mr. Jones. *Ferrier v. Duckworth*, 902 F.2d 545, 548 (7th Cir. 1990) (finding photographs, in color and enlarged to 12 square feet, showing victim's blood splattered on floor, were irrelevant to any issue in murder trial, and were inadmissible; killing was not denied, and the only issues were whether defendant had been drunk or insane when he killed victim.); *see also Gomez v. Ahitow,* 29 F.3d 1128, 1139 (7th Cir. 1994) (holding that the district court erred in admitting "gruesome" photographs of victim's body).

The California Supreme Court did not adjudicate the claim on the merits because it did not review the gruesome photographs. Mr. Jones requested that the California Supreme Court take judicial notice of the record on appeal (State Pet. at 10), which pursuant to California Rule of Court Rule 8.320(e), included the exhibits. The California Supreme Court, however, did not request transmittal of the photographs as required by Rule 8.320(e) – Cal. R. Ct. 8.320(e) ("Exhibits admitted in evidence, refused, or lodged are deemed part of the record, but may be transmitted to the reviewing court only as provided in rule 8.224.") or by Rule 8.224(d), which provides that "the reviewing court may direct the superior court or a party to send it an exhibit." Moreover, although absent an order to show cause, Mr. Jones was unable to invoke California Rule of Court 8.224. Cal. R. Ct. 8.224 (limiting party's right to request transmittal of exhibits to cases in which respondent's brief has been or could have been filed). Therefore, review of this claim is not barred by 28 U.S.C. section 2254(d). Section 2254(d) applies only to

claims that were "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d); *see also Cullen v. Pinholster*, ___ U.S. ___, 131 S. Ct. 1388, 1398, 179 L. Ed. 2d 557 (2011) (explaining that section 2254(d) applies to claims previously "adjudicated on the merits in state court proceedings") (quoting 28 U.S.C. § 2254(d)); *Harrington v. Richter*, ___ U.S. ___, 131 S. Ct. 770, 780, 178 L. Ed. 2d 624 (2011) (same).

Moreover, even had the state court reviewed the photographs, its ruling that Mr. Jones failed to make any prima facie showing of entitlement to relief constitutes an unreasonable application of controlling federal law. Admission of the inflammatory and irrelevant photographs of the victim, individually and cumulatively, had a substantial and injurious influence on the jury's determination of the verdicts at the guilt and penalty phases of Mr. Jones's trial and deprived the proceedings of fundamental fairness. *See Ferrier v*, 902 F.2d at 548; *see also Mann v. Oklahoma*, 488 U.S. 877, 109 S. Ct. 193, 102 L. Ed. 2d 163 (1988) (Marshall, J., dissenting from denial of certiorari.) ("the photographic evidence created an impermissible risk that his death sentence was based on considerations that are 'totally irrelevant to the sentencing process'") (quoting *Zant v. Stephens,* 462 U.S. 862, 885, 103 S. Ct. 2733, 2747, 77 L. Ed. 2d 235 (1983)).

T. Claim Twenty-One: The Jury Received Inadequate and Insufficient Penalty Phase Instructions.

Mr. Jones satisfied state pleading requirements on his claim that the jury was inadequately instructed during the penalty phase by presenting the California Supreme Court with sufficient detail to establish a prima facie showing that he was entitled to relief. *See, e.g.*, *Duvall*, 9 Cal. 4th at 474. Mr. Jones established that his sentence of death was unlawfully obtained because the instructions given to the jury at the penalty phase were insufficient and permitted the jury to consider mitigating factors as aggravation, in violation of his constitutional rights. State Pet. at 326-32; Inf. Reply at 299-306. The California Supreme Court's summary

denial of this claim decision satisfies section 2254(d) because it was an unreasonable application of clearly established federal law.

1. Mr. Jones's Claim Is Not Procedurally Defaulted.

The state court's summary denial declared this claim procedurally barred, with citations to *In re Harris*, 5 Cal. 4th 813, 824 n.3, 21 Cal. Rptr. 2d 373 (1993), and *In re Dixon*, 41 Cal. 2d 756, 759, 264 P.2d 513 (1953), "[t]o the extent [the claim] was not raised on appeal, and except insofar as [the claim] allege[d] ineffective assistance of counsel." Order Denying Case No. S110791, NOL at C.7. As discussed above, *see* section III, *supra*, the *Dixon* bar is not adequate to preclude federal habeas review. Thus, the procedural default doctrine does not bar this Court's review of the merits of Mr. Jones's claim.

The state court's application of the *Dixon* bar to this claim also was inappropriate because the application is contrary to state law requirements for preservation of instructional errors. The California Supreme Court has stated that "a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." *People v. Andrews*, 49 Cal. 3d 200, 218, 260 Cal. Rptr. 583 (1989), *overruled on other grounds in People v. Trevino*, 26 Cal. 4th 237, 109 Cal. Rptr. 2d 567 (2001); *see also People v. Castaneda*, 51 Cal. 4th 1292, 1347-48, 127 Cal. Rptr. 3d 200 (2011) (holding that because CALJIC 8.85 was a "correct statement of the law and defendant did not request different language, he has forfeited his claim that the instruction should have been modified" by deleting descriptions of inapplicable mitigating factors). Mr. Jones's claim rests on the insufficiency of the standard CALJIC instructions (*i.e.*, CALJIC 8.85 and 8.88) and the failure of the trial court to provide appropriate guidance to the jury in light of the prosecutor's misstatements about the law in his closing argument. Thus, because this claim of error was not raised at trial, it could not have been raised on direct appeal, and the state court acted contrary to its own

decisions when it barred the claim under *Dixon* in the habeas corpus proceeding. Simply, Mr. Jones did not violate the *Dixon* procedural rule, and federal review of his claim is not precluded. *See Sivak v. Hardison*, 658 F.3d 898, 907 (9th Cir. 2011) ("While it is unusual to reject a state court's use of a procedural bar on the ground that it was erroneously applied, '[t]he procedural default doctrine self-evidently is limited to cases in which a "default" actually occurred *i.e.*, cases in which the prisoner actually violated the applicable state procedural rule.' [Citation.] Here, the state court applied the state's procedural rule to [petitioner's] case in an erroneous and arbitrary manner. Thus, we follow the Supreme Court and our sister circuits in holding that an erroneously applied procedural rule does not bar federal habeas review.").

2. Mr. Jones Established His Entitlement to Relief in the State Court, and Section 2254(d) Does Not Preclude Relief.

a. The Jury Was Misinformed That Mitigation Had to Be Related to the Crime.

As Mr. Jones pointed out to the state court, the prosecutor repeatedly made statements during his penalty phase closing argument telling the jury that it should weigh as mitigation only evidence that directly related to Mr. Jones's conduct at and around the time of the crime. State Pet. at 326-28; Inf. Reply at 300-02; *see also* Fed. Pet. at 376-68. The prosecutor argued, "[o]n the other hand, a mitigating circumstance is any fact, condition or event which as such does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." 31 RT 4635. The prosecutor continued, impermissibly and repeatedly defining the mitigating evidence advanced by Mr. Jones as relating only to the crime. With respect to sympathy, the prosecutor stated, "I would suggest to you that you show the same sympathy to the defendant that he showed to [the victim] if you are going to think about sympathy in this case." 31 RT 4643. In discussing Mr. Jones's

mental health evidence, the prosecutor stated, "if you accept that he has a mental problem, even if you accept that based upon the doctor's testimony, I asked the doctor does schizophrenic, schizoaffective patients have a greater likelihood of committing violent acts than a normal person? And he says no." 31 RT 4648. The prosecutor continued, "if you accept that he is telling you the truth, that he truly has the schizophrenic, schizoaffective psychosis that led to this delusional state that led to the killing, does that mitigate?" 31 RT 4653.

In the state court, respondent noted that the trial court's instruction on subdivision (k) of Penal Code section 190.3 (commonly referred to as "Factor (k)" or the "catchall" mitigation provision) included language broadly encompassing mitigation "whether or not related to the offense for which [the defendant] is on trial." Inf. Resp. at 50; 2 CT 411. In the Opposition, respondent also quoted a portion of the prosecutor's argument wherein he mentioned the definition of Factor (k). Opp. at 154. Respondent's quotation of the prosecutor's argument, however, supports Mr. Jones's point about the prosecutor's intent and effort during his closing argument to mislead the jury into not considering relevant mitigating evidence. When the prosecutor recited for the jury the instruction on Factor (k), he left out the above-quoted language delineating that Factor (k) mitigation need not be related to the crime to be considered when making the decision between life and death. *Compare* 31 RT 4642 *with* 2 CT 411.

No nexus between the crime and the mitigation offered by a defendant is required in a capital case. *Smith v. Texas*, 543 U.S. 37, 45, 125 S. Ct. 400, L. Ed. 2d 303 (2004) (explaining that the Supreme Court "never countenanced" and "unequivocally rejected" a "nexus" requirement for mitigation); *Tennard v. Dretke*, 542 U.S. 274, 284-87, 124 S. Ct. 2562, 159 L. Ed. 2d 384 (2004). "[F]ull consideration of evidence that mitigates against the death penalty is essential if the jury is to give a reasoned moral response to the defendant's background, character, and crime." *Penry v. Lynaugh* (*Penry I*), 492 U.S. 302, 328, 109 S. Ct. 2934, 106

L. Ed. 2d 256 (1989) (quotation omitted), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). Instructions that prevent the jury from considering a capital defendant's mitigating evidence as it bears on his or her personal culpability violate the defendant's constitutional rights under the Eighth and Fourteenth Amendments. *Penry I*, 492 U.S. at 328; *see also Abdul-Kabir v. Quarterman*, 550 U.S 233, 263-64, 127 S. Ct. 1654, 167 L. Ed. 2d 585 (2007) ("Our line of cases in this area has long recognized that before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense."); *Brewer v. Quarterman*, 550 U.S. 286, 289, 127 S. Ct. 1706, 167 L. Ed. 2d 622 (2007) ("In more recent years, we have repeatedly emphasized that a *Penry* violation exists whenever a statute, or a judicial gloss on a statute, prevents a jury from giving meaningful effect to mitigating evidence that may justify the imposition of a life sentence rather than a death sentence.").

When reviewing jury instructions, "[t]he critical question . . . is whether petitioner's interpretation of the sentencing process is one a reasonable jury could have drawn from the instructions given by the trial judge." *Mills v. Maryland*, 486 U.S. 367, 375, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988); *see also Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990) ("the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence").

Though a jury is presumed to follow the court's instructions, *Weeks v. Angelone*, 528 U.S. 225, 234, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000), the presumption that the jury understood and followed the trial court's direction is overcome in this case by the pervasive mischaracterization of mitigation

undertaken by the prosecutor in the face of the minimal and imprecise instruction concerning the consideration of mitigation that is not directly tethered to the crime. As the United States Supreme Court has noted, "the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made." *Boyde*, 494 U.S. at 385. The trial court's guidance to the jury on this crucial issue amounted to only thirteen words in a recitation of instructions that spanned seventeen pages of the reporter's transcript. *See* 31 RT 4629, 4616-33. Defense counsel made no effort in his feeble closing argument to explain further the trial court's instruction or counter the prosecutor's misleading definition of mitigation. *See* 31 RT 4663-92. Moreover, juror Emil Ruotolo recounted:

> During deliberations, the jurors talked about how surprised we were that the defense did not present testimony that explained why someone might do the things that Mr. Jones did. That kind of evidence would have been helpful, because without it, we had no reason to vote for anything but death. We thought that the testimony should have been presented at the guilt trial. We all talked about how we already decided that he was guilty, and we did not understand how to view the evidence in light of our guilt verdicts.

Ex. 9 at 95.

The combination of the insufficient instructions and the prosecutor's misleading comments about the scope of mitigation makes it reasonably likely that the jury applied the instruction in a way that prevented the consideration of constitutionally relevant evidence. *See Mills*, 486 U.S. at 384 (finding a substantial probability that the jurors may well have thought they were precluded from considering mitigating evidence unless they unanimously agreed on existence of particular mitigating circumstance).

b. The Trial Court Failed to Prohibit the Consideration of Mitigating Factors as Aggravation.

