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10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
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 15 **ERNEST DEWAYNE JONES,**
 16 Petitioner,
 17 v.
 18 **ROBERT K. WONG, Acting Warden**
of California State Prison at San
 19 **Quentin,**
 20 Respondent.
 21

CV-09-2158-CJC
DEATH PENALTY CASE
ANSWER TO PETITION FOR
WRIT OF HABEAS CORPUS
 The Honorable Cormac J. Carney, U.S.
 District Judge

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1 Vincent Cullen, the Acting Warden of the California State Prison in San
2 Quentin, California,¹ by and through his attorneys of record, files this Answer to the
3 Petition for Writ of Habeas Corpus filed on March 10, 2010, and hereby generally
4 and specifically denies each and every allegation therein, including but not limited
5 to the allegations contained in subject headings, subheadings, and footnotes, except
6 as expressly set forth herein. Respondent answers the Petition by admitting,
7 denying, and affirmatively alleging as follows:

8 Dated: April 6, 2010

Respectfully submitted,

9 EDMUND G. BROWN JR.
10 Attorney General of California
11 DANE R. GILLETTE
12 Chief Assistant Attorney General
13 PAMELA C. HAMANAKA
14 Senior Assistant Attorney General
15 A. SCOTT HAYWARD
16 Deputy Attorney General

17 /s/ Herbert S. Tetef
18 HERBERT S. TETEF
19 Deputy Attorney General
20 *Attorneys for Respondent*

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¹ Respondent notes that Vincent Cullen is now the Acting Warden of the
27 California State Prison in San Quentin, California. Pursuant to Federal Rule of
28 Civil Procedure 25(d), Respondent respectfully requests that he be substituted as
Respondent in this matter.

1 **PROCEDURAL AND JURISDICTIONAL STATEMENT**

2 **A. Custody**

3 Petitioner, Ernest Dewayne Jones, is in the custody of the California
4 Department of Corrections and Rehabilitation in San Quentin, California, pursuant
5 to the judgment and conviction in *People v. Ernest Dwayne Jones*, Los Angeles
6 County Superior Court case number BA063825.

7 Petitioner received a fair guilt and penalty trial by an impartial jury. No errors
8 of federal constitutional dimension occurred in connection with his criminal
9 proceedings. The convictions for which he is held in custody and his sentence of
10 death are valid and proper and do not violate the Constitution or laws or treaties of
11 the United States. Petitioner is entitled to no relief on any of the claims or
12 subclaims alleged in the Petition for Writ of Habeas Corpus.

13 **B. Trial Court Proceedings**

14 On February 1, 1995, a jury convicted Petitioner of the first degree murder
15 (Cal. Penal Code § 187(a); count 1) and forcible rape (Cal. Penal Code § 261(a)(2);
16 count 3) of Julia Ann Miller. As to the murder, the jury found true a special
17 circumstance that it was committed while Petitioner was engaged in the
18 commission of a rape (Cal. Penal Code § 190.2(a)(17)). As to both offenses, the
19 jury found that Petitioner personally used a knife (Cal. Penal Code § 12022(b)) and
20 had served a prior prison term (Cal. Penal Code § 667.5(a)&(b)).² (CT at 365,
21 367.)

22 On February 16, 1995, following a penalty trial, the jury fixed the penalty for
23 the murder at death. (CT at 428.) On April 7, 1995, the court pronounced a

24 ² Respondent is filing, concurrently with this Answer, a Notice of Lodging
25 (“NOL”), which describes the documents being lodged pursuant to Local Rule 83-
26 17.7, including the Clerk’s Transcript (“CT”), the Reporter’s Transcript (“RT”),
27 and the briefs, opinion, and/or orders filed in connection with Petitioner’s direct
28 appeal (case number S046117) and the habeas corpus proceedings (case numbers
S110791, S159235, & S180926) in the California Supreme Court. All further
references to particular lodged documents herein will be to “NOL” letter and
number (e.g., NOL A1) or “CT” or “RT” unless otherwise specifically indicated.

1 judgment of death in accordance with the jury's verdict. In addition, it imposed a
2 prison sentence of twelve years for the rape, which was stayed. (CT at 512, 515-
3 16.)

4 **C. State Post-Conviction Proceedings**

5 **1. Appeal to the California Supreme Court**

6 On March 17, 2003, the California Supreme Court affirmed the judgment of
7 conviction and death sentence on direct appeal (case number S046117). *People v.*
8 *Jones*, 29 Cal. 4th 1229, 131 Cal. Rptr. 2d 468 (2003). (NOL B4.) On October 14,
9 2003, the United States Supreme Court denied a petition for writ of certiorari.
10 *Jones v. California*, 540 U.S. 952, 124 S. Ct. 395, 157 L. Ed. 2d 286 (2003). (NOL
11 B7.)

12 **2. California Supreme Court Habeas Corpus Petitions**

13 On October 21, 2002, Petitioner filed his first petition for writ of habeas
14 corpus in the California Supreme Court (case number S110791). (NOL C1.) On
15 October 16, 2007, Petitioner filed his second petition for writ of habeas corpus in
16 the California Supreme Court (case number S159235). (NOL D1.) On March 11,
17 2009, the California Supreme Court denied both petitions for writ of habeas corpus.
18 (NOL C7 & D6.) On March 11, 2010, the day after he filed the instant Petition for
19 Writ of Habeas Corpus, Petitioner filed a third petition for writ of habeas corpus in
20 the California Supreme Court (case number S180926). (NOL E1.) That petition is
21 pending.³

22 ///

23 ///

24 ³ At the time Petitioner filed his third habeas corpus petition in the California
25 Supreme Court, he also filed a motion in the California Supreme Court to defer
26 briefing on the petition pending resolution of exhaustion issues in the instant federal
27 proceedings. In the motion, Petitioner indicated that he would withdraw the state
28 petition if it were determined that all claims in the instant federal Petition are
exhausted. Since Respondent is not asserting that any claims in the instant federal
Petition are unexhausted, Respondent anticipates that Petitioner will be
withdrawing the California Supreme Court habeas petition.

1 contained in the “Introduction” section. As to the statements contained in the
2 “Procedural History and Background” section of the Petition, Respondent denies, or
3 lacks sufficient knowledge to admit or deny, every allegation contained in the
4 “Procedural History and Background” section. As to the statements contained in
5 the “Jurisdiction” section of the Petition, Respondent denies, or lacks sufficient
6 knowledge to admit or deny, every allegation contained in the “Jurisdiction”
7 section. In addition, as to the factual allegations made in support of Petitioner’s
8 thirty claims for relief (including all subclaims), Respondent denies, or lacks
9 sufficient knowledge to admit or deny, every factual allegation made in support of
10 Petitioner’s thirty claims for relief (including all subclaims); alternatively,
11 Respondent denies that the alleged facts, if true, entitle Petitioner to federal habeas
12 relief. Additionally, Respondent does not respond to argumentative or conclusory
13 statements in the Petition, because these statements do not require an admission or
14 denial.

15 Further, Petitioner is not entitled to an evidentiary hearing on any claim or
16 subclaim alleged in the Petition because a proper application of § 2254(d) requires
17 that each claim be adjudicated on the basis of the record before the California
18 Supreme Court. *Holland v. Jackson*, 542 U.S. 649, 652, 124 S. Ct. 2736, 159 L.
19 Ed. 2d 683 (2004) (per curiam) (“we have made clear that whether a state court’s
20 decision is unreasonable must be assessed in light of the record the court had before
21 it”), citing *Yarborough v. Gentry*, 540 U.S. 1, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003),
22 *Miller-el v. Cockrell*, 537 U.S. 322, 348, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003),
23 *Bell v. Cone*, 535 U.S. 685, 697 n.4, 122 S. Ct. 1843, 152 L. Ed. 2d (2002) (*Bell I*)
24 (declining to consider evidence not presented to state court in determining whether
25 its decision was contrary to federal law). Permitting an evidentiary hearing to allow
26 Petitioner to more fully develop the factual basis of a claim would render any such
27 claim unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
28 *Landrigan*, 550 U.S. 465, 474, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007)

1 (“Because the deferential standards prescribed by § 2254(d) control whether to
2 grant habeas relief, a federal court must take into account those standards in
3 deciding whether an evidentiary hearing is appropriate.”). Moreover, no
4 evidentiary hearing should be held because, to the extent that any of Petitioner’s
5 claims is not fully factually developed, he failed to exercise “due diligence” within
6 the meaning of § 2254(e), and he cannot otherwise meet the stringent requirements
7 of § 2254(e)(2).

8 **STATEMENT OF FACTS**

9 The Respondent’s Brief filed in connection with Petitioner’s direct appeal in
10 the California Supreme Court included a statement of facts. Respondent
11 respectfully incorporates the factual statement from that brief herein, which
12 includes citations to the Reporter’s Transcript. (*See* NOL B2 at 3-22.)

13 In addition, the California Supreme Court recited the facts of this case in its
14 opinion on direct appeal. The California Supreme Court’s findings in this regard
15 are factual determinations that are both reasonable within the meaning of § 2254(d)
16 and presumed correct within the meaning of § 2254(e)(1). *Bragg v. Galaza*, 242
17 F.3d 1082, 1087 (9th Cir. 2001). Because the California Supreme Court’s factual
18 determinations were reasonable in light of the evidence presented to it, Petitioner is
19 not entitled to federal habeas relief. Moreover, because Petitioner has not and
20 cannot rebut the presumption of correctness by clear and convincing evidence, this
21 Court must accept those findings. 28 U.S.C. § 2254(e)(1). The following is the
22 California Supreme Court’s statement of facts, including the guilt phase evidence
23 and penalty phase evidence. The court’s reference to “defendant” is to Petitioner.

24 A. Guilt Phase

25 1. The People’s Case

26 Shortly after midnight on August 25, 1992, in Los Angeles, Chester
27 Miller returned home from work and noticed the family station wagon
28 was missing from the driveway. Mr. Miller went into his house and

1 found his wife, Julia, lying dead at the foot of their bed. Mrs. Miller's
2 robe was open, her nightgown was bunched above her waist, and she was
3 naked from the waist down. A telephone cord and a purse strap had been
4 used to tie Mrs. Miller's arms over her head, and a nightgown had been
5 used to loosely tie her ankles together. Mrs. Miller had been gagged with
6 two rags, one in her mouth and another around her face. Two kitchen
7 knives were sticking out of her neck. Pieces of three other knives were
8 found on or around her body.

9 Defendant and the Millers' daughter, Pam, lived together in an
10 apartment about two and one-half miles from the Millers. Around 6:00
11 p.m. on the previous day, August 24, 1992, Pam had been on the phone
12 with her mother. Defendant had interrupted Pam to ask her whether her
13 parents were at home. Pam told defendant that her father was at work,
14 but that her mother was home.

15 Around 7:40 p.m. the same evening, defendant left the apartment.
16 Pam later noticed defendant had apparently switched off the ringer on
17 their phone, something he had never done before. At 9:30 p.m.,
18 defendant returned to the apartment, smoked a joint of marijuana and
19 cocaine, and then left again at 10:00 p.m. He had again switched off the
20 phone ringer. Defendant returned in 20 minutes and rolled some more
21 "joints."

22 Pam always slept with the television on, but this night defendant
23 told her to turn it off because he had things on his mind. Around
24 midnight she woke up and saw defendant looking out the window. At
25 some point in the evening he had changed clothes. At 1:00 a.m., their
26 doorbell rang. Defendant told Pam not to answer it. Hearing her name
27 called, Pam looked out of the bedroom window and saw her
28 grandmother, who told her to open the apartment door. When defendant

1 did so, Pam's grandfather said her mother had been killed. Pam
2 repeatedly asked defendant to accompany her to her grandparents' house,
3 but defendant refused, saying he would come when he got his sister's car.

4 When Pam arrived at her grandparents' house, she called her friend
5 Shamaine Love. Pam told Love that Mrs. Miller had been killed. Love,
6 a childhood friend of Pam's, as well as a drug dealer who regularly sold
7 cocaine to her and to defendant, lived near Mr. and Mrs. Miller. Love
8 told Pam that several times during the day Mrs. Miller had been
9 murdered defendant had been to Love's house to buy drugs from her.
10 Two of defendant's trips to Love's house were in the afternoon; on both
11 occasions he paid for the drugs in cash. Shortly after sunset, which
12 would have been sometime between 7:30 and 7:55 p.m., defendant had
13 again visited Love, this time paying for cocaine and marijuana with a
14 gold chain. Later that night defendant again bought cocaine from Love,
15 paying for it with a pearl necklace, pearl earrings, and a pearl bracelet.
16 Pam identified the pearl jewelry, and later the gold chain, as Mrs.
17 Miller's. Pam took the pearl jewelry to the Miller house and showed it to
18 detectives there. Pam told the officers that she knew who had killed her
19 mother and that they should go to the apartment.

20 At 3:00 a.m., police officers staked out the Millers' station wagon,
21 which they found parked around the corner from the apartment. Shortly
22 thereafter defendant got into the station wagon and drove away. The
23 officers followed in their marked patrol car. Defendant looked back in
24 the officers' direction, reached into the backseat, and brought a rifle into
25 the front seat. Defendant then sped up, and the officers gave chase, their
26 lights and sirens on. Defendant ran red lights and stop signs. Other
27 patrol cars joined in pursuit. Defendant hit a traffic island and blew out
28 the tires on the driver's side of the station wagon. He continued driving

1 on the rims, however, and entered a freeway. First the wheels and then
2 the rims on the station wagon disintegrated, forcing defendant to stop.
3 The pursuit lasted 40 minutes. Defendant was ordered out of the station
4 wagon, but instead he placed the rifle to his chest and shot himself. A
5 subsequent search of the apartment revealed that the front and back doors
6 had been barricaded with furniture.

7 The deputy medical examiner with the Los Angeles County
8 Coroner's Office who performed the autopsy on Mrs. Miller's body
9 concluded, on the basis of the following evidence, that she had been
10 stabbed to death. Two knives were sticking out of Mrs. Miller's neck.
11 She also had 14 stab wounds in her abdomen and one in her vagina, but
12 the fatal stab wound, which penetrated to the spine, was the one in the
13 middle of her chest. Aside from the stab wound, there was no evidence
14 of trauma to the vaginal region.

15 At the crime scene, a criminalist with the Los Angeles County
16 Coroner's Office took swabs of Mrs. Miller's vagina. Another criminalist
17 found a great abundance of intact spermatozoa on the vaginal swab,
18 leading him to conclude that ejaculation occurred no more than five to 10
19 hours before Mrs. Miller's death. A blood sample was taken from
20 defendant. A molecular biologist for Cellmark Diagnostics performed
21 deoxyribonucleic acid (DNA) testing on the blood sample taken from
22 defendant and on the vaginal swabs taken from Mrs. Miller. This testing
23 yields banding patterns that are, with the exception of identical twins,
24 unique to every individual. There is only one chance in 78 million that a
25 random individual would have the same DNA banding pattern as
26 defendant. The tests showed that the banding pattern in the DNA from
27 defendant's blood sample matched the banding pattern of the semen on
28 the vaginal swab taken from Mrs. Miller.

1 Defendant's prior conviction for sexually assaulting Dorothea H.

2 Previously, defendant had lived with Glynnis H. and their infant son
3 in a garage behind the home of Glynnis's mother, Dorothea H. (Mrs. H.).
4 After defendant and Glynnis broke up and Glynnis moved away, Mrs. H.
5 told defendant to move out of the garage. On March 29, 1985, around
6 6:30 a.m., Mrs. H. heard the gate to her backyard rattle and then heard a
7 window in the bedroom nearest the garage, the bedroom Glynnis had
8 used, break. Mrs. H. investigated and found defendant standing in her
9 hallway. Appearing desperate, defendant asked Mrs. H. where Glynnis
10 and the infant were. When he learned they were not there, defendant,
11 telling her not to scream, took Mrs. H. into her bedroom. Defendant
12 gagged Mrs. H. and bound her arms and legs. The binding permitted Mrs.
13 H.'s legs to be separated a bit. Defendant then raped and sodomized her.

14 After the assault, while defendant was resting on the bed, the
15 doorbell rang. After peeking outside, defendant untied Mrs. H., told her
16 not to say anything, and stood behind her as she opened the door. It was
17 a delivery from the United Parcel Service - a package from Glynnis
18 containing a photograph of Glynnis, defendant and their infant. When he
19 saw the photograph, defendant began crying. He told Mrs. H. he was not
20 going to kill her because Mrs. H., who was a teacher, could take care of
21 the baby financially.

22 Defendant then took a knife from the kitchen drawer, placed it
23 against his stomach, and asked Mrs. H. to kill him. When Mrs. H. said
24 she couldn't, that it would be against her religion, defendant bound her to
25 her bed, took \$40 dollars from her purse, and asked her for her
26 neighbor's phone number, saying that after he left he would call her
27 neighbor. Defendant did so, and the neighbor released Mrs. H.

