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10 **UNITED STATES DISTRICT COURT**

11 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

12 ERNEST DEWAYNE JONES, 13 Petitioner, 14 v. 15 16 KEVIN CHAPPELL, Warden of California State Prison at San 17 Quentin, 18 Respondent.	Case No. CV-09-2158-CJC **DEATH PENALTY CASE** **PETITIONER'S OPENING 2254(D) BRIEF ON EVIDENTIARY HEARING CLAIMS**

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INTRODUCTION

Mr. Jones filed his Petition for Writ of Habeas Corpus in this Court on March 10, 2010, and Respondent filed an Answer on April 6, 2010. ECF Nos. 26 & 28. Pursuant to the parties' stipulation and the Court's order, ECF Nos. 30 & 31, Mr. Jones thereafter filed a Motion for an Evidentiary Hearing on February 17, 2011, ECF No. 59. On April 4, 2011, the United States Supreme Court issued its opinion in *Cullen v. Pinholster*, __ U.S. __, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011), holding that the bar to federal habeas corpus relief set forth in 28 U.S.C. section 2254(d)(1) must be evaluated solely by reference to "the record that was before the state court that adjudicated the claim on the merits." *Id.* at 1398. In response to the opinion, this Court vacated the remaining briefing schedule for Mr. Jones's Motion for Evidentiary Hearing and ordered the parties to brief Mr. Jones's entitlement to an evidentiary hearing in light of *Pinholster*, which they completed. *See* ECF Nos. 62, 68, 71, & 74. In an order denying Mr. Jones's Motion for an Evidentiary Hearing without prejudice, this Court ordered the parties to conduct merits briefing to "set forth how each claim satisfies section 2254(d)(1) and/or section 2254(d)(2) on the basis of the record that was before the state court that adjudicated the claim on the merits." ECF No. 75.[1]

[1] This Court subsequently directed Mr. Jones to limit his Opening Merits Brief on Section 2254(d) to 100 pages. *See* ECF No. 81. In an Ex Parte Application to File Petitioner's Opening Brief on Section 2254(d) in Excess of Page Limits, Mr. Jones explained that he was unable to complete merits briefing within the Court's page limitation, even for the claims contained in his Motion for Evidentiary Hearing. *See* ECF No. 83. Indeed, the state briefing, which set forth the factual and legal bases for the claims without briefing federal habeas procedural requirements, was almost 1200 pages; Mr. Jones's briefing in the automatic appeal comprised 357 pages, and the petitions filed October 21, 2002, and October 16, 2007, and replies to Respondent's informal responses comprised 838 pages. Given these restraints, Mr. Jones has not attempted to also brief the remaining claims from his Petition for Writ of Habeas Corpus, including claims that first were presented in the direct appeal in state court. Mr. Jones anticipates

continued...

Mr. Jones fully presented the claims addressed in this Opening Brief to the California Supreme Court, submitting comprehensive and detailed allegations and supporting them with additional factual proffers in 3,414 pages of documentary material, including seventy-three declarations from lay witnesses, experts, trial team members, and jurors. The state court was required to accept these allegations as true to determine whether Mr. Jones presented a prima facie case for relief and, if so, to issue an order to show cause to permit Mr. Jones to engage in factual development, prove his claims, and allow the court to resolve factual disputes. *See*, *e.g*., *In re Serrano*, 10 Cal. 4th 447, 454-56, 41 Cal. Rptr. 2d 695 (1995); *People v. Romero*, 8 Cal. 4th 728, 737, 35 Cal. Rptr. 2d 270 (1994).

Central to Mr. Jones's case, and to the claims of constitutional error he raised in state court, is that his mental functioning throughout his life, and in particular at the time of the crime and trial, was severely impaired due to his life-long mental illness, brain damage, and intellectual disabilities. Mr. Jones's mental dysfunction—which included hallucinations, delusions, dissociation, and paranoia—was evident not only throughout his troubled history, but also in the capital crime itself, which involved a bizarre and disorganized sexual assault, with evidence that sexual contact with the victim occurred after her death. Hallucinating and distraught following the crime, Mr. Jones attempted suicide by shooting himself in the chest.

During the guilt phase, Mr. Jones's impaired mental state was trial counsel's only defense. As detailed in Claim One, trial counsel was ineffective for failing to investigate or present *any* of the readily available mental state evidence available

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that following this Court's determination whether to conduct an evidentiary hearing, and proceedings consistent with that determination, the parties will return to merits briefing for all remaining claims, including the application of 28 U.S.C. section 2254(d) for each claim on which Mr. Jones seeks relief.

to support Mr. Jones's testimony about events on the day of the crime. Although trial counsel retained an expert who concluded that Mr. Jones suffered a psychotic break at the time of the crime and was not capable of controlling his actions, trial counsel did not present that or any other expert testimony during the guilt phase. Declarations from trial counsel, the defense paralegal, the defense expert, and numerous other witnesses and documentary evidence supported these and other allegations establishing trial counsel's prejudicially deficient performance.

As Claim Three established, the jury further was deprived of critical information about Mr. Jones's mental impairments by the prosecutor's failure to comply with his constitutional obligation to disclose exculpatory material. In particular, the prosecutor unlawfully withheld records that documented Mr. Jones's prior emergency psychiatric care and treatment in jail with antipsychotic medication, at the same time that the prosecution repeatedly argued that Mr. Jones's claimed mental illness was fabricated. Critically, although Mr. Jones's identity as the perpetrator was not in dispute, and without the benefit of a minimally adequate defense or the withheld records, the jury deliberated for several days before finally arriving at the guilt verdicts.

As demonstrated by Claim Sixteen, trial counsel's performance at the penalty phase similarly was prejudicially deficient. Delegating preparation for the penalty phase defense to the paralegal, trial counsel utterly failed to discover or present a wealth of information about Mr. Jones's history of being sexually abused by his mother, physically abused, and exposed to life-threatening and terrifying violence that regularly occurred between his alcoholic parents. Trial counsel did not investigate clear indications of Mr. Jones's intellectual disabilities and brain damage, or his dramatically deteriorating mental health prior to the crime. As trial counsel acknowledged, he considered Mr. Jones's mental illness the most important issue in the case, but failed to retain a mental health expert until very late in the trial, did not follow the expert's recommendations, failed to provide the

expert with necessary background information, and neglected to prepare him to testify. In support of this claim, Mr. Jones presented the state court with declarations from trial counsel, the defense paralegal, the defense expert, two new experts able to fully and competently evaluate Mr. Jones, and the lengthy statements of many people who knew Mr. Jones throughout his life and compellingly described its many tragedies. In Claim Eighteen, Mr. Jones supported his allegations that jurors were not impartial with the declarations by jurors describing their discussions about imposing a death sentence before the penalty phase began, their exposure to prejudicial extrinsic evidence, and the fact that one juror slept during critical portions of the penalty phase.

In Claim Four, Mr. Jones alleged that his due process rights were violated because he was subject to an involuntary and inappropriate medication regimen that concealed and altered his presentation before the jury and impaired his ability to participate in the trial and his defense. During the trial, Mr. Jones was medicated with Haldol, a potent antipsychotic medication, as well as antidepressants and other medications, some with significant side effects. In the middle of the guilt phase, this medication was abruptly discontinued and later restarted. Mr. Jones's clinical need for this medication, a mental health expert's conclusion that Mr. Jones was incompetent to stand trial, and Mr. Jones's unusual and irrational behavior, all compelled the trial court to conduct a hearing to determine his competence to stand trial.

In Claim Five, Mr. Jones alleged that his due process rights were violated by the trial court's failure to hold a competency hearing and by his having to stand trial when he was, in fact, incompetent. Mr. Jones supported these allegations with the opinion of the defense expert who evaluated Mr. Jones at the time of the trial, lay witnesses who observed Mr. Jones at the time, and the corroborating opinions of additional experts. In Claim Twenty-three, Mr. Jones alleged that these impairments and his intellectual disability—established by his subaverage

intelligence and deficits in adaptive functioning—render him ineligible for the death penalty. Finally, in Claim Twenty-four, Mr. Jones presented factual documentation never considered by the state court in support of his claim that the death penalty statute in California unconstitutionally fails to narrow the class of those eligible for the death penalty.

In compliance with this Court's order and to establish his entitlement to an evidentiary hearing on these compelling claims, Mr. Jones submits this briefing explaining why 28 U.S.C. section 2254(d) does not bar this Court from granting him habeas relief. Section I sets out analysis under section 2254(d)(1) and (d)(2) that applies to each of Mr. Jones's claims, demonstrating why the state court's failure to conduct a hearing to resolve Mr. Jones's claims and engage in adequate procedures before denying them satisfies section 2254(d)(1), and why the state court likely resolved factual questions without a hearing, thus also satisfying section 2254(d)(2). In Section II, Mr. Jones presents controlling Supreme Court precedent for each claim, summarizes the prima facie showing he made in state court and Respondent's contentions presented in response, and discusses additional claim-specific bases on which section 2254(d)(1) and (d)(2) are satisfied.

I. APPLICABLE LEGAL FRAMEWORK

A. Overview of 28 U.S.C. Section 2254(d).

A habeas petitioner may receive relief on a claim "adjudicated on the merits" in state court whenever the last reasoned state decision either was (1) contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court, 28 U.S.C. § 2254(d)(1); or (2) based on an unreasonable determination of the facts given the evidence presented in state court, *id.* at § 2254(d)(2). A state court decision is "contrary to" clearly established federal law when it (1) applies a legal rule that contradicts prior Supreme Court precedent; or (2) reaches a different result from a Supreme Court

case despite confronting indistinguishable facts. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 405, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (O'Connor, J., concurring). A state court's decision is an "unreasonable application" of clearly established federal law when it is "objectively unreasonable." *Id*. at 409-10. In applying section 2254(d)(1), a federal habeas court "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, __ U.S. __, 131 S. Ct. 1388, 1398, 179 L. Ed. 2d 557 (2011).

B. Section 2254(d) Applications Common To All Claims.

The California Supreme Court summarily denied all of Mr. Jones's state habeas corpus claims on the merits.[2] The state court was required to accept all of Mr. Jones's allegations as true in ruling that Mr. Jones failed to make any prima facie showing that he was entitled to relief. *See*, *e.g.*, *People v. Duvall*, 9 Cal. 4th 464, 474-75, 37 Cal. Rptr. 2d 259 (1995). Because of its summary denial, the state court did not (1) require Respondent to formally respond to Mr. Jones's claims or present evidence in support of any factual disputes; (2) authorize Mr. Jones to conduct depositions or other discovery to fully develop his claims; (3) permit Mr. Jones to present any evidence in support of his allegations; or (4) engage in any fact finding to resolve Mr. Jones's claims.[3] Because Mr. Jones's habeas corpus

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

[3] It is through the return and the traverse that the issues are joined in a habeas corpus proceeding. *People v. Romero*, 8 Cal. 4th 728, 739, 883 P.2d 388 (1994). The informal response is not a substitute for the formal return and traverse, because it "is not a pleading, does not frame or join issues, and does not establish a 'cause' in which a court may grant relief." *Id.* at 741. Rather, the informal response serves a screening function similar to that of a demurrer in a civil action. *Id*. at 742 n.9. For a more complete description of the limitations of resolving a capital habeas petition informally, see Petitioner's Supplemental Reply Brief on

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claims were denied on the same basis, the 2254(d) analysis that follows is applicable to all of them.

At the core of Mr. Jones's 2254(d) arguments, and discussed in detail in Section II, is that he successfully established a prima facie case for relief for each of his claims in state court. The state court's summary denial of the claims therefore indicates that it required a showing to advance beyond the pleading stage that is greater than, or significantly different from, that mandated by federal law. This results in a state court decision that satisfies sections 2254(d)(1) and (d)(2) for each of Mr. Jones's claims at the outset. First, the decision is contrary to Supreme Court precedent because the state court rejected constitutional claims that were adequately pled as a matter of federal law and failed to engage in fact finding to resolve them. Relatedly, declining to conduct a hearing on claims that present a prima facie showing for relief constitutes an unreasonable application of the constitutional law underlying each of them. Second, the resolution of constitutional claims on the basis of informal factual disputes raised by Respondent—at the pleading stage and without providing Mr. Jones an opportunity to rebut or present evidence—is an unreasonable determination of the facts and allegations presented in the state habeas petition.

1. The State Court's Summary Denial Is Contrary To Federal Pleading Burdens and an Unreasonable Application of Federal Law.

When federal constitutional claims are "plainly and reasonably made," the Supreme Court has long held that a state court must engage in meaningful fact-finding to resolve them. *Angel v. Bullington*, 330 U.S. 183, 188, 67 S. Ct. 657, 91 L. Ed. 832 (1947); *see also McNeal v. Culver*, 365 U.S. 109, 110, 81 S. Ct. 413, 5 L. Ed. 2d 445 (1961) (state court must hold hearing to determine facts when

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the Effect of *Cullen v. Pinholster* on the Court's Power to Grant an Evidentiary Hearing, filed Oct. 28, 2011, ECF No. 74 ("Supp. Br. on *Pinholster*") at 6-9.

petition alleged constitutional violation "with reasonable clarity"); *Davis v. Wechsler*, 263 U.S. 22, 24-25, 44 S. Ct. 13, 68 L. Ed. 143 (1923) (states may not create "unreasonable obstacles" to resolution of federal constitutional claims that are "plainly and reasonably made"). As the Court explained, "[t]he power of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution." *Angel*, 330 U.S. at 188. Moreover, "the question whether a right or privilege, claimed under the Constitution or laws of the United States was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a Federal question." *Carter v. Texas*, 177 U.S. 442, 447, 20 S. Ct. 687, 44 L. Ed. 839 (1900). The Court therefore has invalidated state decisions made without adequate fact-finding where constitutional claims were supported by "factual allegations not patently frivolous or false." *See Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 118-19, 76 S. Ct. 223, 100 L. Ed. 126 (1956); *see also Cash v. Culver*, 358 U.S. 633, 638, 79 S. Ct. 432, 3 L. Ed. 2d 557 (1959) (allegations of the habeas petition "made it incumbent upon the Florida courts to determine what the true facts were").[4]

The Supreme Court also has reversed state court decisions that purport to resolve federal constitutional claims but fail to provide adequate procedures for doing so. In *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986), for example, the Court held that the state's failure to permit adversarial proceedings for a competency determination and related constitutional claims created "a much greater likelihood of an erroneous decision." *Id.* at 414-15 (a decision based on inadequate proceedings "will be distorted"). The Court therefore rejected the state's resolution of the constitutional issue, concluding that state

[4] For more discussion of this precedent, see Supp. Br. on *Pinholster* at 12-17.

proceedings were "inadequate to … protect the federal interests." *Id.* at 416.

In *Panetti v. Quarterman*, 551 U.S. 930, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007), the Court held that this type of deficiency constitutes an unreasonable application of federal law. *Id*. at 954 (section 2254(d)(1) is satisfied when the "fact finding procedures upon which the court relied were 'not adequate for reaching reasonably correct results' or, at a minimum, resulted in a process that appeared to be 'seriously inadequate for the ascertainment of the truth.'") (quoting *Ford v. Wainwright*, 477 U.S. at 423-24 (Powell, J., concurring)); *cf. Wiggins v. Smith*, 539 U.S. 510, 527, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (state court decision was an unreasonable application of *Strickland* for resolving claim without conducting assessment of the facts to determine whether counsel's investigation was adequate). In a case applying *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), the Fifth Circuit held that "[t]he lesson we draw from *Panetti* is that, where a petitioner has made a prima facie showing of retardation as Rivera did, the state court's failure to provide him with the opportunity to develop his claim deprives the state court's decision of the deference normally due." *Rivera v. Quarterman*, 505 F.3d 349, 358 (5th Cir. 2007) (ruling that section 2254(d)(1) was satisfied); *see also Nunes v. Mueller*, 350 F.3d 1045, 1054-55 (9th Cir. 2003) (section 2254(d)(1) satisfied; where petitioner made prima facie showing of ineffective assistance of counsel but state court denied hearing, state court appears unreasonably to require more than the prima facie showing required by *Strickland*).

Recent case law confirms that application of section 2254(d) under *Panetti* has not changed following the Supreme Court's decisions in *Cullen v. Pinholster*, __ U.S. __, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011), and *Harrington v. Richter*, __ U.S. __, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). For example, prior to *Pinholster* and *Richter*, the Fourth Circuit held that when the state court refused petitioner discovery and an evidentiary hearing, the state court adjudication "was

materially incomplete" and its decision was not an "adjudication on the merits" subject to 2254(d) limitations. *Winston v. Pearson* (*Winston I*), 592 F.3d 535, 555-58 (4th Cir. 2010).[5] Following the Supreme Court's decisions in *Pinholster* and *Richter*, the Fourth Circuit recently reexamined *Winston I*. *Winston v. Pearson (Winston II)*, 683 F.3d 489 (4th Cir. 2012).

In *Winston II*, the court declined to overrule *Winston I*, because neither *Richter* nor *Pinholster* were contrary controlling authority: neither case resolved the contours of a state court's "adjudication on the merits." *Id*. at 498-500. In *Pinholster*, the parties did not dispute the existence of a state court "adjudication." *Id*. at 501-02. In *Richter*, the Court only decided that a decision's summary nature did not preclude its characterization as a merits adjudication. The Fourth Circuit held that *Richter* did not address other possible defects in state court decisions and therefore did not govern a case in which the petitioner contests the state court's unreasonable denial of his request for an evidentiary hearing. *Id.* at 502. Other courts have reached similar conclusions. *See, e.g.*, *Mosley v. Atchison*, 689 F.3d 838, 849 (7th Cir. 2012) (summary denial of ineffectiveness claim unreasonable without a fully developed factual record); *Fanaro v. Pineda*, No. 2:10-CV-1002, 2012 WL 1854313 (S.D. Ohio May 21, 2012) (state court decision unreasonable for rejecting prima facie showing of ineffectiveness without hearing); *Ballinger v. Prelesnik*, 844 F. Supp. 2d 857, 867 (E.D. Mich. 2012).

In the discussion of claims that follows in Section II, Mr. Jones demonstrates that his allegations and supporting exhibits in state court established a prima facie case for relief under each of the constitutional violations alleged. As such, he was

[5] *Cf. Wilson v. Workman*, 577 F.3d 1284, 1292 (10th Cir. 2009) (en banc) ("When the state court relies solely upon the record evidence, and denies both the claim itself and an evidentiary hearing on the proffered non-record evidence without any alternative holding based upon the proffered evidence, there is no adjudication on the merits that would warrant deferential review.").

entitled to have the state court hear and resolve his claims. The state court's failure to do so was contrary to clearly established federal law. By rejecting Mr. Jones's prima facie claims for relief without any hearing, the state court decision was an unreasonable application of the federal constitutional law governing each of his claims. As the Court in *Panetti* held, "[w]hen a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied."

2. The State Court's Summary Denial Is an Unreasonable Determination of Facts.

As described for each of the claims in Section II, *infra*, Respondent raised numerous factual disputes in response to Mr. Jones's state habeas petition. Respondent did not argue in state court that Mr. Jones's allegations, taken as true, failed to establish a prima facie case for relief. Instead, Respondent urged the state court to *reject* Mr. Jones's factual allegations. For example, Respondent urged the state court to disbelieve Mr. Jones's allegations about trial counsel failing to investigate and present evidence for the penalty phase. *See* Informal Response to Petition for Writ of Habeas Corpus, NOL at C.5. ("Inf. Resp.") at 22-25. Respondent suggested that, contrary to Mr. Jones's allegations, trial counsel could have made tactical decisions to limit mitigating evidence for a variety of reasons, including: (1) the jury would become "desensitized" and "alienated" by additional mitigation; (2) the mitigation had little relevance; and (3) expert testimony about Mr. Jones's history of mental illness would not be helpful. *Id.* Needless to say, each of these contentions required the state court to make factual determinations. *See Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) (whether trial counsel's actions are tactical is a question of fact); *Ferrell v. Hall*, 640 F.3d 1199, 1223 (11th Cir. 2011) (same).

In response to each of Mr. Jones's claims, Respondent thus invited the state court to assume adverse facts to reject Mr. Jones's allegations and summarily deny

1 his claims. Without a reasoned opinion from the state court on most of Mr. Jones's claims, it is not possible to establish definitively that this occurred. It is apparent, however, that the California Supreme Court's appellate review improperly encompasses such factual determination in some instances. *See, e.g.*, *People v. Jones*, 29 Cal. 4th 1229, 1254-55, 131 Cal. Rptr. 2d 468 (2003) (attributing tactical decision to Mr. Jones's counsel to reject ineffectiveness claim on appeal where no evidence of tactical decision making appeared in the record). Furthermore, because Mr. Jones's allegations taken as true *did* make a prima facie showing for relief, a plausible interpretation of the state court ruling is that it necessarily resolved some factual issues as suggested by Respondent in determining that no prima facie showing was made. This would be an unreasonable determination of the facts under section 2254(d)(2). *See, e.g.*, *Hurles v. Ryan*, 650 F.3d 1301, 1312 (9th Cir. 2011) ("We have repeatedly held that where a state court makes factual findings without an evidentiary hearing or other opportunity for the petitioner to present evidence, the fact-finding process itself is deficient and not entitled to deference"); *Williams v. Woodford*, 859 F. Supp. 2d 1154, 1159 (E.D. Cal. 2012) (section 2254(d)(2) is satisfied where "the court made assumptions of fact without giving Williams an opportunity to present evidence, conduct discovery or otherwise develop the record"); *id.* at 1161 ("*Pinholster* isn't relevant where, as here, petitioner surmounts section 2254(d) because he was not allowed to develop the record in state court"); *Lor v. Felker*, No. CIV S-08-2985 GEB, 2012 WL 1604519 (E.D. Cal. May 7, 2012) (section 2254(d)(2) satisfied where the state court's "failure to conduct an evidentiary hearing violated petitioner's right to a fair process for developing the record supporting his claim"); *Palazzolo v. Burt*, 778 F. Supp. 2d 805, 811 (E.D. Mich. 2011) (same).[6]

[6] The California Supreme Court's inability to provide adequate process for these claims may be the result of being overburdened with more than 3,000 habeas

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In the section that follows, Mr. Jones highlights some—but by no means all—of the allegations he made in state court that established a prima facie case for relief on his claims that require an evidentiary hearing. This showing, together with the controlling Supreme Court precedent for each claim, Respondent's contentions in state court, and additional analysis under section 2254(d)(1) and (d)(2), demonstrates that section 2254(d) is satisfied for each of Mr. Jones's claims.