The jury instructions also provided only broad definitions for an "aggravating factor" and a "mitigating circumstance." *See* 2 CT 405. The trial court did not tell the jury which factors could be considered only as mitigating factors under the controlling law. The prosecutor stepped into this void with arguments that Mr. Jones's mental illness and supposed failure to take advantage of purportedly available mental health treatment were aggravating factors. As detailed in the State Petition, State Pet. at 328-30, *see also* Fed. Pet. at 369-70, the prosecutor told the jurors that if they accepted that Mr. Jones was mentally ill, that fact should be weighed in aggravation, e.g., "if you accept the psychotic killer that the doctor put forth . . . that fact in itself might be an aggravating factor if you so decide as far as putting him to death," 31 RT 4644, and that Mr. Jones's failure to take advantage of purported treatment opportunities in the face of "wake up calls" was a "factor in aggravation." 31 RT 4642.

In *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983), the Supreme Court held that "due process of law would require that the jury's decision to impose death be set aside" if the jury were told to consider as aggravation "conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness." *Id.* at 885. Moreover, the Eighth Amendment mandates that "sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses. The Constitution instead requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." *California v. Brown*, 479 U.S. 538, 541, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987) (citing *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), and *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972)).

In this case, the jury instructions, when analyzed in the context of the

prosecutor's improper arguments, unconstitutionally and prejudicially failed to delineate for the jury the factors that could be considered aggravating and those that could be considered only as mitigating, thereby failing to provide the constitutionally mandated guidance and allowing the jury to consider evidence in aggravation that may only constitutionally be considered in mitigation. *See Espinosa v. Florida*, 505 U.S. 1079, 1081, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992) ("Our cases establish that, in a State where the sentencer weighs aggravating and mitigating circumstances, the weighing of an invalid aggravating circumstance violates the Eighth Amendment.").

Respondent's assertion that *Cullen v. Pinholster*, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011), supports the proposition that "some evidence can be a 'two-edged' sword that can be both aggravating and mitigating" is incorrect and inapposite. Opp. at 155. In the passage from *Pinholster* cited by respondent, the Supreme Court clearly states its view that the new mitigation presented in that case was of limited mitigating value; not that the mitigation evidence could have been considered by the jury as an aggravating factor, as respondent implies. *Pinholster*, 131 S. Ct. at 1410 ("To the extent the state habeas record includes new factual allegations or evidence, much of it is of questionable mitigating value. . . . The new evidence relating to Pinholster's family—their more serious substance abuse, mental illness, and criminal problems—is also by no means clearly mitigating, as the jury might have concluded that Pinholster was simply beyond rehabilitation.") (citations omitted).

The trial court's vague instructions failed to cure the prosecutor's misconduct because they were not specific enough to provide the constitutionally required guidance to the jurors to limit their discretion when deciding whether to impose a death sentence on Mr. Jones. Moreover, as with the claim above concerning the nexus between mitigation and the crime, trial counsel did not say anything in his closing argument that might have corrected the prosecutor's

misleading comments. *See* 31 RT 4663-92.

The state court's summary denial of Mr. Jones claim amounted to an unreasonable application of clearly established federal law set forth above. In its Informal Response in the state court, respondent cited *People v. Frye*, 18 Cal. 4th 894, 1026, 77 Cal. Rptr. 2d 25 (1998), for the proposition that "the trial court need not identify any of the sentencing factors as aggravating or mitigating." Inf. Resp. at 50-51. In *Frye*, the California Supreme Court cited *Tuilaepa v. California*, 512 U.S. 967, 979, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994), and included a parenthetical explaining that a "capital sentencer need not be instructed how to weigh sentencing factors." *Frye*, 18 Cal. 4th at 1026. Respondent also cites *Tuilaepa* in its Opposition, arguing that the "Supreme Court has held that a capital sentencer need not be instructed on how to weigh sentencing factors." Opp. at 155. Respondent's arguments in the state court and in this Court are beside the point, and do not render the state court's denial of Mr. Jones's claim reasonable. As detailed in the State Petition and reiterated in the Informal Reply, Mr. Jones's claim is not that the jury instructions broadly failed to label the sentencing factors of California Penal Code section 190.3 as aggravating and mitigating. Rather, his claim is that the prosecutor's misleading arguments about the treatment of the mitigation as an aggravating factor rendered otherwise arguably valid instructions inadequate to provide the constitutionally required guidance to the jury for it sentencing determination. The United States Supreme Court has recognized that, without appropriate guidance, reasonable jurors may infer, contrary to governing law, that mitigating circumstances such as mental vulnerabilities are aggravating. *See Atkins v. Virginia*, 536 U.S. 304, 320-21, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (noting that "[m]entally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes"). Thus, the state court's refusal to consider Mr. Jones's claim in light of

the clearly established federal law was unreasonable under section 2254(d). Accordingly, there is no prohibition on this Court reviewing Mr. Jones's claim de novo and granting relief.

U. Claim Twenty-Two: Mr. Jones Was Deprived of His Right to a Jury Determination of Facts Necessary to Sentence Him to Death.

In the state court, Mr. Jones alleged that his death sentence was rendered in violation of the his right to a reliable, rational, non-arbitrary determination of guilt and penalty as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the trial court failed to instruct the jury on the proper burden of proof regarding facts necessary to sentence him to death. State Pet. at 333-46; Inf. Reply at 308-20; *see also Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). Specifically, Mr. Jones alleged that this controlling federal law required the jury to be instructed that before it could impose a sentence of death, it must, beyond a reasonable doubt:

> (1) unanimously find the existence of each aggravating factor, 2 CT 409 (CALJIC 8.87 specifically instructs "[i]t is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider" it as an aggravating);[89]
>
> (2) find the aggravating factors outweigh the mitigating factors, 2 CT 406 (CALJIC 8.88 merely requires aggravating factor to be "so substantial" in relation to the mitigating factors); and,

[89] Respondent correctly notes that is subclaim was presented on direct appeal. Opp. at 155.

(3) find that death is the appropriate punishment, 2 CT 406 (CALJIC 8.88 requires no finding that death is the appropriate punishment).

Mr. Jones satisfied state pleading requirements on his claim that the jury was inadequately instructed during the penalty phase by presenting the state court with sufficient detail and supporting factual material to establish a prima facie showing that he was entitled to relief. *See, e.g.*, *Duvall*, 9 Cal. 4th at 474. The state court's summary denial satisfies section 2254(d) because it was an unreasonable application of clearly established federal law.

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances," Cal. Penal Code § 190.3, and that aggravation is so substantial compared to mitigation that a verdict of death is appropriate. The jury was so instructed in this case. 2 CT 406 (CALJIC 8.88); 31 RT 4699 (instructing the jury that "[t]o return a judgment of death each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death, instead of life without parole."). The trial court, however, did not instruct the jury on the proper burden of proof for each of their tasks. Mr. Jones's jury was not instructed that, before it could impose a sentence of death, it must, beyond a reasonable doubt: unanimously find the existence of each aggravating factor; find the aggravating factors outweigh the mitigating factors; and find that death is the appropriate punishment.

Three years before the state court decided Mr. Jones's direct appeal, the United States Supreme Court held that a state may not impose a sentence greater than that authorized by the jury's verdict of guilt unless the facts supporting an increased sentence, other than a prior conviction, were submitted to the jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 478. Two years later, the Court applied these principles to Arizona's death penalty scheme, under which a judge makes factual findings necessary to impose the death penalty, and held that

the scheme violated the defendant's constitutional right to have a jury determine, unanimously and beyond a reasonable doubt, any fact that might increase the maximum punishment. *Ring*, 536 U.S. at 609. Finally, in *Cunningham v. California*, the Court, in rejecting California's Determinate Sentencing law, expressly held that circumstances in aggravation are facts that might increase the maximum punishment. *Cunningham v. California*, 549 U.S. 270, 280, 289, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007) (holding that facts that expose a defendant to a greater potential sentence must be unanimously found by a jury beyond a reasonable doubt and determining that the Determinate Sentencing Law was unconstitutional because it violated *Apprendi*'s "bright-line rule" that any fact increasing the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt). Thus, a reasonable doubt standard is applicable to the jury's findings at the penalty phase, and a jury must conclude beyond a reasonable that the aggravating circumstances outweigh those in mitigation and that death is the appropriate penalty to sentence a defendant to death. The court's failure to instruct the jury in this regard was in error.

With respect to whether the jury was required to unanimously find the existence of each aggravating factor, the state court denied this claim by noting that it had rejected such claims in the past, and quoting a 1990 decision in which the court stated, "We have consistently held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." *Jones*, 29 Cal. 4th at 1267 (quoting *People v. Taylor*, 52 Cal. 3d 719, 749, 276 Cal. Rptr. 391 (1990).[90] The state court's summary denial of the two other subclaims did not provide any reasoning for its decision, but the court has explained it

[90] The court cited to *People v. Seaton*, 26 Cal. 4th 598, 688, 110 Cal. Rptr. 2d 441 (2001), and *People v. Taylor*, 52 Cal. 3d 719, 749, 276 Cal. Rptr. 391 (1990), in support.

reasoning in other published decisions. With respect to the *Apprendi-Ring* argument, the California Supreme Court has held in *People v. Snow*, 30 Cal. 4th 43, 126 n.32, 132 Cal. Rptr. 2d 271, 331 n.32 (2003), in which it concluded that because at the penalty phase, death is no more than the statutory maximum, and the only alternative is life without parole, "facts which bear upon, but do not necessarily determine, which of the two alternative penalties is appropriate do not come within the holding of *Apprendi*." *Snow*, 30 Cal. 4th at 126 n.32. The court decided that *Ring* does not change this analysis because "[t]he final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another. . . . [and] [n]othing in *Apprendi* or *Ring* suggests the sentencer in such a system constitutionally must find any aggravating factor true beyond a reasonable doubt." *Id*.

The state court's interpretation is contrary to clearly established federal law under section 2254(d)(1). First, the Supreme Court made clear in *Cunningham* that *Apprendi* applies to circumstances in aggravation. *Cunningham*, 549 U.S. at 289. Second, the Supreme Court rejected in *Ring* the analysis adopted by the California Supreme Court that death is no more than the statutory maximum. The Court in *Ring* rejected the identical argument made by Arizona, explaining that the argument, "overlooks *Apprendi*'*s* instruction that the relevant inquiry is one not of form, but of effect. In effect, the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict." *Ring*, 536 U.S. at 604 (internal citations, quotations, and brackets omitted); *see also id*. (explaining that "[i]f Arizona prevailed on its opening argument, *Apprendi* would be reduced to a 'meaningless and formalistic' rule of statutory drafting."). The issue of *Ring*'s applicability hinges on whether as a practical matter, the sentencer must make additional fact-findings during the

penalty phase before determining whether or not the death penalty can be imposed. In both Arizona and California, this is true. Accordingly, *Ring* is applicable to California's sentencing scheme, and the state court's conclusion to the contrary dictates de novo review, as Mr. Jones satisfies section 2254(d)(1). *See, e.g.*, *Garrus v. Secretary of Pennsylvania Dept. of Corrections*, 694 F.3d 394, 405-06 (3d Cir. 2012) (holding state court's objectively unreasonable application of *Apprendi* satisfies section 2254(d)); *Estrella v. Ollison*, 668 F.3d 593 (9th Cir. 2011) (finding California state court's decision permitting the imposition of upper term sentence contrary to *Apprendi*); *Wilson v. Knowles*, 638 F.3d 1213 (9th Cir. 2011) (same).

V. Claim Twenty-Three: Mr. Jones Is Ineligible for the Death Penalty.

Mr. Jones satisfied state pleading requirements by presenting this claim in state court with sufficient detail and supporting factual material to establish a prima facie showing that he was entitled to relief. *See, e.g.*, *Duvall*, 9 Cal. 4th at 474. Among other things, Mr. Jones presented declarations by qualified experts and numerous lay witnesses that demonstrated that he is constitutionally ineligible for the death penalty because he is intellectually disabled and suffers from other mental impairments that diminish his culpability. This claim was not procedurally defaulted, and respondent did not present factual materials or legal argument in state court to establish that Mr. Jones's prima facie showing should not be taken as true or that it otherwise lacked merit. Under these circumstances, the state court was required to issue an order to show cause and allow Mr. Jones access to state processes to develop and present evidence to prove his claim. *See, e.g.*, *In re Hawthorne*, 35 Cal. 4th 40, 49, 24 Cal. Rptr. 3d 189 (2005); *Duvall*, 9 Cal. 4th at 475; *Romero*, 8 Cal. 4th at 742. By instead summarily denying Mr. Jones's claim, the California Supreme Court's decision satisfies section 2254(d) as set forth in Mr. Jones's prior briefing and in the sections that follow.

1. There Is No Reasonable Basis for the State Court Ruling That Mr. Jones Failed to Make a Prima Facie Showing for Relief.