28 As a result of this incident, defendant was convicted of first degree

1 burglary [citations], residential robbery [citations], assault with a deadly
2 weapon [citation], rape [citation], and sodomy [citation]. In April 1986,
3 defendant was sentenced to prison for 12 years, and he was paroled in
4 1991, 10 months before the murder of Mrs. Miller.

5 2. The Defense Case

6 Defendant testified as follows: Around 3:00 p.m. on the day he
7 killed Mrs. Miller, defendant, feeling depressed, bought rock cocaine and
8 marijuana from Shamaine Love, paying \$20 in cash. He went to the
9 apartment and smoked some of the drugs, and not having used drugs for
10 seven years, became very high and paranoid. Pam came home to the
11 apartment around 5:30 p.m. She was also high on drugs. Giving
12 defendant a gold chain, pearl necklace, pearl earrings, and a pearl
13 bracelet, Pam told defendant to use the jewelry to buy drugs from
14 Shamaine Love. Defendant had seen Pam with Mrs. Miller's jewelry
15 before, but he did not recognize this jewelry as belonging to Mrs. Miller.
16 After Pam spoke on the phone with her mother, defendant took the bus to
17 Shamaine Love's house, arriving around 7:30 p.m., and bought cocaine
18 from her, paying \$125 in cash plus the jewelry.

19 After waiting at a bus stop for 30 or 40 minutes, defendant decided
20 to walk to the Millers' nearby home and ask Mrs. Miller for a ride back
21 to the apartment. He did so for two reasons: He was feeling the effects of
22 the drugs and liquor he had consumed throughout the day, and Love had
23 told him police were patrolling the neighborhood. Mrs. Miller invited
24 defendant into her house and agreed to give him a ride to the apartment.

25 A few weeks earlier, defendant had broken his thumb in six places.
26 Defendant had previously given Mrs. Miller a more innocuous
27 explanation - that he had broken it in the course of horseplay with Pam -
28 but now Mrs. Miller asked him how he had really broken it. Defendant

1 admitted that when Pam had come home late one night, he had
2 confronted her, she had walked away from him, and he had grabbed at
3 her waist and missed, jamming his thumb into the door frame.

4 Upon hearing this, Mrs. Miller became very angry. She told
5 defendant she would kill him if he hurt Pam, and that she would lie to his
6 parole officer to get him sent back to prison, a threat she had made on a
7 previous occasion. Mrs. Miller took a knife from the kitchen drawer.
8 Defendant pushed her. "You bastard," Mrs. Miller said, "My husband
9 don't put his hands on me." As Mrs. Miller came at defendant with the
10 knife, defendant responded by grabbing a knife out of the kitchen drawer
11 himself. Defendant told Mrs. Miller he did not want to hurt her. Mrs.
12 Miller swung at defendant with her knife, missing him. Defendant
13 swung back at her, cutting her arm. "Just wait until I get my gun," Mrs.
14 Miller said, running to her bedroom. Defendant followed Mrs. Miller
15 and as she was taking a rifle out of the bedroom closet, defendant
16 grabbed her from behind and spun her around. Mrs. Miller lost her grip
17 on the rifle and fell to the floor. As defendant stood over her, Mrs. Miller
18 said, "Give it to me."

19 Defendant then "kind of slipped back into [his] childhood" and had
20 a vision of walking into a room where his mother was with a man "who
21 wasn't [his] father." He picked up a knife and began stabbing Mrs.
22 Miller. The next thing defendant knew he was curled up in a ball, crying,
23 and Mrs. Miller was tied up on the floor with knives sticking out of her
24 neck. Defendant remembered nothing after the first few stabs, but he
25 admitted that he must have been the one who tied Mrs. Miller up,
26 sexually assaulted her, and killed her. He insisted he had not come to the
27 Miller house with the intention of robbing, raping, or killing Mrs. Miller.

28 After the killing, defendant "started experiencing things that [he]

1 had not experienced for a while.” He was “hearing . . . things in [his]
2 head telling [him] to do certain things. [He] guess[ed] you could call it
3 paranoia, thinking someone was coming to kill [him].” He grabbed a
4 second rifle and bullets from the bedroom closet with the intention of
5 taking his life. Defendant drove the Millers’ station wagon to the
6 apartment and parked around the corner, leaving the rifle in the station
7 wagon. He locked all the windows and doors in the apartment, believing
8 someone was coming to kill him, yet he went outside later to smoke some
9 of the drugs he had purchased from Shamaine Love. When Pam’s
10 grandparents informed her of Mrs. Miller’s death, and she left with them,
11 defendant barricaded the doors of the apartment.

12 When defendant left the apartment he intended to drive the station
13 wagon off a cliff and kill himself. Following the police chase, after the
14 station wagon was disabled, a voice inside his head said, “They’re going
15 to kill you.” Defendant then put the rifle to his chest and pulled the
16 trigger. He was hospitalized for three weeks, recovering from the wound,
17 and for the first week he was unconscious and on a respirator.

18 With regard to his prior conviction for sexually assaulting Mrs. H.,
19 defendant testified he was “not denying any of that.”

20 B. Penalty Phase

21 1. The People’s Case

22 Mr. and Mrs. Miller were married for 30 years, and he died eight
23 months after Mrs. Miller was murdered. In Pam’s opinion, Mr. Miller
24 “grieved himself to death.”

25 Gloria Hanks, defendant’s sister, testified that defendant told her he
26 “didn’t give a fuck about Pam or her family.”

27 During the entire year they lived together, defendant did not tell
28 Pam he heard voices; he did not, in Pam’s opinion, act like someone who

1 was hearing voices; and he did not display such behavior when he
2 returned to the apartment after killing Mrs. Miller.

3 The rape of Kim J.

4 On May 28, 1984, Kim J. attended a barbecue party given by
5 defendant's sister, Gloria Hanks. Kim and defendant smoked marijuana
6 together at the party, and then they went to Kim's house and smoked
7 some more. Kim considered defendant to be like a brother. However,
8 when she suggested it was time for him to leave, defendant grabbed her
9 by the throat, told her he would kill her if she screamed, and then raped
10 her at knifepoint. While defendant was attacking Kim "he seemed to be
11 in a trance. His eyes got big and glassy and his whole demeanor
12 changed. [¶] It was like he took on a new person, like he was in a trance,
13 and then afterwards, he seemed to snap back." Defendant apologized and
14 asked Kim whether she was going to tell anyone. She said she would
15 not, but later, urged by her mother to do so, Kim called the police. She
16 testified against defendant at a preliminary hearing, but then dropped the
17 charges because she had known defendant "practically all of his life" and
18 she was "best friends with two of his sisters." "[F]or whatever reason I
19 was thinking he needs a second chance."

20 2. The Defense Case

21 In the words of an aunt, defendant's home life was a "living hell."
22 Defendant's father and mother were alcoholics. They also used
23 marijuana in front of their children. The father and mother had "pretty
24 rough fights" with one another, and on one occasion the mother stabbed
25 the father in the hand. The mother had numerous affairs. Once, the
26 father caught the mother in bed with one of the father's friends, and
27 defendant and his sister were in the bed at the time. After that incident,
28 the father began beating the mother and "stomped her in her vagina."

1 When the father left the family, the mother and her boyfriend drank
2 heavily and often the family had no money for food. The mother beat the
3 children. “Whatever she had in her hands, she might hit them with it.”
4 In defendant’s presence, defendant’s mother told his father that defendant
5 was not in fact his child.

6 In the opinion of James Park, a corrections consultant and retired
7 Department of Corrections employee, defendant was likely to be a good
8 prisoner and unlikely to become involved in violence. Mr. Park based his
9 opinion on the following factors: Younger prisoners are more likely to be
10 violent, and at 30, defendant was older; during his previous eight-year
11 prison term, defendant had relatively few infractions, and only one for
12 fighting; finally, defendant had completed the requirements for a high
13 school degree.

14 In the opinion of Dr. Claudewell S. Thomas, a psychiatrist
15 appointed by the court at the request of the defense, defendant suffered
16 from schizoaffective schizophrenia, a major psychiatric disorder. In
17 reaching his diagnosis, Dr. Thomas interviewed defendant and reviewed
18 various documents: a 1985 report by a psychologist concluding that
19 defendant’s mental processes were intact and he was not psychotic; a
20 1985 report by a psychiatrist concluding defendant suffered from a
21 chronic underlying depressive mental illness exacerbated by alcohol and
22 drug abuse; a report by a psychologist who examined defendant in 1994
23 concluding that defendant was schizophrenic.

24 (NOL B4; *People v. Jones*, 29 Cal. 4th at 1238-44.)

25 **AFFIRMATIVE DEFENSES**

26 Respondent alleges the following affirmative defenses, as applicable, to each
27 claim in the Petition.

28 ///

1 **A. Failure to Allege Violation of Federal Law**

2 Federal habeas corpus relief, as a matter of law, is available to a prisoner in
3 state custody only if he demonstrates that he is being held in custody “in violation
4 of the Constitution or laws or treaties of the United States.” 28 U.S.C. §§ 2241(c)
5 & 2254(a). As a matter of law, such relief is not available for errors in the
6 application of state law.

7 Since none of Petitioner’s claims allege facts which, even if true, would
8 amount to a “violation of the Constitution or laws or treaties of the United States,”
9 federal habeas corpus relief is not available on any of his claims.

10 To the extent that Petitioner’s claims are based upon purported errors in the
11 application of state law, federal habeas corpus relief is unavailable.

12 **B. Lack of Subject Matter Jurisdiction**

13 Because the “federal question” requirement -- i.e., that a prisoner demonstrate
14 he is being held in state custody in “violation of the Constitution or laws or treaties
15 of the United States” -- is jurisdictional, Petitioner’s failure to allege facts in
16 support of any of his claims which, if true, would amount to a “violation of the
17 Constitution or laws or treaties of the United States” deprives this Court of subject
18 matter jurisdiction.

19 Any claims that are based solely on purported violations of state statutes or the
20 state constitution are likewise not cognizable on federal habeas corpus and are
21 outside this Court’s subject matter jurisdiction.

22 **C. Procedural Default**

23 The California Supreme Court found that Petitioner had defaulted a number of
24 the claims and subclaims contained in the pending Petition. Specifically, on direct
25 appeal, the California Supreme Court found that Petitioner had waived his claim
26 that prior crimes evidence was erroneously admitted at trial (NOL B4; *People v.*
27 *Jones*, 29 Cal. 4th at 1255; *see* Pet. Claim Ten, Subclaims 1 through 5), waived his
28 claim that CALJIC No. 4.21.1 erroneously told the jury that voluntary intoxication

1 or mental disorder could not be considered in determining whether Petitioner had
2 the specific intent to commit rape (NOL B4; *People v. Jones*, 29 Cal. 4th at 1258;
3 *see* Pet. Claim Twelve, Subclaim 6), waived his claim that the guilt phase verdict
4 form was fatally ambiguous (NOL B4; *People v. Jones*, 29 Cal. 4th at 1259; *see*
5 Pet. Claim Twelve, Subclaim 8), and waived his claim that the prosecutor
6 committed misconduct in implying that Petitioner was a member of a prison gang
7 (NOL B4; *People v. Jones*, 29 Cal. 4th at 1262-63; *see* Pet. Claim Fourteen,
8 Subclaim 11). Accordingly, relief on those claims is barred.

9 In denying Petitioner's first habeas corpus petition, the California Supreme
10 Court found that, to the extent they were not raised on appeal, and except insofar as
11 they alleged ineffective assistance of counsel, Subclaim 6b of Claim Three (NOL
12 C1 paragraph 1 of Claim "G"), Claim Seven (NOL C1 Claim "L"), Claim Nine
13 (NOL C1 Claim "K"), Claim Ten (NOL C1 Claim "C"), Claim Twelve (NOL C1
14 Claim "M"), Claim Fourteen, with the exception of Subclaims 8a(3) and 12 (NOL
15 C1 Claim "I" with the exception of paragraph 5(c), and Claim "Q" with the
16 exception of paragraph 2), Claim Fifteen (NOL C1 Claim "U"), and Claim Twenty-
17 One (NOL C1 Claim "R") were barred by *In re Harris*, 5 Cal. 4th 813, 825 & n.3,
18 826-29, 21 Cal. Rptr. 2d 373 (1993) and *In re Dixon*, 41 Cal. 2d 756, 759, 264 P.2d
19 513 (1953). (NOL C7.) Accordingly, relief on those claims is barred.

20 In denying Petitioner's first habeas corpus petition, the California Supreme
21 Court also found that, except to the extent they alleged ineffective assistance of trial
22 counsel, Subclaim 8a(3) of Claim Fourteen (NOL C1 Claim "I" paragraph 5(c)) and
23 Claim Twenty-Five (NOL C1 Claim "Y") were denied because Petitioner failed to
24 raise them in the trial court, citing *In re Seaton*, 34 Cal. 4th 193, 17 Cal. Rptr. 3d
25 633 (2004). (NOL C7.) Accordingly, relief on those claims is barred.

26 In denying Petitioner's first habeas corpus petition, the California Supreme
27 Court also found that, to the extent it alleged insufficiency of the evidence, Claim
28 Nine (NOL C1 Claim "K") was not cognizable on habeas corpus, citing *In re*

1 *Lindley*, 29 Cal. 2d 709, 723, 177 P.2d 918 (1947). (NOL C7.) Accordingly, relief
2 on that claim is barred.

3 The various procedural default doctrines invoked by the California Supreme
4 Court are independent of federal law and adequate to bar review on federal habeas
5 corpus. Accordingly, the identified claims, as having been procedurally defaulted,
6 are barred from review by this Court and should be dismissed.

7 **D. Non-Retroactivity: The Teague Doctrine**

8 The non-retroactivity doctrine forecloses federal habeas corpus relief as to the
9 constitutional provisions alleged by Petitioner in support of each of his claims
10 because, at the time his conviction became final, existing precedent did not
11 “compel” the result he now seeks. *See Teague v. Lane*, 489 U.S. 288, 299-301,
12 310, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). None of the recognized exceptions
13 to this doctrine applies to any of the claims.

14 **E. Harmless Error**

15 Even if Petitioner has alleged an error that is potentially cognizable on federal
16 habeas corpus, any such error was harmless under the governing standards of
17 harmless error review and therefore cannot be grounds for federal habeas relief.

18 **THE STANDARD OF REVIEW**

19 The Antiterrorism and Effective Death Penalty Act of 1996 became effective
20 on April 24, 1996. When a state court adjudicates a claim on the merits, the
21 AEDPA bars federal habeas corpus relief on that claim unless the state-court
22 adjudication was either (1) “contrary to, or involved an unreasonable application of,
23 clearly established Federal law, as determined by the Supreme Court of the United
24 States,” or (2) “based on an unreasonable determination of the facts in light of the
25 evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d); *Price v.*
26 *Vincent*, 538 U.S. 634, 638-39, 123 S. Ct. 1848, 155 L. Ed. 2d 877 (2003). This is
27 a “highly deferential standard for evaluating state-court rulings’ which demands
28 that state-court decisions be given the benefit of the doubt.” *Woodford v. Visciotti*,

1 537 U.S. 19, 24, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (per curiam) (quoting
2 *Lindh v. Murphy*, 521 U.S. 320, 333 n.7, 117 S. Ct. 2059, 138 L. Ed. 2d 481
3 (1997)).

4 A state court decision is “contrary to” federal law if it either “applies a rule
5 that contradicts the governing law” as set forth in Supreme Court opinions, or
6 reaches a different decision from a Supreme Court opinion when confronted with
7 materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S.
8 Ct. 1495, 146 L. Ed. 2d 389 (2000); *accord Bell I*, 535 U.S. at 694; *Clark v.*
9 *Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003). A state court makes an
10 “unreasonable application” of federal law if the state court identifies the correct
11 governing legal principle from the Supreme Court’s decisions but unreasonably
12 applies that principle to the facts of the prisoner’s case. *Williams v. Taylor*, 529
13 U.S. at 413; *Bell I*, 535 U.S. at 694; *accord Lockyer v. Andrade*, 538 U.S. 63, 71,
14 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) (“AEDPA does not require a federal
15 habeas court to adopt any one methodology in deciding the only question that
16 matters under § 2254(d)(1) -- whether a state court decision is contrary to, or
17 involved an unreasonable application of, clearly established federal law”).

18 It is not enough merely to show that the state court was incorrect. Federal
19 habeas corpus relief is not available simply because a federal court independently
20 concludes “that the relevant state-court decision applied clearly established federal
21 law erroneously or incorrectly. Rather, that application must also be unreasonable.”
22 *Williams v. Taylor*, 529 U.S. at 411; *accord Lockyer v. Andrade*, 538 U.S. at 75-76;
23 *Early v. Packer*, 537 U.S. 3, 11, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002); *Bell I*,
24 535 U.S. at 694; *Lambert v. Blodgett*, 393 F.3d 943, 978 (9th Cir. 2004) (“we may
25 not review state court judgments on the same terms as we do for direct appeals”).