II. MR. JONES'S CLAIMS SATISFY SECTION 2254(D)

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

Mr. Jones presented the California Supreme Court with a prima facie claim of ineffective assistance of counsel, alleging that he was prejudiced by trial counsel's unreasonable actions and omissions during the guilt phase of his trial.[7]

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cases per year. *Walker v. Martin*, __ U.S. __, 131 S. Ct. 1120, 1126 n.2, 179 L. Ed. 2d 62 (2011). From 1978 to 2007, in capital habeas cases, the state court denied an order to show cause (which formally commences a habeas proceeding and is a prerequisite to an evidentiary hearing) in 92 percent of cases and granted evidentiary hearings in only 4 percent of cases. *See* Judge Arthur Alarcon, Remedies for California's Death Row Deadlock, 80 S. Cal. L. Rev. 697, 740-41, 749 (2007). Yet 70 percent of California capital petitioners prevail in federal court on claims denied in state court. *See* Cal. Comm'm on the Fair Admin. of Justice, Final Report 125 (2008), *available at* http://www.ccfaj.org/documents/CCFAJFinalReport.pdf.

[7] Mr. Jones's state ineffective assistance of counsel claim, Claim Four, alleged prejudicial deficient performance in both the guilt and penalty phases of trial. Petition for Writ of Habeas Corpus, Notice of Lodging, filed Apr. 6, 2010, ECF No. 29 ("NOL") at C.1. ("State Pet.") at 66-239; Reply to the Informal Response, NOL at C.6. ("Reply") at 53-199. Mr. Jones also raised a record-based portion of this claim on direct appeal. Appellant's Opening Brief, NOL at B.1. ("AOB") at 126-42. In his federal briefing, Mr. Jones's ineffective assistance of counsel allegations are divided into guilt phase (Claim One) and penalty phase (Claim Sixteen) allegations. Petition for Writ of Habeas Corpus by a Prisoner in State Custody, filed Mar. 10, 2010, ECF No. 26 ("Fed. Pet.") at 21-91, 223-338.

The only defense that counsel pursued at trial was that Mr. Jones's mental illness and substance use on the day of the crime kept him from forming the specific intent necessary for a capital conviction. Instead of conducting investigation to support this defense, however, counsel relied solely on Mr. Jones's testimony, which the trial court curtailed and the prosecutor successfully attacked. Had counsel investigated adequately, he would have made two critical discoveries. First, a wealth of expert and lay testimony and record evidence existed to support the mental state defense. Second, substantial evidence supported a second defense: there was a reasonable doubt whether Mr. Jones had pre-mortem sexual contact with the victim, Mrs. Miller. This was a complete defense to rape and the capital charges based on rape, and also was consistent with the mental state defense.

During the guilt phase, the prosecution also sought to admit Mr. Jones's prior conviction for the rape of Doretha Harris to prove identity and intent in the capital case. The prosecutor stated that admitting the Harris crime would be unnecessary if counsel conceded that Mr. Jones raped Mrs. Miller. Although counsel made this concession, he nonetheless withdrew his objection to the introduction of the Harris prior at the guilt phase, did not investigate the circumstances of that crime, and therefore was unprepared to counter introduction of the Harris prior with compelling evidence of Mr. Jones's mental illness and deteriorating mental state.

1. Controlling U.S. Supreme Court Precedent.

The test for determining whether trial counsel provided constitutionally effective representation is set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Strickland* involves a two-part inquiry into whether (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Id*. at 687. Deficient performance is representation that falls "below an objective standard of reasonableness," where "reasonableness" is determined by "prevailing professional norms" that are "reflected in American Bar

Association standards and the like." *Id*. at 688-89; *see also*, *e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (ruling that ABA guidelines are "well-defined norms" to which the Court has long referred as guides for determining reasonableness).

Counsel's "strategic choices made after less than complete investigation" are reasonable only to the extent that limitations on investigation are reasonable. *Strickland*, 466 U.S. at 690-91; *see also id.* at 688 (ruling that "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances"). At a minimum, trial counsel must thoroughly investigate the circumstances of the case and the defendant's background. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 387, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005); *Williams v. Taylor*, 529 U.S. 362, 396, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). Similarly, counsel must investigate the circumstances of a defendant's prior crimes when the prosecution seeks to introduce those crimes. *Rompilla*, 545 U.S. at 385-86.

Prejudice is established when there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. In making the prejudice determination, a court "must consider the totality of the evidence" before the finder of fact: a verdict "only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 695-96.

2. Prima Facie Allegations Before the State Court.

At trial, the prosecution sought to establish the first-degree murder charge against Mr. Jones based solely on a felony-murder theory: that murder was committed in the course of a robbery, burglary, and/or rape.[8] 1 CT 98-99; Cal. Penal Code § 189. The jury found Mr. Jones guilty of felony murder based on

[8] The prosecution introduced two prior crimes against Mr. Jones: battery of Kim Jackson in 1984 and rape of Doretha Harris in 1985. 14 RT 2380, 2406-07.

rape, but not guilty of robbery or burglary. 2 CT 365. For Mr. Jones to be eligible for the death penalty, the jury also had to find him guilty of a special circumstance. Cal. Penal Code § 190.2(a). The jury found Mr. Jones guilty of the rape special circumstance. 2 CT 366-68. The intent requirement for either felony murder or the special circumstance was specific intent to commit the rape. *People v. Bennett*, 45 Cal. 4th 577, 597-98, 88 Cal. Rptr. 3d 131 (2009); *see also People v. Davenport*, 41 Cal. 3d 247, 262, 710 P.2d 861 (1985) (specific intent describes "a state of mind in which a defendant acts for the purpose or with the desire of causing a particular result"). As counsel explained, "[M]y sole defense to the capital murder charge" was to "demonstrate that [Mr. Jones] was incapable of forming the specific intent required" due to mental illness. Ex. 12 at 107.[9]

In his detailed allegations presented to the state court, Mr. Jones established that counsel failed to investigate and effectively present this mental state defense, did not investigate or present a persuasive defense to the rape charges, and did not oppose the unnecessary introduction of the Harris prior to prove rape during the guilt phase. Mr. Jones's state pleadings further illustrated how each of these categories of deficient performance significantly prejudiced Mr. Jones.

a. Failure to investigate and effectively present mental state defense.

Mr. Jones alleged that his trial counsel was prejudicially deficient for failing to develop and present a mental state defense because he: (1) failed to conduct necessary investigation; and (2) did not present lay and expert witnesses to support the defense. State Pet. at 92-164; Reply at 86-127. Mr. Jones presented, inter alia,

[9] All citations to exhibits refer to the Exhibits to Petition of Writ of Habeas Corpus, NOL at C.2.

the following allegations and supporting facts to the state court.[10]

1) Trial counsel unreasonably failed to investigate.

In a declaration presented to the state court, trial counsel stated, "As a result of reviewing the reports of Mr. Jones's two prior offenses, I became convinced that his offense[s] were the result of his serious mental illness. . . . Very early on, I realized that Mr. Jones's obvious mental illness had to be the crux of the defense to the charged crimes." Ex. 12 at 107; *see also id.* at 109. The reports on Mr. Jones's prior offenses contained, inter alia, the following:

- An officer who investigated the 1985 offense against Doretha Harris concluded that Mr. Jones was mentally ill;
- Following his 1985 arrest, Mr. Jones reported that he had periods in which he engaged in activities without later knowing what he was doing, had blank spells, often felt as if things were not real, had strange and peculiar thoughts, and felt possessed by evil spirits; and
- A prison psychological evaluation in 1986 determined that Mr. Jones was raised in an environment of domestic violence, had a low IQ, had a history of drug and alcohol abuse, was suicidal, and was uncertain of his motivation for the charged crime.

Ex. 87; Ex. 104 at 2179-85.

Trial counsel assigned defense investigator Daniel Bazan responsibility for

[10] Mr. Jones provided the state court with substantial extra-record evidence supporting this subclaim, including: declarations of his counsel, paralegal, penalty phase mental health expert at trial, habeas neuropsychologist, and habeas educational psychologist (Exs. 12, 19, 125, 150, 154, 175, 178); juror declarations (Exs. 9, 138, 140); declarations of lay witnesses who could have testified to his mental health in 1992, the year of the capital crime (Exs. 10, 21, 124, 135, 149); and lay witness and record evidence of his family's and his own extensive history of mental illness, mental impairments, and abuse (Exs. 1-4, 6, 8, 10-11, 13-14, 16, 18, 21, 25, 27, 42, 48, 50-51, 59, 69, 88, 97, 119, 122-26, 128-32, 134-35).

the guilt phase investigation, directing him to investigate the extent of pretrial publicity and the robbery and burglary charges. Ex. 12 at 105-06. Although Mr. Bazan at times made initial contact with penalty phase witnesses, he did not conduct investigation into Mr. Jones's background in preparation for the guilt phase. *Id*. Particularly given the triggering facts concerning Mr. Jones's mental illness contained in the prior offense reports and counsel's view that a mental state defense was the only defense to the charged crimes, counsel was unreasonable for failing to conduct investigation into Mr. Jones's background in preparation for the guilt phase of trial. *See, e.g.*, *Porter v. McCollum*, 558 U.S. 30, 130 S. Ct. 447, 453, 175 L. Ed. 2d 398 (2009) (counsel "ignored pertinent avenues for investigation of which he should have been aware"); *Wiggins*, 539 U.S. at 525 ("In assessing the reasonableness of an attorney's investigation … a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."); *Seidel v. Merkle*, 146 F.3d 750, 755 (9th Cir. 1998) (counsel performed deficiently where he was on notice of client's mental illness but did not investigate mental state defense); American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989) ("ABA Guidelines") 11.4.1 (counsel must expeditiously conduct independent guilt and penalty phase investigations immediately upon appointment).

2) Trial counsel unreasonably failed to present lay and expert testimony.

Without investigating Mr. Jones's background or his mental state leading up to the crime, counsel based his entire mental state defense on Mr. Jones's testimony. Ex. 12 at 109; 22 RT 3297-309, 3314-46. On the day of the crime, Mr. Jones used cocaine, smoked marijuana, and drank beer prior to his encounter with Mrs. Miller. 22 RT 3299-301, 3318. He testified that while he was at Mrs. Miller's house, she threatened him with a knife and a rifle. He heard a voice say

"give it to me" and had a flashback of seeing his mother in bed with another man. He wielded a knife, blacked out, and awoke crying, curled up in the fetal position next to Mrs. Miller. 22 RT 3333-35. Later that evening, he heard voices telling him, "[T]hey're going to kill you," and shot himself in the chest in a suicide attempt. 22 RT 3344-45; *see also* Ex. 178 at 3150. Mr. Jones could not recall or explain anything further about his encounter with Mrs. Miller. 22 RT 3335-36.

In the middle of trial, the court ruled that Mr. Jones could not testify about his dissociative episodes and other mental health symptoms preceding the 1992 timeframe of the crime—including flashbacks, blackouts, hallucinations, and hearing voices—unless counsel presented expert testimony on those topics.[11] 22 RT 3358-60. Counsel explained that he was "blind-sided" by this ruling, which "eviscerated" and "gutted my only defense to the charge of capital murder," and he correctly anticipated that the prosecution would capitalize on the absence of an expert on this critical issue. Ex. 12 at 109-10 (also describing that counsel was not aware of any evidence of mental impairment close to the time of the crime that he could have presented in keeping with the court's time limitation).

Counsel stated that, "I did not consider putting lay witnesses on the stand to

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[11] The court's holding was in error. State law permits lay witnesses to give mental health testimony within their personal knowledge. Cal. Evid. Code §§ 351, 802; *People v. Webb*, 143 Cal. App. 2d 402, 410-12, 300 P.2d 130 (1956) (trial court erred in excluding lay testimony about defendant's mental illness symptoms relevant to his ability to form specific intent). The California Supreme Court's conclusion that the exclusion of such testimony was not in error or harmful is contrary to and an unreasonable application of clearly established federal law. Exclusion of this testimony denied Mr. Jones his right to present a defense and testify in his own defense. *See, e.g.*, *Rock v. Arkansas*, 483 U.S. 44, 51-52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). Had Mr. Jones been permitted to testify about his mental health history, he could have provided evidence that he had suffered a lengthy history of dissociative episodes, flashbacks, blackouts, and hearing voices, thus assisting the jury to understand that the capital crime was a consequence of the untreated mental illness from which he had long suffered.

testify to Mr. Jones's background and to previous instances in which Mr. Jones had entered a similar trance-like state." Ex. 12 at 107-08. Thus, counsel did not investigate or present lay witness testimony and records corroborating Mr. Jones's mental illness and impaired functioning. *Id.* at 107-08, 110. Although counsel retained a psychiatrist for the penalty phase, Dr. Claudewell Thomas, counsel lacked any strategic reason for his failure to use a mental health expert during the guilt phase:

> Based on Dr. Thomas's professional medical opinion, I believed that Mr. Jones's mental state rendered him incapable of forming the intent required for the rape-murder special circumstance . . . . I determined that Dr. Thomas's testimony was critical to the jury's understanding of the crime, and I decided to have him testify at the penalty phase . . . I did not present a mental health expert during the guilt phase in addition to Mr. Jones's testimony in spite of the court's severe, and crucial curtailment of his testimony regarding his mental state during the sexual assault. I argued I had no legal obligation to do so. . . . I had no strategic reason for failing to have a second mental health expert ready to testify in the guilt phase.

Ex. 150 at 2731-32; *see also* Ex. 12 at 110.[12] Even when Dr. Thomas provided

[12] It is well-established that expert and lay testimony on a defendant's mental illness where a specific intent crime is charged may be critical to the defense. Cal. Penal Code § 28(a); *People v. Jackson*, 152 Cal. App. 3d 961, 964-66, 968, 970, 199 Cal. Rptr. 848 (1984) (holding, in an attempted murder (specific intent) case, that trial court properly permitted two defense psychiatrists to testify that defendant's conduct during stabbing was a nearly involuntary consequence of his mental illness); *People v. Webb*, 143 Cal. App. 2d at 410-12 (lay testimony admissible on this issue); *see also People v. Cortes*, 192 Cal. App. 4th 873, 904, 909-11, 121 Cal. Rptr. 3d 605 (2011) (defense expert should have been permitted to testify that defendant entered dissociative state while stabbing victim).

counsel with critical conclusions about Mr. Jones's mental state, counsel did not consider using guilt phase experts, partly because it was too late. Ex. 150 at 2732.

Although counsel began representing Mr. Jones in late 1992, shortly after the capital crime, he unreasonably delayed in retaining any mental health expert until nearly the start of trial. State Pet. at 158; Reply at 88-90; 1 CT 3. Counsel retained Dr. Thomas in August 1994, only three months before jury selection. Ex. 150 at 2731; Ex. 154 at 2748; 1 CT 2141; 23 Supp II CT 6386-88. Dr. Thomas interviewed Mr. Jones three times, in September and December 1994 and February 1995. Ex. 154 at 2749; 30 RT 4413, 4427, 4435, 4529. Following the second interview in December, Dr. Thomas informed counsel that Mr. Jones suffered from schizoaffective disorder and an extreme dissociative disorder that prevented him from predicting in advance, planning, or controlling his dissociative episodes. Ex. 150 at 2731 (counsel recalls, "I was impressed when Dr. Thomas explained that he had seen this kind of major dissociation only four times in his career, and that it was not the kind of diagnosis he readily made."). Dr. Thomas concluded that this had a critical impact on Mr. Jones's state of mind during his encounter with Mrs. Miller. *Id.* Dr. Thomas also recommended thorough neuropsychological testing. Based on Dr. Thomas's recommendation, trial counsel retained neuropsychologist William Spindell, Ph.D. Ex. 150 at 2732. However, counsel did not provide Dr. Spindell with sufficient time or information to evaluate Mr. Jones adequately. *Id.* As a result, Dr. Spindell completed only a partial test battery before the guilt phase began. *Id.*; 30 RT 4429.

Trial counsel's exclusive reliance on Mr. Jones's testimony for the mental state defense was not based on reasonable investigation. *See, e.g.*, *Wiggins*, 539 U.S. at 523, 529 (deficient performance question is "whether the investigation supporting counsel's decision not to introduce [additional evidence] was itself reasonable"; finding deficient performance where counsel's investigation "began and ended with" the records in his possession); *Jennings v. Woodford*, 290 F.3d

1 1006, 1015 (9th Cir. 2002); *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999).
2 He unreasonably failed to retain a guilt phase mental health expert, as was
3 necessary to the defense and to rebut the prosecution's case. *See, e.g.*, *Daniels v.*
4 *Woodford*, 428 F.3d 1181, 1207 (9th Cir. 2005); *cf. Bloom v. Calderon*, 132 F.3d
5 1267, 1278 (9th Cir. 1997) (where defense was based on mental state, "[e]ven the
6 third-year law student [assisting counsel] knew the defense needed a psychiatric
7 expert witness."); *see also id.* at 1272, 1277. Nor did he provide the experts he
8 retained, Drs. Thomas and Spindell, with sufficient information and time to
9 examine Mr. Jones. *See Bean v. Calderon*, 163 F.3d 1073, 1077 (9th Cir. 1998)
10 (finding ineffective assistance where counsel delayed in following mental health
11 expert's recommendation to retain neuropsychologist); *Daniels*, 428 F.3d at 1205
12 (finding ineffective assistance where counsel failed to investigate and present
13 evidence of client's brain damage).
14 Counsel also failed to investigate and present readily available lay witness
15 testimony and Mr. Jones's mental health records that would have demonstrated Mr.
16 Jones's mental illness and corroborated his testimony. *See, e.g.*, *Williams*, 529 U.S.
17 at 396 ("trial counsel did not fulfill their obligation to conduct a thorough
18 investigation of the defendant's background"); *Wiggins*, 539 U.S. at 524 (counsel
19 performed deficiently where they "abandoned their investigation of petitioner's
20 background after having acquired only rudimentary knowledge of his history from
21 a narrow set of sources."); *Rompilla*, 545 U.S. at 390 (counsel performed
22 deficiently where, if they "had looked in the file on [defendant's] prior conviction
23 … they would have found a range of mitigation leads that no other source had
24 opened up."); *Jennings*, 290 F.3d at 1013 (finding ineffective assistance where
25 counsel did not interview witnesses with mental state information or request
26 medical records); *Daniels*, 428 F.3d at 1204 (finding ineffective assistance where
27 counsel did not review reports describing client's mental illness); *see also* ABA
28 Guidelines 11.4.1(D)(2)(B) (counsel should "explore the existence of other

potential sources of information relating to . . . the client's mental state"), 11.4.1(D)(3)(B) (counsel should consider interviewing potential witnesses "familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s)"); Ex. 183 at 3178-80.

3) Trial counsel's deficient performance was prejudicial.

Had trial counsel provided effective representation, the jury would have had ample evidence to conclude that Mr. Jones's mental illness and substance use on the day of the crime prevented him from forming the specific intent necessary for felony murder and a special circumstance based on rape. *See* State Pet. at 152-62; Reply at 86-103.

A reasonable investigation of Mr. Jones's background before the guilt phase would have yielded substantial relevant information from many witnesses. *See generally*, section II.C.2.c., *infra*; State Pet. at 93-147; Reply at 88-92, 135-84. For example, a reasonable investigation would have furnished counsel with lay witnesses to describe Mr. Jones's history of impaired functioning, including his paranoia, delusions, hallucinations, depression, and dissociative episodes.[13] State Pet. at 92; Reply at 91-95. Numerous witnesses could have described Mr. Jones's personal and family history of physical and sexual abuse, mental impairment, and substance abuse that were relevant to his mental state during the crime. *See* State Pet. at 94-147; Reply at 88-92, 172-84. Trial counsel also would have discovered lay witnesses who could have testified to Mr. Jones's mental condition

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[13] In addition to this background, a qualified neuropsychologist with sufficient time and information to complete a full evaluation would have provided additional information and testified, inter alia, that Mr. Jones had markedly subaverage intelligence and severe neuropsychological dysfunction, and that his brain damage resulted in disinhibition regarding aggression and sexual behavior, misperception of social expectations, and impaired ability to plan, organize, or regulate his behavior. Ex. 175 at 3063-69; *see also* Ex. 125 at 2552.

deteriorating after his release from prison in 1991 and his irrational behavior leading up to the crime. *See, e.g.*, Ex. 10; Ex. 21 at 226-27; Ex. 124 at 2543-44.

Lay witnesses could have testified that prior to the capital crime, Mr. Jones was depressed, expressed suicidal thoughts, and experienced dissociative trances. Ex. 10 at 99-100; Ex. 124 at 2544. After his release from prison in 1991, Mr. Jones was unable to maintain employment and had trouble interacting with others. Ex. 10 at 97; Ex. 21 at 226-27. His uncle gave him part-time work at his transmission shop, but did not offer him full-time work because he lacked the mental capacity to repair cars and the shop employees thought he was too strange. Ex. 21 at 226-27. At times his voice was flat and his eyes had a glazed, faraway look. Ex. 10 at 97. He became increasingly worried about what others thought of him and was convinced that people were out to get him. *Id.* Mr. Jones also behaved bizarrely, recording phone conversations, speaking in a deep, strange voice, and staring with "blank scary eyes." Ex. 124 at 2544. Mr. Jones needed mental health treatment, but lacked the skills to access it. Ex. 135 at 2666.