Mr. Jones's allegations and supporting factual material in state court established that Mr. Jones suffers from significantly subaverage intellectual functioning that has existed concurrently with deficits in adaptive behavior since before the age of eighteen. Mr. Jones also established he is ineligible for the death penalty because he is morally less culpable as a result of his mental impairments. These allegations made a prima facie showing that Mr. Jones is ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), as well as broader Eighth Amendment prohibitions on cruel and unusual punishment. State Pet. at 347-70; Inf. Reply at 320-30.

a. Mr. Jones Made a Prima Facie Showing That He Is Intellectually Disabled.

The California Supreme Court has held that an order to show cause should issue for claims brought under *Atkins* when a qualified expert's declaration has "set forth a factual basis for finding the petitioner has significantly subaverage intellectual functioning and deficiencies in adaptive behavior" that manifested prior to the age of eighteen. *Hawthorne*, 35 Cal. 4th at 48. The state court adopted clinical definitions for adaptive functioning deficits established by the American Association on Mental Retardation and the American Psychiatric Association, which were based on "limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work." *Hawthorne*, 35 Cal. 4th at 47-48.[91] The California Supreme Court noted

[91] In 2012, the California Legislature replaced the phrase "mental retardation" in several state statutes, including California Penal Code section 1376, with the term "intellectual disability." MENTALLY RETARDED AND DEVELOPMENTALLY DISABLED PERSONS – CLASSIFICATION – *continued…*

that an IQ of 75 or lower "is typically considered the cutoff IQ for the intellectual prong" of a showing of intellectual disability, but held that the necessity of holding an evidentiary hearing for claims raised under *Atkins* "reflects the consensus that mental retardation is a question of fact. It is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individual's overall capacity based on a consideration of all the relevant evidence." *Hawthorne*, 35 Cal. 4th at 49 (internal citations omitted).

Mr. Jones's factual allegations and supporting materials, taken as true, established a prima facie showing that he is intellectually disabled within the meaning of *Atkins*, and the state law interpretations of its prohibitions. Mr. Jones submitted a declaration from a clinical psychologist specializing in neuropsychology and neuropsychological assessment, Natasha Khazanov, Ph.D., who concluded that, with an overall IQ of 77, Mr. Jones has markedly subaverage intelligence. Ex. 175 at 3063. Mr. Jones also submitted a declaration from a psychiatrist specializing in adolescent psychiatry, Zakee Matthews, M.D., who documented Mr. Jones's history of "intelligence testing in the mentally retarded range of functioning" (Ex. 178 at 3132) and "significantly compromised adaptive functioning." Ex. 178 at 3155; *see also* Inf. Reply at 321-22 (detailing expert testing and evaluation demonstrating Mr. Jones's intellectual disability).

On the basis of his review of extensive material documenting Mr. Jones's medical, social, economic, educational, and family background (Ex. 178 at 3091),

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MEDICAL CARE AND TREATMENT, 2012 Cal. Legis. Serv. Ch. 448 (A.B. 2370); Cal. Penal Code § 1376. This is in keeping with a change of terminology adopted by the American Association on Intellectual and Developmental Disabilities, formerly the American Association on Mental Retardation. *See* AAIDD, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT, 11th Ed. (2010) at 3.

Dr. Matthews described a number of areas of Mr. Jones's deficient functioning in detail. Dr. Matthews discussed and provided examples of Mr. Jones's significant limitations in processing information, difficulty understanding and responding to what was being said in conversations, and inability to follow basic instructions. Ex. 178 at 3132. Dr. Matthews also recounted Mr. Jones's "tremendous difficulty in school" (Ex. 178 at 3133), including his placement in special education throughout his schooling, obvious cognitive impairments, inability to master even the simplest academic skills throughout elementary school, placement in high school in the Educationally Handicapped Program, and failure to graduate from high school. Ex. 178 at 3132-35. Dr. Matthews also detailed the observations of Mr. Jones's family members, and noted that they realized from their experiences with Mr. Jones that his "intellectual functioning was seriously compromised." Ex. 178 at 3135.

In addition to documenting Mr. Jones's deficits in communication and academic functioning, Dr. Matthews also observed from Mr. Jones's history that as he grew older, he "lacked the capacity to live independently or manage his own affairs." Ex. 178 at 3155. These deficits also were reflected in the declarations of educational experts who evaluated school records documenting Mr. Jones's intellectual disability and severely impaired academic functioning (Ex. 125; Ex. 130) and in numerous lay witness declarations that Mr. Jones submitted in support of his allegations. *See, e.g.*, Ex. 16 at 147-48; Ex. 19 at 207,;Ex. 123 at 2491-92; Ex. 124 at 2541; Ex. 132 at 2637-38; Ex. 143 at 2703 (describing Mr. Jones's immaturity and communication and interpersonal difficulties); Ex. 16 at 145; Ex. 155 at 2766 (describing Mr. Jones's inability to accomplish simple errands and count and use money); Ex. 10 at 97; Ex. 14 at 136; Ex. 16 at 150, 166. 174-75; Ex. 21 at 226; Ex. 124 at 2539; Ex. 142 at 2698-99; Ex. 147 at 2723; Ex. 189 at 3400 (describing Mr. Jones's inability to live independently and maintain employment); *See also* Inf. Reply at 321-26 (detailing adaptive functioning deficits).

In state court, respondent questioned whether Mr. Jones was raising a claim under *Atkins*, but argued that any such claim was without merit. Inf. Resp. at 54 n.26.[92] In support of this contention, respondent cited to the cross-examination of the defense expert, Dr. Thomas, during the penalty phase of trial, in which Dr. Thomas agreed with the prosecutor's suggestion that Mr. Jones's IQ had been tested between 79 and 87, "depending upon which reports we have." 30 RT 4534. Inf. Resp. at 54 n.26. Respondent suggested that this passage of the transcript established that Mr. Jones's IQ was "above the cutoff IQ score for mental retardation." Inf. Resp. at 54 n.26.

Respondent's assertion could not have provided the basis for the state court to deny Mr. Jones's claim. First, the prosecutor's representation of the range of IQ scores Mr. Jones had obtained on intelligence testing was inaccurate. Mr. Jones's factual allegations during state habeas proceedings established that prior intelligence testing included a score of 68 (*see, e.g.*, Ex. 130 at 2599), that the limited neuropsychological evaluation done at the time of trial was incomplete and unreliable (*see, e.g.*, Ex. 150 at 2732), and that testing during postconviction proceedings established Mr. Jones's IQ at 77. Ex. 175 at 3063. Second, the prosecutor's inaccurate reference to Mr. Jones's intelligence testing could not have provided a reason why Mr. Jones's extensive factual allegations should not be accepted as true. *Duvall*, 9 Cal. 4th at 475; *Romero*, 8 Cal. 4th at 742. Finally, respondent's assertion that an IQ "cutoff" is the sole requirement for a finding of intellectual disability is contrary to the state and federal law governing Mr. Jones's claim.[93] At most, respondent's assertions created factual disputes that the state

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[92] In keeping with the state court's procedures, in his Informal Reply, Mr. Jones expressly stated that he was raising an *Atkins* claim and further detailed the elements of that aspect of his claim. Inf. Reply at 320-26.

[93] Before this Court, respondent incorrectly interprets Mr. Jones's allegations as a claim that he is incompetent to be executed, an issue not raised in this claim.

continued…

court could not have resolved without issuing an order to show cause. *Duvall*, 9 Cal. 4th at 475; *Romero*, 8 Cal. 4th at 742.

b. Mr. Jones Made a Prima Facie Showing That He Suffers From Other Mental Impairments That Diminish His Culpability.

Mr. Jones not only established that his is ineligible for the death penalty because he is intellectually disabled, but also that he suffers from additional mental impairments that diminish his culpability and eligibility for the death penalty pursuant to broader Eighth Amendment prohibitions. *See* State Pet. at 347-70; Inf. Reply at 328-30. Mr. Jones's allegations and supporting factual material established that Mr. Jones suffers from dissociative episodes, psychotic breaks, depression, auditory and visual hallucinations, and brain damage, among other impairments that seriously impair his mental functioning and lessen his culpability. *See* Opening Br. at 125-27.

In state court, respondent did not challenge Mr. Jones's claim that mental impairment made him ineligible for the death penalty on legal grounds; rather, respondent contested the "factual predicate" of the claim. Inf. Resp. at 53. Respondent asserted that a jury finding Mr. Jones guilty of a specific intent crime refuted Mr. Jones's showing that he suffered from impaired mental functioning that diminished his culpability. Inf. Resp. at 53-54. Respondent's factual contentions could not have provided a reasonable basis for the state court's denial of this aspect of Mr. Jones's claim because, among other reasons, the factual material that Mr. Jones presented during his state habeas proceedings to demonstrate his impaired functioning was not before the jury when it rendered its verdicts. At most,

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Opp. at 156-57; *see Ford v. Wainwright*, 477 U.S. 399, 410, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986). Respondent's focus on the proper timing of a claim alleging incompetence to be executed therefore is not applicable to any portion of this claim.

respondent's assertion created a factual dispute that the state court could not have resolved without issuing an order to show cause. *Duvall*, 9 Cal. 4th at 475; *Romero*, 8 Cal. 4th at 742.

2. Section 2254(d) Is Satisfied by the State Court's Summary Denial of Mr. Jones's Adequately Pled Claim That He Is Ineligible for the Death Penalty.

In his Opening Brief, Mr. Jones detailed the ways in which the state court's summary denial of Mr. Jones's prima facie showing that he is ineligible for the death penalty satisfies section 2254(d). Opening Br. at 128-29. As a general matter, the California Supreme Court's refusal to hear Mr. Jones's adequately pled claims of constitutional error is contrary to clearly established federal law that prohibits state courts from creating "unreasonable obstacles" to the resolution of federal constitutional claims that are "plainly and reasonably made." *Davis v. Wechsler*, 263 U.S. 22, 24-25, 44 S. Ct. 13, 14, 68 L. Ed. 143 (1923); *see also* Opening Br. at 7-11. Specifically, in light of Mr. Jones's extensive factual allegations and supporting materials in the state court–which the state court was obligated to accept as true–the state court's ruling that Mr. Jones failed to make any prima facie showing of entitlement to relief, and refusal to initiate proceedings to take evidence and assess the claim, constitutes an unreasonable application of *Atkins* and other Eighth Amendment authority. *See, e.g.*, *Rivera v. Quarterman*, 505 F.3d 349, 357 (5th Cir. 2007) (holding state court unreasonably rejected prima facie showing of intellectual disability and stating, "Faced only with the threshold question of whether to allow Rivera's claim to proceed, it was unreasonable on the record before the CCA to reject Rivera's *Atkins* claim as failing to even establish a prima facie case – especially when viewed through the prism of *Atkins*' command that the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender.") (internal quotations omitted).

Respondent's failure to respond to these arguments constitutes consent to a

ruling in favor of Mr. Jones on these bases. *See, e.g.*, *Stichting*, 802 F. Supp. 2d at 1132; *In re Teledyne*, 849 F. Supp. at 1373; Local Civil Rules, L.R. 7-9. Given Mr. Jones's showing before the state court, he is entitled to an evidentiary hearing in this Court in which he has an opportunity, for the first time, to develop and present evidence to prove his claim and obtain relief.

W. Claim Twenty-Four: California's Death Penalty Statute Does Not Fulfill the Constitutional Mandate to Narrow the Class of Death-Eligible Defendants.

Mr. Jones satisfied state pleading requirements by presenting his claim that the California death-penalty statute fails to meaningfully narrowing the categories of person eligible for a death sentence with sufficient detail and supporting factual material to establish a prima facie showing that he was entitled to relief. *See, e.g.*, *Duvall*, 9 Cal. 4th at 474. In the state court, Mr. Jones presented comprehensive studies examining the application of the California death-penalty statute and legislative history materials demonstrating that, far from narrowing the scope of capital punishment, the death-penalty statute applies to virtually all first-degree murders and thus permits the imposition of death sentences in an arbitrary and capricious manner. State Pet. at 383-408. Rather than address the legal and factual issues raised in the claim, the California Supreme Court denied the claim based on its mistaken assumption that the United States Supreme Court previously rejected such a challenge. Opening Br. at 138-40.