26 If there is no Supreme Court precedent that controls a legal issue raised by a
27 petitioner in state court, the state court’s decision cannot be contrary to, or an
28 unreasonable application of, clearly established federal law. *See Wright v. Van*

1 *Patten*, 552 U.S. 120, 126, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008); *Carey v.*
2 *Musladin*, 549 U.S. 70, 77, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). Decisions of
3 the Supreme Court are the only ones that can form the basis justifying habeas relief;
4 lower federal courts cannot themselves establish such a principle to satisfy the
5 AEDPA bar. *Clark v. Murphy*, 331 F.3d at 1069; *Hernandez v. Small*, 282 F.3d
6 1132, 1140 (9th Cir. 2002) (any principle on which a petitioner seeks to rely must
7 be found in the holdings, as opposed to dicta, of the Supreme Court decisions).
8 Under the AEDPA, “clearly established federal law” is the “governing legal
9 principle or principles set forth by the Supreme Court at the time the state court
10 renders its decision.” *Lockyer v. Andrade*, 538 U.S. at 71; *see also Williams v.*
11 *Taylor*, 529 U.S. at 412.

12 A state court’s failure to cite any federal law in its opinion does not run afoul
13 of the AEDPA. In fact, a state court need not even be aware of applicable Supreme
14 Court precedents “so long as neither the reasoning nor the result of the state-court
15 decision contradicts them.” *Early v. Packer*, 537 U.S. at 8; *Bell v. Cone*, 543 U.S.
16 447, 455, 125 S. Ct. 847, 160 L. Ed. 2d 881 (2005) (per curiam) (*Bell II*) (federal
17 courts are not free to presume that a state court did not comply with constitutional
18 dictates on the basis of nothing more than a lack of citation; federal courts must
19 presume that the state court applied the same constitutionally sufficient review it
20 used in earlier cases absent some contrary indication).

21 In addition, under § 2254(d)(2), a state court’s findings of fact are binding in
22 federal court unless the federal court determines that the state court’s factual
23 findings were unreasonable in light of the evidence presented in state court. *Taylor*
24 *v. Maddox*, 366 F.3d 992, 1000-01 (9th Cir. 2004) (federal court first undertakes
25 “intrinsic review” of state court’s fact-finding under § 2254(d)(2); during this
26 process, the federal court “must be particularly deferential”); *Lambert v. Blodgett*,
27 393 F.3d at 972 (§ 2254(d)(2) applies to challenges based on state court record).
28 The burden a petitioner faces in attempting to show an unreasonable determination

1 of the facts based on the evidence presented is “daunting -- one that will be satisfied
2 in few cases.” *Taylor v. Maddox*, 366 F.3d at 1000; *see also Rice v. Collins*, 546
3 U.S. 333, 336-42, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006) (federal court
4 misapplied settled rules that limit its role and authority by setting aside reasonable
5 state-court determinations of fact in favor of its own debatable interpretation of the
6 record).

7 The state court’s factual findings are also entitled to a “presumption of
8 correctness” and are controlling unless the petitioner rebuts the presumption by
9 clear and convincing extrinsic evidence. *See* 28 U.S.C. § 2254(e)(1); *Lambert v.*
10 *Blodgett*, 393 F.3d at 973 (“the only evidence eligible to meet the ‘clear and
11 convincing’ burden is new evidence presented exclusively in federal court”); *see*
12 *also Miller-El v. Dretke*, 545 U.S. 231, 240, 125 S. Ct. 2317, 162 L. Ed. 2d 196
13 (2005).

14 CLAIMS FOR RELIEF

15 CLAIM ONE: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AT GUILT 16 AND PENALTY PHASES

17 In Claim One, Petitioner claims various federal constitutional violations on the
18 ground that he was denied the effective assistance of trial counsel at the guilt and
19 penalty phases of his trial.⁵ (Pet. at 21-92.) Petitioner raised part of this claim in

20 ⁵ Petitioner claims trial counsel rendered ineffective assistance by: (1) failing
21 during the guilt phase to investigate, develop, and present compelling expert and
22 lay witness testimony about Petitioner’s mental state (Pet. at 22-37); (2) failing to
23 develop and present a coherent and persuasive defense to the rape count, the rape
24 felony murder theory, and the rape special circumstance (Pet. at 37-47); (3)
25 pleading Petitioner guilty to the crime of rape during his closing argument (Pet. at
26 47-48); (4) failing to reasonably investigate and present potential challenges to the
27 admissibility of the DNA testimony (Pet. at 48-58); (5) failing to enter a plea of not
28 guilty by reason of insanity and investigating and presenting such a defense (Pet. at
58-60); (6) failing to conduct an adequate voir dire of potential jurors and ensure
the selection of a jury capable of a fair and reliable determination of guilt and
penalty (Pet. at 60-63); (7) failing to investigate the criminal background and the
status of pending cases against critical prosecution witnesses (Pet. at 64-67); (8)
failing to investigate Petitioner’s prior crimes, develop a strategy for addressing the
prosecution’s use of the prior crimes, and ensure that the jury was not
impermissibly influenced by the prior crimes (Pet. at 67-71); (9) failing to advise
(continued...)

1 his opening brief on appeal in the California Supreme Court.⁶ (NOL B1 at 126-43.)
2 The California Supreme Court rejected the claim on the merits in its reasoned
3 published opinion on appeal. (NOL B4; *People v. Jones*, 29 Cal. 4th at 1251, 1254-
4 55.) Petitioner also raised the claim in his first habeas corpus petition in the
5 California Supreme Court. (NOL C1 at 66-166 (Claim “D”).) The California
6 Supreme Court rejected the claim on the merits in its unpublished order denying the
7 petition. (NOL C7.)

8 Petitioner is precluded from obtaining federal habeas relief because the
9 California Supreme Court’s denial of each claim and subclaim was not contrary to
10 any clearly established Supreme Court authority, did not involve an unreasonable
11 application of clearly established Supreme Court authority, and did not involve an
12 unreasonable determination of the facts based on the evidence presented to it within
13 the meaning of § 2254(d). To the extent that no governing clearly established
14 Supreme Court authority existed at the time of the California Supreme Court’s
15 denial of the claim, federal habeas relief is precluded by § 2254(d). To the extent
16 that Petitioner overcomes the § 2254 bar, the claim fails under a de novo standard
17 of review. To the extent that the claim fails to allege a cognizable claim in a federal
18 habeas proceeding, or fails to allege a prima facie federal constitutional claim for
19 relief, it fails.

20
21 _____
22 (...continued)

23 Petitioner about possible ramifications stemming from his testimony and failing to
24 prepare Petitioner for testifying (Pet. at 71-75); (10) failing to request necessary
25 jury instructions and verdict forms during the guilt phase (Pet. at 75-81); (11)
26 failing to object to numerous instances of prosecutorial misconduct in the guilt and
27 penalty phases (Pet. at 81-89); and (12) having a disabling conflict of interest (Pet.
28 at 89-91).

29 On appeal, Petitioner claimed that trial counsel rendered ineffective
30 assistance by: (1) failing to call live witnesses when challenging the admission of
31 the DNA evidence; (2) failing to cross-examine the DNA expert at trial; (3)
32 withdrawing his objection to the prior crimes evidence; and (4) failing to call an
33 expert at the guilt phase to testify about Petitioner’s inability to form specific intent.
34 (NOL B1 at 126-43.)

1 As to the factual allegations made in support of Claim One, Respondent
2 denies, or lacks sufficient knowledge to admit or deny, every allegation;
3 alternatively, Respondent denies that the alleged facts, if true, entitle Petitioner to
4 federal habeas relief. Further, Petitioner is not entitled to an evidentiary hearing on
5 this claim, including all subclaims, because a proper application of § 2254(d)
6 requires that the claim be adjudicated on the basis of the record before the
7 California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652 (“we have made
8 clear that whether a state court’s decision is unreasonable must be assessed in light
9 of the record the court had before it”), citing *Yarborough v. Gentry*, 540 U.S. 1,
10 *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at 697 n.4 (declining
11 to consider evidence not presented to state court in determining whether its decision
12 was contrary to federal law). Permitting an evidentiary hearing to allow Petitioner
13 to more fully develop the factual basis of the claim would render his claim
14 unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
15 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
16 2254(d) control whether to grant habeas relief, a federal court must take into
17 account those standards in deciding whether an evidentiary hearing is
18 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
19 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
20 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
21 stringent requirements of § 2254(e)(2).

22 **CLAIM TWO: IRRECONCILABLE CONFLICT WITH TRIAL COUNSEL**

23 In Claim Two, Petitioner claims various federal constitutional violations on
24 the ground that he had an irreconcilable conflict with his trial attorney and that the
25 trial court conducted an inadequate hearing into the nature of the alleged conflict.
26 (Pet. at 92-98.) Petitioner raised this claim in his opening brief on appeal in the
27 California Supreme Court. (NOL B1 at 96-108.) The California Supreme Court
28

1 rejected the claim on the merits in its reasoned published opinion on appeal. (NOL
2 B4; *People v. Jones*, 29 Cal. 4th at 1244-46.)

3 Petitioner is precluded from obtaining federal habeas relief because the
4 California Supreme Court's denial of each claim and subclaim was not contrary to
5 any clearly established Supreme Court authority, did not involve an unreasonable
6 application of clearly established Supreme Court authority, and did not involve an
7 unreasonable determination of the facts based on the evidence presented to it within
8 the meaning of § 2254(d). To the extent that no governing clearly established
9 Supreme Court authority existed at the time of the California Supreme Court's
10 denial of the claim, federal habeas relief is precluded by § 2254(d). To the extent
11 that Petitioner overcomes the § 2254 bar, the claim fails under a de novo standard
12 of review. To the extent that the claim fails to allege a cognizable claim in a federal
13 habeas proceeding, or fails to allege a prima facie federal constitutional claim for
14 relief, it fails.

15 As to the factual allegations made in support of Claim Two, Respondent
16 denies, or lacks sufficient knowledge to admit or deny, every allegation;
17 alternatively, Respondent denies that the alleged facts, if true, entitle Petitioner to
18 federal habeas relief. Further, Petitioner is not entitled to an evidentiary hearing on
19 this claim, including all subclaims, because a proper application of § 2254(d)
20 requires that the claim be adjudicated on the basis of the record before the
21 California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652 ("we have made
22 clear that whether a state court's decision is unreasonable must be assessed in light
23 of the record the court had before it"), citing *Yarborough v. Gentry*, 540 U.S. 1,
24 *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at 697 n.4 (declining
25 to consider evidence not presented to state court in determining whether its decision
26 was contrary to federal law). Permitting an evidentiary hearing to allow Petitioner
27 to more fully develop the factual basis of the claim would render his claim
28 unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*

1 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
2 2254(d) control whether to grant habeas relief, a federal court must take into
3 account those standards in deciding whether an evidentiary hearing is
4 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
5 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
6 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
7 stringent requirements of § 2254(e)(2).

8 **CLAIM THREE: FAILURE TO DISCLOSE EXCULPATORY EVIDENCE**

9 In Claim Three, Petitioner claims various federal constitutional violations on
10 the ground that the prosecutor failed to disclose exculpatory evidence, including
11 medical records for Petitioner, witness impeachment evidence, and materials
12 concerning the DNA laboratory. (Pet. at 98-107.) Petitioner raised this claim in his
13 first and second habeas corpus petitions in the California Supreme Court. (NOL C1
14 at 262-66 (Claim “G”); NOL D1 at 5-10.) The California Supreme Court rejected
15 the claim on the merits in its unpublished orders denying the first and second
16 habeas corpus petitions. (NOL C7; NOL D6.) In its unpublished order denying the
17 first habeas corpus petition, the California Supreme Court also rejected the claim on
18 the ground that, to the extent it was not raised on direct appeal, and except insofar
19 as it alleged ineffective assistance of counsel, it was barred by *In re Harris*, 5 Cal.
20 4th at 825 & n.3, 826-29 and *In re Dixon*, 41 Cal. 2d at 759. (NOL C7.) As a
21 result, Claim Three is procedurally barred from consideration on the merits herein
22 because California’s *Harris* bar and *Dixon* bar are independent and adequate, and
23 Petitioner has not and cannot demonstrate that a fundamental miscarriage of justice
24 would occur if the claim was not considered on the merits. *Bennett v. Mueller*, 322
25 F.3d 573, 583 (9th Cir. 2003).

26 In addition, Petitioner is precluded from obtaining federal habeas relief
27 because the California Supreme Court’s denial of each claim and subclaim was not
28 contrary to any clearly established Supreme Court authority, did not involve an

1 unreasonable application of clearly established Supreme Court authority, and did
2 not involve an unreasonable determination of the facts based on the evidence
3 presented to it within the meaning of § 2254(d). To the extent that no governing
4 clearly established Supreme Court authority existed at the time of the California
5 Supreme Court’s denial of the claim, federal habeas relief is precluded by §
6 2254(d). To the extent that Petitioner overcomes the § 2254 bar, the claim fails
7 under a de novo standard of review. To the extent that the claim fails to allege a
8 cognizable claim in a federal habeas proceeding, or fails to allege a prima facie
9 federal constitutional claim for relief, it fails.

10 As to the factual allegations made in support of Claim Three, Respondent
11 denies, or lacks sufficient knowledge to admit or deny, every allegation;
12 alternatively, Respondent denies that the alleged facts, if true, entitle Petitioner to
13 federal habeas relief. Further, Petitioner is not entitled to an evidentiary hearing on
14 this claim, including all subclaims, because a proper application of § 2254(d)
15 requires that the claim be adjudicated on the basis of the record before the
16 California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652 (“we have made
17 clear that whether a state court’s decision is unreasonable must be assessed in light
18 of the record the court had before it”), citing *Yarborough v. Gentry*, 540 U.S. 1,
19 *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at 697 n.4 (declining
20 to consider evidence not presented to state court in determining whether its decision
21 was contrary to federal law). Permitting an evidentiary hearing to allow Petitioner
22 to more fully develop the factual basis of the claim would render his claim
23 unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
24 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
25 2254(d) control whether to grant habeas relief, a federal court must take into
26 account those standards in deciding whether an evidentiary hearing is
27 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
28 extent that Petitioner’s claim is not fully factually developed, he failed to exercise

1 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
2 stringent requirements of § 2254(e)(2).

3 **CLAIM FOUR: INCOMPETENCE TO STAND TRIAL**

4 In Claim Four, Petitioner claims various federal constitutional violations on
5 the ground that he was incompetent to stand trial. (Pet. at 107-24.) Petitioner
6 raised this claim in his first habeas corpus petition in the California Supreme Court.
7 (NOL C1 at 240-53 (Claim “E”).) The California Supreme Court rejected the claim
8 on the merits in its unpublished order denying the first habeas corpus petition.
9 (NOL C7.)

10 Petitioner is precluded from obtaining federal habeas relief because the
11 California Supreme Court’s denial of each claim and subclaim was not contrary to
12 any clearly established Supreme Court authority, did not involve an unreasonable
13 application of clearly established Supreme Court authority, and did not involve an
14 unreasonable determination of the facts based on the evidence presented to it within
15 the meaning of § 2254(d). To the extent that no governing clearly established
16 Supreme Court authority existed at the time of the California Supreme Court’s
17 denial of the claim, federal habeas relief is precluded by § 2254(d). To the extent
18 that Petitioner overcomes the § 2254 bar, the claim fails under a de novo standard
19 of review. To the extent that the claim fails to allege a cognizable claim in a federal
20 habeas proceeding, or fails to allege a prima facie federal constitutional claim for
21 relief, it fails.

22 As to the factual allegations made in support of Claim Four, Respondent
23 denies, or lacks sufficient knowledge to admit or deny, every allegation;
24 alternatively, Respondent denies that the alleged facts, if true, entitle Petitioner to
25 federal habeas relief. Further, Petitioner is not entitled to an evidentiary hearing on
26 this claim, including all subclaims, because a proper application of § 2254(d)
27 requires that the claim be adjudicated on the basis of the record before the
28 California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652 (“we have made

1 clear that whether a state court’s decision is unreasonable must be assessed in light
2 of the record the court had before it”), citing *Yarborough v. Gentry*, 540 U.S. 1,
3 *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at 697 n.4 (declining
4 to consider evidence not presented to state court in determining whether its decision
5 was contrary to federal law). Permitting an evidentiary hearing to allow Petitioner
6 to more fully develop the factual basis of the claim would render his claim
7 unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
8 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
9 2254(d) control whether to grant habeas relief, a federal court must take into
10 account those standards in deciding whether an evidentiary hearing is
11 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
12 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
13 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
14 stringent requirements of § 2254(e)(2).