In the days leading up to his arrest, Mr. Jones's "speech did not make sense, and he was literally talking nonsense. He was convinced that people were talking about him behind his back. . . . He looked disturbed and unfocused." Ex. 21 at 227. One acquaintance recalled that the day before his arrest, Mr. Jones "started talking about trees. He was mumbling to himself about how people were out to get him and that he did not want to go on. . . . From the look in his eyes and his babbling speech, it seemed like he was talking to someone other than me, but I was the only one there." Ex. 10 at 99-100.

Even with the limited information he received, Dr. Thomas could have explained to the jury during the guilt phase that Mr. Jones "suffered a psychotic break at the time of the incident, dissociating from external reality and rational consciousness, and responding instead only to an unconscious, internal world of memories and messages over which he had no control." Ex. 154 at 2750. Dr.

Thomas concluded that Mr. Jones suffered from a Schizoaffective Disorder that had been worsening over time. *Id.* "Outwardly, Mr. Jones was a polite, respectful, and ethical young man, loyal to friends and family. When Mr. Jones was overwhelmed by an extremely stressful or emotional situation, however, another self emerged as he experienced a severe state of dissociation." *Id.* at 2750-51. Dr. Thomas would have testified that Mr. Jones "was not in control of any of his actions during this incident; at best, he was a spectator, watching someone else act, as if watching a movie of himself. He was therefore not in a position to appreciate the moral quality of his behavior, or distinguish right from wrong in those moments." *Id.* at 2755; *see also* Ex. 178 at 3156-57.

If he had been provided the results of a reasonable investigation, Dr. Thomas would have recognized that "[s]exuality was a frequent trigger for brutal and violent domestic strife when [Mr. Jones was] little." Ex. 154 at 2757. He would have learned that Mr. Jones's mother was the victim of physical and sexual abuse, suffered from mental illness, and was tested with an IQ of 61. *Id.* at 2758-59. Background information would have revealed that the "pattern of sexual abuse and mental illness in the family is multi-generational. Members of Mr. Jones's maternal and paternal families were both victims and perpetrators of sexual abuse." *Id.* at 2759. Considering the background information that could have been discovered, Dr. Thomas stated that "Against this backdrop of domestic, sexualized violence, and in particular the demonization of his mother by his father, Mr. Jones's childhood memory of his mother in bed at a moment of great stress with Mrs. Miller makes even more sense to me, and I would have done a much better job conveying that connection to the jury." *Id.* at 2761.

Counsel's reliance on Mr. Jones's uncorroborated testimony was damning. The prosecutor argued that counsel's failure to present a guilt phase mental health expert proved that Mr. Jones did not suffer from a mental disorder:

> He only blacks out the times he can't—he has no other explanation for . . . There's nobody who can come in and say, well, I saw Mr. Jones talking to someone else. He is hearing these voices and he is responding to them. It's only his word that that is so, and you shouldn't believe it. . . . Is it possible that he is thinking about what his defense might be in this case, and that a psychiatric defense is probably his best bet[?] . . . If there was a psychiatrist to support this mental disorder, wouldn't he be here? Ask yourself that. If there was really a mental disorder that lessened the criminal culpability, wouldn't that person be here? There is none.

27 RT 3969-72; *see also* 26 RT 3905-06. As one juror observed, "The prosecution differed from the defense in that they actually presented evidence to back up their theory of what happened that night." Ex. 140 at 2695. For his part, counsel told the jury, "And I quite frankly feel some guilt because maybe I should have put on the psychiatrist." 31 RT 4681.

Importantly, although it was undisputed that Mr. Jones was the perpetrator, the jury deliberated for four days before reaching a verdict. 2 CT 247-48, 251, 377. The jury also asked about the intent instructions, indicating that it was grappling with this issue. 27 RT 4013. Thus, the additional evidence that counsel unreasonably failed to investigate and present surely would have affected the trial outcome. *See, e.g.*, *Rompilla*, 545 U.S. at 393 (holding counsel's failure to investigate and present lay and expert evidence prejudicial when case based on adequate investigation "bears no relation to the few naked pleas" that were "actually put before the jury"); *Wiggins*, 539 U.S. at 526 (ruling counsel's presentation of a "halfhearted" case was prejudicial); *Daniels*, 428 F.3d at 1205 (holding ineffective assistance prejudicial at guilt phase; had counsel undertaken a thorough investigation of Mr. Daniels's mental state, the jury would have heard evidence that he suffered from a mental disorder at the time he committed the

murders); *Jennings*, 290 F.3d at 1019 (counsel's failure to investigate and present mental state defense was prejudicial where evidence of guilt was overwhelming, yet the jury deliberated for two days).

b. Failure to investigate and defend against the rape charges.

Mr. Jones alleged that his trial counsel was unreasonable when he (1) failed to investigate or consult an expert about a defense to the rape charges; and (2) conceded that Mr. Jones was guilty of rape. Mr. Jones presented, inter alia, the following allegations and supporting facts to the state court.[14]

1) Counsel unreasonably failed to investigate or consult expert.

Felony murder and a special circumstance based on rape both require a finding that the victim was alive at the time of the sexual contact. *People v. Kelly*, 1 Cal. 4th 495, 524, 526, 3 Cal. Rptr. 2d 677 (1992); *see also People v. Cain*, 10 Cal. 4th 1, 43, 40 Cal. Rptr. 2d 481 (1995). Counsel understood that it therefore was crucial to determine whether Mr. Jones's sexual contact with the victim preceded her death. II Supp. 1 CT 83 (counsel moves to strike rape special circumstance because the victim must be alive for rape to occur). Mr. Jones could not assist counsel because he did not remember having sexual contact with Mrs. Miller. 22 RT 3336. Despite recognizing this defense, counsel explained, "I do not recall investigating whether the victim may have died prior to the sexual contact. I did not . . . have an independent medical expert explore this theory." Ex. 181 at 3161; *see also Rompilla*, 545 U.S. at 387 (ruling that trial counsel was deficient for failing to thoroughly investigate the circumstances of the case); *Duncan v. Ornoski*, 528 F.3d 1222, 1236 (9th Cir. 2008); *Baylor v. Estelle,* 94 F.3d 1321, 1324 (9th Cir.

[14] Mr. Jones provided the state court with substantial extra-record evidence supporting this subclaim, including declarations of trial counsel and a forensic pathologist (Exs. 12, 150, 177, 181); a juror declaration (Ex. 138); and the autopsy, coroner's investigator, and criminalist lab reports (Exs. 103, 171-72.)

1996); ABA Guideline 11.4.1(D)(7) (counsel should retain and use experts necessary to rebuttal of prosecution's case and to presentation of a defense).

2) Trial counsel unreasonably conceded rape.

Without reasonably investigating the available physical evidence, trial counsel believed, "Because we had no defense to the rape charge, I needed Mr. Jones to admit the rape," which "would be consistent with the scientific evidence, and make Mr. Jones more credible overall." Ex. 12 at 107; *see also* Ex. 150 at 2730. Counsel's reasoning was inconsistent with the flashback and subsequent blackout that Mr. Jones experienced, which were critical to his mental state defense. Mr. Jones testified that he had no memory of sexual contact with Mrs. Miller, "but I know it had to be me, though." 22 RT 3336. Even though Mr. Jones never testified to pre-mortem sexual contact with Mrs. Miller, the prosecutor asked him, "Do you remember raping her?" and "Did you rape her before or after you stabbed her?" 23 RT 3484. Instead of objecting, counsel conceded the rape and mischaracterized Mr. Jones's testimony, stating that "Mr. Jones . . . said, '. . . I must have forced her to have sex with me.'" 26 RT 3928; *see also id.* at 3927 ("And there is no doubt in this case Mr. Jones is guilty of the rape"). Not surprisingly, the prosecutor immediately told the jury that counsel "conceded the rape." 27 RT 3963. Counsel performed deficiently by conceding rape without investigating the physical evidence or considering that his concession was inconsistent with Mr. Jones's testimony. *See, e.g.*, *Strickland*, 466 U.S. at 690-91; *Wiggins*, 539 U.S. at 525 ("any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses"); Cal. Evid. Code §§ 400-03; *United States v. Swanson*, 943 F.2d 1070, 1071 (9th Cir. 1991) (counsel ineffective for conceding client's guilt during closing argument).

3) Trial counsel's deficient performance was prejudicial.

The prosecution theorized that Mr. Jones bound the victim to prevent her

from struggling, raped her, and then killed her. 26 RT 3902-03. The state of the victim's clothing, her bindings, and her rapid death, instead created a reasonable doubt whether she experienced pre-mortem sexual contact. A qualified expert would have so testified. *See generally* Ex. 177 (medical examiner, Dr. Thomas Rogers, describing the evidence as most consistent with post-mortem sexual penetration and binding). Furthermore, counsel had the police, autopsy, and coroner's investigator's reports and crime scene photos with this information, and he easily could have consulted an expert. 1 Supp. III-CT 3-4, 8; Ex. 171 at 3031-34, 3046; Ex. 103 at 2125.

Mr. Jones provided the state court with a detailed description of the evidence supporting a defense that sexual contact occurred post-mortem. *See* State Pet. at 86-90; Reply at 76-80. Indeed, counsel regarded this evidence of post-mortem sexual contact as compatible with his psychiatric defense: "If I had the findings of Dr. Rogers, which offered a reasonable possibility that the victim was dead at the time of the sexual contact, I could have presented this evidence, which was also compatible with my psychiatric defense, to defend against the rape and felony-murder rape charges and the special circumstance rape allegation." Ex. 181 at 3161. If he had, it is reasonably probable that Mr. Jones would have received a more favorable outcome. Mr. Jones also was presumptively prejudiced by counsel conceding the rape during his closing argument, which the prosecutor immediately emphasized. 26 RT 3927-28; 27 RT 3963; *see also* Ex. 138 at 2690 (juror stating, "[W]e heard nothing about the rape charge except that he did it").

Counsel performed ineffectively because he had at his "fingertips information that could have undermined the prosecution's case" that Mrs. Miller was raped, yet chose not to develop and use this evidence at trial. *Rompilla*, 545 U.S. at 388; *see also Lord v. Wood*, 184 F.3d 1083, 1096 (9th Cir. 1999). Moreover, the Ninth Circuit has held that where, as here, counsel concedes his client's guilt during closing argument, counsel violates the right to due process by

"abandon[ing] his client at a critical stage of the proceedings" and "caus[ing] a breakdown in our adversarial system of justice." *Swanson*, 943 F.3d at 1071, 1073, 1075. Under *Swanson*, this form of egregious ineffectiveness triggers the *Cronic* exception to *Strickland*, which presumes prejudice due to a breakdown in the adversarial process. *Id*. at 1072 (citing *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)).

c. Failure to investigate and defend against the prior conviction.

The prosecutor sought to admit Mr. Jones's 1986 conviction for the rape of Doretha Harris, the mother of his ex-girlfriend. The prosecutor moved to introduce the Harris prior under California Evidence Code section 1101(b) to establish Mr. Jones's identity, intent, and common plan or scheme for the rape charges underlying the felony murder and special circumstances. 1 Supp. II CT 1-9. In state habeas corpus proceedings, Mr. Jones alleged that his trial counsel was ineffective in defending against the admission of the Harris crime at the guilt phase by failing to (1) investigate the circumstances of the crime; (2) oppose its admission during the guilt phase of trial; and (3) mitigate the evidence once it was presented. State Pet. at 158-59; Reply at 105-06. In support of this claim, Mr. Jones presented, inter alia, the following allegations and supporting facts to the state court.[15]

1) Trial counsel unreasonably failed to investigate.

Counsel acknowledged that he had "no strategic reason" for his failure to interview lay witnesses who could have supported mental health and mitigation themes, including those with knowledge of the Harris crime. Ex. 150 at 2732-33.

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[15] Mr. Jones provided the state court with substantial extra-record evidence supporting this subclaim, including: declarations of his trial counsel, habeas psychiatrist, and habeas neuropsychologist (Exs. 12, 150, 175, 178); the Harris crime police report and court file (Exs. 104, 136); and declarations of lay witnesses who observed his mental deterioration before the crime (Exs. 8, 14, 21).

Forgoing this investigation fell well below the standard of care and was plainly unreasonable. Ex. 183 at 3178, 3185; *see Rompilla*, 545 U.S. at 383 (failure to investigate prior conviction was deficient performance); ABA Guidelines 11.4.1(D)(2)(B), (D)(2)(C), & (D)(3)(B) (counsel should investigate client's prior crimes, client's mental state, and lay witnesses with mitigating information).

2) Trial counsel unreasonably withdrew his opposition to the admission of the prior crime evidence.

In pretrial proceedings, the judge deferred ruling on the admissibility of the Harris prior. The trial court, however, prohibited the prosecutor from referring to the prior in his opening statement and noted, "I don't believe you can use the [Harris crime] to show identity, common plan, or design or intent." 1 RT 689. When the trial court later revisited the admissibility of the prior, it ruled that it came within the exception to section 1101(b), but deferred balancing its prejudicial effect and probative value until further development of the evidence at trial. 14 RT 2378-79. The court expressed "some real concerns obviously about a prior conviction coming in . . . that happened several years ago." 14 RT 2379.

When first seeking to admit the Harris prior, the prosecutor stated that the foremost reason to admit it was to prove identity. 1 RT 686-87. By the time the trial court revisited the issue, Mr. Jones's identity was undisputed: the court had ruled admissible the DNA evidence identifying Mr. Jones as the perpetrator. *Id.*; *see also People v. Ewoldt*, 7 Cal. 4th 380, 406, 867 P.2d 757 (1994) (if perpetrator's identity is undisputed, prior crime evidence is cumulative: its prejudicial effect will outweigh its probative value); *Guerrero*, 16 Cal. 3d at 724.

The prosecution had also argued that it needed the prior crime evidence to prove that Mrs. Miller was raped, but stated that if the defense conceded the rape, admission of the Harris prior would be unnecessary. 1 RT 679-81. By the time the trial court reconsidered introduction of the Harris prior, counsel had settled on this concession, explaining that, "I did not envision a defense to the rape charge and the

rape felony-murder charge once the DNA evidence was admitted." Ex. 12 at 106, 107; *see also* Ex. 150 at 2730 ("I believed the court's ruling on this [DNA] evidence foreclosed any other possible defense."); 1 RT 696.

Despite these powerful reasons not to admit the Harris prior, and the trial court's hesitance to admit it, trial counsel withdrew his opposition and the prior crime was admitted on the critical issue of intent underlying the felony murder and special circumstance charges. 14 RT 2382-83. Counsel explained, "I knew that Mr. Jones's last prior conviction for raping Mrs. Harris was an evidentiary time bomb . . . When [the pretrial judge] deferred his ruling, I withdrew my objection to admission . . . because the evidence would have been admissible at the penalty phase and I needed to plan for the jury hearing it." Ex. 12 at 108. Trial counsel's actions were unreasonable not only because of the state of the evidence, but also because counsel had not conducted investigation into the crime and was unprepared to counter it with evidence that mitigated its impact. *See, e.g.*, Ex. 150 at 2732-33.

3) Trial counsel unreasonably failed to mitigate the details of the prior crime.

At trial, counsel addressed the Harris prior through direct examination of Mr. Jones and cross-examination of Mrs. Harris, both of which elicited few mitigating details. 20 RT 3175-79 (Harris cross-examination, in which counsel elicits that Mr. Jones broke into the house, was very upset, and asked Mrs. Harris to kill him after the assault); 22 RT 3289-91, 3294, 3370-72 (Jones direct examination, in which counsel primarily elicits from Mr. Jones that the "incident . . . did occur" and he pled guilty to "those charges," was incarcerated, and was released on parole); *see also* 24 RT 3600, 3602. Counsel also incorrectly argued that Mr. Jones went to the Harris household intending to burglarize Mrs. Harris. 26 RT 3925. Instead, Mr. Jones had testified that he entered the house to talk to the grandmother of his son. 22 RT 3371. Counsel's erroneous concession allowed the prosecutor to argue that

1 even Mr. Jones's attorney thought he was lying about the Harris prior. 27 RT 3976.

2 **4) Trial counsel's deficient performance was prejudicial.**

3 Had trial counsel conducted a reasonable investigation, he would have
4 learned that prior to the Harris crime, Mr. Jones was homeless, his mental health
5 was deteriorating, and his drug use was increasing. Ex. 8 at 88; Ex. 14 at 136; *see*
6 *also* section II.C.2.c, *infra*. Mr. Jones went to Mrs. Harris's home because she was
7 the mother of his ex-girlfriend, and his paranoia led him to believe that they would
8 never allow him to see his son again. Ex. 178 at 3147. Prior to the incident, Mr.
9 Jones used LSD for the first time; he also used alcohol, marijuana, and cocaine.
10 Ex. 104 at 2179; 22 RT 3294. He "felt an overwhelming force driving him to go
11 into the house" and felt that he was watching a movie where he could view but not
12 control his actions. He entered the residence unarmed and in a trance-like state,
13 hearing voices. Ex. 178 at 3147, 3154-55. He smashed and crawled through a
14 bedroom window in the early morning. 20 RT 3162-63. Mrs. Harris was in the
15 kitchen, preparing her lunch for later that day. Ex. 136 at 2669. She picked up a
16 nine-inch kitchen knife, which she was holding when she encountered Mr. Jones.
17 Ex. 178 at 3147. Due to his deteriorating mental state, paranoia, significant drug
18 use, and the knife, Mr. Jones felt that his life was threatened, dissociated, and
19 engaged in a disjointed assault on Mrs. Harris. 20 RT 3163-69; *see also* Ex. 178 at
20 3152, 3155-56 (Mr. Jones's dissociative episodes are triggered by stressful events
21 he perceives as threatening).

22 After the assault, Mr. Jones picked up the knife Mrs. Harris had dropped,
23 pressed it to his chest, and begged her to kill him. Ex. 136 at 2670. He fell asleep
24 on her bed instead of leaving. *Id.*; 20 RT 3169. When he woke up, he sat with her
25 and cried, looking at a picture of his ex-girlfriend, son, and himself. 20 RT 3171.
26 He was remorseful about her injuries, which he cleaned with alcohol and cotton. 1
27 Supp. II CT 19. Mr. Jones's jail record and a 1986 psychiatric report prepared after
28 this crime reflect that an officer investigating the crime believed Mr. Jones was

mentally ill; Mr. Jones did not know what motivated him to commit the Harris crime and he described blank spells and engaging in activities without knowing what he was doing. Ex. 87; Ex. 104 at 2179-85. Had counsel conducted a reasonable investigation, he could have mitigated the Harris prior as the chaotic, disturbed result of Mr. Jones's paranoia, psychosis, and fear-induced dissociation, which demonstrated his inability to plan. Ex. 178 at 3154-56; 30 RT 4428, 4442; Ex. 154 at 2755. This would have been consistent with the mental state defense, which described how the capital crime was similarly the result of Mr. Jones's mental illness, substance use, and dissociative episodes.

Moreover, the prosecutor seized on counsel's errors to use evidence of the Harris prior as improper propensity evidence. The prosecutor repeatedly argued that the jury should infer that Mrs. Miller was raped due to the mere existence of the Harris prior. 26 RT 3902; 27 RT 3977, 3991. The prosecutor asked the jury during closing argument "to accept that [Mr. Jones] formed the specific intent to rape the same way he did it with Mrs. Harris, and to come back with first degree murder." 27 RT 3991-92; *see also id.* at 3978, 3976 (prosecutor arguing, "[P]eople who do similar acts often harbor similar intents when they commit those acts.").

Under these circumstances, it is evident that counsel's failure to seek exclusion of the Harris prior or mitigate it prejudiced Mr. Jones. *Jones*, 13 Cal. 4th at 581-82 (counsel ineffective for allowing the prosecution to introduce evidence of his client's involvement in an unrelated shooting incident). Counsel's sole defense to felony murder and the special circumstance was Mr. Jones's inability to form the specific intent for rape. Allowing the jury to hear about the Harris crime at the guilt phase without explaining Mr. Jones's mental impairment fatally tipped the balance towards conviction. *See, e.g.*, *Sears v. Upton*, 130 S. Ct. 3259, 3264, 177 L. Ed. 2d 1025 (2010) (deficient performance where counsel failed to introduce evidence of petitioner's mental functioning, because it "might well have helped the jury understand" petitioner and his acts); *Rompilla*, 545 U.S. at 385

(trial counsel was obligated, inter alia, to "discover any mitigating evidence" about the prior crime); *Crotts v. Smith*, 73 F.3d 861, 866 (9th Cir. 1996).

3. Respondent Disputed Key Facts in State Court.

The state's Informal Response to Mr. Jones's state habeas petition raised numerous factual disputes as to Mr. Jones's allegations on *Strickland*'s deficient performance and prejudice prongs, but did not substantiate those disputes with any documentary or other factual support. *See* Inf. Resp. at 8-26.

First, on direct appeal and state habeas, Respondent contended that there was a "plausible tactical reason" that counsel did not call Dr. Thomas to testify at the guilt phase: the prosecutor could have elicited evidence from Dr. Thomas about the rape of Kim Jackson and early statements that Mr. Jones made about consensual sex with Mrs. Miller, which would have weakened Mr. Jones's defense by suggesting it was fabricated. Respondent contended that Mr. Jones was not prejudiced by counsel's failure to call Dr. Thomas. Inf. Resp. at 15; Resp. Brief at 95. Respondent also argued that Mr. Jones was not prejudiced by counsel's failure to present lay testimony about his mental illness symptoms because the trial court would have excluded that testimony unless counsel presented an expert. Inf. Resp. at 14-15, 18.