Respondent concedes that "for a capital sentencing scheme to pass constitutional muster, it must perform a narrowing function with respect to the class of persons eligible for the death penalty." Opp. at 157. Respondent further does not contest the factual presentation presented in the California Supreme Court and this Court. Instead, respondent's sole argument why 28 U.S.C. section 2254(d) bars merits review of this claim is his assertion that the United States Supreme Court "has never held that there is a constitutional limit on the number and scope

of special circumstances that can be included in a death penalty statute. Therefore, the California Supreme Court reasonably rejected Petitioner's claim that California's death penalty is insufficiently narrow." Opp. at 157-58. In so doing, respondent fails to offer any reasoning underlying the California Supreme Court's decision or contest the analysis contained in the Opening Brief regarding the basis for the state court's decision.

As detailed in the Opening Brief, the California Supreme Court denied Mr. Jones's narrowing claim because it mistakenly believed that the United States Supreme Court fully resolved the constitutionality of the Briggs Initiative in *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984), and *Tuilaepa v. California*, 512 U.S. 967, 973, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994). Opening Br. at 138-40. The California Supreme Court repeatedly has relied on these decisions in rejecting narrowing claims in published opinions before and after its summary decision in Mr. Jones's case. *See, e.g.*, Opening Br. at 138-39 (collecting cases).[94] Unquestionably, this was the reasoning used in Mr. Jones's

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[94] *See also People v. Jennings*, 50 Cal. 4th 616, 648-49, 114 Cal. Rptr. 3d 133 (2010) (stating the United States Supreme Court "has held that California's requirement of a special circumstance finding 'adequately limits the death sentence to a small sub-class of capital-eligible cases'") (quoting *Harris*, 465 U.S. at 53)); *People v. Beames*, 40 Cal. 4th 907, 933-34, 55 Cal. Rptr. 3d 865 (2007) (rejecting the defendant's narrowing claim by citing to *Tuilaepa*, 512 U.S. at 971-72, for the proposition that "the special circumstances listed in section 190.2 apply only to a subclass of murderers, not to all murderers . . . [thus] there is no merit to defendant's contention . . . that our death penalty law is impermissibly broad"); *People v. Bacigalupo*, 6 Cal. 4th 457, 467, 24 Cal. Rptr. 2d 808 (1993) (holding that "California's 1978 death penalty statute is essentially identical to California's 1977 death penalty law the United States Supreme Court upheld in *Pulley v. Harris* [citations omitted] in that it 'requir[es] the jury to find at least one special circumstance beyond a reasonable doubt,' thereby 'limit[ing] the death sentence to a small subclass' of murders."); *People v. Whitt*, 51 Cal. 3d 620, 659-60, 274 Cal. Rptr.252 (1990) (rejecting defendant's claim there is no "meaningful" distinction between capital and noncapital murderers because of

continued…

case because the California Supreme Court was bound by these published decisions unless it issued an order to show cause and corrected the misstatement of law in a published opinion.[95] *See* section II.C., *supra*.

Deference under 28 U.S.C. section 2254(d) cannot be afforded to a state court decision that fails to properly address the merits of a claim because it mistakenly believes that the United States Supreme Court has foreclosed the issue. *See, e.g.*, *Taylor v. Workman*, 554 F.3d 879, 887 (10th Cir. 2009) (finding state court decision "contrary to" federal law because its analysis was "inconsistent with the inquiry demanded by" relevant precedent); *Frantz v. Hazey*, 533 F.3d 724, 734 (9th Cir. 2008) ("[M]istakes in reasoning or in predicate decisions of the type in question here—use of the wrong legal rule or framework—do constitute error under the 'contrary to' prong of § 2254(d)(1)."); *Brumley v. Wingard*, 269 F.3d 629, 638-39 (6th Cir. 2001) (finding section 2254(d) did not bar relief when "the difficulty with the state courts' decisions is not with their application of [*Ohio v.*

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aggravating sentencing factors common to most murders by citing *Harris* and stating "California's statute satisfies the Eighth Amendment's requirement that the category of death-eligible murderers by suitably narrowed").

[95] Indeed, respondent urged the California Supreme Court to continue to apply this line of reasoning in Mr. Jones's case. In his Informal Response, respondent argued that Court should reject the narrowing claim based on the reasoning in *People v. Bolden*, 29 Cal. 4th 515, 567, 127 Cal. Rptr. 2d 802 (2002). In *Bolden*, the state court simply relied on its previous decision in *People v. Kipp*, 26 Cal. 4th 1100, 113 Cal. Rptr. 2d 27 (2001), which in turn relied on the reasoning in *People v. Mendoza*, 24 Cal. 4th 130, 191-92, 99 Cal. Rptr. 2d 485 (2000). The decision in *Mendoza*, 24 Cal. 4th at 191-92, relies on *People v. Crittenden*, which expressly contains the misapplication of *Harris*. *People v. Crittenden*, 9 Cal. 4th 83, 154-56, 36 Cal. Rptr. 2d 474 (1994) (reasoning that the U.S. Supreme Court upheld the constitutionality of the 1977 Law's special circumstances in *Pulley v. Harris* and concluding that the 1978 Law's special circumstances play an "essentially identical" role in "thereby limiting the death sentence to a small subclass of murders," apparently despite the "greatly expanded" number of special circumstances).

Roberts, 448 U.S. 56 (1980)], but rather their refusal to apply *Roberts* at all"). Indeed, "[o]ne of the most obvious ways a state court may render a decision 'contrary to' the Supreme Court's precedent is when it sets forth the wrong legal framework." *Goodman v. Bertrand*, 467 F.3d 1022, 1028 (7th Cir. 2006) (quoting *Van Patten v. Deppisch*, 434 F.3d 1038, 1042 n.2 (7th Cir. 2006).

Moreover, respondent is incorrect in his unsupported assertion that the United States Supreme Court has not established controlling law governing this claim. The Supreme Court articulated the guiding principles that govern this claim first in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), and again in a series of cases in which the Court consistently held that to "pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Tuilaepa*, 512 U.S. at 982 (1994) (Stevens, J., concurring) (quoting *Lowenfield v. Phelps*, 484 U.S. 231, 244, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988), and *Zant v. Stephens*, 462 U.S. 862, 877, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983)); *see also Arave v. Creech*, 507 U.S. 463, 474, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1993). In *Furman* and the companion cases, the Court held that Georgia's and Texas's death penalty statutes violated the Eighth and Fourteenth Amendment proscriptions against cruel and unusual punishment. *Furman*, 408 U.S. at 239 (per curiam); *id*. at 386 n.11 (Burger, C.J., dissenting). The opinions of several Justices concurring in the judgment concluded that statutes that allowed the infrequent and seemingly random imposition of the death penalty upon only a small percentage of death-eligible criminal defendants violated the prohibition against cruel and unusual punishment because they permitted the death penalty "to be so wantonly and freakishly imposed." *Id.* at 309-10 (Stewart, J., concurring), 313 (White, J.,

concurring).[96]

Furman and its progeny made clear that the Eighth Amendment demands that the legislature set forth standards and criteria to regulate its state capital sentencing system to avoid an unconstitutional pattern of arbitrary and capricious sentences. *See, e.g.*, *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (plurality opinion) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"). As Justice Scalia has explained, these principles are well established:

> Since the 1976 cases, we have routinely read *Furman* as standing for the proposition that "channelling and limiting . . . the sentencer's discretion in imposing the death penalty" is a "fundamental constitutional requirement," and have insisted that States furnish the sentencer with "'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death[.]'"

Walton v. Arizona, 497 U.S. 639, 660, 110 S. Ct. 3047, 111 L. Ed. 2d 571 (1990) (Scalia, J., concurring) (quoting *Maynard v. Cartwright*, 486 U.S. 356, 362, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), and *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980)), *overruled on other grounds by Ring v.*

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[96] The data before the Court in *Furman* was that "from 15% to 20% of those convicted of murder are sentenced to death in States where it is authorized." *Furman*, 408 U.S. at 386 n.11 (Burger, C.J., dissenting). The Court considered data regarding the ratio of cases in which death sentences were imposed to cases in which death was a statutorily permissible punishment as well as data regarding the ratio of cases in which death sentences were imposed to cases that were charged capitally. *See id*. at 386 n.11 (Burger, C.J., dissenting), 435 n.19 (Powell, J., dissenting).

Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

Respondent cites to the Ninth Circuit's decision in *Mayfield v. Woodford*, 270 F.3d 915, 924 (9th Cir. 2001), to support his view that the California statute is immune from a narrowing challenge. Opp. at 158. Respondent's reliance on *Mayfield*, however, is unavailing.

In *Mayfield*, an en banc panel of the Ninth Circuit declined to grant a certificate of appealability on the narrowing claim, thus reaffirming the three-judge panel's previous affirmance of the district court's denial of habeas relief on this ground. *Mayfield*, 270 F.3d at 919. Petitioner proffered no evidence in support of his narrowing claim to the district court. *See Mayfield v. Calderon*, No. CV 94-6001, 1997 WL 778685 at *23 (C.D. Cal. Oct. 27, 1997) ("The United States Supreme Court and the Ninth Circuit have consistently upheld both the 1977 and 1978 versions of the California death penalty statute and, without presenting additional facts or law, petitioner has failed to establish that he is entitled to relief on this claim."). As such, the Ninth Circuit had before it only a facial challenge to the constitutionality of the statute, which the appellate court rejected. "The 1978 death penalty statute pursuant to which Mayfield was convicted and sentenced narrows the class of persons eligible for the death penalty at both the guilt and penalty phases." *Mayfield*, 270 F.3d at 924. The Ninth Circuit supported this determination with conclusory statements that California's death penalty scheme conformed to the narrowing requirements set forth in *Jurek v. Texas*, 428 U.S. 262, 270-71, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976) (narrowing at guilt phase), and *Lowenfield v. Phelps*, 484 U.S.at 246 (narrowing at penalty phase). *Id.* Nowhere in its brief treatment of the claim did the Ninth Circuit address the constitutionality of the statute in operation.

Unlike the facial challenge addressed by the Ninth Circuit in *Mayfield*, the record before the California Supreme Court and this Court contains extensive expert testimony about the broad scope of the California death penalty scheme, as

applied, as well as undisputed testimony concerning the lack of legislative consideration of any narrowing requirement in its creation. Thus, the decision in *Mayfield* is irrelevant to whether Mr. Jones stated a prima facie case and is entitled to an evidentiary hearing. *See Sanders v. Woodford*, No. 01-99017 (9th Cir. July 30, 2002) (order) (granting certificate of appealability on narrowing claim despite the decision in *Mayfield*); Order Denying Resp't's Mot. for Leave to File Mot. to Reconsider Order Re: Evidentiary Hr'g, Doc. No. 315, *Ashmus v. Martel*, No. 3:93-cv-00594-TEH (Mar. 6, 2003) (holding that *Mayfield* did not bar evidentiary hearing on narrowing claim).

X. Claim Twenty-Five: Unconstitutional Discrimination Affected the Charging and Prosecution of Mr. Jones.

In state court, Mr. Jones alleged that his death sentence was rendered in violation of his right to a reliable, rational non-arbitrary determination of guilt and penalty as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the Los Angeles District Attorney's ("District Attorney") decision to charge him capitally and pursue the death penalty was the result of invidious discrimination based on race, gender, and economic status. State Pet. at 409-15; Inf. Reply at 363-65. Specifically, Mr. Jones alleged that at the time of his trial, black defendants were prosecuted capitally at a disproportionately higher rate compared to white defendants and that the ultimate decision-maker in the office was white. State Pet. at 410-11. Mr. Jones also alleged that the District Attorney had a pattern and practice of gender discrimination between 1977 and 1995, including in this case; this pattern and practice is consistent with empirical studies indicating the widespread presence of constitutionally impermissible gender bias in charging decisions. State Pet. at 411-12. In addition, Mr. Jones claimed that during the period 1977-95, the Los Angeles County District Attorney's Office used economic status as a criterion in its charging decision regarding the identification of cases in which to seek a penalty of

death, including the decision to charge petitioner. State Pet. at 412-13.

The California Supreme Court's ruling that Mr. Jones failed to make any prima facie showing of entitlement to relief constitutes an unreasonable application of controlling federal law. Mr. Jones established a denial of equal protection by demonstrating that the District Attorney was selectively prosecuting people "based on an unjustifiable standard" of race, gender, and "other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962); *see also Wayte v. United States*, 470 U.S. 598, 608, 105 S. Ct. 1524, 1531, 84 L. Ed. 2d 547 (1985) (same). It is well established that "the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Wayte*, 470 U.S. at 608 (internal quotations omitted); *see also United States v. Armstrong*, 517 U.S. 456, 464, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996). This equal protection violation is established by demonstrating that the prosecution "had a discriminatory effect and that it was motivated by a discriminatory purpose." *Armstrong*, 517 U.S. at 465 (ruling that discriminatory effect based on race may be established by a showing that "similarly situated individuals of a different race were not prosecuted"); *see also McCleskey v. Kemp*, 481 U.S. 279, 292, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987). Evaluating an equal protection violation "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).