15 **CLAIM FIVE: MEDICATED AT TRIAL**

16 In Claim Five, Petitioner claims various federal constitutional violations on
17 the ground that he was involuntarily medicated at the time of trial, which affected
18 his cognitive functioning and his appearance to the jury. (Pet. at 124-30.)
19 Petitioner raised this claim in his first habeas corpus petition in the California
20 Supreme Court. (NOL C1 at 254-61 (Claim “F”).) The California Supreme Court
21 rejected the claim on the merits in its unpublished order denying the first habeas
22 corpus petition. (NOL C7.)

23 The non-retroactivity doctrine forecloses federal habeas corpus relief as to the
24 constitutional provisions alleged by Petitioner in support of this claim because, at
25 the time his conviction became final, existing precedent did not “compel” the result
26 he now seeks. *See Teague v. Lane*, 489 U.S. at 299-301. And, in any event, none
27 of the recognized exceptions to the non-retroactivity doctrine apply to this claim.
28

1 Petitioner is also precluded from obtaining federal habeas relief because the
2 California Supreme Court’s denial of each claim and subclaim was not contrary to
3 any clearly established Supreme Court authority, did not involve an unreasonable
4 application of clearly established Supreme Court authority, and did not involve an
5 unreasonable determination of the facts based on the evidence presented to it within
6 the meaning of § 2254(d). To the extent that no governing clearly established
7 Supreme Court authority existed at the time of the California Supreme Court’s
8 denial of the claim, federal habeas relief is precluded by § 2254(d). To the extent
9 that Petitioner overcomes the § 2254 bar, the claim fails under a de novo standard
10 of review. To the extent that the claim fails to allege a cognizable claim in a federal
11 habeas proceeding, or fails to allege a prima facie federal constitutional claim for
12 relief, it fails.

13 As to the factual allegations made in support of Claim Five, Respondent
14 denies, or lacks sufficient knowledge to admit or deny, every allegation;
15 alternatively, Respondent denies that the alleged facts, if true, entitle Petitioner to
16 federal habeas relief. Further, Petitioner is not entitled to an evidentiary hearing on
17 this claim, including all subclaims, because a proper application of § 2254(d)
18 requires that the claim be adjudicated on the basis of the record before the
19 California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652 (“we have made
20 clear that whether a state court’s decision is unreasonable must be assessed in light
21 of the record the court had before it”), citing *Yarborough v. Gentry*, 540 U.S. 1,
22 *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at 697 n.4 (declining
23 to consider evidence not presented to state court in determining whether its decision
24 was contrary to federal law). Permitting an evidentiary hearing to allow Petitioner
25 to more fully develop the factual basis of the claim would render his claim
26 unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
27 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
28 2254(d) control whether to grant habeas relief, a federal court must take into

1 account those standards in deciding whether an evidentiary hearing is
2 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
3 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
4 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
5 stringent requirements of § 2254(e)(2).

6 **CLAIM SIX: TRIAL JUDGE’S CONFLICT OF INTEREST AND**
7 **PSYCHOLOGICAL IMPAIRMENT**

8 In Claim Six, Petitioner claims various federal constitutional violations on the
9 ground that the judge who presided over some of the pretrial proceedings “had a
10 conflict of interest and disabling psychological condition that prevented him from
11 being an unbiased decision-maker.” (Pet. at 130-34.) Petitioner raised this claim in
12 his first habeas corpus petition in the California Supreme Court. (NOL C1 at 378-
13 82 (Claim “W”).) The California Supreme Court rejected the claim on the merits in
14 its unpublished order denying the first habeas corpus petition. (NOL C7.)

15 Petitioner is precluded from obtaining federal habeas relief because the
16 California Supreme Court’s denial of each claim and subclaim was not contrary to
17 any clearly established Supreme Court authority, did not involve an unreasonable
18 application of clearly established Supreme Court authority, and did not involve an
19 unreasonable determination of the facts based on the evidence presented to it within
20 the meaning of § 2254(d). To the extent that no governing clearly established
21 Supreme Court authority existed at the time of the California Supreme Court’s
22 denial of the claim, federal habeas relief is precluded by § 2254(d). To the extent
23 that Petitioner overcomes the § 2254 bar, the claim fails under a de novo standard
24 of review. To the extent that the claim fails to allege a cognizable claim in a federal
25 habeas proceeding, or fails to allege a prima facie federal constitutional claim for
26 relief, it fails.

27 As to the factual allegations made in support of Claim Six, Respondent denies,
28 or lacks sufficient knowledge to admit or deny, every allegation; alternatively,

1 Respondent denies that the alleged facts, if true, entitle Petitioner to federal habeas
2 relief. Further, Petitioner is not entitled to an evidentiary hearing on this claim,
3 including all subclaims, because a proper application of § 2254(d) requires that the
4 claim be adjudicated on the basis of the record before the California Supreme
5 Court. *Holland v. Jackson*, 542 U.S. at 652 (“we have made clear that whether a
6 state court’s decision is unreasonable must be assessed in light of the record the
7 court had before it”), citing *Yarborough v. Gentry*, 540 U.S. 1, *Miller-el v.*
8 *Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at 697 n.4 (declining to consider
9 evidence not presented to state court in determining whether its decision was
10 contrary to federal law). Permitting an evidentiary hearing to allow Petitioner to
11 more fully develop the factual basis of the claim would render his claim
12 unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
13 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
14 2254(d) control whether to grant habeas relief, a federal court must take into
15 account those standards in deciding whether an evidentiary hearing is
16 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
17 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
18 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
19 stringent requirements of § 2254(e)(2).

20 **CLAIM SEVEN: INADEQUATE INQUIRY INTO JUROR BIAS**

21 In Claim Seven, Petitioner claims various federal constitutional violations on
22 the ground that the trial court “permitted an improper and one-sided voir dire of the
23 jurors and failed to ensure that the prospective jurors’ biases were revealed.” (Pet.
24 at 134-37.) Petitioner raised this claim in his first habeas corpus petition in the
25 California Supreme Court. (NOL C1 at 282-84 (Claim “L”).) The California
26 Supreme Court rejected the claim on the merits in its unpublished order denying the
27 first habeas corpus petition. In that same order, the California Supreme Court also
28 rejected the claim on the ground that, to the extent it was not raised on direct

1 appeal, and except insofar as it alleged ineffective assistance of counsel, it was
2 barred by *In re Harris*, 5 Cal. 4th at 825 & n.3, 826-29 and *In re Dixon*, 41 Cal. 2d
3 at 759. (NOL C7.) As a result, Claim Seven is procedurally barred from
4 consideration on the merits herein because California's *Harris* bar and *Dixon* bar
5 are independent and adequate, and Petitioner has not and cannot demonstrate that a
6 fundamental miscarriage of justice would occur if the claim was not considered on
7 the merits. *Bennett v. Mueller*, 322 F.3d at 583.

8 In addition, Petitioner is precluded from obtaining federal habeas relief
9 because the California Supreme Court's denial of each claim and subclaim was not
10 contrary to any clearly established Supreme Court authority, did not involve an
11 unreasonable application of clearly established Supreme Court authority, and did
12 not involve an unreasonable determination of the facts based on the evidence
13 presented to it within the meaning of § 2254(d). To the extent that no governing
14 clearly established Supreme Court authority existed at the time of the California
15 Supreme Court's denial of the claim, federal habeas relief is precluded by §
16 2254(d). To the extent that Petitioner overcomes the § 2254 bar, the claim fails
17 under a de novo standard of review. To the extent that the claim fails to allege a
18 cognizable claim in a federal habeas proceeding, or fails to allege a prima facie
19 federal constitutional claim for relief, it fails.

20 As to the factual allegations made in support of Claim Seven, Respondent
21 denies, or lacks sufficient knowledge to admit or deny, every allegation;
22 alternatively, Respondent denies that the alleged facts, if true, entitle Petitioner to
23 federal habeas relief. Further, Petitioner is not entitled to an evidentiary hearing on
24 this claim, including all subclaims, because a proper application of § 2254(d)
25 requires that the claim be adjudicated on the basis of the record before the
26 California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652 ("we have made
27 clear that whether a state court's decision is unreasonable must be assessed in light
28 of the record the court had before it"), citing *Yarborough v. Gentry*, 540 U.S. 1,

1 *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at 697 n.4 (declining
2 to consider evidence not presented to state court in determining whether its decision
3 was contrary to federal law). Permitting an evidentiary hearing to allow Petitioner
4 to more fully develop the factual basis of the claim would render his claim
5 unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
6 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
7 2254(d) control whether to grant habeas relief, a federal court must take into
8 account those standards in deciding whether an evidentiary hearing is
9 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
10 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
11 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
12 stringent requirements of § 2254(e)(2).

13 **CLAIM EIGHT: UNREASONABLE RULINGS ON CAUSE CHALLENGES**

14 In Claim Eight, Petitioner claims various federal constitutional violations on
15 the ground that the trial court unreasonably sustained and denied challenges for
16 cause to prospective jurors. (Pet. at 137-42.) Petitioner raised this claim in his
17 opening brief on appeal in the California Supreme Court. (NOL B1 at 35-61.) The
18 California Supreme Court rejected the claim on the merits in its reasoned published
19 opinion on appeal. (NOL B4; *People v. Jones*, 29 Cal. 4th at 1246-50.)

20 Petitioner is precluded from obtaining federal habeas relief because the
21 California Supreme Court’s denial of each claim and subclaim was not contrary to
22 any clearly established Supreme Court authority, did not involve an unreasonable
23 application of clearly established Supreme Court authority, and did not involve an
24 unreasonable determination of the facts based on the evidence presented to it within
25 the meaning of § 2254(d). To the extent that no governing clearly established
26 Supreme Court authority existed at the time of the California Supreme Court’s
27 denial of the claim, federal habeas relief is precluded by § 2254(d). To the extent
28 that Petitioner overcomes the § 2254 bar, the claim fails under a de novo standard

1 of review. To the extent that the claim fails to allege a cognizable claim in a federal
2 habeas proceeding, or fails to allege a prima facie federal constitutional claim for
3 relief, it fails.

4 As to the factual allegations made in support of Claim Eight, Respondent
5 denies, or lacks sufficient knowledge to admit or deny, every allegation;
6 alternatively, Respondent denies that the alleged facts, if true, entitle Petitioner to
7 federal habeas relief. Further, Petitioner is not entitled to an evidentiary hearing on
8 this claim, including all subclaims, because a proper application of § 2254(d)
9 requires that the claim be adjudicated on the basis of the record before the
10 California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652 (“we have made
11 clear that whether a state court’s decision is unreasonable must be assessed in light
12 of the record the court had before it”), citing *Yarborough v. Gentry*, 540 U.S. 1,
13 *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at 697 n.4 (declining
14 to consider evidence not presented to state court in determining whether its decision
15 was contrary to federal law). Permitting an evidentiary hearing to allow Petitioner
16 to more fully develop the factual basis of the claim would render his claim
17 unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
18 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
19 2254(d) control whether to grant habeas relief, a federal court must take into
20 account those standards in deciding whether an evidentiary hearing is
21 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
22 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
23 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
24 stringent requirements of § 2254(e)(2).

25 **CLAIM NINE: INSUFFICIENCY OF THE EVIDENCE**

26 In Claim Nine, Petitioner claims various federal constitutional violations on
27 the ground that there was insufficient evidence to support the rape conviction, rape
28 felony murder conviction, and rape special circumstance. (Pet. at 143-44.)

1 Petitioner raised this claim in his first habeas corpus petition in the California
2 Supreme Court. (NOL C1 at 279-81 (Claim “K”).) The California Supreme Court
3 rejected the claim on the merits in its unpublished order denying the first habeas
4 corpus petition. In that same order, the California Supreme Court also rejected the
5 claim on the ground that, to the extent it was not raised on direct appeal, and except
6 insofar as it alleged ineffective assistance of counsel, it was barred by *In re Harris*,
7 5 Cal. 4th at 825 & n.3, 826-29 and *In re Dixon*, 41 Cal. 2d at 759. In addition, in
8 that same order, the California Supreme Court also rejected the claim on the ground
9 that, to the extent it alleged insufficiency of the evidence, it was not cognizable on
10 habeas corpus, citing *In re Lindley*, 29 Cal. 2d at 723. (NOL C7.) As a result,
11 Claim Nine is procedurally barred from consideration on the merits herein because
12 California’s *Harris* bar, *Dixon* bar, and *Lindley* bar are independent and adequate,
13 and Petitioner has not and cannot demonstrate that a fundamental miscarriage of
14 justice would occur if the claim was not considered on the merits. *Bennett v.*
15 *Mueller*, 322 F.3d at 583.

16 In addition, Petitioner is precluded from obtaining federal habeas relief
17 because the California Supreme Court’s denial of each claim and subclaim was not
18 contrary to any clearly established Supreme Court authority, did not involve an
19 unreasonable application of clearly established Supreme Court authority, and did
20 not involve an unreasonable determination of the facts based on the evidence
21 presented to it within the meaning of § 2254(d). To the extent that no governing
22 clearly established Supreme Court authority existed at the time of the California
23 Supreme Court’s denial of the claim, federal habeas relief is precluded by §
24 2254(d). To the extent that Petitioner overcomes the § 2254 bar, the claim fails
25 under a de novo standard of review. To the extent that the claim fails to allege a
26 cognizable claim in a federal habeas proceeding, or fails to allege a prima facie
27 federal constitutional claim for relief, it fails.

28

1 As to the factual allegations made in support of Claim Nine, Respondent
2 denies, or lacks sufficient knowledge to admit or deny, every allegation;
3 alternatively, Respondent denies that the alleged facts, if true, entitle Petitioner to
4 federal habeas relief. Further, Petitioner is not entitled to an evidentiary hearing on
5 this claim, including all subclaims, because a proper application of § 2254(d)
6 requires that the claim be adjudicated on the basis of the record before the
7 California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652 (“we have made
8 clear that whether a state court’s decision is unreasonable must be assessed in light
9 of the record the court had before it”), citing *Yarborough v. Gentry*, 540 U.S. 1,
10 *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at 697 n.4 (declining
11 to consider evidence not presented to state court in determining whether its decision
12 was contrary to federal law). Permitting an evidentiary hearing to allow Petitioner
13 to more fully develop the factual basis of the claim would render his claim
14 unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
15 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
16 2254(d) control whether to grant habeas relief, a federal court must take into
17 account those standards in deciding whether an evidentiary hearing is
18 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
19 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
20 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
21 stringent requirements of § 2254(e)(2).

22 **CLAIM TEN: INFLAMMATORY PROPENSITY EVIDENCE**

23 In Claim Ten, Petitioner claims various federal constitutional violations on the
24 ground that inflammatory propensity evidence was admitted during the guilt phase
25 of the trial, the trial court failed to properly instruct the jury on the limited purpose
26 of the evidence, trial counsel acted unreasonably with regard to the evidence, and
27 the prosecutor committed misconduct with regard to the evidence. (Pet. at 144-54.)
28 Petitioner raised part of this claim in his opening brief on appeal in the California

1 Supreme Court.⁷ (NOL B1 at 62-79, 133-35.) The California Supreme Court
2 rejected part of the claim as waived and part of the claim on the merits.⁸ (NOL B4;
3 *People v. Jones*, 29 Cal. 4th at 1255-56.) Petitioner also raised the claim in his first
4 habeas corpus petition in the California Supreme Court. (NOL C1 at 54-65 (Claim
5 “C”).) The California Supreme Court rejected the claim on the merits in its
6 unpublished order denying the petition. In that same order, the California Supreme
7 Court also rejected the claim on the ground that, to the extent it was not raised on
8 direct appeal, and except insofar as it alleged ineffective assistance of counsel, it
9 was barred by *In re Harris*, 5 Cal. 4th at 825 & n.3, 826-29 and *In re Dixon*, 41 Cal.
10 2d at 759. (NOL C7.) As a result, Claim Ten is procedurally barred from
11 consideration on the merits herein because California’s waiver bar, *Harris* bar, and
12 *Dixon* bar are independent and adequate, and Petitioner has not and cannot
13 demonstrate that a fundamental miscarriage of justice would occur if the claim was
14 not considered on the merits. *Bennett v. Mueller*, 322 F.3d at 583.

15 In addition, Petitioner is precluded from obtaining federal habeas relief
16 because the California Supreme Court’s denial of each claim and subclaim was not
17 contrary to any clearly established Supreme Court authority, did not involve an
18 unreasonable application of clearly established Supreme Court authority, and did
19 not involve an unreasonable determination of the facts based on the evidence
20 presented to it within the meaning of § 2254(d). To the extent that no governing
21 clearly established Supreme Court authority existed at the time of the California
22 Supreme Court’s denial of the claim, federal habeas relief is precluded by §
23 2254(d). To the extent that Petitioner overcomes the § 2254 bar, the claim fails

24
25 ⁷ On appeal, Petitioner claimed that prior crimes evidence was erroneously
26 admitted at trial and that trial counsel was ineffective for withdrawing his objection
27 to the evidence. (NOL B1 at 62-79, 133-35.)