Second, Respondent contended that counsel's concession regarding the rape charge was reasonable in light of Mr. Jones's testimony and the DNA evidence linking Mr. Jones to the crime. *Id.* at 10. Respondent asserted that counsel may have determined that there was insufficient evidence to support a post-mortem sexual contact defense. *Id.* at 11. Respondent engaged in rampant speculation in proposing a theory of pre-mortem rape based on the physical evidence—an argument that was not raised at trial or established in post-conviction proceedings with any expert or other factual support. *Id.* at 12-13. Finally, Respondent contended, in conclusory fashion, that counsel made a reasonable strategic decision not to object to the introduction of the Harris prior during the guilt phase. *Id.* at 16.

4. The California Supreme Court's Decision.

In 2009, the California Supreme Court summarily denied Mr. Jones's habeas claim for failing to state a prima facie case for relief on any issue raised. The state court therefore did not require Respondent to respond formally to Mr. Jones's allegations or present evidence to support Respondent's factual contentions. The state court ruling also denied Mr. Jones the opportunity to present evidence, subpoena witnesses, and prove his allegations. *See* section I.B.2, *supra*.

The state court had previously rejected two of Mr. Jones's ineffectiveness sub-claims on direct appeal. *People v. Jones*, 29 Cal. 4th 1229 (2003). In the first appellate claim, Mr. Jones alleged that his counsel ineffectively failed to call Dr. Thomas at the guilt phase to testify that Mr. Jones could not form the specific intent to rape Mrs. Miller. *Id*. at 1254. The state court concluded that there was no deficient performance. First, the state court ruled that Dr. Thomas's diagnosis of Mr. Jones relied, inter alia, upon information in Mr. Jones's police report that he had raped and threatened to kill Ms. Jackson. The state court speculated that counsel could have decided that the prosecution would have been entitled to cross-examine Dr. Thomas about the foundation for his opinion and that the benefit of introducing Dr. Thomas's testimony was outweighed by the damage from introducing the Jackson crime at the guilt phase. *Id*. at 1254-55. The state court also speculated that counsel may not have called Dr. Thomas to avoid revealing that Mr. Jones initially told Dr. Thomas that he had consensual sex with Mrs. Miller. *Id*. at 1255.

In the second appellate claim, Mr. Jones alleged that counsel ineffectively withdrew his objection to admitting the Harris prior. *Id*. at 1255. The state court again ruled that counsel did not perform deficiently. The court credited as tactical counsel's statement on the record: if the jury first heard about the prior crime during the penalty phase, it might have a devastating effect on counsel's chances of securing a sentence of life without the possibility of parole. *Id.*

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

Although Mr. Jones must show only one basis upon which either section 2254(1) or (d)(2) is satisfied, multiple bases exist. First, the state court unreasonably applied *Strickland* under section 2254(d)(1) by denying Mr. Jones's habeas claim as failing to plead a prima facie case for relief and denying him a hearing and rejecting the ineffectiveness sub-claims on direct appeal. Second, the state court reviewed Mr. Jones's ineffectiveness claim according to legal standards contrary to *Strickland* under section 2254(d)(1). Third, alternatively, the state court unreasonably determined the facts under section 2254(d)(2) by finding facts and resolving disputes without an adjudicative process.

a. The state court unreasonably applied *Strickland* under section 2254(d)(1).

In state habeas proceedings, Mr. Jones raised numerous allegations about counsel's guilt phase ineffectiveness that were not raised on appeal. As detailed in section II.A.2., *supra*, these included: (1) failure to investigate Mr. Jones's mental state defense; (2) failure to support the defense with lay witnesses; (3) failure to support the defense with a guilt phase expert other than Dr. Thomas; (4) unreasonable exclusive reliance on Mr. Jones's testimony for the defense; and (5) failure to investigate and defend against the rape charges. Mr. Jones also made allegations about the Harris prior that were not raised on appeal, including counsel (1) failing to investigate the prior; (2) acting unreasonably by withdrawing his objection; and (3) failing to mitigate the crime once introduced. Additional habeas allegations concerned counsel's failure to retain Dr. Thomas in a timely fashion and present his testimony at the guilt phase.

Taken as true, Mr. Jones's allegations established a prima facie case that trial counsel's performance was deficient in a variety of ways: (1) though counsel settled on a mental state defense, he did not investigate it, consult with an expert about it in a timely fashion, or present lay and expert testimony to support it, *see*

section II.A.2.a., *supra*; (2) though rape charges formed the basis for the first-degree murder charge and the special circumstance, counsel did not investigate the physical circumstances of the rape, consult with an expert, or defend against it, *see* section II.A.2.b., *supra*; and (3) though counsel had conceded that Mrs. Miller was raped, he withdrew his objection to the introduction of the Harris prior to prove that rape occurred, did not investigate the Harris prior, and had no plan for effectively mitigating it once it was introduced, *see* section II.A.2.c., *supra.*

Mr. Jones also made a prima facie showing that he was prejudiced by counsel's deficient performance. *See, e.g.*, Sections II.A.2.a.3, b.3, c.5, *supra*. The specific allegations of prejudice in this case also must be viewed in the context of the jury deliberations: in a case in which Mr. Jones's identity as the perpetrator was not disputed, the jury deliberated for four days before arriving at a guilt verdict and raised questions about the specific intent instructions during deliberations, which was the key issue before them. *See, e.g.*, section II.A.2.a.3.

In light of this pleading and the extensive supporting facts, the state court's ruling that Mr. Jones failed to plead *any* prima facie entitlement to relief is an objectively unreasonable application of *Strickland*. *See, e.g.*, *Wigginsh*, 539 U.S. at 527 (holding that state court application of *Strickland* was unreasonable when it did not conduct an assessment of whether counsel's limited investigation was reasonable); *Mosley v. Atchison*, 689 F.3d 838, 848 (7th Cir. 2012) (holding that state court summary ruling on limited record was unreasonable application of *Strickland*); *Ballinger*, 844 F. Supp. 2d at 867 (same); *Brumfield v. Cain*, 854 F. Supp. 2d 366, 376-77 (2012) (same, in *Atkins* context). The state court's ruling also was contrary to clearly established federal law requiring a state court to provide fair adjudicative procedures for adequately presented federal claims. *See* section I.B., *supra*.

On direct appeal, the California Supreme Court's opinion was objectively unreasonable for resolving facts about counsel's performance that did not appear in

the record and failing to assess key elements of the claim. The state court dismissed Mr. Jones's claim that counsel was unreasonable for withdrawing his objection to the introduction of the Harris prior, due to counsel's statement that it was better for the jury to hear about the prior before the penalty phase. *Jones*, 29 Cal. 4th at 1255. The state court credited this statement as a reasonable strategic decision, without considering all the circumstances of the case, assessing whether the decision was the result of reasonable investigation, determining whether the failure to investigate before making the decision was reasonable, and considering whether counsel's actions were in keeping with prevailing professional norms. *See* section II.A.2.c., *supra*. This ruling was objectively unreasonable under *Strickland*. *See. e.g., Wiggins*, 539 U.S. at 527 (holding state court unreasonably applied *Strickland* when it assumed counsel's decision was reasonable without assessing whether investigation underlying the decision demonstrated reasonable professional judgment); *Strickland*, 466 U.S. at 688 (ruling that "the performance inquiry must be whether counsel's assistance was reasonable considering *all the circumstances*") (emphasis added).

On appeal, the state court also speculated that counsel failed to call Dr. Thomas during the guilt phase because of a reasonable tactical decision to avoid the possibility of the jury hearing about the Jackson prior. 29 Cal. 4th at 1254-55. There was no record evidence of counsel's reasoning other than his statement to the jury that he felt guilty for not presenting a guilt phase mental health expert. 31 RT 4681. Also, the state court's speculative reasoning was internally inconsistent: the court ruled that it was reasonable for counsel to agree to introduction of the Harris prior and also reasonable for counsel to make decisions on the basis of trying to keep out prior crimes. *Id*. at 1255. It was unreasonable for the state court to invent and ratify a trial "strategy" that counsel never acknowledged and in fact contradicted on the record. *See Plummer v. Jackson*, No. 09-2258, 2012 WL 3216779, *5-7 (6th Cir. Aug. 8, 2012) (when the state court's factual reasons for its

conclusion that counsel did not perform deficiently lack adequate record support, the state court unreasonably applied *Strickland* under § 2254(d)(1)). The state court also unreasonably credited counsel's single statement as a reasonable trial strategy, again without assessing whether the decision was the result of reasonable investigation or was in keeping with prevailing professional norms. *See* section II.A.2.a.; Ex. 150 at 2732 (trial counsel admitting that he did not have a strategic reason for failing to present expert testimony during the guilt phase).[16]

b. The state court's prejudice standards are contrary to *Strickland* under section 2254(d)(1).

Strickland prejudice requires a single showing from petitioner: a reasonable probability that counsel's ineffective assistance affected the outcome of the proceeding. 466 U.S. at 496. In *Williams*, the Supreme Court addressed the application of section 2254(d)(1) when the state court interpreted *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993), to require a second *Strickland* prejudice element: that counsel's ineffectiveness resulted in a fundamentally unfair proceeding. 529 U.S. at 393-94, 397, 413-14. The Court held that state court's analysis was contrary to *Strickland*, and "inasmuch as the [state court] relied on the inapplicable exception recognized in *Lockhart*, an 'unreasonable application of' the clear law as established by this Court." *Id.* at 397.

Like the state court in *Williams*, the California Supreme Court holds that the *Strickland* prejudice prong "is not solely one of outcome determination," but

[16] The state court also speculated that trial counsel did not want Dr. Thomas to testify to avoid cross-examination about Mr. Jones initially claiming that he had consensual sex with Mrs. Miller. *Jones*, 29 Cal. 4th at 1264. If Dr. Thomas had testified, he could have explained that Mr. Jones's initial belief was further evidence of his delusional thinking and mental illness—testimony that would have strengthened Mr. Jones's mental state defense. Ex. 154 at 2751.

requires inquiry into whether counsel's deficient performance rendered the proceeding "fundamentally unfair." *In re Harris*, 5 Cal. 4th 813, 833, 21 Cal. Rptr. 2d 373 (1993). In subsequent cases, the state court has invoked *Fretwell* to deny relief on ineffectiveness claims and has consistently applied this incorrect prejudice standard at least through 2010. *See, e.g.*, *In re Valdez*, 49 Cal. 4th 715, 729, 111 Cal. Rptr. 3d 647 (2010); *In re Hardy*, 41 Cal. 4th 977, 1019, 63 Cal. Rptr. 3d 845 (2007); *In re Cudjo*, 20 Cal. 4th 673, 687, 85 Cal. Rptr. 2d 436 (1999); *In re Visciotti*, 14 Cal. 4th 325, 352, 58 Cal. Rptr. 2d 801 (1996); *In re Avena*, 12 Cal. 4th 694, 721-22, 49 Cal. Rptr. 2d 413 (1996). Section 2254(d)(1) therefore is satisfied, because this erroneous standard was in effect when the state court denied Mr. Jones's direct appeal in March 2003 and his state habeas petition in March 2009. *See Goodman v. Bertrand*, 467 F.3d 1022, 1027-28 (7th Cir. 2006) (holding that section 2254(d)(1) was satisfied where state court relied on *Fretwell* to deny petitioner's ineffectiveness claim).

In addition to erroneously requiring an additional prejudice showing, the California Supreme Court imposes another hurdle on all claims of constitutional error in habeas proceedings, including ineffectiveness claims: all habeas petitioners must overcome a presumption of the "truth, accuracy, and fairness of the conviction and sentence." *People v. Duvall*, 9 Cal. 4th 464, 474, 476 n.3, 37 Cal. Rptr. 2d 259 (1995). The principle that criminal judgments are presumed final and fairly obtained on collateral review, however, does not apply to ineffectiveness claims. *Strickland*, 466 U.S. at 697-98 (rejecting usual presumption of finality and ruling that "no special standards ought to apply to ineffectiveness claims made in habeas proceedings"). Mr. Jones satisfies section 2254(d)(1) because, contrary to *Strickland*'s rejection of additional presumptions, the state court applied *Duvall*'s fairness presumption to habeas petitions raising ineffectiveness claims both before and after its summary denial of Mr. Jones's claim. *See, e.g.*, *In re Crew*, 52 Cal. 4th 126, 149-50, 127 Cal. Rptr. 3d 285 (2011); *In re Avena*, 12 Cal. 4th at 710.

Finally, Mr. Jones also satisfies section 2254(d)(1) because the state court's ineffectiveness prejudice rulings are contrary to *Strickland*'s mandate that a court hearing such a claim "must consider the totality of the evidence before the judge or jury." 466 U.S. at 695. Where, as here, a petitioner identifies multiple instances of deficient performance, the California Supreme Court considers prejudice separately for each instance rather than considering prejudice from all instances of deficient performance cumulatively. *In re Robbins*, 18 Cal. 4th 770, 820-21, 77 Cal. Rptr. 2d 153 (1998) (Kennard, J., dissenting) (explaining the state court's practice and concluding that the court should consider prejudice cumulatively).

c. The state court unreasonably determined the facts under section 2254(d)(2).

Although the state court was obligated to take Mr. Jones's allegations as true, the state court may have made factual findings to decide that counsel's actions, omissions, and decisions were reasonable, or that they were not prejudicial, thus crediting Respondent's informal responses to the allegations. *See* section II.A.3., *supra*. Resolution of Mr. Jones's claim in this manner at the pleading stage is unreasonable under section 2254(d)(2), and is a violation of basic rights to confront and rebut evidence that formed the basis for a decision against him. *See generally* Section I.B., *supra; see also Plummer v. Jackson*, 2012 WL 3216779 at *9 (state court unreasonably denied petitioner's ineffectiveness claim without an evidentiary hearing despite the parties' factual disputes concerning counsel's performance).

An evidentiary hearing is usually required to adjudicate ineffectiveness claims—to determine whether counsel acted strategically or performed deficiently and prejudicially. *See, e.g.*, *Ballinger*, 844 F. Supp. 2d at 867. Accordingly, the California Supreme Court's rejection of a prima facie ineffectiveness claim without fact-finding is an unreasonable determination of the facts under § 2254(d)(2), because the state court should have made a finding of fact but neglected to do so.

Hurles, 650 F.3d at 1312 (§ 2254(d)(2) satisfied where state court made factual findings without an evidentiary hearing); *see also Fanaro v. Pineda*, No. 2:10-CV-1002, 2012 WL 1854313, *3 (S.D. Oh. May 21, 2012); *Williams*, 859 F. Supp. 2d at 1160. The state court's summary denial in this case is similarly unreasonable.

B. The State Withheld Material Exculpatory Evidence.

Mr. Jones presented the California Supreme Court with a prima facie showing that the state withheld material, exculpatory evidence during his trial in violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).[17] He alleged that the prosecution did not disclose two forms of favorable evidence material to a central issue in the case: that Mr. Jones's long-standing mental impairments prevented him from forming the necessary intent for the charged felony murder and special circumstances. The withheld evidence included: (1) a 1984 emergency room report documenting Mr. Jones's pre-existing mental illness; and (2) jail medical records describing the circumstances under which jail medical personnel legitimately prescribed Mr. Jones with antipsychotic medication shortly after his arrest for the capital crime. This evidence would have powerfully countered the prosecution's repeated insistence that Mr. Jones fabricated his mental state defense, falsely testified that he blacked out during his encounter with Mrs. Miller, and faked mental illness to receive antipsychotic medication in jail.

1. Controlling U.S. Supreme Court Precedent.

Constitutional due process is violated where favorable exculpatory or impeachment evidence was suppressed or undisclosed by the state and the

[17] This *Brady* claim was Claim Seven in state court and is Claim Three in federal court. State Pet. at 262; Supplemental Allegations in Support of Petition for Writ of Habeas Corpus, NOL at D.1. ("Supp. Pet.") at 5-10; Fed. Pet. at 98-107.

evidence was material, *i.e.*, the defendant was prejudiced by its absence. *See, e.g.*, *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); *Giglio v. United States*, 405 U.S. 150, 155, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); *Brady*, 373 U.S. at 87. If the evidence is known to any member of the prosecutor's office, that knowledge is attributed to the government. *Giglio*, 405 U.S. at 154. The prosecution also has a duty to ascertain and divulge favorable evidence known to other governmental entities, including the police. *Kyles v. Whitley*, 514 U.S. 419, 432-33, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

A *Brady* violation exists whether the prosecution acted in good or bad faith and whether or not the defense requested the evidence. *See, e.g.*, *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); *Brady*, 373 U.S. at 87. Critically, the prosecution must disclose favorable evidence in time to be of value to the accused. *United States v. Agurs*, 427 U.S. 97, 107, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), *overruled on other grounds by United States v. Bagley*, 473 U.S. 667 (1985) (constitutional right to fair trial obligates the prosecutor to decide what evidence must be disclosed prior to trial, and perhaps during trial); *United States v. Davenport*, 753 F.2d 1460, 1462 (9th Cir. 1985).

Favorable evidence is "material" where there is a reasonable probability that it would have affected the jury's determination. *See, e.g.*, *Kyles*, 514 U.S. at 434. As the Court in *Kyles* explained, materiality "is not a sufficiency of evidence test." *Id*. "The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict;" the materiality inquiry considers whether "favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id*. at 435; *see also Bagley*, 473 U.S. at 676, 678, 682.

"[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Agurs*, 427 U.S. at 113. The only *Brady* "prejudice" analysis is materiality: once

suppression of material, exculpatory evidence is established, it is not subject to harmless error analysis. *Kyles*, 514 U.S. at 436. *Brady* errors are considered cumulatively: if multiple pieces of evidence taken cumulatively would lead to a reasonable probability of a different outcome, then the prosecution must disclose each of them. *Id.* at 437.

2. Prima Facie Allegations Before the State Court.

Mr. Jones demonstrated to the California Supreme Court that the withheld 1984 medical record and jail medical records were favorable and material to his mental state defense during the guilt phase and to his case in mitigation during the penalty phase of trial. State Pet. at 262-66; Supp. Pet. at 5-10.

a. The 1984 medical record.

On May 29, 1984, at 12:30 a.m., police arrested Mr. Jones as a suspect in the sexual assault of Kim Jackson. Ex. 179. During the booking process, the police observed that Mr. Jones exhibited severe psychiatric symptoms requiring immediate medical attention and transported him to the Beverly Hills Medical Center emergency room. Dr. Strom examined Mr. Jones at 1:50 a.m. and prepared a medical report ("Report") that noted his history of "transient memory loss" and diagnosed him as suffering from "transient memory lapse." Ex. 180.

1) The Report was favorable to Mr. Jones.

At the guilt phase of his capital trial, Mr. Jones testified that during his encounter with Mrs. Miller, "I kind of slipped back into my childhood. In my mind, I was visioning when I was little, when I walked into a room with my mother who was with another man that wasn't my father." 22 RT 3335. Mr. Jones did not remember killing Mrs. Miller or having sexual contact with her. 22 RT 3335-36. Based on this evidence, trial counsel argued that Mr. Jones's lack of memory was a symptom of his mental illness that prevented him from forming the specific intent to rape Mrs. Miller. 26 RT 3928. The Report would have been favorable to demonstrate that Mr. Jones previously experienced a dissociative

episode and arresting officials recognized his need for emergency psychiatric care. It also would have alerted trial counsel to the need to investigate the specific mental health issues described in the Report and to explore the possibility of calling Dr. Strom as a witness. Supp. Pet. at 8-10; Reply to the Informal Response, NOL at D.5. ("Supp. Reply") at 9-10.

At the penalty phase, the prosecution introduced the assault of Kim Jackson as aggravating evidence. 28 RT 4175. Although Mr. Jones was referred for mental health care following the incident, the prosecution argued that Mr. Jones "didn't really have a problem, and … [the mental health treatment] was something that he went along with in order to get a reduced sentence." 31 RT 4640-41. The Report, and evidence developed in response to it, would have mitigated the circumstances of the crime and rebutted the prosecution's argument. Furthermore, the defense expert, Dr. Thomas, testified that Mr. Jones suffered from a dissociative disorder, dissociated during his encounter with Mrs. Miller, and was unaware of and unable to control his actions. 30 RT 4435. Mr. Jones's documented behavior during the Jackson crime was consistent with Dr. Thomas's conclusions presented in the penalty phase. 30 RT 4414, 4435.

The Report would have corroborated Mr. Jones's testimony describing symptoms of his mental illness, including memory loss, thus supporting both his guilt phase mental state defense and Dr. Thomas's penalty phase testimony. *See Brady*, 373 U.S. at 84, 87-91 (finding seminal *Brady* violation where prosecution suppressed extra-record evidence that corroborated defendant's testimony about his actions during the crime).

2) The state did not disclose the Report to trial counsel.

The prosecution did not disclose Dr. Strom's Report to the defense. The prosecution first disclosed the Report in August 2004, during post-conviction discovery proceedings pursuant to Penal Code section 1054.9. Supp. Pet. at 2, 10. Until that time, the Report had been among documents in the District Attorney's

file that were labeled as privileged and not previously provided to counsel. *Id.* at 7. Trial counsel explained that if he had received a copy of the Report at the time of trial, it would have been in his file and among the materials he provided to Dr. Thomas. However, the Report was in neither location. Ex. 181 at 3161-62.

3) The Report was material.