Respondent asserts that the California Supreme Court's summary denial of this claim was reasonable because Mr. Jones's statistical showing was not sufficient to establish discrimination in his case. Opp. at 159 (quoting *McCleskey*, 481 U.S. at 297). The decision in *McCleskey* did not involve a claim of discriminatory charging, but rather one of discriminatory outcome in the entire process. *McCleskey*, 481 at 292 ("In its broadest form, McCleskey's claim of discrimination extends to every actor in the Georgia capital sentencing process,

from the prosecutor who sought the death penalty and the jury that imposed the sentence, to the State itself that enacted the capital punishment statute and allows it to remain in effect despite its allegedly discriminatory application."). The Court's comments on the statistical evidence present in *McCleskey*, and cited by respondent (Opp. at 159) must be "viewed in the context of his challenge." 481 U.S. at 297. When a challenge is brought against specific decision makers – as in this case with a challenge to the Los Angeles District Attorney – statistical evidence is sufficient to establish a prima facie case. *See, e.g.*, *Armstrong*, 517 U.S. at 464; *People v. Ochoa*, 165 Cal. App. 3d 885, 888, 212 Cal. Rptr. 4 (1985) ("The best evidence of discriminatory prosecution would be a comparative breakdown by race of inmates who are referred to the district attorney for prosecution versus those who are actually prosecuted on weapons charges.").[97]

Y. Claim Twenty-Six: International Law Bars the Execution of Mentally Disordered Individuals Such as Mr. Jones.

In state court, Mr. Jones alleged that customary international law and *jus cogens* prohibit the imposition of the death penalty on mentally disordered individuals. Such international law is part of United States federal law and is, thus, the supreme law of the land under Article VI, section 2 of the Constitution of the United States. Because Mr. Jones is mentally disordered, his execution would violate international customary law and the obligations of the United States under

[97] Respondent's assertion that merits review of this claim is barred by the procedural default doctrine is foreclosed for the reasons stated in Section III, *supra*. In addition, trial counsel's failure to object to invidious discrimination by the prosecution constitutes ineffective assistance of counsel. *See, e.g.*, *Hollis v. Davis*, 941 F.2d 1471, 1478 (11th Cir. 1991); *Williams v. Woodford*, 396 F.3d 1059, 1070-72 (9th Cir. 2005) (Rawlinson, J., dissenting from denial of rehearing en banc) (ineffective assistance of counsel was made out by counsel's failure to object to the prosecutor's discriminatory strikes resulting in African-American defendant's being tried by an all-white jury).

that law. State Pet. at 416-24; Inf. Reply at 366-68. Specifically, the imposition of a judgment of conviction and sentence of death on an individual suffering the mental disorders that afflict Mr. Jones violates fundamental notions of due process and human dignity, and offends any acceptable standard of civilized behavior.

According to the Supreme Court, "International law is part of our law, and must be ascertained and administered by the court of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700, 20 S. Ct. 290, 44 L. Ed. 320 (1900); *see also* Restatement (Third) Of Foreign Relations Law Of The United States § 111 (1987) ("International law and international agreements of the United States are law of the United States and supreme over the law of the several States."); *id*. at § 702 cmt. c ("[T]he customary law of human rights is part of the law of the United States to be applied as such by state as well as federal courts."). Furthermore, under the Supremacy Clause, customary law trumps state law. *See Zschernig v. Miller*, 389 U.S. 429, 441, 88 S. Ct. 664, 19 L. Ed. 2d 683 (1968); *Clark v. Allen*, 331 U.S. 503, 508, 67 S. Ct. 1431, 91 L. Ed. 1633 (1947); *Missouri v. Holland*, 252 U.S. 416, 433-35, 40 S. Ct. 382, 64 L. Ed. 641 (1920). The states, under the Articles of Confederation, had applied international law as common law, but with the signing of the United States Constitution, "the law of nations became preeminently a federal concern." *Filartiga v. Pena-Irala*, 630 F.2d 876, 877-78 (2d Cir. 1980). "[I]t is now established that customary international law in the United States is a kind of federal law, and like treaties and other international agreements, it is accorded supremacy over state law by Article VI of the Constitution." Louis Henkin, et al., *International Law, Cases And Materials* 164 (3d ed. 1993); see also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964) (finding international law to be federal law).

Citing to *Rowland v. Chappell*, 902 F. Supp. 2d 1296, 1339 (N.D. Cal. 2012), respondent asserts that Mr. Jones's international law claim is not cognizable

on federal habeas corpus review. Opp. at 160. In that case, the petitioner alleged a death sentence carried out via lethal gas or lethal injection constituted cruel and unusual punishment under international law, specifically the International Covenant of Civil and Political Rights. The court's ruling in that case focused on the petitioner's inability "to demonstrate that the International Covenant of Civil and Political Rights creates a form of relief enforceable in United States courts." *Id*. By contrast, Mr. Jones's claim is that the imposition of the death penalty on him as a mentally disordered offender is a violation of international law, which is enforceable in habeas corpus proceedings.

As an initial matter, it is well established that a determination of the scope of basic rights set forth in the state and federal constitutions must be informed by international norms and consensus. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (acknowledging, in holding that capital punishment of juveniles under eighteen violates the Eighth Amendment's prohibition against cruel and unusual punishment, "the overwhelming weight of international opinion against the juvenile death penalty" and stating the "opinion of the world community, . . . does provide respected and significant confirmation of our own conclusions"); *Lawrence v. Texas*, 539 U.S. 558, 572-73, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (recognizing opinions expressed by European nations and European Court of Human Rights opposing criminalization of sodomy as important support for its decision that Texas law criminalizing sodomy violated Due Process Clause of the Fourteenth Amendment); *Gruter v. Bollinger*, 539 U.S. 306, 344, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003) (Ginsburg, J., concurring) (citing Convention on the Elimination of All Forms of Racial Discrimination as support for permitting use of affirmative action in law schools); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (explaining, in determining that a "national consensus" had developed against execution of mentally retarded and holding such executions unconstitutional under Eighth

Amendment, that Court was influenced by fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved").

Nations throughout the world have adopted the norm that the execution of mentally disordered individuals is morally intolerable. At least 141 nations presently prohibit the execution of the mentally disordered. Amnesty Int'l, *Death Penalty Facts* 3 (May 2012), *available at* http://www.amnestyusa.org/pdfs/DeathPenaltyFactsMay2012.pdf (lasted visited Jan. 27, 2014) The bodies and agencies of the United Nations competent to make such determinations have unanimously attested to this norm. In 1984, the United Nations Economic and Social Council (ECOSOC) adopted standards relating to capital punishment that state, inter alia, "nor shall the death sentence be carried out on pregnant women, or on new mothers, *or on persons who have become insane*." ECOSOC, *Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty*, ECOSOC Res. 1984/50 U.N. Doc. E/1984/84 (May 15, 1984) (emphasis added). The United Nations General Assembly endorsed these safeguards that same year. *See* G.A. Res. 39/118 ¶¶ 2, 5, U.N. Doc. A/39/51 (Dec. 14, 1984). In 1989, the ECOSOC expanded these standards and recommended that "Member States take steps to implement the safeguards . . . where applicable by: eliminating the death penalty for persons suffering from mental retardation *or extremely limited mental competence, whether at the stage of sentence or execution*." ECOSOC, *Implementation of Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty*, ¶ 1(d), ECOSOC Res. 1989/64, U.N. Doc. E/1989/91 (May 24, 1989).

Various international bodies around the world have endorsed this norm through resolutions and protocols. On June 25, 2001, the Parliamentary Assembly of the Council of Europe adopted a resolution condemning the execution of mentally disordered persons, stating, "The Assembly condemns all executions,

wherever they are carried out. However, it is particularly disturbed about executions carried out in Observer states which have committed themselves to respect human rights. The Assembly condemns the execution . . . of offenders suffering from mental illness or retardation . . . ." Parliamentary Assembly, Council of Europe, *Abolition of the Death Penalty in Council of Europe Observer States*, Resolution 1253 (June 25, 2001), *available at* http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16922& lang=en (last visited Jan. 27, 2014).[98]

The United Nations Commission on Human Rights has officially held that the continued use of the death penalty against mentally disordered individuals in the United States is a violation of international law. From 1999 until it was replaced by the Human Rights Council in 2006, the United Nations Commission on Human Rights specifically urged "all States that still maintain the death penalty . . . [n]ot to impose the death penalty on a person suffering from any forms of mental disorder or to execute any such person." U.N. Human Rights Comm'n, *The Question of the Death Penalty*, 61st Sess., Res. 2005/59, U.N. Doc. E/CN.4 / 2005/59 (2005); U.N. Human Rightss Comm'n, *The Question of the Death Penalty*, 60th Sess., Res. 2004/67, U.N. Doc. E/CN.4/RES 2004/67 (2004); U.N. Human Rights Comm'n, *The Question of the Death Penalty*, 59th Sess., Res. 2003/67, U.N. Doc. E/CN.4/RES/2003/67 (2003); U.N. Human Rights Comm'n, *The Question of the Death Penalty*, 58th Sess., Res. 2002/77, U.N. Doc. E/CN.4/2002/77 (2002); U.N. Human Rights Comm'n, *The Question of the Death Penalty*, 57th Sess., Res. 2001/68, U.N. Doc. E/CN.4/RES/2001/68 (2001); U.N. Human Rights Comm'n, *The Question of the Death Penalty*, 56th Sess., Res.

[98] The Council of Europe is comprised of forty-seven countries from the European continent. The United States is one of six countries currently enjoying Observer status on the council. *See* http://hub.coe.int/ (last visited Jan. 27, 2014).

200/65, U.N. Doc. E/CN.4/RES/2000/65 (2000); U.N. Human Rights Comm'n, *The Question of the Death Penalty*, 55th Sess., Res. 1999/61, U.N. Doc. E/CN.4/RES/1999/61 (1999). Beginning in 2007, the United Nations General Assembly called for a moratorium on the execution of all persons because of its concern about consistency with international law. *See Moratorium on the Use of the Death Penalty*, G.A. Assembly, 62d Sess., Res. 62/149, U.N. Doc. A/RES/62/149 (2007).

As demonstrated throughout the state petition, Mr. Jones suffers from severe, debilitating mental impairments to the extent that imposition of the death penalty under these circumstance violates the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) (Articles 1, 2, 11, and 16); the International Covenant on Civil and Political Rights (Articles 2, 4, 6, 7, 14, and 26); and the Universal Declaration of Human Rights (Articles 1, 2, 3, 5, 7, and 11). His death sentence therefore violates binding customary international law and *jus cogens* and is unlawful.

This claim was not procedurally defaulted, and respondent did not present factual materials or legal argument in state court to establish that Mr. Jones's prima facie showing should not be taken as true or that it otherwise lacked merit. Under these circumstances, the state court was required to issue an order to show cause and allow Mr. Jones access to state processes to develop and present evidence to prove his claim. *See, e.g,. Duvall*, 9 Cal. 4th at 475; *Romero*, 8 Cal. 4th at 742. By instead summarily denying Mr. Jones's claim, the California Supreme Court's decision satisfies section 2254(d).

Z. Claim Twenty-Seven: Mr. Jones's Constitutional Rights Would Be Violated by Execution Following a Long Period of Confinement Under a Sentence of Death.

In state court, Mr. Jones alleged that his death sentence was rendered in violation of his right to a reliable, rational non-arbitrary determination of guilt and

penalty as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the California death penalty post-conviction procedures failed to provide him with a constitutionally full, fair, and timely review of his conviction and sentence. App. Opening Br. at 229-43; App. Reply Br. at 100. Specifically, Mr. Jones was sentenced to death on February 16, 1995. More than four years passed before the California Supreme Court appointed counsel on April 13, 1999, to represent Mr. Jones on appeal. Mr. Jones's Opening Brief was filed more than two years later on June 19, 2001. Respondent's Brief on appeal was filed on November 6, 2001, and Appellant's Reply Brief was filed on February 26, 2002. Mr. Jones's conviction and sentence were affirmed by the California Supreme Court on March 17, 2003, and his petition for a writ of certiorari to the United States Supreme Court was denied on October 14, 2003, over eight years after he was sentenced to death. Mr. Jones's state habeas petition was filed on October 21, 2002. His state habeas petition was denied by the California Supreme Court on March 11, 2009, fourteen years after he was sentenced to death. Mr. Jones was received at San Quentin on April 24, 1995, and assigned to Death Row, where he currently lives. Since Mr. Jones's confinement at San Quentin in 1995, fourteen men have been executed, twenty-three more committed suicide, and sixty-eight more have died of natural causes or other means. During this time, several of the executions have been botched, and unprecedented publicity has focused on the torturous nature of the method of execution currently employed in California.