28 ⁸ The California Supreme Court found that Petitioner had waived his claim
that prior crimes evidence was erroneously admitted at trial and rejected on the
merits the claim that trial counsel was ineffective for withdrawing his objection to
the evidence. (NOL B4; *People v. Jones*, 29 Cal. 4th at 1255-56.)

1 under a de novo standard of review. To the extent that the claim fails to allege a
2 cognizable claim in a federal habeas proceeding, or fails to allege a prima facie
3 federal constitutional claim for relief, it fails.

4 As to the factual allegations made in support of Claim Ten, Respondent
5 denies, or lacks sufficient knowledge to admit or deny, every allegation;
6 alternatively, Respondent denies that the alleged facts, if true, entitle Petitioner to
7 federal habeas relief. Further, Petitioner is not entitled to an evidentiary hearing on
8 this claim, including all subclaims, because a proper application of § 2254(d)
9 requires that the claim be adjudicated on the basis of the record before the
10 California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652 (“we have made
11 clear that whether a state court’s decision is unreasonable must be assessed in light
12 of the record the court had before it”), citing *Yarborough v. Gentry*, 540 U.S. 1,
13 *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at 697 n.4 (declining
14 to consider evidence not presented to state court in determining whether its decision
15 was contrary to federal law). Permitting an evidentiary hearing to allow Petitioner
16 to more fully develop the factual basis of the claim would render his claim
17 unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
18 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
19 2254(d) control whether to grant habeas relief, a federal court must take into
20 account those standards in deciding whether an evidentiary hearing is
21 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
22 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
23 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
24 stringent requirements of § 2254(e)(2).

25 **CLAIM ELEVEN: DENIAL OF PETITIONER’S RIGHT TO TESTIFY ABOUT**
26 **HIS MENTAL HEALTH HISTORY**

27 In Claim Eleven, Petitioner claims various federal constitutional violations on
28 the ground that the trial court refused to permit him to testify about his mental

1 health history at the guilt phase of his trial. (Pet. at 154-61.) Petitioner raised this
2 claim in his opening brief on appeal in the California Supreme Court. (NOL B1 at
3 109-25.) The California Supreme Court rejected the claim on the merits in its
4 reasoned published opinion on appeal. (NOL B4; *People v. Jones*, 29 Cal. 4th at
5 1252-53.)

6 The non-retroactivity doctrine forecloses federal habeas corpus relief as to the
7 constitutional provisions alleged by Petitioner in support of this claim because, at
8 the time his conviction became final, existing precedent did not “compel” the result
9 he now seeks. *See Teague v. Lane*, 489 U.S. at 299-301. And, in any event, none
10 of the recognized exceptions to the non-retroactivity doctrine apply to this claim.

11 Petitioner is also precluded from obtaining federal habeas relief because the
12 California Supreme Court’s denial of each claim and subclaim was not contrary to
13 any clearly established Supreme Court authority, did not involve an unreasonable
14 application of clearly established Supreme Court authority, and did not involve an
15 unreasonable determination of the facts based on the evidence presented to it within
16 the meaning of § 2254(d). To the extent that no governing clearly established
17 Supreme Court authority existed at the time of the California Supreme Court’s
18 denial of the claim, federal habeas relief is precluded by § 2254(d). To the extent
19 that Petitioner overcomes the § 2254 bar, the claim fails under a de novo standard
20 of review. To the extent that the claim fails to allege a cognizable claim in a federal
21 habeas proceeding, or fails to allege a prima facie federal constitutional claim for
22 relief, it fails.

23 As to the factual allegations made in support of Claim Eleven, Respondent
24 denies, or lacks sufficient knowledge to admit or deny, every allegation;
25 alternatively, Respondent denies that the alleged facts, if true, entitle Petitioner to
26 federal habeas relief. Further, Petitioner is not entitled to an evidentiary hearing on
27 this claim, including all subclaims, because a proper application of § 2254(d)
28 requires that the claim be adjudicated on the basis of the record before the

1 California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652 (“we have made
2 clear that whether a state court’s decision is unreasonable must be assessed in light
3 of the record the court had before it”), citing *Yarborough v. Gentry*, 540 U.S. 1,
4 *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at 697 n.4 (declining
5 to consider evidence not presented to state court in determining whether its decision
6 was contrary to federal law). Permitting an evidentiary hearing to allow Petitioner
7 to more fully develop the factual basis of the claim would render his claim
8 unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
9 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
10 2254(d) control whether to grant habeas relief, a federal court must take into
11 account those standards in deciding whether an evidentiary hearing is
12 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
13 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
14 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
15 stringent requirements of § 2254(e)(2).

16 **CLAIM TWELVE: ERRONEOUS JURY INSTRUCTIONS AND VERDICT**
17 **FORMS**

18 In Claim Twelve, Petitioner claims various federal constitutional violations on
19 the ground that the guilt phase jury instructions and guilt phase verdict forms were
20 “conflicting, confusing, inaccurate, and incomplete.” (Pet. at 161-73.) Petitioner
21 raised this claim in his opening brief on appeal in the California Supreme Court.
22 (NOL B1 at 144-72.) The California Supreme Court rejected the claim on the
23 merits in its reasoned published opinion on appeal. It also rejected part of the claim
24 as waived.⁹ (NOL B4; *People v. Jones*, 29 Cal. 4th at 1256-60.) Petitioner also

25 _____
26 ⁹ The California Supreme Court found that Petitioner had waived his claim
27 that CALJIC No. 4.21.1 erroneously told the jury that voluntary intoxication or
28 mental disorder could not be considered in determining whether Petitioner had the
specific intent to commit rape and waived his claim that the guilt phase verdict
form was fatally ambiguous. (NOL B4; *People v. Jones*, 29 Cal. 4th at 1258-59.)

1 raised the claim in his first habeas corpus petition in the California Supreme Court.
2 (NOL C1 at 285-89; Claim “M”).) The California Supreme Court rejected the
3 claim on the merits in its unpublished order denying the petition. In that same
4 order, the California Supreme Court also rejected the claim on the ground that, to
5 the extent it was not raised on direct appeal, and except insofar as it alleged
6 ineffective assistance of counsel, it was barred by *In re Harris*, 5 Cal. 4th at 825 &
7 n.3, 826-29 and *In re Dixon*, 41 Cal. 2d at 759. (NOL C7.) As a result, Claim
8 Twelve is procedurally barred from consideration on the merits herein because
9 California’s waiver bar, *Harris* bar, and *Dixon* bar are independent and adequate,
10 and Petitioner has not and cannot demonstrate that a fundamental miscarriage of
11 justice would occur if the claim was not considered on the merits. *Bennett v.*
12 *Mueller*, 322 F.3d at 583.

13 To the extent this claim turns on state law, it fails to present a federal
14 constitutional question cognizable herein. § 2254(a); *Estelle v. McGuire*, 502 U.S.
15 62, 68, 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (federal habeas courts do not
16 grant relief, as a state appellate court might, simply based on a violation of state
17 law); *Dugger v. Adams*, 489 U.S. 401, 409, 109 S. Ct. 1211, 103 L. Ed. 2d 435
18 (1989) (“the availability of a claim under state law does not of itself establish that a
19 claim was available under the United States Constitution”); *Engle v. Isaac*, 456
20 U.S. 107, 119, 102 S. Ct. 1558, 71 L. Ed. 783 (1982).

21 In addition, Petitioner is precluded from obtaining federal habeas relief
22 because the California Supreme Court’s denial of each claim and subclaim was not
23 contrary to any clearly established Supreme Court authority, did not involve an
24 unreasonable application of clearly established Supreme Court authority, and did
25 not involve an unreasonable determination of the facts based on the evidence
26 presented to it within the meaning of § 2254(d). To the extent that no governing
27 clearly established Supreme Court authority existed at the time of the California
28 Supreme Court’s denial of the claim, federal habeas relief is precluded by §

1 2254(d). To the extent that Petitioner overcomes the § 2254 bar, the claim fails
2 under a de novo standard of review. To the extent that the claim fails to allege a
3 cognizable claim in a federal habeas proceeding, or fails to allege a prima facie
4 federal constitutional claim for relief, it fails.

5 As to the factual allegations made in support of Claim Twelve, Respondent
6 denies, or lacks sufficient knowledge to admit or deny, every allegation;
7 alternatively, Respondent denies that the alleged facts, if true, entitle Petitioner to
8 federal habeas relief. Further, Petitioner is not entitled to an evidentiary hearing on
9 this claim, including all subclaims, because a proper application of § 2254(d)
10 requires that the claim be adjudicated on the basis of the record before the
11 California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652 (“we have made
12 clear that whether a state court’s decision is unreasonable must be assessed in light
13 of the record the court had before it”), citing *Yarborough v. Gentry*, 540 U.S. 1,
14 *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at 697 n.4 (declining
15 to consider evidence not presented to state court in determining whether its decision
16 was contrary to federal law). Permitting an evidentiary hearing to allow Petitioner
17 to more fully develop the factual basis of the claim would render his claim
18 unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
19 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
20 2254(d) control whether to grant habeas relief, a federal court must take into
21 account those standards in deciding whether an evidentiary hearing is
22 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
23 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
24 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
25 stringent requirements of § 2254(e)(2).

26 **CLAIM THIRTEEN: UNRELIABLE DNA EVIDENCE**

27 In Claim Thirteen, Petitioner claims various federal constitutional violations
28 on the ground that unreliable and prejudicial DNA evidence was admitted at trial.

1 (Pet. at 173-96.) Petitioner raised part of the claim in his opening brief on appeal in
2 the California Supreme Court.¹⁰ (NOL B1 at 80-95.) The California Supreme
3 Court rejected the claim on the merits in its reasoned published opinion on appeal.
4 (NOL B4; *People v. Jones*, 29 Cal. 4th at 1250-52.) Petitioner also raised the claim
5 in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 20-
6 53 (Claim “B”).) The California Supreme Court rejected the claim on the merits in
7 its unpublished order denying the petition.

8 Petitioner is precluded from obtaining federal habeas relief because the
9 California Supreme Court’s denial of each claim and subclaim was not contrary to
10 any clearly established Supreme Court authority, did not involve an unreasonable
11 application of clearly established Supreme Court authority, and did not involve an
12 unreasonable determination of the facts based on the evidence presented to it within
13 the meaning of § 2254(d). To the extent that no governing clearly established
14 Supreme Court authority existed at the time of the California Supreme Court’s
15 denial of the claim, federal habeas relief is precluded by § 2254(d). To the extent
16 that Petitioner overcomes the § 2254 bar, the claim fails under a de novo standard
17 of review. To the extent that the claim fails to allege a cognizable claim in a federal
18 habeas proceeding, or fails to allege a prima facie federal constitutional claim for
19 relief, it fails.

20 As to the factual allegations made in support of Claim Thirteen, Respondent
21 denies, or lacks sufficient knowledge to admit or deny, every allegation;
22 alternatively, Respondent denies that the alleged facts, if true, entitle Petitioner to
23 federal habeas relief. Further, Petitioner is not entitled to an evidentiary hearing on
24 this claim, including all subclaims, because a proper application of § 2254(d)
25 requires that the claim be adjudicated on the basis of the record before the

26 ¹⁰ On appeal, Petitioner claimed that the trial court erred in taking judicial
27 notice of evidence to prove that the DNA procedure was generally accepted in the
28 scientific community. (NOL B1 at 80-95.)

1 California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652 (“we have made
2 clear that whether a state court’s decision is unreasonable must be assessed in light
3 of the record the court had before it”), citing *Yarborough v. Gentry*, 540 U.S. 1,
4 *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at 697 n.4 (declining
5 to consider evidence not presented to state court in determining whether its decision
6 was contrary to federal law). Permitting an evidentiary hearing to allow Petitioner
7 to more fully develop the factual basis of the claim would render his claim
8 unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
9 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
10 2254(d) control whether to grant habeas relief, a federal court must take into
11 account those standards in deciding whether an evidentiary hearing is
12 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
13 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
14 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
15 stringent requirements of § 2254(e)(2).

16 **CLAIM FOURTEEN: PROSECUTORIAL MISCONDUCT**

17 In Claim Fourteen, Petitioner claims various federal constitutional violations
18 on the ground that the prosecutor committed misconduct during the guilt and
19 penalty phases of the trial, including presenting false testimony, making false and
20 prejudicial arguments, referring to facts not in evidence, misstating the law,
21 introducing irrelevant and inflammatory victim impact evidence, characterizing
22 Petitioner as a gang member, characterizing Petitioner’s failure to take advantage of
23 psychiatric treatment as aggravating evidence, and making improper victim impact
24 arguments. (Pet. at 196-207.) Petitioner raised part of this claim in his opening
25 brief on appeal in the California Supreme Court.¹¹ (NOL B1 at 202-11.) The
26 California Supreme Court rejected the claim as waived and on the merits in its

27 ¹¹ On appeal, Petitioner claimed that the prosecutor committed misconduct
28 in characterizing Petitioner as a gang member. (NOL B1 at 202-11.)

1 reasoned published opinion on appeal. (NOL B4; *People v. Jones*, 29 Cal. 4th at
2 1262-63.) Petitioner also raised the claim in his first habeas corpus petition in the
3 California Supreme Court. (NOL C1 at 272-76, 320-25 (Claims “I” and “Q”).)
4 The California Supreme Court rejected the claim on the merits in its unpublished
5 order denying the petition. In that same order, the California Supreme Court also
6 rejected part of the claim on the ground that, to the extent it was not raised on direct
7 appeal, and except insofar as it alleged ineffective assistance of counsel, it was
8 barred by *In re Harris*, 5 Cal. 4th at 825 & n.3, 826-29 and *In re Dixon*, 41 Cal. 2d
9 at 759.¹² Further, in that same order, the California Supreme Court also rejected
10 part of the claim on the ground that, with the exception that it alleged ineffective
11 assistance of trial counsel, Petitioner failed to raise it in the trial court, citing *In re*
12 *Seaton*, 34 Cal. 4th 193.¹³ (NOL C7.) As a result, Claim Fourteen is procedurally
13 barred from consideration on the merits herein because California’s waiver bar,
14 *Harris* bar, *Dixon* bar, and *Seaton* bar are independent and adequate, and Petitioner
15 has not and cannot demonstrate that a fundamental miscarriage of justice would
16 occur if the claim was not considered on the merits. *Bennett v. Mueller*, 322 F.3d at
17 583.

18 In addition, Petitioner is precluded from obtaining federal habeas relief
19 because the California Supreme Court’s denial of each claim and subclaim was not
20 contrary to any clearly established Supreme Court authority, did not involve an
21 unreasonable application of clearly established Supreme Court authority, and did
22 not involve an unreasonable determination of the facts based on the evidence
23 presented to it within the meaning of § 2254(d). To the extent that no governing
24 clearly established Supreme Court authority existed at the time of the California

25 ¹² The California Supreme Court denied Claim Fourteen, with the exception
26 of Subclaims 8a(3) and 12 (NOL C1 Claim “I” with the exception of paragraph
27 5(c), and Claim “Q” with the exception of paragraph 2), as barred by *Harris* and
28 *Dixon*.¹³ (NOL C7.)

¹³ The California Supreme Court denied Subclaim 8a(3) of Claim Fourteen
(NOL C1 Claim “I” paragraph 5 (c)) under *Seaton*.

1 Supreme Court’s denial of the claim, federal habeas relief is precluded by §
2 2254(d). To the extent that Petitioner overcomes the § 2254 bar, the claim fails
3 under a de novo standard of review. To the extent that the claim fails to allege a
4 cognizable claim in a federal habeas proceeding, or fails to allege a prima facie
5 federal constitutional claim for relief, it fails.

6 As to the factual allegations made in support of Claim Fourteen, Respondent
7 denies, or lacks sufficient knowledge to admit or deny, every allegation;
8 alternatively, Respondent denies that the alleged facts, if true, entitle Petitioner to
9 federal habeas relief. Further, Petitioner is not entitled to an evidentiary hearing on
10 this claim, including all subclaims, because a proper application of § 2254(d)
11 requires that the claim be adjudicated on the basis of the record before the
12 California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652 (“we have made
13 clear that whether a state court’s decision is unreasonable must be assessed in light
14 of the record the court had before it”), citing *Yarborough v. Gentry*, 540 U.S. 1,
15 *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at 697 n.4 (declining
16 to consider evidence not presented to state court in determining whether its decision
17 was contrary to federal law). Permitting an evidentiary hearing to allow Petitioner
18 to more fully develop the factual basis of the claim would render his claim
19 unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
20 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
21 2254(d) control whether to grant habeas relief, a federal court must take into
22 account those standards in deciding whether an evidentiary hearing is
23 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
24 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
25 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
26 stringent requirements of § 2254(e)(2).