During the guilt phase, there was no evidence presented to corroborate Mr. Jones's testimony that he experienced a blackout or flashback during the crime. As a result, the prosecution asked the jury: "What evidence is there here of a mental disorder other than the defendant saying I flashed back to my childhood?" 26 RT 3905; *see also* 27 RT 3969 (prosecution arguing that "He only blacks out the times that he . . . has no other explanation for."). The prosecution urged the jury to believe that "a defense story has been concocted in order—in the hopes that you will give him some lesser offense." 26 RT 3906. The jury struggled to reach a verdict—guilt phase deliberations lasted for four days, and the jury submitted a question to the judge on specific intent, 2 CT 247-48, 251, 377—and the resolution of this mental state question was "the crux of the defense to the charged crimes." Ex. 12 at 107; *see also* section II.A.2.a, *supra* (describing the centrality of mental state issues to the case).

Given the prosecutor's repeated assertion that Mr. Jones's mental health symptoms were contrived, *see* 26 RT 3905-06; 27 RT 3969, 3971-72; 31 RT 4645, 4652-53, a Report documenting the long-standing nature of his mental illness and "transient memory lapse[s]" was critical, Ex. 180; *see also* Supp. Reply at 9-10. The Report existed because trained law enforcement officers reacted to address his severe psychiatric symptoms. Supp. Reply at 10. It would have further explained and lent credibility to Mr. Jones's testimony. Timely disclosure of the Report also would have alerted trial counsel to the need to investigate Mr. Jones's blackouts, including by consulting an expert. A qualified and adequately prepared expert alerted to Mr. Jones's need for emergency psychiatric care following his 1984

arrest and prior diagnosis of transient memory loss would have been able to explain to the jury the basis and effect of Mr. Jones's long-standing dissociative disorder. *See* Ex. 178 at 3156-57; *see also* section II.A.2.a.3, *supra*. Counsel also could have interviewed Dr. Strom and presented his testimony in conjunction with the Report. Supp. Reply at 10. Indeed, during state habeas proceedings, trial counsel recognized that the Report was "strong evidence, which would have supported my guilt phase defense," Ex. 181 at 3162, stating that "[i]f I had possessed this medical record, I would have introduced it into evidence and used it in my direct examinations of Mr. Jones and Dr. Claudewell Thomas," *id.* at 3163.

Especially given the importance of the mental state evidence, the prosecutor's attacks on Mr. Jones's credibility, and the jury's lengthy guilt phase deliberations, it is impossible to "be confident that the jury's verdict would have been the same" had the prosecution disclosed the corroborating Report.[18] *Kyles*, 514 U.S. at 453; *see also Agurs*, 427 U.S. at 113 (where verdict is of questionable validity, even "evidence of relatively minor importance" could create that reasonable probability); c*f. Napue v. Illinois*, 360 U.S. at 269 ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence[.]"); *Jackson v. Brown*, 513 F.3d 1057, 1070, 1075-79 (9th Cir. 2008) (granting penalty phase relief where undisclosed *Brady* evidence was material to capital special circumstances that required a specific intent showing).

[18] Withholding the Report allowed the prosecution repeatedly and falsely to assert in both cross-examination and argument that Mr. Jones was lying. Unlike a *Brady* violation, misconduct involving a prosecutor's presentation of false evidence requires a showing that the prosecution *knowingly* engaged in deceit. *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). A reasonable inference about the Report's location -- in a file marked "privileged" -- is that the prosecutor recognized its importance and took steps to ensure its non-disclosure. As Mr. Jones requested in state court, he needed access to discovery procedures to further develop and present this aspect of his claim.

Accordingly, there is a reasonable probability of a different outcome, sufficient to undermine confidence in the trial's outcome.[19] *See, e.g.*, *Bagley*, 473 U.S. at 678.

During the penalty phase, Dr. Thomas testified about Mr. Jones's mental problems without the benefit of historical mental health evidence such as the Report. Supp. Reply at 13. The state court's view of the evidence in the direct appeal powerfully describes the materiality of this information: "[I]f defendant had a history of flashbacks and blackouts, Dr. Thomas should have been aware of it . . . the fact that [he] . . . failed to mention any such history suggests that defendant's proposed testimony concerning such a history would have been a recent fabrication." *Jones*, 29 Cal. 4th at 1253. The prosecutor's argument that Mr. Jones did not have a mental health problem involving flashbacks and blackouts, 31 RT 4640-41, highlighted this issue as critical to the penalty phase considerations. During penalty phase closing arguments, the prosecutor argued that Dr. Thomas's diagnosis of Mr. Jones was medically questionable because it lacked a sufficient basis: "[T]o what extent can somebody interview [Mr. Jones] in December or October of '94 and tell us what he is thinking in August of '92. . . . ask the doctor what basis, where's the science that supports [his conclusions], there is none." 31 RT 4645.

The Report was evidence of Mr. Jones's history of dissociative episodes and mental impairment that provided independent mitigating evidence as well as a convincing basis for and critical corroboration of Dr. Thomas's conclusions. *See Cone v. Bell*, 556 U.S. 449, 475, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009) (ruling that suppressed evidence of mental impairment might have been material to rebut

[19] As counsel notes, by substantiating the long-standing nature of Mr. Jones's mental illness, the Report might also have alleviated the trial court's concerns underlying his erroneous ruling that Mr. Jones could not testify to pre-1992 symptoms of his mental illness. Ex. 181 at 3162.

prosecution's suggestion that defendant manipulated expert into believing he was a drug addict and to jury's assessment of the proper punishment in capital case; holding that a full review of the suppressed evidence and its effect was warranted); *Brown v. Borg*, 951 F.2d 1011, 1015 (9th Cir. 1991) (murder conviction overturned where prosecutor advanced a robbery-murder theory due to the victim's missing wallet and jewelry while failing to disclose that hospital personnel had found these items and returned them to the victim's family).

b. Los Angeles County Jail medical records.

After his August 1992 arrest, Mr. Jones was detained in the custody of the Los Angeles County Sheriff's Department. 1 CT 89. Prior to and during his trial, the Sheriff's Department was solely responsible for providing him with, and maintaining records of, his psychiatric care. The prosecution disclosed partial records reflecting that jail personnel prescribed Mr. Jones with the strong antipsychotic medication Haldol and that he received Haldol at least in June 1993 and later. *See generally* Ex. 33. As the jail psychiatrist testified, critical records were missing: "There was a gap in the record that specifically did not mention when and how the Haldol was prescribed." 23 RT 3562.

1) The missing jail medical records would have been favorable to the defense.

Mr. Jones testified that shortly after he was detained, in November or December 1992, jail medical staff prescribed Haldol to treat his mental health symptoms. 24 RT 3587, 3619-20. Counsel also presented the testimony of a jail psychiatrist, Dr. Kunzman, who did not prescribe the Haldol, but treated Mr. Jones after he already was receiving it. Dr. Kunzman was not able to establish the timing or clinical necessity of the medication. *See, e.g.*, 23 RT 3562. The medical records thus would have been favorable to corroborate Mr. Jones's testimony and support the mental state defense, establishing that in the judgment of trained medical professionals, Mr. Jones had a mental illness that required strong antipsychotic

medication shortly after the crime.

2) The medical records have not been disclosed by the state.

The prosecution disclosed some of Mr. Jones's jail medical records to trial counsel. Ex. 33. However, it did not disclose records describing the jail mental health staff's evaluation of Mr. Jones's mental functioning, including when jail personnel first prescribed Mr. Jones with Haldol, what dosage they deemed medically necessary, and what symptoms of psychosis he exhibited that led to the prescription. State Pet. at 265-66; Reply at 232-33; 23 RT 3562. The Los Angeles County District Attorney's Office was responsible for ensuring that these exculpatory jail medical records were disclosed. *Kyles*, 514 U.S. at 437-38 (the prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf); *Brady*, 373 U.S. at 84, 87-91 (finding violation where prosecution suppressed corroborating exculpatory evidence); *Carriger v. Stewart*, 132 F.3d 463, 480-81 (9th Cir. 1997) (finding *Brady* violation although it was not clear whether individual prosecutors possessed the withheld corrections file); *In re Brown*, 17 Cal. 4th 873, 880-83, 952 P.2d 715 (1998) (prosecution had duty to review files from other governmental entities to disclose exculpatory information).

3) The undisclosed jail medical records are material.

Mr. Jones testified that he blacked out during the attack on Mrs. Miller and that when he regained consciousness after the crime, "I was hearing certain little things in my head telling me to do certain things. I guess you could call it paranoia, thinking someone was coming to kill me." 22 RT 3338; *see also* 22 RT 3344 (testifying that voices telling him "they're going to kill you" after the crime "had to come from inside of my head, I guess"). He also testified that when he sought treatment in the county jail in 1992, shortly after his arrest, the doctor recommended that he take Haldol; Mr. Jones did not request this medication. 24 RT 3587, 3619-20.

In support of the mental state defense, trial counsel argued as to the night of

the capital crime that "In these kinds of circumstances, people don't always act rationally . . . I mean he wasn't thinking very clearly at this point." 26 RT 3950. Trial counsel acknowledged that "Now, the district attorney says, well, we didn't hear from any psychiatrist. Well, don't blame Mr. Jones, you know, for maybe a witness that I didn't put on, but what do we know? What do we know about him?" 26 RT 3951. Counsel went on to argue that Mr. Jones was not "normal," pointing in part to Mr. Jones's medication with Haldol in jail; he asked the jury to consider Mr. Jones's behavior during the Harris prior, stating "I mean do you need a psychiatrist to tell you that is not normal?" 26 RT 3952. Therefore, aside from Mr. Jones's testimony, his treatment in jail with antipsychotic medication was the only source of evidence for the mental state defense. *See* section II.A.2.a, *supra* (describing the centrality of mental state issues to the case).

In response, the prosecutor argued during both the guilt and penalty phases that Mr. Jones faked his mental illness. He argued that in June 1993, months after Mr. Jones was incarcerated, Mr. Jones first received Haldol at his own request. Without evidence, he speculated that Mr. Jones was not suffering from a continuing mental illness, but requested Haldol allegedly because "talking to the other inmates in the pill module" revealed "that a psychiatric defense is probably his best bet." 27 RT 3971-72 (guilt closing); *see also* 31 RT 4652-53 (penalty closing). He further claimed without evidence that jail doctors were "fooled" into prescribing antipsychotic medicine and that Mr. Jones might be "getting these pills and palming them or giving them to another inmate."[20] 27 RT 3970-72; 31 RT 4652.

Without the relevant jail records, counsel was unable conclusively to rebut

[20] Although counsel believed that his only guilt phase defense was based on Mr. Jones's mental health, he unreasonably and prejudicially left these false remarks unchallenged. Ex. 12 at 107, 109; Ex. 150 at 2730-31.

the prosecution's fabrication argument. Instead, he could only ask the jury to infer that Mr. Jones's behavior was consistent with genuine mental illness and that the jail medical records were incomplete:

> Now, the District Attorney says, well, he asked for medication … Well, most people do. I mean the county jail, if you don't ask for something, you're probably not going to get it, but he didn't ask for Haldol … What he asked for was for something to help him and what did he get? Well, we don't know if the records are complete because remember, Dr. Kunzman … said, "Well, I can't tell from these records when he got [Haldol] first or whom he got it from[.]"

26 RT 3952-53.

With complete jail medical records, counsel could have conclusively rebutted the prosecution's argument and compensated for not presenting a mental health expert to explain Mr. Jones's behavior in clinical terms. The records would have illustrated that jail doctors recognized the need to treat Mr. Jones's symptoms of psychosis, and legitimately prescribed appropriate medication for his condition. The records would have corroborated Mr. Jones's testimony concerning when he began to receive Haldol and illustrated that his mental state defense was not fabricated. Moreover, the records would have yielded the name of the jail doctor who first prescribed Haldol to Mr. Jones; counsel could have interviewed the doctor and presented his or her testimony. As such, the missing jail records were both material and exculpatory.

The prosecutor's failure to disclose this material exculpatory evidence undermines confidence in the trial outcome. *See, e.g.*, *Bagley*, 473 U.S. at 678; *Jackson*, 513 F.3d at 1070, 1075-79 (*Brady* violation where prosecution failed to disclose exculpatory evidence as to whether the defendant had the specific intent necessary for a true special circumstance finding); *Benn v. Lambert*, 283 F.3d 1040, 1062 (9th Cir. 2002) (granting relief where defense received records that supported

the prosecution's theory of the case, but the prosecution did not disclose other records that would support exactly the opposite conclusion); Ex. 9 at 95 (evidence of the medications Mr. Jones was receiving was important to the jury). The state's failure to disclose Mr. Jones's complete jail medical records rendered its case much stronger, and the defense case much weaker, than the full facts would have supported. *See, e.g.*, *Kyles*, 514 U.S. at 429. Finally, the prosecution's repeated exploitation of this second *Brady* violation in closing arguments also supports a determination of materiality. *Brown*, 951 F.2d at 1017.

c. Cumulative prejudice

In state court, Mr. Jones also alleged cumulative prejudice due to the prosecution's multiple *Brady* violations. Reply at 247-48; *Kyles*, 514 U.S. at 437. The defense could have used the Report coupled with Mr. Jones's full jail medical records powerfully to counter the prosecutor's argument that Mr. Jones was lying about his mental illness. Together, these documents illustrate that Mr. Jones required medical attention for his mental illness beginning years before the capital crime and continuing after his arrest for that crime. Mr. Jones not only demonstrated entitlement to relief on the basis of each individual *Brady* violation but also that relief is warranted where, as here, the cumulative effect of the undisclosed favorable evidence places the whole case in such a different light as to undermine confidence in the verdict. *Kyles*, 514 U.S. at 429.

3. Respondent Disputed Key Facts in State Court.

In response to Mr. Jones's allegations about the withheld Report, Respondent stated that Mr. Jones did not present the state court with sufficient factual support for his claim because he did not present a declaration from the doctor who prepared the Report or "other documentation that supports the basis or the reliability of the statements in the report." Informal Response to Petition for Writ of Habeas Corpus, NOL at D.4. ("Supp. Inf. Resp.") at 5. Respondent also objected to Mr. Jones's allegations about the Report, contending that evidence that

the police referred Mr. Jones for emergency psychiatric care and the resulting clinical observations about Mr. Jones's psychiatric symptoms while in emergency care would not have been admissible evidence regarding Mr. Jones's mental condition. *Id.* In response to Mr. Jones's allegations about withheld jail records, Respondent contended that Mr. Jones's "own medical records were presumably available to him if he had made reasonable efforts to acquire them" and that Mr. Jones's mental condition in jail was immaterial to his mental condition during the crime. Inf. Resp. at 30.

4. Section 2254 does not bar relief on this claim.

In 2009, the state court summarily denied Mr. Jones's *Brady* habeas claim as failing to state a prima facie case for relief. To the extent the state court's ruling reflects its determination that Mr. Jones failed to plead sufficient facts that, if proven, would entitle him to *Brady* relief, the state court's decision is (1) contrary to clearly established federal law and (2) an unreasonable application of *Brady* under section 2254(d)(1). In the alternative, the state court unreasonably determined the facts under section 2254(d)(2) by finding facts and resolving disputes without any adjudicative procedure.

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

Although Respondent argued that Mr. Jones had not presented sufficient documentary material in support of the claim, the California Supreme Court did not deny Mr. Jones's claim pursuant to *In re Swain*, 34 Cal. 2d 300, 303-04, 209 P.2d 793 (1949), to which the court cites when claims have not been alleged with sufficient particularity. *See Kim v. Villalobos*, 799 F.2d 1317, 1319 (9th Cir. 1986) ("*Swain* is cited by the California Supreme Court to indicate that claims have not been alleged with sufficient particularity. That deficiency, when it exists, can be cured in a renewed petition."). Nor did the state court deny the claim because of inadequate evidentiary support. *See*, *e.g.*, *In re Curtis Price*, No. S018328, Order (Cal. Jan. 29, 1992) (rejecting claim because petitioner failed to provide copy of

1 competency report generated at trial).[21] Moreover, had the California Supreme
2 Court found that Mr. Jones failed to provide readily available documentary
3 support, stating this in its order would have permitted him to modify and cure any
4 such deficiency.[22]

5 Taken as true, Mr. Jones's allegations established a prima facie *Brady*
6 violation, demonstrating two categories of favorable records that were withheld
7 and material to Mr. Jones's mental state defense and penalty phase mitigation. *See*
8 section II.B.2, *supra.* By summarily denying the claim, the state court did not
9 require Respondent to respond formally to Mr. Jones's allegations or present
10 evidence to support Respondent's factual contentions. The state court ruling also
11 denied Mr. Jones the opportunity to present evidence, subpoena witnesses, and
12 prove his allegations. *See* section I.B.2, *supra*. The state court's summary denial
13 of this claim therefore was contrary to federal law requiring a state court to
14 ascertain facts reliably before denying adequately presented federal claims. *See*
15 section I.B.1., *supra*; Reply Br. on *Pinholster* at 12-17.

16 To the extent that the California Supreme Court determined that Mr. Jones
17 did not state a prima facie case, its determination was an unreasonable application
18 of *Brady*. *See Maxwell v. Roe*, 628 F.3d 486, 508-12 (9th Cir. 2010)
19 (independently reviewing record to hold that California Supreme Court
20 unreasonably applied *Brady* in silently denying petitioner's prima facie claim that

21
22 [21] The text of the order is available on the California Supreme Court website
at http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id
23 =1750119&doc_no=S018328.

24 [22] Contrary to Respondent's assertions, Mr. Jones provided the state court
25 with significant, extra-record evidence that was available to support this claim,
including: the police report on the Jackson crime associated with the emergency
26 room record, Ex. 179; the favorable emergency room report, Ex. 180; Mr. Jones's
27 incomplete jail medical records, Exs. 33, 34; and trial counsel's declarations, Exs.
12, 150, 181.
28

the state failed to disclose impeachment evidence); *Browning v. Workman*, No. 07-CV-16, 2011 WL 2604744, *3-9 (N.D. Ok. June 30, 2011) (granting writ based on state court's unreasonable application of *Brady*, where prosecution failed to disclose exculpatory material evidence to capital defendant concerning an eyewitness's severe mental illness).

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

Alternatively, the state court's summary denial could be based on its resolution of key factual issues, such as whether:

- the Report, which documented Mr. Jones's previous mental illness symptoms similar to those raised in his mental state defense, was favorable, contained reliable statements, or could have led to admissible evidence;
- the Report's evidence that Mr. Jones received emergency psychiatric care for a dissociative episode and other mental illness symptoms was material to either the guilt or penalty phases, where the prosecutor argued that Mr. Jones's mental illness was fabricated and the only evidence of his mental illness was his own testimony;
- complete jail medical records that would have established that Mr. Jones received antipsychotic medication in 1992—and the clinical basis for that prescription—were favorable to Mr. Jones, where the prosecutor speculated before the jury that Mr. Jones received medication only in mid-1993 after fabricating a mental state defense on the advice of other inmates;
- the legitimacy of Mr. Jones's treatment for psychosis shortly after the crime was material in a case where auditory hallucinations, paranoia, and dissociation were the sole trial defense; and
- Mr. Jones's own medical records were presumably available to him if he had made reasonable efforts to get them, as respondent contends, when

the defense was not given full records despite multiple requests.

If the state court denied Mr. Jones's *Brady* claim on any of these or other factual bases at the pleading stage, it unreasonably determined the facts under section 2254(d)(2) by failing to provide Mr. Jones either with (1) process to develop and present supporting evidence; or (2) notice of and an opportunity to be heard on the factual issues that the state court intended to resolve. *Lor*, 2012 WL 1604519 at *4-5 (citing *Hurles*, 650 F.3d at 1312) (a state court determination of factual issues not supported by the record, without an evidentiary hearing on those issues, is *per se* a § 2254(d)(2) unreasonable determination of the facts); *Williams*, 859 F. Supp. 2d at 1160 (same).

C. Mr. Jones Received Ineffective Assistance of Counsel During The Penalty Phase of His Trial.

Mr. Jones presented the California Supreme Court with a prima facie showing of ineffective assistance of counsel, alleging that, as a result of trial counsel's failures, the jury never heard critical mitigating details about Mr. Jones's life that would have changed the outcome of the penalty phase.[23] Mr. Jones grew up with alcoholic and physically violent parents who attacked each other and regularly beat Mr. Jones and his siblings. He was sexually abused by his mother. He suffered brain damage and low intellectual functioning due, at least in part, to his mother's drinking during pregnancy and the numerous beatings and head injuries he received at the hands of his parents and other relatives. Left virtually homeless as a young boy, Mr. Jones's mental health deteriorated significantly in the years preceding his arrest. In spite of numerous family members, friends, and

[23] Mr. Jones's state ineffectiveness claim, Claim Four, alleged prejudicial deficient performance in both the guilt and penalty phases of trial. State Pet. at 66-239; Reply at 53-199. In his federal briefing, Mr. Jones's ineffectiveness allegations are divided into guilt phase (Claim One) and penalty phase (Claim Sixteen) allegations. Fed. Pet. at 21-91, 223-338.

neighbors knowledgeable about Mr. Jones and his family and readily available to testify about this background, trial counsel did not discover or present their testimony to the jury.

Trial counsel effectively conceded most of the guilt phase. This heightened the importance of mitigating evidence related to Mr. Jones's impaired mental functioning, which trial counsel considered the most important issue in the case. Nonetheless, trial counsel failed to investigate Mr. Jones's history of sexual abuse, mental illness and deteriorating mental health, brain damage, and low intellectual functioning, all of which were indicated in the reports he consulted. Trial counsel also failed to investigate Mr. Jones's assault of Kim Jackson, which he knew the prosecution would introduce as aggravating evidence. Trial counsel retained an expert at the last minute to address some of these issues, but the expert largely was discredited because trial counsel failed to provide him with critical information, follow up on his expert's recommendations, or prepare him adequately. Trial counsel ultimately planned to introduce mitigating evidence about Mr. Jones's alcoholic, neglectful, and physically abusive parents, and the traumatic death of his older brother. Trial counsel, however, did not conduct a reasonable investigation into these issues, did not prepare the few relevant witnesses he presented to testify about them, and only raised the topics in brief, superficial terms, if at all. Trial counsel thus provided the jury a glimpse of Mr. Jones's life that bore little resemblance to the compelling mitigation that a reasonable investigation would have uncovered and that would have caused the jury to spare Mr. Jones's life.

