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IN THE UNITED STATES DISTRICT COURT
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FOR THE CENTRAL DISTRICT OF CALIFORNIA
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15 **ERNEST DEWAYNE JONES,**	CV-09-2158-CJC
16 Petitioner,	**DEATH PENALTY CASE**
17 **v.**	**ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS**
18 **ROBERT K. WONG, Acting Warden of California State Prison at San Quentin,**	
19	The Honorable Cormac J. Carney, U.S. District Judge
20 Respondent.	

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

Dated: April 6, 2010

Respectfully submitted,

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Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
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/s/ Herbert S. Tetef
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[1] Respondent notes that Vincent Cullen is now the Acting Warden of the California State Prison in San Quentin, California. Pursuant to Federal Rule of Civil Procedure 25(d), Respondent respectfully requests that he be substituted as Respondent in this matter.

PROCEDURAL AND JURISDICTIONAL STATEMENT

A. Custody

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

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

B. Trial Court Proceedings

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

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

[2] Respondent is filing, concurrently with this Answer, a Notice of Lodging ("NOL"), which describes the documents being lodged pursuant to Local Rule 83-17.7, including the Clerk's Transcript ("CT"), the Reporter's Transcript ("RT"), and the briefs, opinion, and/or orders filed in connection with Petitioner's direct 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.

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

C. State Post-Conviction Proceedings

1. Appeal to the California Supreme Court

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

2. California Supreme Court Habeas Corpus Petitions

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

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[3] At the time Petitioner filed his third habeas corpus petition in the California Supreme Court, he also filed a motion in the California Supreme Court to defer briefing on the petition pending resolution of exhaustion issues in the instant federal proceedings. In the motion, Petitioner indicated that he would withdraw the state 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.

D. Federal Habeas Corpus Proceedings

On March 27, 2009, Petitioner filed in this Court a request for appointment of counsel, a request for stay of execution and status conference, and a notice of intention to file a petition for writ of habeas corpus. On March 31, 2009, this Court issued an order staying execution of the death sentence until ninety days after the appointment of counsel. On April 14, 2009, current counsel was appointed to represent Petitioner in these proceedings.

On March 10, 2010, Petitioner filed the instant Petition for Writ of Habeas Corpus ("Petition" or "Pet."), which contains thirty claims for relief.

PREAMBLE TO ANSWER

The Petition is subject to 28 U.S.C. § 2254 et seq., as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[4] The California Supreme Court denied each of Petitioner's claims and subclaims on the merits. As a result, Petitioner cannot obtain federal habeas relief 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 unreasonable application of clearly established Supreme Court authority, and did not involve an unreasonable determination of the facts based on the evidence presented to it within the meaning of § 2254(d). As to each claim for which no clearly established Supreme Court authority existed at the time of the California Supreme Court's denial of the claim, federal habeas relief is precluded by § 2244(d). As to each claim and subclaim that fails to allege a cognizable claim in a federal habeas proceeding, or fails to allege a prima facie federal constitutional claim for relief, the claim fails.

As to the statements contained in the "Introduction" section of the Petition, Respondent denies, or lacks sufficient knowledge to admit or deny, every allegation

[4] All further statutory references are to Title 28 of the United States Code unless otherwise specified.

contained in the "Introduction" section. As to the statements contained in the "Procedural History and Background" section of the Petition, Respondent denies, or lacks sufficient knowledge to admit or deny, every allegation contained in the "Procedural History and Background" section. As to the statements contained in the "Jurisdiction" section of the Petition, Respondent denies, or lacks sufficient knowledge to admit or deny, every allegation contained in the "Jurisdiction" section. In addition, as to the factual allegations made in support of Petitioner's thirty claims for relief (including all subclaims), Respondent denies, or lacks sufficient knowledge to admit or deny, every factual allegation made in support of Petitioner's thirty claims for relief (including all subclaims); alternatively, Respondent denies that the alleged facts, if true, entitle Petitioner to federal habeas relief. Additionally, Respondent does not respond to argumentative or conclusory statements in the Petition, because these statements do not require an admission or denial.

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

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

STATEMENT OF FACTS

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

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

A. Guilt Phase

1. The People’s Case

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

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

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

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

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

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

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

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

Defendant's prior conviction for sexually assaulting Dorothea H.