Respondent contends that Mr. Jones's claim that the execution of a prisoner after a lengthy period of confinement on death row violates the Eighth Amendment prohibition against the imposition of cruel and unusual punishment is not grounded in clearly established federal law as set forth by the United States Supreme Court

and therefore "the California Supreme Court reasonably rejected the claim." Opp. at 162.[99] Respondent is incorrect, and the state court's refusal to acknowledge, let alone apply, well established Eighth Amendment jurisprudence is contrary to and an unreasonable application of controlling federal law. *See, e.g.*, *Frantz v. Hazey*, 533 F.3d 724, 734 (9th Cir. 2008) ("[M]istakes in reasoning or in predicate decisions of the type in question here—use of the wrong legal rule or framework—do constitute error under the 'contrary to' prong of § 2254(d)(1)."); *Goodman v. Bertrand*, 467 F.3d 1022, 1028 (7th Cir. 2006) ("One of the most obvious ways a state court may render its decision 'contrary to' the Supreme Court's precedent is when it sets forth the wrong legal framework.").

Mr. Jones's claim is clearly grounded in federal law interpreting the Eighth Amendment's prohibition on cruel and unusual punishment as established by the United States Supreme Court. *Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct. 1421, 131 L. Ed. 2d 304 (1995) (Stevens, J., memorandum respecting denial of certiorari) ("petitioner's claim is not without foundation"). Under firmly established federal law, a death sentence passes constitutional muster under the Eighth Amendment only when "it comports with the basic concept of human dignity at the core of the Amendment." *Gregg v. Georgia*, 428 U.S. 153, 182, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). "[P]unishments of torture, . . . and all others in the same line of unnecessary cruelty, are forbidden" under the Eighth Amendment. *Wilkerson v. Utah*, 99 U.S. 130, 134, 25 L. Ed. 345 (1879); *see also id.* at 135 (noting that executions in which the condemned prisoner was "emboweled alive, beheaded, and quartered" or "burn[ed] alive" are prohibited by the Eighth Amendment); *cf. Baze*

[99] Respondent's argument is that this claim is barred by *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L .Ed. 2d. 334 (1989)." Opp. at 161. The *Teague* doctrine limits this Court's ability to grant relief apart from 28 U.S.C. section 2254(d) and thus it is not relevant to this stage of the proceedings. *See* n.1, *supra*.

v. Rees, 553 U.S. 35, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008) (holding that a method of execution that does not pose a "substantial risk of serious harm" does not violate the Eighth Amendment). Imposition of a death sentence is constitutionally prohibited when the punishment is "so totally without penological justification that it results in the gratuitous infliction of suffering." *Gregg*, 428 U.S. at 183. In addition, under clearly established federal law, if a death sentence does not serve a legitimate penological purpose, such as retribution or deterrence of criminal behavior, it is "'excessive' and unconstitutional." *Coker v. Georgia*, 433 U.S. 584, 592, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977); *see also, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 318-19, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (barring death penalty for mentally retarded offenders in part because "there is serious question as to whether either [retribution or deterrence] applies to mentally retarded offenders"); *Roper v. Simmons*, 543 U.S. 551, 572, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (barring death penalty for juveniles under eighteen because "neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders"). Thus, clearly established federal law dictates that death sentences that result in torture or that lack legitimate penological justification are unconstitutional and cannot stand.

The United States Supreme Court has concluded that lengthy periods of confinement can be torturous. *In re Medley*, 134 U.S. 160, 172, 10 S. Ct. 384, 33 L. Ed. 835 (1890) (describing the period between the sentence of death and the execution – in that case a mere four weeks – as engendering "immense mental anxiety"); *see also Furman v. Georgia*, 408 U.S. 238, 288-89, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Brennan, J., concurring) (noting the "frightful toll" exacted "between the imposition of sentence and the actual infliction of death"). Justices of the United States Supreme Court have expressed no reluctance to apply these well-established principles in individual cases, opining that protracted periods of incarceration under sentence of death serve no legitimate penological purpose.

See, e.g., *Johnson v. Bredesen*, 558 U.S. 1067, 130 S. Ct. 541, 542, 175 L. Ed. 2d 552 (2009) (Stevens, J., dissenting) (noting that the petitioner had been confined under sentence of death for 29 years, that the delay was at least in part attributable to state action, and that "both the conditions of confinement and the nature of the penalty itself" were "constitutionally significant"); *Thompson v. McNeil*, 556 U.S. 1114, 129 S. Ct. 1299, 1300 (2009) (Stevens, J., dissenting from denial of certiorari) ("[O]ur experience during the past three decades has demonstrated that delays in state-sponsored killings are inescapable and that executing defendants after such delays is unacceptably cruel."); *Foster v. Florida*, 537 U.S. 990, 123 S. Ct. 470, 471, 154 L. Ed. 2d 359 (2002) (Breyer, J., dissenting) ("the combination of uncertainty of execution and long delay is arguably 'cruel.'"); *Knight v. Florida*, 528 U.S. 990, 120 S. Ct. 459, 461, 145 L. Ed. 2d 370 (1999) (Breyer, J., dissenting) ("Where a delay, measured in decades, reflects the State's own failure to comply with the Constitution's demands, the claim that time has rendered the execution inhuman is a particularly strong one."); *Elledge v. Florida*, 525 U.S. 944, 944, 119 S. Ct. 366, 142 L. Ed. 2d 303 (1998) (Breyer, J., dissenting) (opining that a death row confinement of 23 years is "unusual" and "may prove particularly cruel" and that "[a]fter such a delay, an execution may well cease to serve the legitimate penological purposes that otherwise provide a necessary constitutional justification for the death penalty"). Thus, the state court could not reasonably conclude that Mr. Jones was entitled to relief.

To the extent, however, that the factual bases for this claim continue to develop, adjudication of the claim is premature.

AA. Claim Twenty-Eight: Mr. Jones Received Ineffective Assistance of Counsel on Appeal.

In state court, Mr. Jones alleged that his death sentence was rendered in violation of his right to a reliable, rational non-arbitrary determination of guilt and penalty as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to

the United States Constitution due to appellate counsel's prejudicially unreasonable representation, which fell below minimally acceptable standards of competence by counsel acting as a zealous advocate in a capital case. State Pet. at 375-77; Inf. Reply at 352-54. The California Supreme Court appointed appellate counsel to represent Mr. Jones in his automatic appeal on April 13, 1999. Appellate counsel filed Mr. Jones's direct appeal brief on June 19, 2001, and the reply brief on February 26, 2002.

An indigent criminal appellant is entitled to constitutionally effective assistance by his appointed counsel for his first appeal. *Douglas v. California*, 372 U.S. 353, 354, 356-57, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963); *Evitts*, 469 U.S. at 396; *see also Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012) (where appellate counsel is ineffective, "the prisoner has been denied fair process"). In a capital case, ineffective assistance of appellate counsel undermines "the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." *Parker v. Dugger*, 498 U.S. 308, 321 (1991).

The Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984) sets forth the standard for determining whether appellate counsel performed ineffectively. *See Smith v. Robbins*, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000). *Strickland* requires a two-part inquiry into whether (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. Deficient performance is representation that falls "below an objective standard of reasonableness," where "reasonableness" is determined by "prevailing professional norms" that are "reflected in American Bar Association standards and the like." *Id*. at 688-89; American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003) ("2003 ABA Guidelines") 10.15.1; American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (1989) ("1989 ABA Guidelines"), Guideline 11.2,

Commentary to Guideline 1.1; *see also Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (ruling that ABA Guidelines are "well-defined norms" to which the Court has long referred as guides for determining reasonableness).

Prejudice is established where appellate counsel fails to raise an issue on which there is a reasonable probability that the defendant would have prevailed. *Strickland*, 466 U.S. at 694; *Delgado v. Lewis*, 223 F.3d 976, 980-81 (9th Cir. 2000) (partially overruled on other grounds); *In re Smith*, 3 Cal. 3d 192, 202-03 (1970) (finding prejudice where appellate counsel failed to raise several claims of error "which arguably might have resulted in a reversal"). When this occurs, the petitioner is entitled to habeas relief. *Smith*, 3 Cal. 3d at 202-03.

Omissions by appellate counsel, such as the failure to present all available facts in support of legal claims, the failure to advance legal claims that could have been raised on appeal because they fully appear on the certified record, or the failure to advance every available legal basis for a litigated claim were not the product of a reasonable – or any – tactical decision. *See Reagan v. Norris*, 279 F.3d 651, 656-58 (8th Cir. 2002) (where appellate counsel failed to raise and preserve a viable claim on defendant's behalf, appellate counsel provided ineffective assistance); *Claudio v. Scully*, 982 F.2d 798, 804-05 (2d Cir. 1992) (same); *see also Gray v. Greer*, 800 F.2d 644, 647 (7th Cir. 1985); *see also* 2003 ABA Guidelines, Commentary to Guideline 1.1 ("Appellate counsel must be intimately familiar with technical rules of issue preservation and presentation[.]"); 1989 ABA Guidelines, Guideline 11.7.3. The following are meritorious issues for which appellate counsel unreasonably and prejudicially failed to present in Mr. Jones's direct appeal, and for which the California Supreme Court rejected Mr. Jones's claim on habeas corpus purportedly because of a procedural bar:

- Portions of Claim Three (alleging the prosecution violated petitioner's federal constitutional rights by failing to disclose material exculpatory evidence)*;*

- Portions of Claim Seven (alleging trial court violated petitioner's federal constitutional rights when it abdicated its responsibility to ensure an effective inquiry into prospective juror biases);
- Portions of Claim Nine (alleging insufficiency of the evidence);
- Portions of Claim Ten (alleging improper admission of propensity evidence);
- Claim Twelve (alleging the jury was given incomplete and confusing jury instructions and verdict forms in the guilt phase);
- Portions of Claim Fourteen (alleging prosecutorial misconduct);
- Portions of Claim Fifteen (alleging insufficient notice of aggravators);
- Claim Seventeen (alleging admission of improper victim impact evidence);
- Claim Twenty-One (alleging the jury was given incomplete and confusing jury instructions in the penalty phase).

This claim was not procedurally defaulted, and respondent did not present factual materials or legal argument in state court to establish that Mr. Jones's prima facie showing should not be taken as true or that it otherwise lacked merit. Under these circumstances, the state court was required to issue an order to show cause and allow Mr. Jones access to state processes to develop and present evidence to prove his claim. *See, e.g,. Duvall*, 9 Cal. 4th at 475; *Romero*, 8 Cal. 4th at 742. By instead summarily denying Mr. Jones's claim, the California Supreme Court's decision satisfies section 2254(d). *See, e.g.*, *Farina v. Sec'y*, 536 Fed. Appx 966, 976-77 (11th Cir. 2013) (finding "Florida Supreme Court's rejection of Mr. Farina's ineffective assistance of appellate counsel claim was based on an unreasonable determination of the facts under § 2254(d)(2)"); Shaw v. Wilson, 721

F.3d 908, 917-18 (7th Cir. 2013) (finding Indiana court's denial of appellate ineffective assistance of counsel claim to be "an unreasonable application of Supreme Court precedent"). In addition, for the reasons set forth in the Opening Brief, the California Supreme Court consistently has misapplied the Strickland standard and thus its summary denial is not entitled to deference under 28 U.S.C. section 2254(d). Opening Br. at 40-43.

BB. Claim Twenty-Nine: The State Court Failed to Create and Preserve an Adequate and Reliable Record of the Proceedings That Resulted in Mr. Jones's Convictions and Death Sentence.