1. Controlling U.S. Supreme Court Precedent.

The two-pronged inquiry of *Strickland v. Washington*, and its related precedents discussed in section II.A.1, *supra*, are the controlling law for this claim. In addition to general requirements for counsel's performance in criminal trials, the U.S. Supreme Court has held that counsel's preparation for a capital trial's penalty phase "should comprise efforts to discover all reasonably available mitigating

evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins*, 539 U.S. at 524 (addressing standards for 1988 crime). In cases where trial counsel knows that the prosecution will introduce a prior crime against a defendant, trial counsel also has "a duty to make all reasonable efforts to learn what they [can] about the offense," and to "discover any mitigating evidence the [State] would downplay" in its aggravating evidence. *Rompilla*, 545 U.S. at 385-86.

"In assessing the reasonableness of an attorney's investigation … a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 525. Counsel's penalty phase preparation thus falls below an objective standard of reasonableness when they "abandon[] their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Id.* at 524; *see also id.* at 526 (finding counsel unreasonable for putting on "a halfhearted mitigation case"). To make a prejudice determination for claims of penalty phase ineffectiveness, courts must "evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation." *Williams*, 529 U.S. at 397-98.

2. Prima Facie Allegations Before the State Court.

The state court pleadings alleged, inter alia, that trial counsel failed to conduct a reasonable investigation of Mr. Jones's background in preparation for the penalty phase, effectively present the penalty phase witnesses he did call to testify, and timely retain appropriate experts and adequately prepare and present expert testimony. Mr. Jones made a prima facie showing that trial counsel's deficient performance was prejudicial. Trial counsel did not conduct a reasonable investigation or effectively present penalty phase witnesses.

After reading reports of Mr. Jones's prior offenses, trial counsel "became

convinced" that Mr. Jones's actions "were the result of his serious mental illness." Ex. 12 at 107. The reports described domestic violence, dissociative episodes, and psychosis in Mr. Jones's background, among other things. *See, e.g.*, Ex. 104 at 2179-85. School records obtained by trial counsel documented Mr. Jones's poor academic performance and intellectual disability. State Pet. at 214; Exs. 50, 51. Trial counsel also believed that "it was necessary to investigate the possibility of brain damage." Ex. 150 at 2731. Trial counsel therefore placed great importance on Mr. Jones's impaired mental functioning, and the indications he had of Mr. Jones's other problems. Ex. 12 at 108; Ex. 150 at 2731.

Despite awareness of this information, trial counsel failed adequately to investigate and present evidence of the many abuses and traumas that Mr. Jones suffered, including his parents' alcoholism and violence against each other, regular and brutal physical abuse and neglect of Mr. Jones and his siblings, and the murder, suicide, and severe drug addiction of his loved ones. *See* State Pet. at 108-23; Reply at 148-63. In spite of the disturbing and sexual nature of the capital crime, and arrests for bizarre sexual assaults before that crime, counsel also failed to investigate or present evidence of the sexual abuse that Mr. Jones suffered. State Pet. at 102-08; Reply at 143-48. Though the records trial counsel possessed indicated that Mr. Jones had symptoms of mental illness and low intellectual functioning, counsel did not investigate or present evidence of those problems. State Pet. at 93-102, 128-50; Reply at 136-43, 172-84. Finally, no investigation was conducted into the circumstances leading up to the Jackson crime that the prosecution introduced in aggravation. Ex. 12 at 105-06; Ex. 19 at 203.

Many immediate and extended family members; friends, neighbors, and co-workers; and education personnel were available to provide mitigating background information, but counsel did not ask them to do so. State Pet. at 170, 174-75. Indeed, counsel acknowledged, "No one on my legal team, including myself, interviewed these additional witnesses as part of our preparation for Mr. Jones's

trial. I had no strategic reason for not doing so." Ex. 150 at 2733-34. Trial counsel also failed to collect readily available documents and records relevant to Mr. Jones's background. State Pet. at 203-14.

Instead, trial counsel delegated to a paralegal the entire penalty phase investigation of Mr. Jones's background, including responsibility for conducting witness interviews, without providing her any guidance about appropriate topics to pursue. Ex. 12 at 105-06; Ex. 19 at 203. The paralegal obtained quite limited information, Ex. 154 at 2750, and trial counsel's resulting lack of preparation was apparent at trial. In his penalty phase opening statement, trial counsel stated that Mr. Jones's mother, Joyce Jones, used the family's welfare money to buy alcohol and that Mr. Jones had been beaten with extension cords. 29 RT 4227. Trial counsel also told the jury that the murder of Mr. Jones's older brother Carl Jones "was one of the things that had a big effect on Mr. Jones in his growing up." 29 RT 4226. During the brief penalty phase, however, trial counsel did not present evidence to support these claims or effectively elicit testimony from his mental health expert to address them. Trial counsel presented only five witnesses who knew Mr. Jones: Mr. Jones's youngest sister, his father, an aunt, a school friend, and an acquaintance. 29 RT 4236, 4251, 4345, 4354; 31 RT 4566.[24] He failed to ask these witnesses about many aspects of Mr. Jones's background that they were capable of addressing, instead perfunctorily covering only a few topics with each of them. State Pet. at 186-203.

Trial counsel's failure to conduct a thorough investigation of Mr. Jones's background prior to the penalty phase was particularly egregious given the numerous indications he had of powerful mitigating evidence. *See Williams*, 529 U.S. at 396 (counsel unreasonable for failing to conduct investigation that would

[24] The other defense witnesses, a psychiatrist and two witnesses from corrections, did not know Mr. Jones personally. 29 RT 4262, 4270; 31 RT 4410.

have uncovered evidence of petitioner's severe and repeated beatings, neglect, intellectual impairment, and academic problems); *Wiggins*, 539 U.S. at 525 (counsel unreasonable for failing to investigate indications that petitioner's mother was a chronic alcoholic who left him and his siblings alone for days without food; "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses"). Trial counsel also performed deficiently when he described details of Mr. Jones's painful upbringing to the jury during opening argument, but failed to substantiate his description with witness testimony or other evidence. *See Wiggins*, 539 U.S. at 526 (counsel unreasonable when "she told the jury it would 'hear that Kevin Wiggins has had a difficult life,' [but] . . . never followed up on that suggestion with details of Wiggins' history"). Moreover, trial counsel was deficient for failing to investigate and present the "circumstances extenuating the behavior described by the victim[s]" of Mr. Jones's prior crimes. *See Rompilla*, 545 U.S. at 386.

a. Trial counsel did not timely retain, adequately prepare, or effectively present expert testimony.

Trial counsel understood that testimony from a mental health expert was the "cornerstone of the penalty phase defense." Ex. 12 at 110. After meeting the psychiatrist who ultimately testified, Dr. Thomas, trial counsel "became increasingly convinced that his testimony would be instrumental in saving Mr. Jones's life." *Id*. at 108. Dr. Thomas highlighted the importance of obtaining background information about Mr. Jones, including his medical, mental health, educational, and other social history. Ex. 154 at 2750. He also informed trial counsel that thorough neuropsychological testing was necessary to evaluate Mr. Jones adequately. Ex. 150 at 2732; Ex. 154 at 2761. Though trial counsel retained a neuropsychologist, Dr. Spindell, Ex. 150 at 2732, he failed to retain an expert to prepare Mr. Jones's social history or specifically to describe the intellectual and academic problems he knew Mr. Jones had in school. State Pet. at 156, 175, 237.

1 In spite of Dr. Thomas's importance to the case, trial counsel failed to retain
2 and consult with him in sufficient time to effectively prepare his testimony. *See*
3 section II.A.2.a.2, *supra*. Furthermore, because trial counsel did not conduct a
4 reasonable investigation into Mr. Jones's background, he was unable to provide Dr.
5 Thomas with material necessary for his assessment or adequately prepare him to
6 testify. After his belated appointment, Dr. Thomas "noted several areas in which
7 information about Mr. Jones's social history and functioning were lacking. I
8 conveyed to Mr. Manaster the need to obtain this information, but at no time was
9 this information provided to me." Ex. 154 at 2749; *see also id.* at 2750 (counsel
10 did not provide Dr. Thomas with requested "materials relating to Mr. Jones's
11 medical, mental health, education, and other social history"). Trial counsel gave
12 Dr. Thomas summaries of interviews that the defense paralegal had conducted, but
13 "[a]lthough the summaries clearly indicated a difficult home environment, they
14 failed to elucidate the problems in much detail or discuss Mr. Jones with much
15 specificity." *Id.* Dr. Thomas did not receive Mr. Jones's family members' school
16 and medical records, social service records, court records, or military records, all
17 of which would have allowed him to present "far more effective and compelling
18 testimony on Mr. Jones's behalf." *Id.*

19 Trial counsel did not retain an expert to review and explain Mr. Jones's
20 social history to the jury. State Pet. at 237. Trial counsel asked Dr. Thomas only to
21 determine whether Mr. Jones was legally insane at the time of the offense, or
22 whether he was suffering "from some mental condition or defect which he could
23 not control and which might help explain his behavior." Ex. 154 at 2748. "At no
24 time prior to my testifying did Mr. Manaster explain my role in the capital
25 sentencing context. He did not explain the scope of potential mitigation in a
26 capital trial or the importance that such information may have on a jury's
27 decision." *Id.* at 2755. As a result, Dr. Thomas was unable to "testify about even
28 the limited information I did have of the dysfunctional family life Mr. Jones had,

and the impact it had on his growth and functioning." *Id.*

Although Dr. Thomas advised trial counsel that a full battery of neuropsychological testing was indicated, Ex. 150 at 2732, trial counsel did not ensure its completion, State Pet. at 156. Instead, Dr. Spindell conducted very limited neuropsychological testing, including superfluous testing that trial counsel did not request. Ex. 150 at 2732. After trial counsel concluded that he would not ask Dr. Spindell to testify due to dissatisfaction with his work, he failed to retain a new neuropsychologist to perform a complete battery of neuropsychological testing and testify as to his or her findings. *Id.* at 2732-33 (stating that "I did not have any strategic reason for failing to hire another neuropsychologist to conduct thorough testing on Mr. Jones; by the time I had finished working with Dr. Spindell . . . Mr. Jones's trial was beginning and there was no time to do so"). Though trial counsel was troubled by multiple factual errors in Dr. Spindell's report and his failure to perform the testing requested, *id.*, trial counsel provided the report to Dr. Thomas and asked him to rely on it in reaching his conclusions, 30 RT 4429.

Despite the clear mitigating relevance of Mr. Jones's school records that trial counsel possessed, he did not consult education personnel, present testimony about the records' contents, or introduce the records. State Pet. at 175; Reply at 194. Given time and the opportunity, Dr. Thomas also would have informed trial counsel that Mr. Jones's school records contained a tremendous amount of important information the jury never heard, including the fact that Mr. Jones was in an Educably Mentally Retarded program in elementary school. Ex. 154 at 2755.

Trial counsel's performance in consulting and utilizing experts during the penalty phase was professionally unreasonable. As trial counsel himself recalled, "[a]lthough Dr. Thomas was the cornerstone of the penalty phase defense, he was not adequately prepared to testify. . . . Dr. Thomas did not adequately convey to the jury how mentally ill Mr. Jones really is." Ex. 12 at 110. Numerous courts have held such failure deficient under *Strickland*. For example, "When experts

request necessary information and are denied it, when testing requested by expert witnesses is not performed, and when experts are placed on the stand with virtually no preparation or foundation, a capital defendant has not received effective penalty phase assistance of counsel." *Bean v. Calderon*, 163 F.3d 1073, 1079 (9th Cir. 1998); *see also, e.g.*, *Caro v. Woodford*, 280 F.3d 1247, 1254-55 (9th Cir. 2002) ("counsel has an affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health"); *Clabourne v. Lewis*, 64 F.3d 1373, 1385-85 (9th Cir. 1995) (counsel ineffective for retaining expert with little time to prepare, failing to provide experts with records, and failing to prepare them to testify).

b. Trial counsel's deficient performance was prejudicial.

1) Lay witness testimony that could have been presented.

Mr. Jones's life was dominated by the severe alcoholism and terrifying abuse of his parents, Earnest Lee and Joyce Jones, in ways the jury never could have imagined from the limited information they were provided. *See generally* State Pet. at 108-21; Reply at 143-67. Trial counsel did identify several mitigating themes, including: (1) Earnest Lee's and Joyce's alcoholism and their neglect of Mr. Jones and his siblings; (2) physical violence between Earnest Lee and Joyce; and (3) physical abuse of Mr. Jones. However, trial counsel failed to discover and present powerful mitigating evidence that lay witnesses could have provided about those topics; instead, trial counsel gave the jury the false impression that Mr. Jones's background was relatively unremarkable. Moreover, trial counsel wholly failed to investigate and present additional, critical mitigating evidence, including Mr. Jones's (1) history of sexual abuse; (2) long-standing symptoms of dissociation; (3) low intellectual and academic functioning; (4) homelessness as a young boy; and (5) deteriorating mental health prior to the crimes he committed. A brief summary of some of the available evidence trial counsel could have presented, but failed to present, follows.

Mr. Jones's uncle, Thomas Jones, was one of many witnesses who could have testified about the severity and deleterious effects of Earnest Lee and Joyce's drinking problems. He observed that:

> By the time Meso[25] was around nine or ten years old, both Earnest Lee and Joyce were constantly drunk. Earnest Lee was mean and violent when he got drunk. Both he and Joyce were either drunk or on their way to being drunk again. As bad as their drinking had been when Meso was younger, it somehow got worse. The worse their drinking became, the more their children had to raise themselves.

Ex. 21 at 221. Other witnesses could have provided additional descriptions:

- Mr. Jones's older sister Gloria stated that "my parents drank at the parties they threw in our apartments, and they drank when there was no party. They drank at all hours. The more they drank, the more they fought with each other." Ex. 124 at 2502;
- A neighbor observed that Joyce drank every day and "[w]hen she drank she acted like a different person; she got loud, and vulgar and violent. … When she was drinking she did not want to be bothered by her children. Unfortunately, in that small apartment it was almost impossible for all those children to stay out of their mother's way." Ex. 143 at 2702;
- A friend stated that "Earnest Lee lost at least three jobs because of drinking. …[Eventually,] he could not hold a job at all because of his drinking" and "[w]hen [Joyce] was drunk, any little thing set her off and she would start fighting." Ex. 145 at 2710.

Mr. Jones's mother also drank while she was pregnant with him. Ex. 4 at 55; Ex. 18 at 195; Ex. 20 at 215.

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[25] Mr. Jones's family gave him the nickname "Meso," short for "measles," because he had red bumps on his face. Ex. 18 at 195.

As his parents' drinking intensified, so did their neglect of Mr. Jones and his siblings. Mr. Jones's sister Cassandra remembered, "When both Meso and I were in elementary school, there were many days that we had to go to school with mis-matched clothes and uncombed, wild looking hair because our mother was passed out drunk and could not help us get ready for school." Ex. 132 at 2628. The family lived in at least six different homes when Mr. Jones was growing up, as they were often kicked out of their previous home because of his parents' fighting and drinking. *Id.* During Mr. Jones's early childhood in the late 1960s and 1970s, Mr. Jones's father could not hold down a job due to his drinking; the "electricity was turned off more and more often and there was less and less food in the house. … [the] children went without food or adequate clothing." Ex. 25 at 251. When he could, Mr. Jones turned to friends and neighbors to keep from going hungry. *Id.*

The brief testimony at trial did not convey the frequency and intensity of the violence between Earnest Lee and Joyce. Mr. Jones's older sister Gloria was one of many witnesses who could have described it:

> My parents did not simply yell or shout or even slap each other; when they got going, they were at each other like they hated one another. The scariest part about their fights, especially for little children, was that they often acted like they were fighting to the death. . . . My mother threw dishes, ashtrays or anything that was handy. Numerous times, she would defend herself with knives from the kitchen. . . . It was like living in a combat zone, and we never knew what would set them off.

Ex. 124 at 2502. Once, when Mr. Jones was a little boy running to get out of the way of his parents' fighting, his father pushed him and he hit his head on a glass table, began bleeding profusely, passed out, and had to be taken to the hospital. *Id.* at 2512. As Mr. Jones's sister Jean explained, their parents' fighting was "much worse when Meso was young, because our father lived at home more." Ex. 16 at

151. Examples of the abuse included the following:

- "It was common for [Joyce and Earnest Lee] to pull out knives and start cutting each other." Ex. 4 at 57;
- Joyce went to a relative's house "with blood pouring from a gash in her head where Earnest Lee had hit her with a heavy ashtray;" the children regularly saw the fights and "would just scream and cry helplessly." Ex. 25 at 250;
- An aunt recalled that after Earnest Lee found Joyce in bed with another man, he beat her when he got home from work every day "just on principle, as well as during arguments. … I am surprised that Joyce did not commit suicide during that time." Ex. 123 at 2485;
- A neighbor saw Earnest Lee beating Joyce in the head with a solid, wooden table leg; "Meso and his older brother and sisters were in the apartment screaming and crying as they watch (sic) what was happening. Joyce was on the ground, . . . her head bloody, and her clothes nearly torn off of her body." Ex. 155 at 2767.

Police regularly were summoned, but they "would just make Earnest Lee leave the apartment, but this never made anything better in the long run." Ex. 147 at 2718.

Mr. Jones's sister explained that their mother also beat her children relentlessly, and "Meso got hit more by our mother" than the other children. Ex. 124 at 2513. As a young boy, Mr. Jones liked to take things apart but was unable to put them back together; "[t]his made my mother very angry, and she would use an excuse like that to beat him." *Id.*; *see also* Ex. 1 at 2 ("Joyce beat Meso repeatedly on the side of his head. Meso just seemed to take it. . . . Sometimes she hit him so hard, she knocked him down."); Ex. 18 at 197 (Joyce "gave [her children] whippings for just about anything. She would hit them for being too loud, spilling a crumb or not being able to do their homework"). Geraldine Jones saw that "Joyce did not know how to regulate her behavior. When she got angry

with her children she beat them like she was fighting her grown six feet tall husband." Ex. 123 at 2483. Mr. Jones's father most often used a belt or extension cord to beat him and his brother Carl; he "would make them strip naked, and then beat them with the cord until they bled." Ex. 16 at 155.

Mr. Jones's uncle, Samuel Jones, who lived with Mr. Jones's family for a period of time beginning in 1972, witnessed even more horrific abuse:

> There are several distressing things about Meso's childhood . . . The most upsetting is that his mother, Joyce, sexually abused him for many years when he was a young boy. When she was drunk, she went after Meso and made him have sex with her.

Ex. 128 at 2579. In addition, Mr. Jones's mother "was wild and loose about having sex with other men in the house" in front of Mr. Jones and his brothers and sisters. Ex. 124 at 2516; *see also* Ex. 16 at 154 (Mr. Jones and his siblings "were routinely exposed to our parents' sex life," including a time when Joyce threatened to cut off Earnest Lee's penis after they had sex). When he was younger, Mr. Jones also spent a lot of time with his Uncle Carvis, who was considered "a pervert who does not respect women." Ex. 147 at 2723; *see also* Ex. 13 at 118 (Carvis hung the underwear of women he had slept with on the wall of his house for decoration); Ex. 3 at 31 (Carvis kept life-size nude pictures of himself that were visible to anyone who walked in the house as well as photos of naked women and panties); Ex. 135 at 2657 (same). Unlike other children, "[e]ven though he was a little boy, Meso knew how to talk to my father about sex." Ex. 124 at 2516.

Mr. Jones's parents also had been sexually abused and/or exposed to sexual abuse. *See generally* Reply at 143-48. Earnest Lee's sister Bertha Mae Jones described being sexually abused by their father, "Doc," two or three times a week:

> When I was little he would wait until my mother left the house to go to town or visit friends. … When I was older, my father simply called me into another room of the house and forced himself on me.

He did not care if other people were there or not. If my mother was home, he called me out to a field and did it there.

Ex. 4 at 51. A maternal uncle also abused Bertha Mae. *Id.* Earnest Lee knew about the abuse, *id*. at 59, which happened to at least one other sister as well, *id.* at 52; Ex. 1 at 7. When Bertha Mae finally went to their mother and told her about the abuse, their mother told Doc, who punished Bertha Mae by raping her and severely beating her. Ex. 4 at 51. The sexual abuse was so blatant that in the community, "[i]t was common knowledge that Doc had sex with his eldest daughter Bertha Mae." Ex. 6 at 66; *see also* Ex. 4 at 54 (Bertha Mae learned from her second husband that "the whole town knew about Doc having sex with me … [it] had been a town joke"). When Earnest Lee was an adult, his sister tried to discuss their father's sexual abuse with him, but he crawled under her bed yelling and screaming because he could not bear to talk about it. *Id.* at 59.