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

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

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

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

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

2. The Defense Case

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

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

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

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

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

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

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

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

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

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

B. Penalty Phase

1. The People's Case

Mr. and Mrs. Miller were married for 30 years, and he died eight months after Mrs. Miller was murdered. In Pam's opinion, Mr. Miller "grieved himself to death."

Gloria Hanks, defendant's sister, testified that defendant told her he "didn't give a fuck about Pam or her family."

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

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

The rape of Kim J.

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

2. The Defense Case

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

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

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

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

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

AFFIRMATIVE DEFENSES

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

///

A. Failure to Allege Violation of Federal Law

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

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

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

B. Lack of Subject Matter Jurisdiction

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

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

C. Procedural Default

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

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

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

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

In denying Petitioner's first habeas corpus petition, the California Supreme Court also found that, to the extent it alleged insufficiency of the evidence, Claim 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*,

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

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

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

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

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

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

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

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

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

CLAIMS FOR RELIEF

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

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

[5] Petitioner claims trial counsel rendered ineffective assistance by: (1) failing during the guilt phase to investigate, develop, and present compelling expert and lay witness testimony about Petitioner's mental state (Pet. at 22-37); (2) failing to develop and present a coherent and persuasive defense to the rape count, the rape felony murder theory, and the rape special circumstance (Pet. at 37-47); (3) pleading Petitioner guilty to the crime of rape during his closing argument (Pet. at 47-48); (4) failing to reasonably investigate and present potential challenges to the admissibility of the DNA testimony (Pet. at 48-58); (5) failing to enter a plea of not 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.
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22 (…continued)
Petitioner about possible ramifications stemming from his testimony and failing to prepare Petitioner for testifying (Pet. at 71-75); (10) failing to request necessary jury instructions and verdict forms during the guilt phase (Pet. at 75-81); (11) failing to object to numerous instances of prosecutorial misconduct in the guilt and penalty phases (Pet. at 81-89); and (12) having a disabling conflict of interest (Pet. at 89-91).

[6] On appeal, Petitioner claimed that trial counsel rendered ineffective assistance by: (1) failing to call live witnesses when challenging the admission of the DNA evidence; (2) failing to cross-examine the DNA expert at trial; (3) withdrawing his objection to the prior crimes evidence; and (4) failing to call an expert at the guilt phase to testify about Petitioner's inability to form specific intent. (NOL B1 at 126-43.)
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As to the factual allegations made in support of Claim One, Respondent denies, or lacks sufficient knowledge to admit or deny, every allegation; alternatively, Respondent denies that the alleged facts, if true, entitle Petitioner to federal habeas relief. Further, Petitioner is not entitled to an evidentiary hearing on this claim, including all subclaims, because a proper application of § 2254(d) requires that the claim be adjudicated on the basis of the record before the California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652 ("we have made clear that whether a state court's decision is unreasonable must be assessed in light of the record the court had before it"), citing *Yarborough v. Gentry*, 540 U.S. 1, *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at 697 n.4 (declining to consider evidence not presented to state court in determining whether its decision was contrary to federal law). Permitting an evidentiary hearing to allow Petitioner to more fully develop the factual basis of the claim would render his claim unexhausted, and a sound application of § 2254(d) impossible. *Schriro v. Landrigan*, 550 U.S. at 474 ("Because the deferential standards prescribed by § 2254(d) control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate."). Moreover, no evidentiary hearing should be held because, to the extent that Petitioner's claim is not fully factually developed, he failed to exercise "due diligence" within the meaning of § 2254(e), and cannot otherwise meet the stringent requirements of § 2254(e)(2).

CLAIM TWO: IRRECONCILABLE CONFLICT WITH TRIAL COUNSEL

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

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.*

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

CLAIM THREE: FAILURE TO DISCLOSE EXCULPATORY EVIDENCE

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

In addition, Petitioner is precluded from obtaining federal habeas relief 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

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

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

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

CLAIM FOUR: INCOMPETENCE TO STAND TRIAL

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

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

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

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

CLAIM FIVE: MEDICATED AT TRIAL

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

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

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

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

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

CLAIM SIX: TRIAL JUDGE'S CONFLICT OF INTEREST AND PSYCHOLOGICAL IMPAIRMENT

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

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

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

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

CLAIM SEVEN: INADEQUATE INQUIRY INTO JUROR BIAS

In Claim Seven, Petitioner claims various federal constitutional violations on the ground that the trial court "permitted an improper and one-sided voir dire of the jurors and failed to ensure that the prospective jurors' biases were revealed." (Pet. at 134-37.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 282-84 (Claim "L").) The California Supreme Court rejected the claim on the merits in its unpublished order denying the first habeas corpus petition. In that same order, the California Supreme Court also 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,