In state court, Mr. Jones alleged that his death sentence was rendered in violation of his right to a reliable, rational non-arbitrary determination of guilt and penalty as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the trial court refused to comply with constitutional and statutory requirements that all significant proceedings be conducted on the record and that the record compiled on appeal be complete.[100] State Pet. at 11-19; Inf. Reply at 4-9. Specifically, on or about March 23, 2000, the Los Angeles County Superior Court certified the record on appeal in *People v. Ernest Jone*s, Los Angeles Superior Court No. BA 063825. The certified record is incomplete in numerous respects, for example:

- The Clerk's Transcript on appeal does not include many documents that are contained in the Los Angeles Superior Court Clerk's in this case. See State Pet. at 12-13;
- The Clerk's Transcript on appeal is missing transcripts of pre-

[100] Mr. Jones alleged also he was deprived of the effective assistance of appellate counsel by their failure to ensure that a complete and accurate record on appeal was provided to the California Supreme Court. *See, e.g.*, *Hardy v. United States* (1964) 375 U.S. 277, 279-80, 282 (anything short of a complete transcript is incompatible with effective appellate advocacy).

trial proceedings held in the Los Angeles County Municipal Court. State Pet. at 14;

- The clerk's office misfiled documents from Mr. Jones's capital prosecution into the clerk's file for his prior prosecutions, resulting in their being omitted from the record on appeal. See State Pet. at 15-16;

In addition, post-conviction counsel learned that, as a result of the Superior Court's failure to maintain an accurate record, the complete clerk's file in this matter cannot be located. State Pet. at 16-17.

The California Supreme Court's summary denial of this claim was an unreasonable application of controlling federal law because Mr. Jones stated a prima facie case for relief. "There can be little doubt that the absence of a complete and accurate transcript impairs the ability of appellate counsel to protect his client's basic rights." *United States v. Workcuff*, 422 F.2d 700, 702 (D.C. Cir. 1970); *see also Bergerco, U.S.A. v. Shipping Corp. of India, Ltd.*, 896 F.2d 1210, 1215 (9th Cir. 1990) ("the unavailability of a transcript itself becomes the problem because it deprives the defendant of the opportunity to make a fair showing on appeal of the gravity of the claimed error"). The United States Supreme Court has recognized that accuracy in the record on appeal is compelled by the Eighth Amendment prohibition against arbitrary or capricious imposition of the death penalty. "We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. . . . It cannot be gainsaid that meaningful appellate review requires that the appellate court consider the defendant's actual record." *Parker v. Dugger*, 498 U.S. 308, 321, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991); *see also Dobbs v. Zant*, 506 U.S. 357, 113 S. Ct. 835, 122 L. Ed. 2d 103 (1993) ("We have emphasized before the importance of reviewing capital sentences on a complete record."); *Chessman v. Teets*, 354 U.S. 156, 162, 77 S. Ct. 1127, 1 L. Ed. 2d 1253 (1957)

(petitioner denied due process when he was not represented in person or by counsel in state court proceedings for settlement of trial transcript constituting appellate record upon which his conviction was affirmed). As the Supreme Court held in *Gardner v. Florida*, 430 U.S. 349, 360-61, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977), the failure to produce a full and accurate record renders the death sentence invalid:

> Even if it were permissible to withhold a portion of the report from a defendant, and even from defense counsel, pursuant to an express finding of good cause for nondisclosure, it would nevertheless be necessary to make the full report a part of the record to be reviewed on appeal. Since the State must administer its capital-sentencing procedures with an even hand, *see Proffitt v. Florida*, 428 U.S., at 250-53, 96 S. Ct., at 2966-67, it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects would resulted in the holding of unconstitutionality in *Furman v. Georgia.*

Similarly, the United States Supreme Court has recognized that an incomplete record affects a federal court's ability to ascertain whether a state court's decision is entitled to deference pursuant to 28 U.S.C. section 2254(d). *See Pannetti v. Quarterman*, 551 U.S. 930, 950, 127 S, Ct, 2842, 168 L. Ed. 2d 662 (2007) ("The state court refused to transcribe its proceedings, notwithstanding the multiple motions petitioner filed requesting this process. To the extent a more complete record may have put some of the court's actions in a more favorable light, this only constitutes further evidence of the inadequacy of the proceedings.").

Respondent asserts that Mr. Jones has failed to explain "how the omission of any of the materials from the record prevented proper consideration of his claims

on appeal. Therefore, the California Supreme Court reasonably rejected Petitioner's claim that the record on appeal was constitutionally deficient." Opp. at 164. As the above authority recognizes, the state bears the burden of producing and maintaining the record; shifting the responsibility to the defendant to establish the material that the state has lost presents an unreasonable burden. As the Supreme Court has recognized with respect to *Brady* violations: "A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004). Mr. Jones presented a prima facie case for relief, the extent to which he was prejudiced by the lack of a complete record would have required the California Supreme Court to make a factual determination, one that it was unable to make prior to the issuance of an order to show cause. *See* section II.A.3, *supra*.

The state court's summary denial of Mr. Jones's claim was both contrary to and an unreasonable application of Supreme Court precedent. As a general matter, the California Supreme Court's refusal to hear Mr. Jones's adequately pled claims of constitutional error is contrary to clearly established federal law that prohibits state courts from creating "unreasonable obstacles" to the resolution of federal constitutional claims that are "plainly and reasonably made." *Davis v. Wechsler*, 263 U.S. at 24-25; *see also* Opening Br. at 7-11. Specifically, in light of Mr. Jones's extensive factual allegations and supporting materials in the state court – which the state court was obligated to accept as true – the state court's ruling that Mr. Jones failed to make any prima facie showing of entitlement to relief. *See, e.g.*, *Williams*, 529 U.S. at 405 (O'Connor, J., concurring). To the extent that the state court settled these questions or other factual questions, its decision was an unreasonable determination of facts. *See Hurles v. Ryan*, 650 F.3d at 1312.

CC. Claim Thirty: Considered Cumulatively, the Constitutional Errors in Mr. Jones's Case Require the Granting of Relief.

Mr. Jones satisfied state pleading requirements by presenting the California Supreme Court with sufficient detail and supporting factual material to establish a prima facie showing that he was entitled to relief because of the cumulative effect of the constitutional errors. *See, e.g.*, *Duvall*, 9 Cal. 4th at 474. In his habeas corpus proceedings, Mr. Jones presented the California Supreme Court with a prima facie claim that his conviction and death sentence are unconstitutional because the constitutional errors that he identified on direct appeal and in his state habeas proceedings, viewed cumulatively, prejudicially altered the outcomes of the guilt phase and penalty phase of his trial. State Pet. at 425-26; Inf. Reply at 368-69.

This claim was not procedurally defaulted, and respondent did not present factual materials or legal argument in state court to establish that Mr. Jones's prima facie showing should not be taken as true or that it otherwise lacked merit. Under these circumstances, the state court was required to issue an order to show cause and allow Mr. Jones access to state processes to develop and present evidence to prove his claim. *See, e.g. Duvall*, 9 Cal. 4th at 475; *Romero*, 8 Cal. 4th at 742. By instead summarily denying Mr. Jones's claim, the California Supreme Court's decision satisfies section 2254(d) as set forth in Mr. Jones's prior briefing and in the sections that follow. *See, e.g.*, *Parle v. Runnels*, 505 F.3d 922, 928 (9th Cir. 2007) ("the Supreme Court has clearly established that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal") (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3, 298, 302–03, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)),

Respondent's sole argument is that the "[t]he California Supreme Court

reasonably rejected Petitioner's cumulative error claim because it reasonably could have determined that, to the extent there were any errors at Petitioner's trial, they were not prejudicial, either individually or cumulatively, given the overwhelming evidence of Petitioner's guilt and the overwhelming aggravating evidence introduced at the trial." Opp. at 165. In so arguing, respondent ignores, and thus concedes, the arguments in the Opening Brief demonstrating that the California Supreme Court (1) "analyzes cumulative error contrary to clearly established Supreme Court law," (2) failed to "engage in fact-finding to resolve" Mr. Jones's adequately pled claims, contrary to clearly established federal law; and (3) "unreasonably applied "*Chambers* and its progeny." Opening Br. at 144-45. These mistakes in the state court's reasoning render its analysis contrary to established federal law within the meaning of § 2254(d)(1). *See, e.g.*, *Frantz v. Hazey*, 533 F.3d 724, 734 (9th Cir. 2004); *Parle v. Runnels*, 505 F.3d 922, 934 (9th Cir. 2007) ("in view of the unique symmetry of these errors–by which each so starkly amplified the prejudice caused by the other–and their direct relation to the sole issue contested at trial the California Court of Appeal's contrary conclusion was an objectively unreasonable application" of cumulative prejudice law). Similarly, respondent ignores, and thus concedes, that 28 U.S.C. section 2254(d)(2) is satisfied because the California Supreme Court made unreasonable factual findings. Opening Br. at 145.

Finally, respondent concedes that, to the extent that this Court finds that the state court's resolution of one or more constitutional issues on direct appeal or habeas was unreasonable under section 2254(d)(1), by definition the state court's cumulative error analysis was unreasonable under section 2254(d)(1), because the cumulative error analysis depends on the correct identification of errors. *See Panetti v. Quarterman*, 551 U.S. 930, 953, 127 S. Ct. 2842, 168 L. Ed. 2d. 662 (2007) (section 2254(d)(1) is satisfied when the state court's adjudication of a claim "is dependent on an antecedent unreasonable application of federal law").

V. CONCLUSION

For the reasons set forth in the previous briefing before this Court and herein, 28 U.S.C. section 2254(d) does not preclude this Court from reviewing the merits of Mr. Jones's claims in the Petition for Writ of Habeas Corpus.

Dated: January 27, 2014

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

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Attorneys for Petitioner
ERNEST DEWAYNE JONES

EXHIBIT A

California Capital Habeas Summary Denials, From January 1, 2000 to January 27, 2014, In Which Claims Were Procedurally Defaulted and the Defaulted Claims Were Also Denied on the Merits

#	Petitioner	Case No.	Order Date
1	Schmeck, Mark	S131578	11/13/13
2	Hoyos, Jaime	S190357	10/30/13
3	Collins, Scott	S136461	09/25/13
4	Kennedy, Jerry	S138625	09/18/13
5	Bacigalupo, Miguel	S079656	09/11/13
6	Taylor, Freddie	S137164	09/11/13
7	Boyette, Maurice	S092356	08/28/13
8	Kraft, Randy	S172964	05/22/13
9	Marlow, James	S178166	05/22/13
10	Harris, Maurice	S139789	05/15/13
11	DePriest, Timothy	S171297	05/01/13
12	Payton, William	S209849	05/01/13
12	Catlin, Steven	S173793	03/27/13
13	Halvorsen, Arthur	S130342	02/20/13
14	Davis, Richard	S157917	01/23/13
15	Jurado, Robert	S181061	01/16/13
16	Roybal, Rudolph	S156846	01/03/13
17	Pinholster, Scott Lynn	S193875	10/31/12

#	Petitioner	Case No.	Order Date
18	Cook, Joseph, Lloyd	S160915	09/12/12
19	Ramos, William James	S175417	08/22/12
20	Williams, Dexter Winfred	S163977	08/08/12
21	Williams, Dexter Winfred	S128008	08/08/12
22	Crew, Mark Christopher	S107856	08/08/12
23	Fauber, Curtis Lynn	S134365	07/25/12
24	Howard, Alphonso	S144008	07/18/12
25	Combs, Michael Stephen	S134705	07/11/12
26	Monterroso, Christian Antonio	S120980	06/20/12
27	Dickey, Colin Raker	S165302	05/23/12
28	Bonilla, Steven Wayne	S129612	02/22/12
29	Martinez, Omar Fuentes	S198765	02/15/12
30	Clark, Royal	S142741	01/11/12
31	Jones, Michael Lamont	S132646	11/30/11
32	Maury, Robert Edward	S122460	11/16/11
33	Hart, Joseph William	S152912	09/28/11
34	Dykes, Ernest Edward	S126085	08/31/11
35	Clair, Kenneth	S169188	08/24/11
36	Navarette, Martin Anthony	S122097	08/17/11
37	Perry, Clifton	S138225	07/27/11
38	Carasi, Paul Joe	S129603	07/13/11

#	Petitioner	Case No.	Order Date
39	Alvarez, Manuel Machado	S146501	07/13/11
40	Smith, Robert Lee	S144019	06/15/11
41	Avila, Johnny Jr.	S116554	06/15/11
42	Pinholster, Scott Lynn	S113357	04/20/11
43	Price, Curtis Floyd	S069685	04/13/11
44	Panah, Hooman Ashkan	S155942	03/16/11
45	Lewis, John Irvin	S139017	01/19/11
46	Smith, Gregory Calvin	S186093	01/12/11
47	Ochoa, Sergio	S121184	12/21/10
48	Cook, Walter Joseph	S136687	12/15/10
49	Carrington, Celeste Simone	S142464	09/15/10
50	Danks, Joseph Martin	S121004	09/15/10
51	Hinton, Eric Lamont	S125276	09/01/10
52	Taylor, Robert Clarence	S166952	09/01/10
53	Wallace, Keone	S140077	09/01/10
54	Lewis, Albert	S120420	08/18/10
55	Oliver, Anthony Cedric	S122545	08/18/10
56	Richardson, Charles Keith	S148523	08/18/10
57	Beames, John Michael	S153603	07/28/10
58	Lewis, Raymond Anthony	S131322	07/21/10
59	Lewis, Raymond Anthony	S154015	07/21/10