Sexual abuse was so pervasive in Joyce's family that her mother once observed that beatings and sexual molestation are things that "happen to everyone." Ex. 129 at 2592. Joyce's brother Carvis had sex with their sister Vernice, who also was sexually abused by at least one of her uncles. *Id.* at 2584. Joyce also was sexually molested as a young girl. Ex. 8 at 82. Particularly when Joyce was drunk, "all the sadness" about those experiences came out. *Id.* Joyce's sister Vernice eventually worked as a prostitute. Ex. 129 at 2585. Joyce's sister Jackie was living with Vernice and her family when Vernice's young son Reggie told his family that Jackie had sexually molested him; she performed oral sex on him several times. *Id.* at 2587; Ex. 135 at 2662. After news of the abuse surfaced, Jackie was kicked out of the home and went to live with Joyce. Reggie's father reflected that, "I am ashamed to say that I did not say something to protect Joyce's young boys from Jackie. Of course, Joyce did not concern herself with whether or not Carl, Meso, or Alvin were safe with her around." *Id.*

In response to the violence and trauma in his life, Mr. Jones often "had this

blank stare on his face. He just stood there like a statue and stared into space, as if he was frozen and could not move." Ex. 1 at 2. After witnessing his parents fight, "we would find Meso shaking under a bed or in bed with a blanket pulled over his head. Although he had tears running down his face, he acted like nothing out of the ordinary had happened." Ex. 16 at 153. One neighbor observed, "Meso was a strange child. It seemed like no matter what happened to him he could not show that he was upset or hurt. … [I found Meso] sitting on the bottom stairs by himself, just staring into space. I even found him after dark in a parking lot, sitting by himself between two parked cars, like he was trying to hide. No matter how many times I asked that boy what was wrong, he could not talk about it." Ex. 152 at 2741.

Mr. Jones also struggled with intellectual and academic limitations. His sister explained that, "We all knew that, from an early age, my brother Meso had trouble learning. Meso struggled with his schoolwork from the beginning and despite assistance from others and me, he was unable to learn what the other children his age learned." Ex. 16 at 144. Mr. Jones could not write his name until he was in the third grade. *Id.* at 145. When he was in the fifth grade, he still could hardly read a complete sentence. Ex. 132 at 2636. Mr. Jones also struggled to learn simple math and was not able to count money and make change. Ex. 16 at 145. Among other things, these difficulties prevented Mr. Jones from escaping his abusive home life. His siblings often went to the library after school in order to escape violence at home. *Id.* at 146. Because Mr. Jones could not read, he did not join them and had nowhere to go but home. *Id.* As he got older, he had "so much trouble in school with reading and writing" that he had difficulty filling out job applications and could not find work. Ex. 14 at 136.[26]

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[26] In addition to describing Mr. Jones's own problems, witnesses also could have described the significant history of mental illness and intellectual disability

continued...

When Mr. Jones was about fourteen years old, his father moved away from California, sinking the family even deeper into crisis. Mr. Jones's mother became "the sloppiest street drunk in the neighborhood. She would stagger down the street drunk at all hours, yelling and cursing at anyone. She drank constantly." *Id.* at 132. "Joyce sometimes got so drunk that she passed out and urinated all over herself," and then her children had to try to clean her up. Ex. 123 at 2488; *see also* Ex. 21 at 222 (it was common to see Joyce passed out drunk on the side of the street). People who witnessed Joyce's alcoholism believed that her drinking would eventually kill her; one of Mr. Jones's aunts recalled that, "On more than one occasion, the children called me panicked and crying because they thought that [Joyce] was dying or dead, and each time I rushed her to the emergency room." Ex. 135 at 2666.

During her decline, Joyce was evicted from her apartment and moved in with a new boyfriend, Horace Jenkins. *Id.* at 2661. The two youngest children eventually were taken in by others. Ex. 2 at 15-16; Ex. 131 at 2614-15. Mr. Jones, however, did not find stable housing. His aunt recalled that after his father left, "Meso, who was still a child, moved from place to place." Ex. 135 at 2661; *see also* Ex. 128 at 2579 ("I cannot remember where Meso lived during that time. It was easy for Meso to get lost in the crowd."); Ex. 21 at 223 (for a time, Meso lived with his Uncle Thomas, who at the time was free basing cocaine and was heavily addicted); Ex. 14 at 134 ("in the short time I knew him, [Ernest] lived at different times with his mother, his Aunt Geraldine, his sister Gloria, his Uncle Thomas, his mother's boyfriend Horace, and in my mother's garage."); *id.* at 135 ("When Ernest was staying with Horace there was no furniture or electricity and Ernest had

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in Mr. Jones's extended family. *See generally* State Pet. at 94-107; Reply at 136-148. Readily available records provided further, extensive documentation of these problems in the family's history. State Pet. at 211-14.

to sleep on the floor").

In spite of the tremendous hardships in his life, things got worse for Mr. Jones after his older brother Carl was murdered.

> After Carl died, Meso's behavior became really bizarre. . . . He had shaved his head and his eyebrows and his entire demeanor had changed. His eyes were blank. . . . He was the neighborhood ghost. . . . Meso started yelling crazy things to people in the neighborhood, just like a street person. He talked trash to people for no reason, even to gang members who could have easily killed him. It made no sense. Fortunately, people realized that Meso was off of his rocker, so they left him alone. Still, it was like he had a death wish. Everyone knew that Meso had lost it.

Ex. 134 at 2651-52; *see also* Ex. 126 at 2563 (in the early 1980s, Meso "looked like a different person . . . [he] was wearing all black and had shaved his head … His eyes looked dead. . . . It was as if something had clicked in his head. He walked around in a daze."); Ex. 135 at 2665 ("No one took Carl's death harder than Meso. Meso looked up to his brother. He was his hero and protector. In the weeks after Carl was killed, Meso stayed up all night and aimlessly roamed the streets."). Mr. Jones's Aunt Jackie, to whom he had been close, committed suicide three years earlier; he had her name tattooed on his arm after her death. Ex. 3 at 36.

By the time of his arrest for assaulting his friend, Kim Jackson, "Meso was clearly having problems. He had gone through several family tragedies, including the suicide death of his aunt, his older sister's drug addiction, and the stabbing death of his older brother." Ex. 21 at 226. His then-girlfriend Glynnis said that he became "moodier and his moods changed very quickly. He got upset so easily that it was impossible to tell exactly what had upset him." Ex. 14 at 134. His problems got to the point that Glynnis noticed that "he would change, without warning, into another person altogether. … [He became] this strange man who did not recognize

his name when I yelled it at him … One time when he looked so different during a fight, he said he was hearing other voices talking to him. No one else was in the room." *Id.* at 137. Others recalled that Mr. Jones lived in his own world, forgetting conversations after they happened and staying awake at night and sitting silently in the dark, alone. Ex. 16 at 167-68. Mr. Jones called Glynnis after he attacked Ms. Jackson: he "wanted to check himself in to the hospital. He felt he needed help and did not know what else to do." Ex. 14 at 135.[27] Trial counsel commented that Ms. Jackson had "testified that Mr. Jones had become a different person during the incident. I was also impressed that she was more concerned with Mr. Jones getting treatment rather than punishment." Ex. 12 at 107.

2) Expert testimony that could have been presented.

In addition to the witness testimony and record evidence that trial counsel would have obtained from a reasonable investigation, adequately prepared expert assessment of Mr. Jones and his background would have provided the jury with a cohesive, compelling understanding of Mr. Jones's significant intellectual, neuropsychological, and mental health impairments, as described below.

If he had been provided with the results of a reasonable background investigation, Dr. Thomas would have testified that Mr. Jones's "opportunity for appropriate social adjustment and development was compromised" by "mental and physical abuse, malnutrition, neglectful parenting, constant and early childhood exposure to substance abuse, and early and often confrontational exposure to sexuality." Ex. 154 at 2757. He would have identified among the witness descriptions many signs that Mr. Jones exhibited "a developing dissociative process" from "as early as anyone could remember." *Id.* at 2760. Moreover,

[27] As described in section II.A.2.a.3, *supra*, these problems continued in the period after the Jackson crime, including the time leading up to Mr. Jones's arrest for the assault of Doretha Harris, and, later, the capital crime.

witness descriptions of specific abuses and traumatic events in Mr. Jones's life, the extent of violence and substance abuse in Mr. Jones's home, and Mr. Jones's mental health problems over time, would have been

> critical to explain the full effect that Mr. Jones's life experiences, especially his cruelly dysfunctional family dynamics, had on his behavior and functioning. Mr. Jones's multiple impairments affected his judgment and his actions throughout his life, and had particularly insidious effects on his behavior and thought processes on the evening of the [capital crime].

Id. at 2761; *see also* section II.A.2.a.3, *supra* (describing powerful conclusions Dr. Thomas could have provided about Mr. Jones's mental state at the time of the crime). Dr. Thomas also would have considered witness accounts about Mr. Jones's bizarre behavior, preoccupation, suspicions, habit of talking to people who were not there, and unusual routines for trying to feel safe to further support his clinical impressions about "Mr. Jones's symptoms of psychosis, including delusional and referential thinking, auditory and visual hallucinations, and paranoia." *Id*. at 2760.

A competent, adequately prepared expert with qualifications in family dynamics and child abuse could have synthesized lay witness accounts, record evidence, and other experts' analyses to provide the jury with a compelling and sympathetic description of Mr. Jones's life and behavior. *See generally* Ex. 178; State Pet. at 237. Among other things, such an expert acting as a social historian would have explained to the jury that:

> The impact of such devastating and numerous physical and emotional assaults during his early childhood stunted Ernest Jones's normal development and adversely affected his mental functioning from his earliest childhood through the time of the [capital] offenses. . . . Emotionally intense or stressful situations triggered intrusive and

> dissociative mental states that further compromised his ability to understand events and respond appropriately. … Ernest was often overwhelmed by the violence and horror of his life. Confronted with this life-threatening environment, Ernest's mind reacted by allowing him to dissociate . . . as a means of self-protection.

Id. at 3151-52. A social historian would have further explained that Mr. Jones "developed an increasing and unfocused fear of the world in general." *Id.* at 3153. The symptoms of Mr. Jones's mental illness progressed to increasing paranoia, auditory and visual hallucinations, and depression. Mr. Jones also began to use drugs and alcohol "as a way to cope with his problems, and to suppress the overwhelming emotional responses he experienced as a result of the abuse and trauma he had suffered." *Id.* at 3153-54; *see also* Ex. 154 at 2762-64 (if he had been provided with the results of a reasonable background investigation, Dr. Thomas would have reached similar conclusions).

To address the impact of his brother Carl's murder on Mr. Jones, a social historian could have testified that:

> Ernest's guilt over his brother's death overwhelms him at times. Ernest continues to blame himself for Carl's death. … For a long time afterwards, he was acutely distressed as he tried to figure out who had done this to his brother. . . . Ernest suffered from flashbacks. He saw Carl, dead, lying on the street in a pool of blood. Ernest also experienced visual hallucinations after his brother's death. While he was out walking near his home, Ernest believed that he saw someone that looked like his brother Carl and followed the person into a local store. Inside, he did not find anyone except for the storeowner who asked Ernest what was he looking for.

Ex. 178 at 3144.

A qualified social historian also could have testified about Mr. Jones's

increasing distress leading up to the Jackson crime and the specific circumstances of the incident. On the day of the Jackson crime, shortly after Carl's death, Mr. Jones and Ms. Jackson smoked marijuana and talked about Carl. The topic was too difficult for Mr. Jones, and he became more and more agitated, but could not do anything about it. Ex. 178 at 3146. This expert would have explained:

> That moment of great vulnerability and stress touched off for Ernest an extreme dissociative reaction. Ms. Jackson could see this change immediately. His entire face and demeanor changed, and he forced her to have intercourse. Immediately after he came out of the 'trance like state,' he saw her crying and slowly began to understand that something bad had happened, and apologized to her profusely.

Id. (following the incident Mr. Jones called his girlfriend and talked to her for three or four hours before turning himself into the police).

A competent neuropsychological evaluation would have revealed that in addition to his mental health problems, "Mr. Jones suffers from such severe brain damage that he is unable to function at the same level as 99 percent of those in his age category." Ex. 175 at 3072; *see also id.* at 3063 (testing also would have confirmed Mr. Jones's low IQ and impaired intellectual functioning). A qualified and adequately prepared neuropsychologist could have testified that this brain damage began even before Mr. Jones was born, when his mother drank alcohol and smoked during her pregnancy with him. *Id*. at 3073. Damage to Mr. Jones's brain continued after birth, through numerous head injuries he received as a very young child and childhood malnutrition and neglect. *Id*. at 3073-74. A qualified neuropsychologist also could have explained that Mr. Jones's organic brain damage severely affected numerous aspects of his mental functioning, including memory, concentration, and attention, and that the damage he suffered to his frontal lobes alone can impair judgment, insight, control, the ability to plan and organize, and overall self-regulation. *Id.* at 3065-66.

Finally, an educational professional who had reviewed Mr. Jones's school records would have been able to testify about his cognitive impairment and academic difficulties, and his enthusiasm and interest in school despite his disability. *See generally* Exs. 125, 130. At an early age, Mr. Jones tested with an IQ of 68, a score markedly below average, and was placed in the Educable Mentally Retarded ("EMR") program from the first through third grade. Ex. 125 at 2552-53. Mr. Jones's low scores on some of the tests "indicated problems with making appropriate decisions, caring for self, and responding age appropriately to social situations." Ex. 130 at 2599. After leaving the EMR in elementary school, Mr. Jones "achieved virtually no academic success." *Id.* at 2601. He did not earn enough credits to graduate from junior high school. Ex. 125 at 2554. At the age of sixteen, his academic achievement was "extremely poor, ranging from the second to the sixth grade level." Ex. 130 at 2601.

3) The picture presented to the jury.

Instead of the powerful and detailed mitigation that was available, trial counsel presented the jury with only a glimpse of Mr. Jones's life. The scant level of detail about Mr. Jones that the jury heard during the penalty phase is exemplified by trial counsel's direct examination of the only sibling he called to testify, Tanya Jones. 29 RT 4237-40. During her brief testimony, trial counsel elicited the following description of Mr. Jones's home life:

Q. Can you describe your home life when you were young?

A. Very, very violent. Our parents fought all the time. Constantly.

Q. Was that in front of you or away from you?

A. In front of us.

Q. What about drinking?

A. My mother and father drank very heavily, and it wasn't hidden. Everybody knew. It was in front of us. It was never a secrete (sic).

Q. Were you actually ever present when there were any fights between your parents?

A. All the time.

29 RT 4237-38; *see also id.* at 4238-39 (describing an incident when her mother stabbed her father).

Mr. Jones's friend Herman Evans gave a similarly brief description of Mr. Jones's home environment: "The mother who would drink a lot. Sometimes the home environment was kind of unstable, not always food there to eat, or, you know, just a lot of instability there." 29 RT 4253. During cross-examination of both Ms. Jones and Mr. Evans, the prosecution suggested that there was no physical abuse of Mr. Jones and his siblings: "Q. And when your father was not around, your mother wasn't violent towards anyone else, was she? . . . A. It was not as bad, no." 29 RT 4244 (questioning Ms. Jones); *see also* 29 RT 4160-61 (questioning Mr. Evans). Mr. Jones's aunt, Geraldine Jones, testified that both of Mr. Jones's parents had drinking problems and fought with each other, and that Mr. Jones's father found his mother in bed with another man. 31 RT 4567-71. She also testified that Mr. Jones's sister Jean developed a drug problem and once tried to cut her wrists with glass at a family barbeque. 31 RT 4572. On cross-examination, she stated, without detail, that she witnessed Mr. Jones's parents beating him. *Id.* at 4578.

Mr. Jones's father acknowledged that both Mr. Jones's mother and he had drinking problems and that when they moved to California "[T]his is when all of the drinking and all of the problems started." 29 RT 4362. Rather than follow up on this testimony, trial counsel immediately asked, "All right, now, aside from the drinking, were there other problems between you and your wife?" 29 RT 4362. Mr. Jones's father testified that he fought with his wife and found her in bed with his friend, and she did not supervise the children adequately. 29 RT 4363, 4366, 4369. He also testified that he had two jobs and did his best to support the family;

in spite of his wife's transgressions, he stayed with her for their children's sake. *Id.* at 4360, 4365, 4369. Mr. Jones's father testified that once he and his wife finally split up, he made sure the children had a place to live and the electricity bills were paid; "I was always there for the things that they needed for the school clothes, their Christmas." *Id.* at 4374.

Although lay witness testimony hinted at Mr. Jones's troubled background, it suggested to the jurors that Mr. Jones's "father was a good man who did everything that he could for his son, including taking him to church. It was not like Mr. Jones's childhood or life was that bad; he was never homeless or begging for food and his father clearly took good care of his children." Ex. 23 at 240; *see also* Ex. 139 at 2693 ("I felt sorry for Mr. Jones's father. He was a poor man who did everything he could to get his family together but it just did not work."); Ex. 127 at 2565 ("There was some testimony about Mr. Jones's childhood but I do not remember thinking his life was all that bad"); Ex. 138 at 2690 (the jury "talked about how we never had a picture of what growing up was really like for [Mr. Jones]").

Little that the witnesses said about Mr. Jones during their testimony provided a logical connection to Dr. Thomas's subsequent testimony that Mr. Jones suffered from schizoaffective psychosis and schizophrenic dissociation. 30 RT 4433-35. The prosecutor capitalized on this. He repeatedly challenged Dr. Thomas's reliance on Mr. Jones's own descriptions and highlighted the absence of other, reliable sources to inform the doctor's opinion. 30 RT 4472 (highlighting the source of the doctor's initial opinion as being based on one interview with Mr. Jones); *id*. at 4473-74 (raising factual inaccuracies in information provided to Dr. Thomas by Mr. Jones); *id*. at 4489-90 (citing need for objective criteria in mental health evaluations); *id.* at 4497-99 (pointing out that testing conducted by Dr. Spindell was not done according to professional standards, thus affecting its reliability). The prosecution asked Dr. Thomas, "isn't it true the literature in this

area would also say that you should be careful on taking the word of somebody who may be as [sic]—has raped and killed in the past and who is facing consequences for that he may have a bias for presenting a certain history?" *Id.* at 4510; *see also id.* at 4532 ("Again, this is the only information you have on him hearing voices is from the defendant himself?"). When the prosecution challenged Dr. Thomas's conclusion that Mr. Jones's assault of Kim Jackson was the result of an "emotional trigger," Dr. Thomas did not have sufficient information to respond, stating, "I'm not sure just what the series of incidents were." *Id.* at 4520.

The prosecution described Dr. Thomas's testimony as an "eclectic approach" based solely on "the Dr. Thomas theory of what Mr. Jones has done." *Id*. at 4515. A juror summed it up this way: "Although he offered his professional opinion about Mr. Jones's conduct, there was no other evidence presented to support his conclusions. It is a hard sell to convince twelve jurors that a person suffers from flashbacks without any other evidence." Ex. 140 at 2694.

4) The totality of mitigating evidence establishes prejudice.

In contrast to the anemic portrayal of Mr. Jones's life during the penalty phase, experts and lay witnesses could have provided compelling mitigation to counter aggravating evidence from the prior crimes against Ms. Jackson and Ms. Harris, as well as the capital crime. The U.S. Supreme Court has held that counsel is prejudicially ineffective for failing to investigate and present the same types of evidence as Mr. Jones's counsel failed to present. In *Rompilla*, for example, the Court found prejudicial the failure to present this information:

> Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at

> least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse.

545 U.S. at 391-92. In *Wiggins*, the Court held that counsel ineffectively failed to investigate and present "powerful" mitigating evidence, including "severe privation and abuse" in the custody of an alcoholic mother, physical torment and sexual molestation, homelessness, and diminished mental capacity. 539 U.S. at 534-35. In *Williams*, the Court ruled that counsel was ineffective for failing to investigate and present evidence that "dramatically described mistreatment, abuse, and neglect, during [Williams's] early childhood, as well as testimony that he was 'borderline mentally retarded,' had suffered repeated head injuries, and might have mental impairments organic in origin," even though "not all of the additional evidence was favorable to Williams." 529 U.S. at 370, 396.

3. Respondent Disputed Key Facts in State Court.

Respondent's Informal Response to Mr. Jones's state habeas petition raised factual disputes with Mr. Jones's allegations, but did not substantiate those disputes with any documentary or other factual support. *See* Inf. Resp. at 22-26. First, Respondent argued, "Counsel may have reasonably determined that the evidence he presented was appropriate and sufficient to create sympathy for petitioner." *Id.* at 23. Respondent further speculated that "the jurors may have concluded that petitioner's horrendous childhood caused him to become a desensitized and incurable sociopath" and that counsel "may have determined that additional evidence regarding petitioner's childhood would have caused the jury to be alienated from rather than sympathetic to petitioner." *Id.* at 24.

Second, regarding expert testimony, Respondent asserted that "counsel may have concluded that Dr. Thomas's testimony was adequate to establish petitioner's

mental disease and evidence related to the extended family would not have been particularly helpful in creating sympathy for petitioner." *Id.* at 24. Respondent also suggested that counsel may have reasonably chosen not to pursue evidence of Mr. Jones's academic failures and learning problems "on the ground that it would have had relatively little mitigating value." *Id.* Respondent argued that any deficient performance was not prejudicial because additional evidence may have been harmful or had relatively little mitigating value. *Id.* at 25. Respondent speculated that "the jury's death sentence was likely based on the gruesome and disturbing nature of petitioner's attack on Mrs. Miller and petitioner's history of violent sexual assault, and it is unlikely the additional evidence regarding petitioner's childhood and family history would have affected the verdict." *Id.*

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

In 2009, the state court summarily denied Mr. Jones's ineffective assistance of counsel claim as failing to state a prima facie case for relief. To the extent the state court's ruling reflects its determination that Mr. Jones failed to plead sufficient facts that, if proven, would entitle him to relief, the state court's decision is (1) contrary to clearly established federal law, and (2) an unreasonable application of *Strickland* under section 2254(d)(1). In the alternative, the state court unreasonably determined the facts under section 2254(d)(2) by finding facts and resolving disputes without any adjudicative procedure.