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

CLAIM EIGHT: UNREASONABLE RULINGS ON CAUSE CHALLENGES

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

Petitioner is precluded from obtaining federal habeas relief 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 unreasonable application of clearly established Supreme Court authority, and did not involve an unreasonable determination of the facts based on the evidence presented to it within the meaning of § 2254(d). To the extent that no governing clearly established Supreme Court authority existed at the time of the California Supreme Court's denial of the claim, federal habeas relief is precluded by § 2254(d). To the extent that Petitioner overcomes the § 2254 bar, the claim fails under a de novo standard

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

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

CLAIM NINE: INSUFFICIENCY OF THE EVIDENCE

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

Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 279-81 (Claim "K").) The California Supreme Court rejected the claim on the merits in its unpublished order denying the first habeas corpus petition. In that same order, the California Supreme Court also rejected the claim on the ground that, to the extent it was not raised on direct appeal, and except insofar as it alleged ineffective assistance of counsel, it was barred by *In re Harris*, 5 Cal. 4th at 825 & n.3, 826-29 and *In re Dixon*, 41 Cal. 2d at 759. In addition, in that same order, the California Supreme Court also rejected the claim on the ground that, to the extent it alleged insufficiency of the evidence, it was not cognizable on habeas corpus, citing *In re Lindley*, 29 Cal. 2d at 723. (NOL C7.) As a result, Claim Nine is procedurally barred from consideration on the merits herein because California's *Harris* bar, *Dixon* bar, and *Lindley* bar are independent and adequate, and Petitioner has not and cannot 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.

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

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

CLAIM TEN: INFLAMMATORY PROPENSITY EVIDENCE

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

Supreme Court.[7] (NOL B1 at 62-79, 133-35.) The California Supreme Court rejected part of the claim as waived and part of the claim on the merits.[8] (NOL B4; *People v. Jones*, 29 Cal. 4th at 1255-56.) Petitioner also raised the claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 54-65 (Claim "C").) The California Supreme Court rejected the claim on the merits in its unpublished order denying the petition. In that same order, the California Supreme Court also rejected the claim on the ground that, to the extent it was not raised on direct appeal, and except insofar as it alleged ineffective assistance of counsel, it was barred by *In re Harris*, 5 Cal. 4th at 825 & n.3, 826-29 and *In re Dixon*, 41 Cal. 2d at 759. (NOL C7.) As a result, Claim Ten is procedurally barred from consideration on the merits herein because California's waiver bar, *Harris* bar, and *Dixon* bar are independent and adequate, and Petitioner has not and cannot 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.

In addition, Petitioner is precluded from obtaining federal habeas relief 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 unreasonable application of clearly established Supreme Court authority, and did not involve an unreasonable determination of the facts based on the evidence presented to it within the meaning of § 2254(d). To the extent that no governing clearly established Supreme Court authority existed at the time of the California Supreme Court's denial of the claim, federal habeas relief is precluded by § 2254(d). To the extent that Petitioner overcomes the § 2254 bar, the claim fails

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

[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.)

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

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

CLAIM ELEVEN: DENIAL OF PETITIONER'S RIGHT TO TESTIFY ABOUT HIS MENTAL HEALTH HISTORY

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

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

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

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

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

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

CLAIM TWELVE: ERRONEOUS JURY INSTRUCTIONS AND VERDICT FORMS

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

[9] The California Supreme Court found that Petitioner had waived his claim that CALJIC No. 4.21.1 erroneously told the jury that voluntary intoxication or 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.)

raised the claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 285-89; Claim "M").) The California Supreme Court rejected the claim on the merits in its unpublished order denying the petition. In that same order, the California Supreme Court also rejected the claim on the ground that, to the extent it was not raised on direct appeal, and except insofar as it alleged ineffective assistance of counsel, it was barred by *In re Harris*, 5 Cal. 4th at 825 & n.3, 826-29 and *In re Dixon*, 41 Cal. 2d at 759. (NOL C7.) As a result, Claim Twelve is procedurally barred from consideration on the merits herein because California's waiver bar, *Harris* bar, and *Dixon* bar are independent and adequate, and Petitioner has not and cannot 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.