27 ///

28 ///

1 **CLAIM FIFTEEN: PREJUDICIAL AGGRAVATING EVIDENCE**

2 In Claim Fifteen, Petitioner claims various federal constitutional violations on
3 the ground that unnoticed, irrelevant, and prejudicial aggravating evidence was
4 introduced at the penalty phase of the trial and that his trial attorney unreasonably
5 failed to investigate and rebut the aggravating evidence. (Pet. at 207-23.)
6 Petitioner raised part of this claim in his opening brief on appeal in the California
7 Supreme Court.¹⁴ (NOL B1 at 182-90.) The California Supreme Court rejected the
8 claim on the merits in its reasoned published opinion on appeal. (NOL B4; *People*
9 *v. Jones*, 29 Cal. 4th at 1265-67.) Petitioner also raised the claim in his first habeas
10 corpus petition in the California Supreme Court. (NOL C1 at 371-74 (Claim “U”).)
11 The California Supreme Court rejected the claim on the merits in its unpublished
12 order denying the petition. In that same order, the California Supreme Court also
13 rejected the claim on the ground that, to the extent it was not raised on direct
14 appeal, and except insofar as it alleged ineffective assistance of counsel, it was
15 barred by *In re Harris*, 5 Cal. 4th at 825 & n.3, 826-29 and *In re Dixon*, 41 Cal. 2d
16 at 759. (NOL C7.) As a result, Claim Fifteen is procedurally barred from
17 consideration on the merits herein because California’s *Harris* bar and *Dixon* bar
18 are independent and adequate, and Petitioner has not and cannot demonstrate that a
19 fundamental miscarriage of justice would occur if the claim was not considered on
20 the merits. *Bennett v. Mueller*, 322 F.3d at 583.

21 In addition, Petitioner is precluded from obtaining federal habeas relief
22 because the California Supreme Court’s denial of each claim and subclaim was not
23 contrary to any clearly established Supreme Court authority, did not involve an
24 unreasonable application of clearly established Supreme Court authority, and did
25 not involve an unreasonable determination of the facts based on the evidence

26 _____
27 ¹⁴ On appeal, Petitioner claimed that the testimony of his sister about a
28 statement that Petitioner made that was offered to show lack of remorse was
improperly admitted at the penalty phase. (NOL B1 at 182-90.)

1 presented to it within the meaning of § 2254(d). To the extent that no governing
2 clearly established Supreme Court authority existed at the time of the California
3 Supreme Court’s denial of the claim, federal habeas relief is precluded by §
4 2254(d). To the extent that Petitioner overcomes the § 2254 bar, the claim fails
5 under a de novo standard of review. To the extent that the claim fails to allege a
6 cognizable claim in a federal habeas proceeding, or fails to allege a prima facie
7 federal constitutional claim for relief, it fails.

8 As to the factual allegations made in support of Claim Fifteen, Respondent
9 denies, or lacks sufficient knowledge to admit or deny, every allegation;
10 alternatively, Respondent denies that the alleged facts, if true, entitle Petitioner to
11 federal habeas relief. Further, Petitioner is not entitled to an evidentiary hearing on
12 this claim, including all subclaims, because a proper application of § 2254(d)
13 requires that the claim be adjudicated on the basis of the record before the
14 California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652 (“we have made
15 clear that whether a state court’s decision is unreasonable must be assessed in light
16 of the record the court had before it”), citing *Yarborough v. Gentry*, 540 U.S. 1,
17 *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at 697 n.4 (declining
18 to consider evidence not presented to state court in determining whether its decision
19 was contrary to federal law). Permitting an evidentiary hearing to allow Petitioner
20 to more fully develop the factual basis of the claim would render his claim
21 unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
22 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
23 2254(d) control whether to grant habeas relief, a federal court must take into
24 account those standards in deciding whether an evidentiary hearing is
25 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
26 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
27 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
28 stringent requirements of § 2254(e)(2).

1 **CLAIM SIXTEEN: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AT**
2 **PENALTY PHASE**

3 In Claim Sixteen, Petitioner claims various federal constitutional violations on
4 the ground that he was denied the effective assistance of trial counsel at the penalty
5 phase of his trial.¹⁵ (Pet. at 223-339.) Petitioner raised this claim in his first habeas
6 corpus petition in the California Supreme Court. (NOL C1 at 167-239 (Claim
7 “D”).) The California Supreme Court rejected the claim on the merits in its
8 unpublished order denying the first habeas corpus petition. (NOL C7.)

9 Petitioner is precluded from obtaining federal habeas relief because the
10 California Supreme Court’s denial of each claim and subclaim was not contrary to
11 any clearly established Supreme Court authority, did not involve an unreasonable
12 application of clearly established Supreme Court authority, and did not involve an
13 unreasonable determination of the facts based on the evidence presented to it within
14 the meaning of § 2254(d). To the extent that no governing clearly established
15 Supreme Court authority existed at the time of the California Supreme Court’s
16 denial of the claim, federal habeas relief is precluded by § 2254(d). To the extent
17 that Petitioner overcomes the § 2254 bar, the claim fails under a de novo standard
18 of review. To the extent that the claim fails to allege a cognizable claim in a federal
19 habeas proceeding, or fails to allege a prima facie federal constitutional claim for
20 relief, it fails.

21 As to the factual allegations made in support of Claim Sixteen, Respondent
22 denies, or lacks sufficient knowledge to admit or deny, every allegation;
23 alternatively, Respondent denies that the alleged facts, if true, entitle Petitioner to
24 federal habeas relief. Further, Petitioner is not entitled to an evidentiary hearing on

25 _____
26 ¹⁵ Petitioner claims trial counsel rendered ineffective assistance by: (1)
27 conducting a deficient penalty phase investigation (Pet. at 224-327); (2) failing to
28 retain, consult, and prepare mental health experts (Pet. at 327-37); and (3) failing to
investigate and challenge the prosecution’s improper victim impact evidence (Pet.
at 337-38).

1 this claim, including all subclaims, because a proper application of § 2254(d)
2 requires that the claim be adjudicated on the basis of the record before the
3 California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652 (“we have made
4 clear that whether a state court’s decision is unreasonable must be assessed in light
5 of the record the court had before it”), citing *Yarborough v. Gentry*, 540 U.S. 1,
6 *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at 697 n.4 (declining
7 to consider evidence not presented to state court in determining whether its decision
8 was contrary to federal law). Permitting an evidentiary hearing to allow Petitioner
9 to more fully develop the factual basis of the claim would render his claim
10 unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
11 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
12 2254(d) control whether to grant habeas relief, a federal court must take into
13 account those standards in deciding whether an evidentiary hearing is
14 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
15 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
16 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
17 stringent requirements of § 2254(e)(2).

18 **CLAIM SEVENTEEN: ADMISSION OF PREJUDICIAL PENALTY PHASE**
19 **EVIDENCE**

20 In Claim Seventeen, Petitioner claims various federal constitutional violations
21 on the ground that the trial court, during the penalty phase, permitted the
22 prosecution to elicit irrelevant and prejudicial facts concerning Petitioner’s minor,
23 non-violent jail infractions and precluded Petitioner from presenting evidence to
24 mitigate such information. (Pet. at 339-43.) Petitioner raised this claim in his
25 opening brief on appeal in the California Supreme Court. (NOL B1 at 191-201.)
26 The California Supreme Court rejected the claim on the merits in its reasoned
27 published opinion on appeal. (NOL B4; *People v. Jones*, 29 Cal. 4th at 1260-62.)
28

1 Petitioner is precluded from obtaining federal habeas relief because the
2 California Supreme Court’s denial of each claim and subclaim was not contrary to
3 any clearly established Supreme Court authority, did not involve an unreasonable
4 application of clearly established Supreme Court authority, and did not involve an
5 unreasonable determination of the facts based on the evidence presented to it within
6 the meaning of § 2254(d). To the extent that no governing clearly established
7 Supreme Court authority existed at the time of the California Supreme Court’s
8 denial of the claim, federal habeas relief is precluded by § 2254(d). To the extent
9 that Petitioner overcomes the § 2254 bar, the claim fails under a de novo standard
10 of review. To the extent that the claim fails to allege a cognizable claim in a federal
11 habeas proceeding, or fails to allege a prima facie federal constitutional claim for
12 relief, it fails.

13 As to the factual allegations made in support of Claim Seventeen, Respondent
14 denies, or lacks sufficient knowledge to admit or deny, every allegation;
15 alternatively, Respondent denies that the alleged facts, if true, entitle Petitioner to
16 federal habeas relief. Further, Petitioner is not entitled to an evidentiary hearing on
17 this claim, including all subclaims, because a proper application of § 2254(d)
18 requires that the claim be adjudicated on the basis of the record before the
19 California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652 (“we have made
20 clear that whether a state court’s decision is unreasonable must be assessed in light
21 of the record the court had before it”), citing *Yarborough v. Gentry*, 540 U.S. 1,
22 *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at 697 n.4 (declining
23 to consider evidence not presented to state court in determining whether its decision
24 was contrary to federal law). Permitting an evidentiary hearing to allow Petitioner
25 to more fully develop the factual basis of the claim would render his claim
26 unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
27 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
28 2254(d) control whether to grant habeas relief, a federal court must take into

1 account those standards in deciding whether an evidentiary hearing is
2 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
3 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
4 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
5 stringent requirements of § 2254(e)(2).

6 **CLAIM EIGHTEEN: JUROR MISCONDUCT**

7 In Claim Eighteen, Petitioner claims various federal constitutional violations
8 on the ground that there were several instances of juror misconduct at his trial.
9 (Pet. at 343-58.) Petitioner raised this claim in his first habeas corpus petition in
10 the California Supreme Court. (NOL C1 at 293-316 (Claim “O”).) The California
11 Supreme Court rejected the claim on the merits in its unpublished order denying the
12 first habeas corpus petition. (NOL C7.)

13 Petitioner is precluded from obtaining federal habeas relief because the
14 California Supreme Court’s denial of each claim and subclaim was not contrary to
15 any clearly established Supreme Court authority, did not involve an unreasonable
16 application of clearly established Supreme Court authority, and did not involve an
17 unreasonable determination of the facts based on the evidence presented to it within
18 the meaning of § 2254(d). To the extent that no governing clearly established
19 Supreme Court authority existed at the time of the California Supreme Court’s
20 denial of the claim, federal habeas relief is precluded by § 2254(d). To the extent
21 that Petitioner overcomes the § 2254 bar, the claim fails under a de novo standard
22 of review. To the extent that the claim fails to allege a cognizable claim in a federal
23 habeas proceeding, or fails to allege a prima facie federal constitutional claim for
24 relief, it fails.

25 As to the factual allegations made in support of Claim Eighteen, Respondent
26 denies, or lacks sufficient knowledge to admit or deny, every allegation;
27 alternatively, Respondent denies that the alleged facts, if true, entitle Petitioner to
28 federal habeas relief. Further, Petitioner is not entitled to an evidentiary hearing on

1 this claim, including all subclaims, because a proper application of § 2254(d)
2 requires that the claim be adjudicated on the basis of the record before the
3 California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652 (“we have made
4 clear that whether a state court’s decision is unreasonable must be assessed in light
5 of the record the court had before it”), citing *Yarborough v. Gentry*, 540 U.S. 1,
6 *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at 697 n.4 (declining
7 to consider evidence not presented to state court in determining whether its decision
8 was contrary to federal law). Permitting an evidentiary hearing to allow Petitioner
9 to more fully develop the factual basis of the claim would render his claim
10 unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
11 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
12 2254(d) control whether to grant habeas relief, a federal court must take into
13 account those standards in deciding whether an evidentiary hearing is
14 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
15 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
16 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
17 stringent requirements of § 2254(e)(2).

18 **CLAIM NINETEEN: OUTBURSTS BY VICTIM’S DAUGHTERS**

19 In Claim Nineteen, Petitioner claims various federal constitutional violations
20 on the ground that the jury was exposed to repeated outbursts by the victim’s
21 daughters. (Pet. at 359-63.) Petitioner raised this claim in his first habeas corpus
22 petition in the California Supreme Court. (NOL C1 at 290-92 (Claim “N”).) The
23 California Supreme Court rejected the claim on the merits in its unpublished order
24 denying the first habeas corpus petition. (NOL C7.)

25 Petitioner is precluded from obtaining federal habeas relief because the
26 California Supreme Court’s denial of each claim and subclaim was not contrary to
27 any clearly established Supreme Court authority, did not involve an unreasonable
28 application of clearly established Supreme Court authority, and did not involve an

1 unreasonable determination of the facts based on the evidence presented to it within
2 the meaning of § 2254(d). To the extent that no governing clearly established
3 Supreme Court authority existed at the time of the California Supreme Court's
4 denial of the claim, federal habeas relief is precluded by § 2254(d). To the extent
5 that Petitioner overcomes the § 2254 bar, the claim fails under a de novo standard
6 of review. To the extent that the claim fails to allege a cognizable claim in a federal
7 habeas proceeding, or fails to allege a prima facie federal constitutional claim for
8 relief, it fails.

9 As to the factual allegations made in support of Claim Nineteen, Respondent
10 denies, or lacks sufficient knowledge to admit or deny, every allegation;
11 alternatively, Respondent denies that the alleged facts, if true, entitle Petitioner to
12 federal habeas relief. Further, Petitioner is not entitled to an evidentiary hearing on
13 this claim, including all subclaims, because a proper application of § 2254(d)
14 requires that the claim be adjudicated on the basis of the record before the
15 California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652 (“we have made
16 clear that whether a state court’s decision is unreasonable must be assessed in light
17 of the record the court had before it”), citing *Yarborough v. Gentry*, 540 U.S. 1,
18 *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at 697 n.4 (declining
19 to consider evidence not presented to state court in determining whether its decision
20 was contrary to federal law). Permitting an evidentiary hearing to allow Petitioner
21 to more fully develop the factual basis of the claim would render his claim
22 unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
23 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
24 2254(d) control whether to grant habeas relief, a federal court must take into
25 account those standards in deciding whether an evidentiary hearing is
26 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
27 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
28

1 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
2 stringent requirements of § 2254(e)(2).

3 **CLAIM TWENTY: INFLAMMATORY PHOTOGRAPHS OF THE VICTIM**

4 In Claim Twenty, Petitioner claims various federal constitutional violations on
5 the ground that irrelevant and inflammatory photographs of the victim were
6 introduced at trial. (Pet. at 363-66.) Petitioner raised this claim in his first habeas
7 corpus petition in the California Supreme Court. (NOL C1 at 277-78 (Claim “J”).)
8 The California Supreme Court rejected the claim on the merits in its unpublished
9 order denying the first habeas corpus petition. (NOL C7.)

10 To the extent this claim turns on state law, it fails to present a federal
11 constitutional question cognizable herein. § 2254(a); *Estelle v. McGuire*, 502 U.S.
12 at 68; *Dugger v. Adams*, 489 U.S. at 409; *Engle v. Isaac*, 456 U.S. at 119.

13 Further, Petitioner is precluded from obtaining federal habeas relief because
14 the California Supreme Court’s denial of each claim and subclaim was not contrary
15 to any clearly established Supreme Court authority, did not involve an unreasonable
16 application of clearly established Supreme Court authority, and did not involve an
17 unreasonable determination of the facts based on the evidence presented to it within
18 the meaning of § 2254(d). To the extent that no governing clearly established
19 Supreme Court authority existed at the time of the California Supreme Court’s
20 denial of the claim, federal habeas relief is precluded by § 2254(d). To the extent
21 that Petitioner overcomes the § 2254 bar, the claim fails under a de novo standard
22 of review. To the extent that the claim fails to allege a cognizable claim in a federal
23 habeas proceeding, or fails to allege a prima facie federal constitutional claim for
24 relief, it fails.

25 As to the factual allegations made in support of Claim Twenty, Respondent
26 denies, or lacks sufficient knowledge to admit or deny, every allegation;
27 alternatively, Respondent denies that the alleged facts, if true, entitle Petitioner to
28 federal habeas relief. Further, Petitioner is not entitled to an evidentiary hearing on

1 this claim, including all subclaims, because a proper application of § 2254(d)
2 requires that the claim be adjudicated on the basis of the record before the
3 California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652 (“we have made
4 clear that whether a state court’s decision is unreasonable must be assessed in light
5 of the record the court had before it”), citing *Yarborough v. Gentry*, 540 U.S. 1,
6 *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at 697 n.4 (declining
7 to consider evidence not presented to state court in determining whether its decision
8 was contrary to federal law). Permitting an evidentiary hearing to allow Petitioner
9 to more fully develop the factual basis of the claim would render his claim
10 unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
11 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
12 2254(d) control whether to grant habeas relief, a federal court must take into
13 account those standards in deciding whether an evidentiary hearing is
14 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
15 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
16 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
17 stringent requirements of § 2254(e)(2).