#	Petitioner	Case No.	Order Date
60	Wilson, Lester Harland	S152074	06/30/10
61	Carter, Dean Phillip	S153790	06/17/10
62	Carter, Dean Phillip	S153780	06/17/10
63	Cox, Michael Anthony	S135128	06/09/10
64	Geier, Christopher Adam	S147393	06/09/10
65	Coddington, Herbert James	S107502	05/20/10
66	Horning, Danny Ray	S137676	05/12/10
67	Majors, James David	S117112	04/28/10
68	Samuels, Mary Ellen	S124998	03/10/10
69	Cornwell, Glen	S152880	02/10/10
70	Burney, Shaun Kareem	S133439	12/17/09
71	Dunkle, Jon Scott	S119946	12/02/09
72	Sapp, John	S130314	12/02/09
73	Turner, Richard Dean	S124851	09/17/09
74	Ayala, Hector Juan	S159584	09/09/09
75	Blair, James Nelson	S144759	09/09/09
76	Stevens, Charles	S119354	08/26/09
77	Weaver, Ward Francis	S115638	08/26/09
78	Holloway, Duane	S147749	08/19/09
79	Michaels, Kurt	S147647	08/19/09
80	Zambrano, Enrique	S116021	08/12/09

#	Petitioner	Case No.	Order Date
81	Reilly, Mark Anthony	S107844	07/08/09
82	Stanley, Darren Cornelius	S106165	07/08/09
83	Martinez, Omar Fuentes	S141480	06/29/09
84	Cornwell, Glen	S126032	06/24/09
85	Vieira, Richard John	S147688	06/24/09
86	Boyer, Richard Delmer	S101970	06/17/09
87	Burgener, Michael Ray	S093551	06/17/09
88	Bolden, Clifford Stanley	S099231	06/10/09
89	Harrison, Cedric Seth	S130762	06/10/09
90	Williams, Bob Russell	S137389	06/10/09
91	Salcido, Ramon Bojorquez	S091159	05/20/09
92	Cole, Stephen	S142889	03/25/09
93	Jones, Ernest Dwayne	S110791	03/11/09
94	Hoyos, Jaime Armando	S146472	02/18/09
95	Tafoya, Ignacio Arriola	S120020	01/28/09
96	Moon, Richard Russell	S126781	12/10/08
97	Marlow, James Gregory	S101172	10/22/08
98	Marlow, James Gregory	S135024	10/22/08
99	Marlow, James Gregory	S101171	10/22/08
100	Arias, Pedro	S114347	09/17/08
101	Demetrulias, Gregory Spiros	S136487	09/17/08

#	Petitioner	Case No.	Order Date
102	Griffin, Donald	S118650	09/17/08
103	Jurado, Robert J.	S136327	07/23/08
104	Hernandez, Francis Gerard	S153853	06/11/08
105	Lawley, Dennis Harold	S089463	06/11/08
106	Brown, Andrew Lamont	S125670	05/21/08
107	Brown, Andrew Lamont	S136785	05/21/08
108	Huggins, Michael James	S127630	01/30/08
109	Bell, Ronald Lee	S105569	01/03/08
110	Ramirez, Richard M.	S125755	01/03/08
111	Gutierrez, Isaac, Jr.	S106745	12/12/07
112	Alfaro, Maria del Rosio	S099569	11/28/07
113	Slaughter, Michael Corey	S113371	10/31/07
114	Lenart, Thomas Howard	S126851	10/10/07
115	Noguera, William Adolf	S116529	10/10/07
116	Noguera, William Adolf	S136826	10/10/07
117	Catlin, Steven David	S090636	09/25/07
118	Taylor, Robert Clarence	S102652	09/25/07
119	Gray, Mario Lewis	S113159	08/29/07
120	Bradford, Mark Alan	S119155	08/08/07
121	Lucky, Darnell	S080669	06/27/07
122	Jablonski, Phillip Carl	S136861	06/13/07

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123	Webb, Dennis Duane	S080638	05/23/07
124	Hart, Joseph William	S134962	03/28/07
125	Burton, Andre	S034725	02/07/07
126	Steele, Raymond Edward	S147651	01/24/07
127	Adcox, Keith Edward	S074000	01/03/07
128	McDermott, Maureen	S130708	01/03/07
129	Wilson, Robert Paul	S121061	01/03/07
130	Hill, Michael	S072693	12/20/06
131	Staten, Deondre Arthur	S141678	12/20/06
132	Tuilaepa, Paul Palalaua	S065022	11/29/06
133	Millwee, Donald Ray	S120084	11/01/06
134	Coffman, Cynthia Lynn	S104807	10/18/06
135	Sturm, Gregory Allen	S122384	10/11/06
136	Young, Robert	S115318	10/11/06
137	Panah, Hooman Ashkan	S123962	08/30/06
138	Heard, James Matthew	S118272	08/16/06
139	San Nicolas, Rodney Jesse	S101300	07/12/06
140	Carter, Dean Phillip	S090230	06/28/06
141	Carter, Dean Phillip	S096874	06/28/06
142	Kipp, Martin James	S129115	06/28/06
143	Cleveland, Dellano Leroy	S143814	06/21/06

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144	Hughes, Kristin William	S126775	06/21/06
145	Barnett, Lee Max	S120570	05/17/06
146	Cudjo, Armenia Levi	S128474	05/17/06
147	Thomas, Ralph International	S063274	04/12/06
148	Hart, Joseph William	S074569	03/01/06
149	Morales, Michael Angelo	S141074	02/15/06
150	Ervin, Curtis Lee	S119420	12/14/05
151	Williams, Stanley	S139526	12/11/05
152	Dickey, Colin Raker	S115079	11/30/05
153	Musselwhite, Joseph T.	S109288	11/16/05
154	Andrews, Jesse James	S120348	10/26/05
155	Turner, Melvin	S114479	10/12/05
156	Barnett, Lee Max	S096831	07/27/05
157	Staten, Deondre Arthur	S121789	07/13/05
158	Nakahara, Evan Teek	S116605	06/08/05
159	Pollock, Milton Ray	S117032	04/27/05
160	Waidla, Tauno	S102401	04/05/05
161	Cleveland, Dellano Leroy	S123149	03/30/05
162	Veasley, Chauncey Jamal	S121562	03/30/05
163	Marks, Delaney Geral	S110988	03/16/05
164	Samayoa, Richard Gonzales	S120249	03/16/05

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165	Hernandez, Jesus Cianez	S107230	03/02/05
166	Bolin, Paul Clarence	S090684	01/19/05
167	Avena, Carlos Jaime	S076118	01/12/05
168	Walker, Marvin Pete	S070934	12/22/04
169	Lewis, Milton Otis	S114868	12/01/04
170	Beeler, Rodney Gene	S065016	11/10/04
171	Beeler, Rodney Gene	S127525	11/10/04
172	Hillhouse, Dannie	S126771	11/10/04
173	Martinez, Omar Fuentes	S112103	10/20/04
174	Seaton, Ronald Harold	S067491	09/29/04
175	Ayala, Hector Juan	S114371	09/01/04
176	Lucas, Larry Douglas	S050142	09/01/04
177	Steele, Raymond Edward	S114551	07/14/04
178	Coleman, Calvin	S117990	06/09/04
179	Scott, James Robert	S122167	06/09/04
180	Box, Christopher Clark	S087643	03/17/04
181	Farnam, Jack Gus	S081408	02/18/04
182	Jenkins, Daniel Steven	S068655	02/18/04
183	Cooper, Kevin	S122507	02/09/04
184	Cooper, Kevin	S122389	02/05/04
185	McDermott, Maureen	S092813	01/14/04

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186	Michaels, Kurt	S071265	12/23/03
187	Williams, Barry Glenn	S100932	12/10/03
188	Cudjo, Armenia Levi	S090162	11/25/03
189	Lucero, Philip Louis	S104589	11/25/03
190	Fairbank, Robert Green	S091530	11/12/03
191	Fudge, Keith Tyrone	S063280	11/12/03
192	Kipp, Martin James	S093369	11/12/03
193	Whitt, Charles Edward	S051684	11/12/03
194	Branner, Willie	S092757	10/29/03
195	Cash, Randall Scott	S099616	10/29/03
196	Jones, Michael Lamont	S094239	10/29/03
197	Anderson, James Phillip	S066574	10/15/03
198	Lewis, Raymond Anthony	S083842	10/15/03
199	Jones, Jeffrey Gerard	S093647	09/24/03
200	Ayala, Ronaldo Medrano	S110094	09/10/03
201	Staten, Deondre Arthur	S107302	09/10/03
202	Mendoza, Manuel	S065595	08/13/03
203	Taylor, Freddie Lee	S062432	07/16/03
204	Davenport, John Galen	S089502	05/14/03
205	Koontz, Herbert Harris	S104295	05/14/03
206	Ray, Clarence	S057313	04/09/03

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207	Ochoa, Lester Robert	S109925	03/26/03
208	Mayfield, Dennis	S081000	03/05/03
209	Mickle, Denny	S066487	02/25/03
210	Kipp, Martin James	S087490	02/19/03
211	Scott, James Robert	S059739	01/27/03
212	Scott, James Robert	S111112	01/27/03
213	Hughes, Kristin William	S089357	01/15/03
214	Carpenter, David Joseph	S110890	12/18/02
215	Dennis, William Michael	S099587	11/26/02
216	Ross, Craig Anthony	S076654	10/30/02
217	Hillhouse, Dannie	S102296	10/02/02
218	Andrews, Jesse James	S017657	08/26/02
219	Cunningham, Albert	S068133	08/21/02
220	Ochoa, Sergio	S095304	08/21/02
221	Stanley, Gerald Frank	S081120	07/17/02
222	Riel, Charles Dell	S105455	05/15/02
223	Cox, Tiequon Aundray	S082898	02/13/02
224	Proctor, William Arnold	S063535	02/13/02
225	Hawthorne, Anderson	S065934	01/29/02
226	Weaver, Ward Francis	S073709	11/14/01
227	Lewis, Milton Otis	S074511	10/24/01

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228	Noguera, William Adolf	S068360	10/17/01
229	Majors, James David	S062533	09/19/01
230	Padilla, Alfredo Alvarado	S043733	09/12/01
231	Rodriguez, Jose Arnaldo	S068488	09/12/01
232	Bradford, Mark Alan	S084903	08/29/01
233	Silva, Mauricio Rodriguez	S070879	07/27/01
234	Musselwhite, Joseph T.	S063433	07/18/01
235	Johnson, Willie Darnell	S090040	06/13/01
236	Coddington, Herbert James	S085976	05/16/01
237	Jones, Ronald Anthony	S092494	03/28/01
238	Fauber, Curtis Lynn	S065139	03/14/01
239	Benson, Richard Allen	S094994	02/28/01
240	Riel, Charles Dell	S084324	02/28/01
241	Stansbury, Robert Edward	S066681	01/30/01
242	Nicolaus, Robert Henry	S060675	01/17/01
243	Turner, Melvin	S069718	12/13/00
244	Bittaker, Lawrence Sigmond	S052371	11/29/00
245	Wrest, Theodore John	S055279	11/21/00
246	Gates, Oscar	S060778	10/25/00
247	Bemore, Terry Douglas	S089272	10/17/00
248	Sully, Anthony John	S060756	10/03/00

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249	Samayoa, Richard Gonzales	S058851	09/27/00
250	Williams, Barry Glenn	S050166	09/18/00
251	Jennings, Wilbur	S045495	08/30/00
252	Pensinger, Brett Patrick	S047895	07/26/00
253	Pensinger, Brett Patrick	S089959	07/26/00
254	Reilly, Mark Anthony	S058819	07/26/00
255	Cain, Tracy Dearl	S067172	06/28/00
256	Hines, Gary Dale	S077380	06/28/00
257	Earp, Ricky Lee	S060715	06/02/00
258	Waidla, Tauno	S076438	04/06/00
259	Jackson, Earl Lloyd	S055993	02/23/00
260	Jones, Earl Preston	S073227	02/23/00
261	Mattson, Michael Dee	S084320	01/19/00
262	Carpenter, David Joseph	S083246	01/13/00