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

In addition, Petitioner is precluded from obtaining federal habeas relief 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 unreasonable application of clearly established Supreme Court authority, and did not involve an unreasonable determination of the facts based on the evidence presented to it within the meaning of § 2254(d). To the extent that no governing clearly established Supreme Court authority existed at the time of the California Supreme Court's denial of the claim, federal habeas relief is precluded by §

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

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

CLAIM THIRTEEN: UNRELIABLE DNA EVIDENCE

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

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

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

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

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

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

CLAIM FOURTEEN: PROSECUTORIAL MISCONDUCT

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

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

reasoned published opinion on appeal. (NOL B4; *People v. Jones*, 29 Cal. 4th at 1262-63.) Petitioner also raised the claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 272-76, 320-25 (Claims "I" and "Q").) The California Supreme Court rejected the claim on the merits in its unpublished order denying the petition. In that same order, the California Supreme Court also rejected part of the claim on the ground that, to the extent it was not raised on direct appeal, and except insofar as it alleged ineffective assistance of counsel, it was barred by *In re Harris*, 5 Cal. 4th at 825 & n.3, 826-29 and *In re Dixon*, 41 Cal. 2d at 759.[12] Further, in that same order, the California Supreme Court also rejected part of the claim on the ground that, with the exception that it alleged ineffective assistance of trial counsel, Petitioner failed to raise it in the trial court, citing *In re Seaton*, 34 Cal. 4th 193.[13] (NOL C7.) As a result, Claim Fourteen is procedurally barred from consideration on the merits herein because California's waiver bar, *Harris* bar, *Dixon* bar, and *Seaton* bar are independent and adequate, and Petitioner has not and cannot 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.

In addition, Petitioner is precluded from obtaining federal habeas relief 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 unreasonable application of clearly established Supreme Court authority, and did not involve an unreasonable determination of the facts based on the evidence presented to it within the meaning of § 2254(d). To the extent that no governing clearly established Supreme Court authority existed at the time of the California

[12] The California Supreme Court denied Claim Fourteen, with the exception of Subclaims 8a(3) and 12 (NOL C1 Claim "I" with the exception of paragraph 5(c), and Claim "Q" with the exception of paragraph 2), as barred by *Harris* and *Dixon*. (NOL C7.)

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

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

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

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CLAIM FIFTEEN: PREJUDICIAL AGGRAVATING EVIDENCE

In Claim Fifteen, Petitioner claims various federal constitutional violations on the ground that unnoticed, irrelevant, and prejudicial aggravating evidence was introduced at the penalty phase of the trial and that his trial attorney unreasonably failed to investigate and rebut the aggravating evidence. (Pet. at 207-23.) Petitioner raised part of this claim in his opening brief on appeal in the California Supreme Court.[14] (NOL B1 at 182-90.) The California Supreme Court rejected the claim on the merits in its reasoned published opinion on appeal. (NOL B4; *People v. Jones*, 29 Cal. 4th at 1265-67.) Petitioner also raised the claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 371-74 (Claim "U").) The California Supreme Court rejected the claim on the merits in its unpublished order denying the petition. In that same order, the California Supreme Court also rejected the claim on the ground that, to the extent it was not raised on direct appeal, and except insofar as it alleged ineffective assistance of counsel, it was barred by *In re Harris*, 5 Cal. 4th at 825 & n.3, 826-29 and *In re Dixon*, 41 Cal. 2d at 759. (NOL C7.) As a result, Claim Fifteen is procedurally barred from consideration on the merits herein because California's *Harris* bar and *Dixon* bar are independent and adequate, and Petitioner has not and cannot 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.

In addition, Petitioner is precluded from obtaining federal habeas relief 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 unreasonable application of clearly established Supreme Court authority, and did not involve an unreasonable determination of the facts based on the evidence

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

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

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

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CLAIM SIXTEEN: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AT PENALTY PHASE

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

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

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

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[15] Petitioner claims trial counsel rendered ineffective assistance by: (1) conducting a deficient penalty phase investigation (Pet. at 224-327); (2) failing to 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).