18 **CLAIM TWENTY-ONE: ERRONEOUS PENALTY PHASE INSTRUCTIONS**

19 In Claim Twenty-One, Petitioner claims various federal constitutional
20 violations on the ground that the jury received confusing and incomplete
21 instructions during the penalty phase of the trial. (Pet. at 366-72.) Petitioner raised
22 this claim in his first habeas corpus petition in the California Supreme Court.
23 (NOL C1 at 326-32 (Claim “R”).) The California Supreme Court rejected the claim
24 on the merits in its unpublished order denying the petition. In that same order, the
25 California Supreme Court also rejected the claim on the ground that, to the extent it
26 was not raised on direct appeal, and except insofar as it alleged ineffective
27 assistance of counsel, it was barred by *In re Harris*, 5 Cal. 4th at 825 & n.3, 826-29
28 and *In re Dixon*, 41 Cal. 2d at 759. (NOL C7.) As a result, Claim Twenty-One is

1 procedurally barred from consideration on the merits herein because California's
2 *Harris* bar and *Dixon* bar are independent and adequate, and Petitioner has not and
3 cannot demonstrate that a fundamental miscarriage of justice would occur if the
4 claim was not considered on the merits. *Bennett v. Mueller*, 322 F.3d at 583.

5 In addition, Petitioner is precluded from obtaining federal habeas relief
6 because the California Supreme Court's denial of each claim and subclaim was not
7 contrary to any clearly established Supreme Court authority, did not involve an
8 unreasonable application of clearly established Supreme Court authority, and did
9 not involve an unreasonable determination of the facts based on the evidence
10 presented to it within the meaning of § 2254(d). To the extent that no governing
11 clearly established Supreme Court authority existed at the time of the California
12 Supreme Court's denial of the claim, federal habeas relief is precluded by §
13 2254(d). To the extent that Petitioner overcomes the § 2254 bar, the claim fails
14 under a de novo standard of review. To the extent that the claim fails to allege a
15 cognizable claim in a federal habeas proceeding, or fails to allege a prima facie
16 federal constitutional claim for relief, it fails.

17 As to the factual allegations made in support of Claim Twenty-One,
18 Respondent denies, or lacks sufficient knowledge to admit or deny, every
19 allegation; alternatively, Respondent denies that the alleged facts, if true, entitle
20 Petitioner to federal habeas relief. Further, Petitioner is not entitled to an
21 evidentiary hearing on this claim, including all subclaims, because a proper
22 application of § 2254(d) requires that the claim be adjudicated on the basis of the
23 record before the California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652
24 (“we have made clear that whether a state court's decision is unreasonable must be
25 assessed in light of the record the court had before it”), citing *Yarborough v.*
26 *Gentry*, 540 U.S. 1, *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at
27 697 n.4 (declining to consider evidence not presented to state court in determining
28 whether its decision was contrary to federal law). Permitting an evidentiary hearing

1 to allow Petitioner to more fully develop the factual basis of the claim would render
2 his claim unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
3 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
4 2254(d) control whether to grant habeas relief, a federal court must take into
5 account those standards in deciding whether an evidentiary hearing is
6 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
7 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
8 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
9 stringent requirements of § 2254(e)(2).

10 **CLAIM TWENTY-TWO: ERRONEOUS PENALTY PHASE INSTRUCTIONS**
11 **AND ARBITRARY DEATH PENALTY SCHEME**

12 In Claim Twenty-Two, Petitioner claims various federal constitutional
13 violations on the following grounds: (1) the jurors were not instructed that they had
14 to unanimously agree on the circumstances in aggravation; (2) the jurors were not
15 instructed that the beyond a reasonable doubt burden of proof applied to
16 determining which factors were aggravating, whether the aggravating factors
17 outweighed the mitigating factors, and whether death was the appropriate penalty;
18 (3) the jurors were not instructed that a presumption of life applied at the penalty
19 phase; and (4) California’s statutory death penalty scheme fails to require written
20 findings from the jury, fails to designate the sentencing factors as either mitigating
21 or aggravating, and fails to require the reviewing court to engage in inter-case
22 proportionality review. (Pet. at 372-81.) Petitioner raised this claim in his opening
23 brief on appeal in the California Supreme Court. (NOL B1 at 217-28.) The
24 California Supreme Court rejected the claim on the merits in its reasoned published
25 opinion on appeal. (NOL B4; *People v. Jones*, 29 Cal. 4th at 1267.)

26 The non-retroactivity doctrine forecloses federal habeas corpus relief as to the
27 constitutional provisions alleged by Petitioner in support of this claim because, at
28 the time his conviction became final, existing precedent did not “compel” the result

1 he now seeks. *See Teague v. Lane*, 489 U.S. at 299-301. And, in any event, none
2 of the recognized exceptions to the non-retroactivity doctrine apply to this claim.

3 In addition, Petitioner is precluded from obtaining federal habeas relief
4 because the California Supreme Court's denial of each claim and subclaim was not
5 contrary to any clearly established Supreme Court authority, did not involve an
6 unreasonable application of clearly established Supreme Court authority, and did
7 not involve an unreasonable determination of the facts based on the evidence
8 presented to it within the meaning of § 2254(d). To the extent that no governing
9 clearly established Supreme Court authority existed at the time of the California
10 Supreme Court's denial of the claim, federal habeas relief is precluded by §
11 2254(d). To the extent that Petitioner overcomes the § 2254 bar, the claim fails
12 under a de novo standard of review. To the extent that the claim fails to allege a
13 cognizable claim in a federal habeas proceeding, or fails to allege a prima facie
14 federal constitutional claim for relief, it fails.

15 As to the factual allegations made in support of Claim Twenty-Two,
16 Respondent denies, or lacks sufficient knowledge to admit or deny, every
17 allegation; alternatively, Respondent denies that the alleged facts, if true, entitle
18 Petitioner to federal habeas relief. Further, Petitioner is not entitled to an
19 evidentiary hearing on this claim, including all subclaims, because a proper
20 application of § 2254(d) requires that the claim be adjudicated on the basis of the
21 record before the California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652
22 (“we have made clear that whether a state court's decision is unreasonable must be
23 assessed in light of the record the court had before it”), citing *Yarborough v.*
24 *Gentry*, 540 U.S. 1, *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at
25 697 n.4 (declining to consider evidence not presented to state court in determining
26 whether its decision was contrary to federal law). Permitting an evidentiary hearing
27 to allow Petitioner to more fully develop the factual basis of the claim would render
28 his claim unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*

1 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
2 2254(d) control whether to grant habeas relief, a federal court must take into
3 account those standards in deciding whether an evidentiary hearing is
4 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
5 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
6 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
7 stringent requirements of § 2254(e)(2).

8 **CLAIM TWENTY-THREE: DEATH SENTENCE IS CRUEL AND UNUSUAL**
9 **GIVEN PETITIONER’S MENTAL RETARDATION AND MENTAL**
10 **IMPAIRMENTS**

11 In Claim Twenty-Three, Petitioner, relying on *Atkins v. Virginia*, 536 U.S.
12 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), claims that his death sentence
13 constitutes cruel and unusual punishment because of his mental retardation and
14 mental impairments. (Pet. at 382-93.) Petitioner raised this claim in his first
15 habeas corpus petition in the California Supreme Court. (NOL C1 at 347-70
16 (“Claim T”).) The California Supreme Court rejected the claim on the merits in its
17 unpublished order denying the first habeas corpus petition. (NOL C7.)

18 Petitioner is precluded from obtaining federal habeas relief because the
19 California Supreme Court’s denial of each claim and subclaim was not contrary to
20 any clearly established Supreme Court authority, did not involve an unreasonable
21 application of clearly established Supreme Court authority, and did not involve an
22 unreasonable determination of the facts based on the evidence presented to it within
23 the meaning of § 2254(d). To the extent that no governing clearly established
24 Supreme Court authority existed at the time of the California Supreme Court’s
25 denial of the claim, federal habeas relief is precluded by § 2254(d). To the extent
26 that Petitioner overcomes the § 2254 bar, the claim fails under a de novo standard
27 of review. To the extent that the claim fails to allege a cognizable claim in a federal
28 habeas proceeding, or fails to allege a prima facie federal constitutional claim for
relief, it fails.

1 As to the factual allegations made in support of Claim Twenty-Three,
2 Respondent denies, or lacks sufficient knowledge to admit or deny, every
3 allegation; alternatively, Respondent denies that the alleged facts, if true, entitle
4 Petitioner to federal habeas relief. Further, Petitioner is not entitled to an
5 evidentiary hearing on this claim, including all subclaims, because a proper
6 application of § 2254(d) requires that the claim be adjudicated on the basis of the
7 record before the California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652
8 (“we have made clear that whether a state court’s decision is unreasonable must be
9 assessed in light of the record the court had before it”), citing *Yarborough v.*
10 *Gentry*, 540 U.S. 1, *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at
11 697 n.4 (declining to consider evidence not presented to state court in determining
12 whether its decision was contrary to federal law). Permitting an evidentiary hearing
13 to allow Petitioner to more fully develop the factual basis of the claim would render
14 his claim unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
15 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
16 2254(d) control whether to grant habeas relief, a federal court must take into
17 account those standards in deciding whether an evidentiary hearing is
18 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
19 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
20 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
21 stringent requirements of § 2254(e)(2).

22 **CLAIM TWENTY-FOUR: CONSTITUTIONAL AND INTERNATIONAL LAW**
23 **VIOLATIONS BECAUSE OF THE FAILURE TO NARROW THE CLASS OF**
24 **OFFENDERS ELIGIBLE FOR THE DEATH PENALTY**

25 In Claim Twenty-Four, Petitioner claims various federal constitutional
26 violations and a violation of international law on the ground that the California
27 death penalty statute fails to narrow the class of offenders eligible for the death
28 penalty. (Pet. at 394-401.) Petitioner raised this claim in his first habeas corpus
petition in the California Supreme Court. (NOL C1 at 383-408 (“Claim X”).) The

1 California Supreme Court rejected the claim on the merits in its unpublished order
2 denying the first habeas corpus petition. (NOL C7.)

3 The non-retroactivity doctrine forecloses federal habeas corpus relief as to the
4 constitutional provisions alleged by Petitioner in support of this claim because, at
5 the time his conviction became final, existing precedent did not “compel” the result
6 he now seeks. *See Teague v. Lane*, 489 U.S. at 299-301. And, in any event, none
7 of the recognized exceptions to the non-retroactivity doctrine apply to this claim.

8 In addition, Petitioner is precluded from obtaining federal habeas relief
9 because the California Supreme Court’s denial of each claim and subclaim was not
10 contrary to any clearly established Supreme Court authority, did not involve an
11 unreasonable application of clearly established Supreme Court authority, and did
12 not involve an unreasonable determination of the facts based on the evidence
13 presented to it within the meaning of § 2254(d). To the extent that no governing
14 clearly established Supreme Court authority existed at the time of the California
15 Supreme Court’s denial of the claim, federal habeas relief is precluded by §
16 2254(d). To the extent that Petitioner overcomes the § 2254 bar, the claim fails
17 under a de novo standard of review. To the extent that the claim fails to allege a
18 cognizable claim in a federal habeas proceeding, or fails to allege a prima facie
19 federal constitutional claim for relief, it fails.

20 As to the factual allegations made in support of Claim Twenty-Four,
21 Respondent denies, or lacks sufficient knowledge to admit or deny, every
22 allegation; alternatively, Respondent denies that the alleged facts, if true, entitle
23 Petitioner to federal habeas relief. Further, Petitioner is not entitled to an
24 evidentiary hearing on this claim, including all subclaims, because a proper
25 application of § 2254(d) requires that the claim be adjudicated on the basis of the
26 record before the California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652
27 (“we have made clear that whether a state court’s decision is unreasonable must be
28 assessed in light of the record the court had before it”), citing *Yarborough v.*

1 *Gentry*, 540 U.S. 1, *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at
2 697 n.4 (declining to consider evidence not presented to state court in determining
3 whether its decision was contrary to federal law). Permitting an evidentiary hearing
4 to allow Petitioner to more fully develop the factual basis of the claim would render
5 his claim unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
6 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
7 2254(d) control whether to grant habeas relief, a federal court must take into
8 account those standards in deciding whether an evidentiary hearing is
9 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
10 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
11 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
12 stringent requirements of § 2254(e)(2).

13 **CLAIM TWENTY-FIVE: USE OF RACE, GENDER, AND OTHER**
14 **UNCONSTITUTIONAL CONSIDERATIONS IN DECISION TO SEEK THE**
15 **DEATH PENALTY**

16 In Claim Twenty-Five, Petitioner claims various federal constitutional
17 violations on the ground that the prosecution used race, gender, and other
18 unconstitutional considerations in its decision to seek the death penalty. (Pet. at
19 401-06.) Petitioner raised this claim in his first habeas corpus petition in the
20 California Supreme Court. (NOL C1 at 409-15 (Claim “Y”).) The California
21 Supreme Court rejected the claim on the merits in its unpublished order denying the
22 first habeas corpus petition. In that same order, the California Supreme Court also
23 rejected the claim on the ground that, with the exception that it alleged ineffective
24 assistance of trial counsel, Petitioner failed to raise it in the trial court, citing *In re*
25 *Seaton*, 34 Cal. 4th 193. (NOL C7.) As a result, Claim Twenty-Five is
26 procedurally barred from consideration on the merits herein because California’s
27 *Seaton* bar is independent and adequate, and Petitioner has not and cannot
28 demonstrate that a fundamental miscarriage of justice would occur if the claim was
not considered on the merits. *Bennett v. Mueller*, 322 F.3d at 583.

1 In addition, the non-retroactivity doctrine forecloses federal habeas corpus
2 relief as to the constitutional provisions alleged by Petitioner in support of this
3 claim because, at the time his conviction became final, existing precedent did not
4 “compel” the result he now seeks. *See Teague v. Lane*, 489 U.S. at 299-301. And,
5 in any event, none of the recognized exceptions to the non-retroactivity doctrine
6 apply to this claim.

7 Further, Petitioner is precluded from obtaining federal habeas relief because
8 the California Supreme Court’s denial of each claim and subclaim was not contrary
9 to any clearly established Supreme Court authority, did not involve an unreasonable
10 application of clearly established Supreme Court authority, and did not involve an
11 unreasonable determination of the facts based on the evidence presented to it within
12 the meaning of § 2254(d). To the extent that no governing clearly established
13 Supreme Court authority existed at the time of the California Supreme Court’s
14 denial of the claim, federal habeas relief is precluded by § 2254(d). To the extent
15 that Petitioner overcomes the § 2254 bar, the claim fails under a de novo standard
16 of review. To the extent that the claim fails to allege a cognizable claim in a federal
17 habeas proceeding, or fails to allege a prima facie federal constitutional claim for
18 relief, it fails.

19 As to the factual allegations made in support of Claim Twenty-Five,
20 Respondent denies, or lacks sufficient knowledge to admit or deny, every
21 allegation; alternatively, Respondent denies that the alleged facts, if true, entitle
22 Petitioner to federal habeas relief. Further, Petitioner is not entitled to an
23 evidentiary hearing on this claim, including all subclaims, because a proper
24 application of § 2254(d) requires that the claim be adjudicated on the basis of the
25 record before the California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652
26 (“we have made clear that whether a state court’s decision is unreasonable must be
27 assessed in light of the record the court had before it”), citing *Yarborough v.*
28 *Gentry*, 540 U.S. 1, *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at

1 697 n.4 (declining to consider evidence not presented to state court in determining
2 whether its decision was contrary to federal law). Permitting an evidentiary hearing
3 to allow Petitioner to more fully develop the factual basis of the claim would render
4 his claim unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
5 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
6 2254(d) control whether to grant habeas relief, a federal court must take into
7 account those standards in deciding whether an evidentiary hearing is
8 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
9 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
10 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
11 stringent requirements of § 2254(e)(2).

12 **CLAIM TWENTY-SIX: UNLAWFUL DEATH SENTENCE BECAUSE**
13 **INTERNATIONAL LAW BARS IMPOSITION OF THE DEATH PENALTY ON**
14 **MENTALLY DISORDERED INDIVIDUALS**

15 In Claim Twenty-Six, Petitioner claims that his death sentence is unlawful
16 because customary international law binding on the United States bars imposition
17 of the death penalty on mentally disordered individuals. (Pet. at 406-14.)
18 Petitioner raised this claim in his first habeas corpus petition in the California
19 Supreme Court. (NOL C1 at 416-24 (Claim “Z”).) The California Supreme Court
20 rejected the claim on the merits in its unpublished order denying the first habeas
21 corpus petition. (NOL C7.)

22 The non-retroactivity doctrine forecloses federal habeas corpus relief as to the
23 constitutional provisions alleged by Petitioner in support of this claim because, at
24 the time his conviction became final, existing precedent did not “compel” the result
25 he now seeks. *See Teague v. Lane*, 489 U.S. at 299-301. And, in any event, none
26 of the recognized exceptions to the non-retroactivity doctrine apply to this claim.

27 In addition, Petitioner is precluded from obtaining federal habeas relief
28 because the California Supreme Court’s denial of each claim and subclaim was not
contrary to any clearly established Supreme Court authority, did not involve an

1 unreasonable application of clearly established Supreme Court authority, and did
2 not involve an unreasonable determination of the facts based on the evidence
3 presented to it within the meaning of § 2254(d). To the extent that no governing
4 clearly established Supreme Court authority existed at the time of the California
5 Supreme Court’s denial of the claim, federal habeas relief is precluded by §
6 2254(d). To the extent that Petitioner overcomes the § 2254 bar, the claim fails
7 under a de novo standard of review. To the extent that the claim fails to allege a
8 cognizable claim in a federal habeas proceeding, or fails to allege a prima facie
9 federal constitutional claim for relief, it fails.

10 As to the factual allegations made in support of Claim Twenty-Six,
11 Respondent denies, or lacks sufficient knowledge to admit or deny, every
12 allegation; alternatively, Respondent denies that the alleged facts, if true, entitle
13 Petitioner to federal habeas relief. Further, Petitioner is not entitled to an
14 evidentiary hearing on this claim, including all subclaims, because a proper
15 application of § 2254(d) requires that the claim be adjudicated on the basis of the
16 record before the California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652
17 (“we have made clear that whether a state court’s decision is unreasonable must be
18 assessed in light of the record the court had before it”), citing *Yarborough v.*
19 *Gentry*, 540 U.S. 1, *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at
20 697 n.4 (declining to consider evidence not presented to state court in determining
21 whether its decision was contrary to federal law). Permitting an evidentiary hearing
22 to allow Petitioner to more fully develop the factual basis of the claim would render
23 his claim unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
24 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
25 2254(d) control whether to grant habeas relief, a federal court must take into
26 account those standards in deciding whether an evidentiary hearing is
27 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
28 extent that Petitioner’s claim is not fully factually developed, he failed to exercise

1 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
2 stringent requirements of § 2254(e)(2).

3 **CLAIM TWENTY-SEVEN: CONSTITUTIONAL AND INTERNATIONAL LAW**
4 **VIOLATIONS BECAUSE OF LENGTHY PERIOD OF CONFINEMENT UNDER**
5 **SENTENCE OF DEATH**

6 In Claim Twenty-Seven, Petitioner claims various federal constitutional
7 violations and a violation of international law on the ground that California’s death
8 penalty post-conviction procedures permit execution following a long period of
9 confinement under a sentence of death. (Pet. at 414-18.) Petitioner raised this
10 claim in his opening brief on appeal in the California Supreme Court. (NOL B1 at
11 229-43.) The California Supreme Court rejected the claim on the merits in its
12 reasoned published opinion on appeal. (NOL B4; *People v. Jones*, 29 Cal. 4th at
13 1267.)

14 The non-retroactivity doctrine forecloses federal habeas corpus relief as to the
15 constitutional provisions alleged by Petitioner in support of this claim because, at
16 the time his conviction became final, existing precedent did not “compel” the result
17 he now seeks. *See Teague v. Lane*, 489 U.S. at 299-301. And, in any event, none
18 of the recognized exceptions to the non-retroactivity doctrine apply to this claim.

19 In addition, Petitioner is precluded from obtaining federal habeas relief
20 because the California Supreme Court’s denial of each claim and subclaim was not
21 contrary to any clearly established Supreme Court authority, did not involve an
22 unreasonable application of clearly established Supreme Court authority, and did
23 not involve an unreasonable determination of the facts based on the evidence
24 presented to it within the meaning of § 2254(d). To the extent that no governing
25 clearly established Supreme Court authority existed at the time of the California
26 Supreme Court’s denial of the claim, federal habeas relief is precluded by §
27 2254(d). To the extent that Petitioner overcomes the § 2254 bar, the claim fails
28 under a de novo standard of review. To the extent that the claim fails to allege a

1 cognizable claim in a federal habeas proceeding, or fails to allege a prima facie
2 federal constitutional claim for relief, it fails.

3 As to the factual allegations made in support of Claim Twenty-Seven,
4 Respondent denies, or lacks sufficient knowledge to admit or deny, every
5 allegation; alternatively, Respondent denies that the alleged facts, if true, entitle
6 Petitioner to federal habeas relief. Further, Petitioner is not entitled to an
7 evidentiary hearing on this claim, including all subclaims, because a proper
8 application of § 2254(d) requires that the claim be adjudicated on the basis of the
9 record before the California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652
10 (“we have made clear that whether a state court’s decision is unreasonable must be
11 assessed in light of the record the court had before it”), citing *Yarborough v.*
12 *Gentry*, 540 U.S. 1, *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at
13 697 n.4 (declining to consider evidence not presented to state court in determining
14 whether its decision was contrary to federal law). Permitting an evidentiary hearing
15 to allow Petitioner to more fully develop the factual basis of the claim would render
16 his claim unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
17 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
18 2254(d) control whether to grant habeas relief, a federal court must take into
19 account those standards in deciding whether an evidentiary hearing is
20 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
21 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
22 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
23 stringent requirements of § 2254(e)(2).

24 **CLAIM TWENTY-EIGHT: INEFFECTIVE ASSISTANCE OF APPELLATE**
25 **COUNSEL**

26 In Claim Twenty-Eight, Petitioner claims various federal constitutional
27 violations on the ground that appellate counsel rendered ineffective assistance by
28

1 failing to include meritorious issues on appeal.¹⁶ (Pet. at 418-21.) Petitioner raised
2 this claim in his first habeas corpus petition in the California Supreme Court.
3 (NOL C1 at 375-77 (Claim “V”).) The California Supreme Court rejected the
4 claim on the merits in its unpublished order denying the first habeas corpus petition.
5 (NOL C7.)

6 Petitioner is precluded from obtaining federal habeas relief because the
7 California Supreme Court’s denial of each claim and subclaim was not contrary to
8 any clearly established Supreme Court authority, did not involve an unreasonable
9 application of clearly established Supreme Court authority, and did not involve an

10 _____
11 ¹⁶ Petitioner claims that appellate counsel rendered ineffective assistance by
12 failing to include the following issues on appeal: (1) Petitioner’s federal
13 constitutional rights to a fair and reliable guilt and sentencing determination were
14 violated by the trial court’s erroneous ruling allowing the jury to draw
15 impermissible inferences from highly inflammatory propensity evidence during the
16 guilt phase; (2) the trial court unreasonably and prejudicially failed to protect
17 Petitioner’s federal constitutional rights by allowing the prosecution to engage in
18 numerous instances of deceptive and reprehensible prosecutorial misconduct in the
19 guilt and penalty phases; (3) the trial court violated Petitioner’s federal
20 constitutional rights when it abdicated its responsibility to ensure an effective
21 inquiry into prospective juror biases; (4) Petitioner was deprived of his federal
22 constitutional rights because the jury was given incomplete and confusing jury
23 instructions and verdict forms in the guilt and penalty phases of Petitioner’s trial;
24 (5) the erroneous admission of improper, prejudicial, and false victim impact
25 evidence violated Petitioner’s state and federal constitutional rights; (6) the
26 prosecution violated Petitioner’s federal constitutional rights by failing to disclose
27 material exculpatory evidence; (7) the prosecution knowingly presented false
28 evidence in violation of Petitioner’s federal constitutional rights; (8) no evidence
supported Petitioner’s convictions and true special circumstance finding in
violation of the federal constitution; (9) Petitioner’s federal constitutional rights
were violated when the prosecution failed to give trial counsel adequate notice of
aggravation evidence pursuant to California Penal Code section 190.3; (10) the trial
court failed to protect Petitioner’s federal constitutional rights by admitting
evidence of Petitioner’s minor, non-violent, prior prison infractions, and not
permitting Petitioner to mitigate the court’s error by permitting evidence of the
conditions of confinement for prisoners sentenced to life without the possibility of
parole; (11) Petitioner’s federal constitutional rights were violated by the admission
of numerous inflammatory and irrelevant photographs and also by trial counsel’s
failure to object to their introduction; (12) the failure of California’s death penalty
statute to narrow the class of death eligible offenders violated Petitioner’s federal
constitutional rights; (13) as a result of Petitioner’s profound mental illness and
severe cognitive defects, Petitioner’s death sentence violates the tenets of
international law; and (14) Petitioner’s federal constitutional rights were violated
because the direct appeal of his capital conviction and death sentence were based on
an incomplete and inaccurate appellate record. (Pet. at 419-21.)

1 unreasonable determination of the facts based on the evidence presented to it within
2 the meaning of § 2254(d). To the extent that no governing clearly established
3 Supreme Court authority existed at the time of the California Supreme Court’s
4 denial of the claim, federal habeas relief is precluded by § 2254(d). To the extent
5 that Petitioner overcomes the § 2254 bar, the claim fails under a de novo standard
6 of review. To the extent that the claim fails to allege a cognizable claim in a federal
7 habeas proceeding, or fails to allege a prima facie federal constitutional claim for
8 relief, it fails.

9 As to the factual allegations made in support of Claim Twenty-Eight,
10 Respondent denies, or lacks sufficient knowledge to admit or deny, every
11 allegation; alternatively, Respondent denies that the alleged facts, if true, entitle
12 Petitioner to federal habeas relief. Further, Petitioner is not entitled to an
13 evidentiary hearing on this claim, including all subclaims, because a proper
14 application of § 2254(d) requires that the claim be adjudicated on the basis of the
15 record before the California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652
16 (“we have made clear that whether a state court’s decision is unreasonable must be
17 assessed in light of the record the court had before it”), citing *Yarborough v.*
18 *Gentry*, 540 U.S. 1, *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at
19 697 n.4 (declining to consider evidence not presented to state court in determining
20 whether its decision was contrary to federal law). Permitting an evidentiary hearing
21 to allow Petitioner to more fully develop the factual basis of the claim would render
22 his claim unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
23 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
24 2254(d) control whether to grant habeas relief, a federal court must take into
25 account those standards in deciding whether an evidentiary hearing is
26 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
27 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
28

1 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
2 stringent requirements of § 2254(e)(2).

3 **CLAIM TWENTY-NINE: INACCURATE AND INCOMPLETE APPELLATE**
4 **RECORD**

5 In Claim Twenty-Nine, Petitioner claims various federal constitutional
6 violations on the ground that the appellate record of his trial proceedings was
7 inaccurate and incomplete. (Pet at 421-28.) Petitioner raised this claim in his first
8 habeas corpus petition in the California Supreme Court. (NOL C1 at 11-19 (Claim
9 “A”).) The California Supreme Court rejected the claim on the merits in its
10 unpublished order denying the first habeas corpus petition. (NOL C7.)

11 To the extent Petitioner alleges error in post-conviction proceedings, his claim
12 is not cognizable in a federal habeas corpus petition. *See Ortiz v. Stewart*, 149 F.3d
13 923, 939 (9th Cir. 1998) (“federal habeas relief is unavailable to redress alleged
14 procedural error in state post-conviction proceedings”).

15 In addition, the non-retroactivity doctrine forecloses federal habeas corpus
16 relief as to the constitutional provisions alleged by Petitioner in support of this
17 claim because, at the time his conviction became final, existing precedent did not
18 “compel” the result he now seeks. *See Teague v. Lane*, 489 U.S. at 299-301. And,
19 in any event, none of the recognized exceptions to the non-retroactivity doctrine
20 apply to this claim.

21 Further, Petitioner is precluded from obtaining federal habeas relief because
22 the California Supreme Court’s denial of each claim and subclaim was not contrary
23 to any clearly established Supreme Court authority, did not involve an unreasonable
24 application of clearly established Supreme Court authority, and did not involve an
25 unreasonable determination of the facts based on the evidence presented to it within
26 the meaning of § 2254(d). To the extent that no governing clearly established
27 Supreme Court authority existed at the time of the California Supreme Court’s
28 denial of the claim, federal habeas relief is precluded by § 2254(d). To the extent

1 that Petitioner overcomes the § 2254 bar, the claim fails under a de novo standard
2 of review. To the extent that the claim fails to allege a cognizable claim in a federal
3 habeas proceeding, or fails to allege a prima facie federal constitutional claim for
4 relief, it fails.

5 As to the factual allegations made in support of Claim Twenty-Nine,
6 Respondent denies, or lacks sufficient knowledge to admit or deny, every
7 allegation; alternatively, Respondent denies that the alleged facts, if true, entitle
8 Petitioner to federal habeas relief. Further, Petitioner is not entitled to an
9 evidentiary hearing on this claim, including all subclaims, because a proper
10 application of § 2254(d) requires that the claim be adjudicated on the basis of the
11 record before the California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652
12 (“we have made clear that whether a state court’s decision is unreasonable must be
13 assessed in light of the record the court had before it”), citing *Yarborough v.*
14 *Gentry*, 540 U.S. 1, *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at
15 697 n.4 (declining to consider evidence not presented to state court in determining
16 whether its decision was contrary to federal law). Permitting an evidentiary hearing
17 to allow Petitioner to more fully develop the factual basis of the claim would render
18 his claim unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
19 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
20 2254(d) control whether to grant habeas relief, a federal court must take into
21 account those standards in deciding whether an evidentiary hearing is
22 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
23 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
24 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
25 stringent requirements of § 2254(e)(2).

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1 **CLAIM THIRTY: MULTIPLE CONSTITUTIONAL ERRORS CUMULATIVELY**
2 **RENDERED PETITIONER’S TRIAL UNFAIR**

3 In Claim Thirty, Petitioner claims various federal constitutional violations on
4 the ground that the multiple constitutional errors committed by the prosecutor,
5 Petitioner’s counsel, and the trial court as alleged in the Petition cumulatively
6 rendered his trial unfair. (Pet. at 428-29.) Petitioner raised this claim in his first
7 habeas corpus petition in the California Supreme Court. (NOL C1 at 425-26
8 (Claim “AA”).) The California Supreme Court rejected the claim on the merits in
9 its unpublished order denying the first habeas corpus petition. (NOL C7.)

10 The non-retroactivity doctrine forecloses federal habeas corpus relief as to the
11 constitutional provisions alleged by Petitioner in support of this claim because, at
12 the time his conviction became final, existing precedent did not “compel” the result
13 he now seeks. *See Teague v. Lane*, 489 U.S. at 299-301. And, in any event, none
14 of the recognized exceptions to the non-retroactivity doctrine apply to this claim.

15 In addition, Petitioner is precluded from obtaining federal habeas relief
16 because the California Supreme Court’s denial of each claim and subclaim was not
17 contrary to any clearly established Supreme Court authority, did not involve an
18 unreasonable application of clearly established Supreme Court authority, and did
19 not involve an unreasonable determination of the facts based on the evidence
20 presented to it within the meaning of § 2254(d). To the extent that no governing
21 clearly established Supreme Court authority existed at the time of the California
22 Supreme Court’s denial of the claim, federal habeas relief is precluded by §
23 2254(d). To the extent that Petitioner overcomes the § 2254 bar, the claim fails
24 under a de novo standard of review. To the extent that the claim fails to allege a
25 cognizable claim in a federal habeas proceeding, or fails to allege a prima facie
26 federal constitutional claim for relief, it fails.

27 As to the factual allegations made in support of Claim Thirty, Respondent
28 denies, or lacks sufficient knowledge to admit or deny, every allegation;

1 alternatively, Respondent denies that the alleged facts, if true, entitle Petitioner to
2 federal habeas relief. Further, Petitioner is not entitled to an evidentiary hearing on
3 this claim, including all subclaims, because a proper application of § 2254(d)
4 requires that the claim be adjudicated on the basis of the record before the
5 California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652 (“we have made
6 clear that whether a state court’s decision is unreasonable must be assessed in light
7 of the record the court had before it”), citing *Yarborough v. Gentry*, 540 U.S. 1,
8 *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at 697 n.4 (declining
9 to consider evidence not presented to state court in determining whether its decision
10 was contrary to federal law). Permitting an evidentiary hearing to allow Petitioner
11 to more fully develop the factual basis of the claim would render his claim
12 unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
13 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
14 2254(d) control whether to grant habeas relief, a federal court must take into
15 account those standards in deciding whether an evidentiary hearing is
16 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
17 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
18 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
19 stringent requirements of § 2254(e)(2).

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CONCLUSION

Except as expressly admitted, Respondent denies each and every allegation of the Petition and specifically denies that the judgment and sentence pursuant to which Petitioner is confined are in any way unconstitutional. Petitioner is entitled to no relief, and Respondent respectfully requests that the Petition be denied with prejudice without an evidentiary hearing.

Dated: April 6, 2010

Respectfully submitted,

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