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

CLAIM SEVENTEEN: ADMISSION OF PREJUDICIAL PENALTY PHASE EVIDENCE

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

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

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

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

CLAIM EIGHTEEN: JUROR MISCONDUCT

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

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

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

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

CLAIM NINETEEN: OUTBURSTS BY VICTIM'S DAUGHTERS

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

Petitioner is precluded from obtaining federal habeas relief 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 unreasonable application of clearly established Supreme Court authority, and did not involve an

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

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

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

CLAIM TWENTY: INFLAMMATORY PHOTOGRAPHS OF THE VICTIM

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

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

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

As to the factual allegations made in support of Claim Twenty, Respondent denies, or lacks sufficient knowledge to admit or deny, every allegation; alternatively, Respondent denies that the alleged facts, if true, entitle Petitioner to 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

procedurally barred from consideration on the merits herein because California's *Harris* bar and *Dixon* bar are independent and adequate, and Petitioner has not and cannot 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.

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

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

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

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

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

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

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

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

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

CLAIM TWENTY-THREE: DEATH SENTENCE IS CRUEL AND UNUSUAL GIVEN PETITIONER'S MENTAL RETARDATION AND MENTAL IMPAIRMENTS

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

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

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

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

In Claim Twenty-Four, Petitioner claims various federal constitutional violations and a violation of international law on the ground that the California death penalty statute fails to narrow the class of offenders eligible for the death 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

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

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

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

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

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

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

In Claim Twenty-Five, Petitioner claims various federal constitutional violations on the ground that the prosecution used race, gender, and other unconstitutional considerations in its decision to seek the death penalty. (Pet. at 401-06.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 409-15 (Claim "Y").) The California Supreme Court rejected the claim on the merits in its unpublished order denying the first habeas corpus petition. In that same order, the California Supreme Court also rejected the claim on the ground that, with the exception that it alleged ineffective assistance of trial counsel, Petitioner failed to raise it in the trial court, citing *In re Seaton*, 34 Cal. 4th 193. (NOL C7.) As a result, Claim Twenty-Five is procedurally barred from consideration on the merits herein because California's *Seaton* bar is independent and adequate, and Petitioner has not and cannot 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.

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

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

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

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

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

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

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

In addition, Petitioner is precluded from obtaining federal habeas relief 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

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

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

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

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

In addition, Petitioner is precluded from obtaining federal habeas relief 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 unreasonable application of clearly established Supreme Court authority, and did not involve an unreasonable determination of the facts based on the evidence presented to it within the meaning of § 2254(d). To the extent that no governing clearly established Supreme Court authority existed at the time of the California Supreme Court's denial of the claim, federal habeas relief is precluded by § 2254(d). To the extent that Petitioner overcomes the § 2254 bar, the claim fails under a de novo standard of review. To the extent that the claim fails to allege a

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

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

CLAIM TWENTY-EIGHT: INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

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

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

Petitioner is precluded from obtaining federal habeas relief 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 unreasonable application of clearly established Supreme Court authority, and did not involve an

[16] Petitioner claims that appellate counsel rendered ineffective assistance by failing to include the following issues on appeal: (1) Petitioner's federal constitutional rights to a fair and reliable guilt and sentencing determination were violated by the trial court's erroneous ruling allowing the jury to draw impermissible inferences from highly inflammatory propensity evidence during the guilt phase; (2) the trial court unreasonably and prejudicially failed to protect Petitioner's federal constitutional rights by allowing the prosecution to engage in numerous instances of deceptive and reprehensible prosecutorial misconduct in the guilt and penalty phases; (3) the trial court violated Petitioner's federal constitutional rights when it abdicated its responsibility to ensure an effective inquiry into prospective juror biases; (4) Petitioner was deprived of his federal constitutional rights because the jury was given incomplete and confusing jury instructions and verdict forms in the guilt and penalty phases of Petitioner's trial; (5) the erroneous admission of improper, prejudicial, and false victim impact evidence violated Petitioner's state and federal constitutional rights; (6) the prosecution violated Petitioner's federal constitutional rights by failing to disclose material exculpatory evidence; (7) the prosecution knowingly presented false 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.)

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

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

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

CLAIM TWENTY-NINE: INACCURATE AND INCOMPLETE APPELLATE RECORD

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

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

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

Further, Petitioner is precluded from obtaining federal habeas relief 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 unreasonable application of clearly established Supreme Court authority, and did not involve an unreasonable determination of the facts based on the evidence presented to it within the meaning of § 2254(d). To the extent that no governing clearly established Supreme Court authority existed at the time of the California Supreme Court's denial of the claim, federal habeas relief is precluded by § 2254(d). To the extent

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

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

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CLAIM THIRTY: MULTIPLE CONSTITUTIONAL ERRORS CUMULATIVELY RENDERED PETITIONER'S TRIAL UNFAIR

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

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

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

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

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