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

Taken as true, Mr. Jones's allegations established a prima facie case that trial counsel's performance was deficient in a variety of ways, including, inter alia, the following:

- counsel failed to conduct a reasonable investigation of Mr. Jones's background in preparation for the penalty phase;
- though counsel believed that the testimony of a mental health expert was necessary to save Mr. Jones's life, he did not retain an expert with

sufficient time to work on the case, provide his expert with necessary and requested materials, adequately prepare the expert to testify, or effectively present his expert's testimony;

- though counsel identified the alcoholism, neglect, and physical abuse as themes to address during the penalty phase, he did not adequately investigate these issues, prepare witnesses to testify about them, or effectively elicit testimony about them; and
- though counsel knew or should have known that sexual abuse, mental illness, brain damage, and low intellectual functioning were critical penalty phase issues, he did not ask testifying witnesses about them or otherwise investigate or present these aspects of Mr. Jones's background.

See section II.C.2, *supra*. Mr. Jones also made a prima facie showing that he was prejudiced by trial counsel's deficient performance, demonstrating in detail the lay witness testimony, documentary evidence, and expert testimony that could have been presented that would have changed the penalty verdict. *See* section II.C.2.c., *supra*. Mr. Jones further supported his allegations with 63 lay witness, expert, and defense team declarations, and nearly 100 social history records and exhibits.

The state court's summary denial of this claim was contrary to federal law requiring a state court to ascertain facts reliably before denying adequately presented federal claims. *See* section I.B., *supra*; Reply Br. on *Pinholster* at 12-17.[28] The state court's decision also was contrary to federal law because it addressed facts that were "materially indistinguishable" from U.S. Supreme Court decisions and nevertheless arrived at a result that differed from the Court's precedents. *Williams*, 529 U.S. at 406. The Court's decisions in *Rompilla*, *Wiggins*, and *Williams* held that counsel was ineffective for failing to investigate

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[28] As discussed previously, the state court prejudice standards also are contrary to *Strickland* under section 2254(d)(1). *See* section II.A.5.b, *supra*.

and present the same types of mitigating evidence omitted in this case. *See* section II.C.2.c.4, *supra*. In spite of sufficiently pleading a materially indistinguishable basis for relief as that found meritorious in the Court's cases, Mr. Jones's claim was summarily denied without a hearing. This also satisfies section 2254(d)(1).

Finally, the state court's summary denial also constituted an unreasonable application of *Strickland*. Although Mr. Jones made detailed factual allegations, which, taken as true, would entitle him to relief, the state court did not require Respondent to respond formally to Mr. Jones's allegations or present evidence to support Respondent's factual contentions. The state court ruling also denied Mr. Jones the opportunity to present evidence, subpoena witnesses, and prove his allegations. *See* section I.B.2, *supra*. The state court therefore declined to engage in any assessment of the factual allegations and fact finding before denying Mr. Jones's claims, thus satisfying section 2254(d)(1). *See, e.g.*, *Wiggins*, 539 U.S. at 527 (holding that state court application of *Strickland* was unreasonable when it did not conduct an assessment of whether counsel's limited penalty phase investigation was reasonable); *Mosley*, 689 F.3d at 848; *Brumfield*, 854 F. Supp. 2d at 376-77.

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

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

- Was objectively unreasonable in his investigation of Mr. Jones's violent and dysfunctional home life, neglect, and physical abuse;
- Fell below an objective standard of reasonableness in failing to investigate and present evidence of Mr. Jones's history of sexual abuse, his mental illness, and low intellectual functioning;
- Failed to adequately prepare and present expert testimony;
- Had tactical reasons for his actions and omissions; or

- Prepared and presented witnesses according to prevailing professional norms.

If the state court denied Mr. Jones's claim on these or other factual bases at the pleading stage, it unreasonably determined the facts under section 2254(d)(2) by failing to provide Mr. Jones either with process to develop and present supporting evidence; or notice of and an opportunity to be heard on the factual issues that the state court intended to resolve. *See* sections I.B. and II.A.5.c, *supra*.

D. Mr. Jones Was Denied His Right to an Impartial Jury and a Fair Trial.

Mr. Jones presented the state court with a prima facie claim that multiple jurors were actually biased and committed misconduct during his trial.[29] State Pet. at 290-316; Reply at 275-99. Given two highly-publicized cases happening at the same time as Mr. Jones's trial—the O.J. Simpson and Heidi Fleiss trials—and juror misconduct that occurred in one of them, the trial court repeatedly admonished Mr. Jones's jury not to discuss the case or penalty phase prematurely and to await full presentation of evidence before forming any opinions. A number of jurors manifested bias against Mr. Jones by disregarding these admonitions.

Several jurors resolved to impose the death penalty before the penalty phase began and regularly talked about this during guilt phase proceedings and while socializing during lunch. The victim's daughters' regular courtroom outbursts further compromised the jury's impartiality. Jurors also improperly considered extrinsic evidence, including: (1) Biblical teachings mandating imposition of the death penalty for murder; (2) one juror's specialized knowledge of evidence the defense presented about Mr. Jones's medications; and (3) information that Mr. Jones would not likely be executed if sentenced to death. One juror slept during

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[29] This claim was pled as Claims Fourteen and Fifteen (state court) and Claims Eighteen and Nineteen (federal court). State Pet. at 290-316; Fed. Pet. at 343-63.

the critical testimony of the defense's only penalty phase mental health expert. Although the law plainly requires a hearing to determine the extent and effect of this bias and misconduct, the state court never conducted one or provided Mr. Jones any opportunity to prove his allegations.

1. Controlling U.S. Supreme Court Precedent.

The Sixth Amendment guarantees a defendant a fair trial by a panel of impartial jurors. *See, e.g.*, *Parker v. Gladden*, 385 U.S. 363, 364, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966). An impartial jury is "willing to decide the case solely on the evidence before it." *McDonough Power Equip v. Greenwood*, 464 U.S. 548, 554, 104 S. Ct. 845, 849, 78 L. Ed. 2d 663 (1984) (internal quotation omitted). Due process also "implies a tribunal both impartial and mentally competent to afford a hearing." *Jordan v. Massachusetts*, 225 U.S. 167, 176, 32 S. Ct. 651, 56 L. Ed. 1038 (1912); *see also Peters v. Kiff*, 407 U.S. 493, 501, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972).

Juror bias "may be actual or implied," *i.e.*, bias in fact or bias conclusively presumed as a matter of law." *United States v. Wood*, 299 U.S. 123, 133, 57 S. Ct. 177, 81 L. Ed. 78 (1936). "[E]xtreme situations … would justify a finding of implied bias," such as a juror's employment with the prosecuting agency, close relation to a participant in the trial or the crime, or role as a witness or other involvement in the crime. *Smith v. Phillips*, 455 U.S. 209, 222, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982) (O'Connor, J., concurring); *see also Leonard v. United States*, 378 U.S. 544, 545, 84 S. Ct. 1696, 12 L. Ed. 2d 1028 (1964) (finding implied bias where prospective jurors in second trial heard guilty verdict from first trial).

Thus, most misconduct cases involve a juror's actual bias, such as by their prejudgment of the facts. *See, e.g.*, *Phillips*, 455 U.S. at 215, 221; *Gibson v. Berryhill*, 411 U.S. 564, 578, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973). "[A] trial by jurors having a fixed, preconceived opinion of the accused's guilt would be a denial of due process." *Irvin v. Dowd*, 366 U.S. 717, 724, 81 S. Ct. 1639, 6 L. Ed.

2d 751 (1961). The test for actual bias is "whether the nature and strength of the opinion formed" by the juror "necessarily raise[s] the presumption of partiality." *Id.* at 723. "Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it." *Phillips*, 455 U.S. at 221 (O'Connor, J., concurring).

The Supreme Court "has long held that the remedy for allegations of juror partiality is a hearing" to allow the defendant to prove actual bias; the hearing serves as "a guarantee of a defendant's right to an impartial jury." *Id.* at 215-16. A hearing inquires into the "juror's memory, his reasons for acting as he did, and his understanding of the consequences of his actions," and permits "the trial judge to observe the juror's demeanor under cross-examination and to evaluate his answers" in light of the facts. *Id.* at 222 (O'Connor, J., concurring); *see also id.* ("in most instances a post-conviction hearing will be adequate to determine whether a juror is biased," but the implied bias doctrine is necessary where a hearing may not be sufficient to protect a defendant's rights).

Courts must also ensure that jurors are unaffected by "extraneous influence" such as hearing or reading prejudicial information not admitted into evidence or being exposed to the comments of outsiders.[30] *Tanner v. United States*, 483 U.S.

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[30] Similarly, a juror's consideration of extraneous facts violates due process guaranteed by the Fifth and Fourteenth Amendments, because the death sentence "[is] imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362 (1977); *see also Irvin v. Dowd*, 366 U.S. at 722. This also violates the Sixth Amendment's Confrontation Clause and Compulsory Process Clause: the juror acts as an unsworn witness without confrontation or cross-examination. *See, e.g.*, *Parker v. Gladden*, 385 U.S. 363 (1966); *Jeffries v. Wood*, 114 F.3d 1484, 1490 (9th Cir. 1997) (en banc), *overruled on other grounds by Lindh v. Murphy*, 521 U.S. 320 (1997); *Marino v. Vasquez*, 812 F.3d 499, 505 (9th Cir. 1987).

107, 117, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987). Extrinsic influences are "for obvious reasons, deemed presumptively prejudicial." *Remmer v. United States*, 347 U.S. 227, 229, 74 S. Ct. 450, 98 L. Ed. 654 (1954). "The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Id.* at 229. To resolve a claim of exposure to extrinsic evidence, the court "should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Id.* at 230; *see also Tanner*, 483 U.S. at 120 (ruling that "[t]he Court's holdings requir[e] an evidentiary hearing where extrinsic influence or relationships have tainted the deliberations"); *Mattox v. United States*, 146 U.S. 140, 150, 13 S. Ct. 50, 36 L. Ed. 917 (1892) (holding that "[p]rivate communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict," unless shown harmless).[31]

When a juror is not impartial, the resulting constitutional violations are not subject to harmless error analysis, because they are structural errors that "infect the entire trial process and necessarily render a trial fundamentally unfair." *Neder v. United States*, 527 U.S. 1, 8-9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *see also Rose v. Clark*, 478 U.S. 570, 578, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986) (ruling that harmless-error analysis presupposes a trial by impartial jury). This is true regardless of the number of jurors affected: a defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." *Parker*, 385 U.S. at 366.

[31] Where the jury was tainted by courtroom disruptions, the Court also has "held that the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the [disruption] compromised" the jury's ability to adjudicate the case fairly. *Phillips*, 455 U.S. at 217 (internal quotation omitted).

2. Prima Facie Allegations Before the State Court

a. Several jurors were biased.

Mr. Jones presented the state court with several allegations about the jurors' actual bias: they (1) formed fixed opinions that Mr. Jones should be sentenced to death prior to the penalty phase; (2) prematurely discussed these opinions during the guilt phase and in social interactions; (3) in so doing, disobeyed the court's repeated admonitions and instructions; and (4) failed to report their misconduct to the court. State Pet. at 296-308; Reply at 290-95.

During Mr. Jones's trial, the courthouse was filled with spectators and media associated with two high-profile cases involving defendants O.J. Simpson and Heidi Fleiss. *See, e.g.* 13 RT 2331; Ex. 138 at 2689 (juror commenting that "I could not get over how many people gathered at the courthouse to see the Simpson trial, it was a circus"). Due to the circus-like atmosphere and misconduct in the Fleiss trial, the trial court took the unusual precaution of repeatedly and thoroughly instructing the jurors on four key obligations. First, the trial court consistently admonished jurors not to discuss the case outside of deliberations. The pretrial judge instructed them at the outset:

> I am going to do something I have never done before but I feel compelled in light of what happened next door in the Heidi Fleiss case; that is, I am ordering each and every one of you not to discuss this case with anyone until the case is actually submitted to the jury. When it's submitted to the jury, you may discuss it if you are a part of the deliberating 12 and only then when you are in the jury room and all 12 deliberating jurors are present. You may not discuss it at any other time.

13 RT 2331-32. The trial judge consistently reiterated this admonition. *See, e.g.*, 16 RT 2546; 18 RT 2892; 23 RT 3457; 24 RT 3688; 26 RT 3820 (guilt phase instructions); 2 CT 258, 337-38 (same); 29 RT 4287; 31 RT 4611-12 (penalty phase instructions); 2 CT 427 (same). Similarly, the alternate jurors were admonished not to discuss the case with other jurors. 2 CT 338; *see also* 16 RT 2546; 23 RT

3457; 31 RT 4697.

Second, the jurors were forcefully instructed not to consider Mr. Jones's penalty until penalty phase deliberations: "[Y]ou are not to talk to anyone about the case or the subject matter of penalty or punishment. That order is being made under penalty of contempt of court if any of you violates that order." 13 RT 2332; *see also* 26 RT 3861, 3875 (guilt phase instructions). The jurors also were instructed not to decide penalty issues before "discussing the evidence and instructions with the other jurors" during deliberations. 31 RT 4693-94; 2 CT 331. Third, the trial judge instructed the jurors to avoid extraneous information and underscored the instruction's importance:

> I don't usually highlight an instruction, but I had two instances last year, both homicide cases where one juror went and got a 1972 penal code to look up something, and that juror didn't remain. Another case, some jurors brought a newspaper article in and used that in their deliberations. Nobody told me about it until after the fact.

26 RT 3820; *see also* 31 RT 4611-12 (penalty phase instructions). Fourth, the jurors were told to report misconduct promptly to the court: it was "imperative" to "deal with it right away," while possible to "remove the juror who's involved in the misconduct and substitute in one of the alternatives." 13 RT 2332-33.

Several jurors blatantly disregarded the court's repeated instructions. They decided to vote for a death sentence prior to Mr. Jones's penalty phase, then discussed their decisions well before penalty phase deliberations—during guilt phase proceedings and in their social interactions. No juror or alternate privy to this misconduct reported it to the court. For example, from the start of guilt phase deliberations, two male jurors were "extremely vocal … that Mr. Jones was guilty of these crimes and *therefore he should get the death penalty*." Ex. 138 at 2690 (emphasis added). Similarly, a male juror "always wanted to talk during the trial and assert his opinion that Mr. Jones was guilty and deserved the death penalty."

1 Ex. 122 at 2475. After hearing the victim's daughters' outbursts during the guilt
2 phase, another juror resolved "right then and there … to vote for death," and
3 shared his decision with the other jurors during guilt phase deliberations. Ex. 9 at
4 93. Prior to penalty phase deliberations, some jurors also discussed their decision
5 to sentence Mr. Jones to death over their lunchtime get-togethers. Ex. 23 at 240.
6 One of these jurors, alternate juror Virginia Suprenant, recalled their concerns
7 about another juror who obeyed the court's admonition and refused to discuss the
8 case: "There was one juror in particular, an African American woman, who we
9 were worried about. She never shared her feelings, so we feared that she was
10 planning to vote for [life without parole.]" Ex. 23 at 240.

11 The jurors' pervasive prejudgment of Mr. Jones's sentence made them view
12 both the defense's penalty phase presentation and their subsequent deliberations as
13 largely irrelevant. As Juror Muhammad explained, "We talked about how the case
14 was all about the guilt phase because once we decided that we knew we had to vote
15 for death … By the time the penalty phase came it was too late, our minds were
16 already made up." Ex. 138 at 2690-91. Juror Ruotolo recalled that penalty phase
17 deliberations were meaningless to the point where the jury did not understand the
18 purpose of considering the defense's mitigating evidence: "We all talked about
19 how we already decided that he was guilty, and we did not understand how to view
20 the [penalty phase] evidence in light of our guilt verdicts." Ex. 9 at 95.

21 Mr. Jones thus alleged that jurors exhibited their actual bias against Mr.
22 Jones by prejudging Mr. Jones's penalty, disregarding the trial court's repeated
23 admonitions, and discussing their views with other jurors and third parties prior to
24 their deliberations. *See Irvin*, 366 U.S. at 724; *Green v. White*, 232 F.3d 671, 673,
25 678 (9th Cir. 2000) (applying Supreme Court precedent to grant relief on juror bias
26 claim where, inter alia, one juror told others that he knew that petitioner was guilty
27 from the moment that he saw him); *United States v. Resko*, 3 F.3d 684, 688-89 (3d
28 Cir. 1993) (granting relief on juror bias claim where jurors prematurely discussed

the case with each other); *cf. Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1056 (9th Cir. 2005) (finding due process violation due to biased decisionmaker, where judge declined to hear relevant testimony due to prejudging the witness's credibility); *Antoniu v. SEC*, 877 F.2d 721 (8th Cir. 1989) (holding due process violated when decisionmaker made statements about party's guilt before case was resolved). The "remedy for allegations of juror partiality is a hearing" to allow Mr. Jones to prove the jurors' actual bias. *Phillips*, 455 U.S. at 215.

b. The jurors were exposed to extrinsic evidence.

Mr. Jones also alleged that jurors were exposed to several extrinsic influences, including the victim's family's outbursts, Biblical teachings, unsworn opinions about Mr. Jones's psychiatric medication, and factors that diminished their responsibility in sentencing Mr. Jones to death. State Pet. at 303-05, 308-10; Reply at 286-90, 296-97.

1) The victim's daughters' outbursts

Throughout trial, the victim's daughters, Pamela Miller and Deborah Harris, were vocally hostile towards Mr. Jones in the jury's presence, calling him names and launching prejudicial, inaccurate accusations at him. Ex. 23 at 239 (alternate juror recalls that "the victim's daughters carried on constantly, screaming and yelling at Mr. Jones … and [were] unable to control themselves. The way they behaved, they could have been on television"); Ex. 9 at 93 (juror recalls that Ms. Miller "and her sister yelled out in court many times").

During a witness's testimony about the night of the crime, Ms. Harris sat in the front row of the courtroom in clear view of the jury. *Id.* Her conduct was so disruptive that the judge asked her to leave "because you keep gesturing with your head, shaking your head, nodding up and down and shaking your head back and forth and making comments." 22 RT 3272-73. Her conduct was so extreme that the judge refused to allow her to remain in the courtroom for the remainder of that witness's testimony and Mr. Jones's testimony, even after she assured the judge she

would stop gesturing and commenting. During trial, Ms. Miller "called Mr. Jones names and screamed out that [he] had also caused the death of her father who died of a heart attack a few months after her mother was killed." Ex. 9 at 93. She was "extremely vocal throughout her testimony and the entire trial." *Id*.

The daughters' disruptive conduct exposed the jurors to harmful extrinsic information about the impact of Mrs. Miller's death that was not introduced as evidence.[32] *See, e.g.*, Ex. 9 at 93 (juror recalls, "During guilt deliberations, one of the jurors told us … he could understand how upset the daughter was … He said right then and there, after hearing the daughter, he knew he had to vote for death"). It denied Mr. Jones his right to a fair trial by a panel of impartial jurors unaffected by extraneous information. *See, e.g.*, *Parker*, 385 U.S. at 364; *Tanner*, 483 U.S. at 117; *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (a defendant is entitled to a jury verdict based solely on trial evidence, not on "other circumstances not adduced as proof at trial").

As in other contexts, where disruptions in the courtroom threaten the impartiality of the jury, the U.S. Supreme Court has "held that the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the [disruption] compromised the ability of the particular jury that heard the case to adjudicate fairly." *Phillips*, 455 U.S. at 217 (internal quotation omitted).

2) Biblical teachings

Juror Youssif Botros improperly consulted with his priest about Mr. Jones's penalty and shared the priest's comments and Biblical teachings on the death penalty with the jurors. Mr. Botros was an Egyptian Coptic Christian. During penalty phase deliberations, "each of the jurors took turns speaking [their] mind."

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[32] This information also severely biased jurors against Mr. Jones and contributed to their misconduct in freely discussing Mr. Jones's penalty prior to penalty phase deliberations, as described *supra*.

Ex. 127 at 2565. Mr. Botros told the other jurors that he was "having a difficult time sentencing someone to death," so "he asked his priest for help." *Id*. His priest told him to read the Bible for guidance. *Id*. Mr. Botros told the other jurors that he subsequently read the Biblical teaching requiring an "eye for an eye" response to murder and was resultantly able to vote for death. *Id*.[33]

Exposure to the Bible's teachings on the death penalty has a particularly improper influence. "[D]elegation of the ultimate responsibility for imposing a sentence to divine authority undermines the jury's role in the sentencing process." *Sandoval v. Calderon*, 241 F.3d 765, 777 (9th Cir. 2000); *see also Jones v. Kemp*, 706 F. Supp. 1534, 1559 (N.D. Ga. 1989) ("To the average juror, Webster's Dictionary may be no more than a reference book, and The Reader's Digest nothing more than a diverting periodical; but the Bible is an authoritative religious document and is different not just in degree, although this difference is pronounced, but in kind").

Mr. Botros's misconduct went to the very purpose of the penalty phase: to decide whether Mr. Jones would be sentenced to death. He violated Mr. Jones's rights to a fair trial by impartial jury and to due process by exposing the jury to "prejudicial information" from the Bible that was not presented at trial and to the comments of others, specifically his priest. *Tanner*, 483 U.S. at 117; *see also Gardner*, 430 U.S. at 362; *Mattox*, 146 U.S. at 149. Courts consistently find constitutional error when jurors consult the Bible for the appropriate penalty for

[33] Botros's disobedience of the trial court's instructions in consulting the priest and his Bible also evinces his actual bias, particularly because it occurred after the trial judge underscored to the jury the importance of not relying on extrinsic sources. 26 RT 3820; *see also* 13 RT 2331-32 (pretrial); 16 RT 2546; 23 RT 3457; 26 RT 3816, 3819-20 (guilt phase instructions); 31 RT 4611-12, 4693, 4697 (penalty phase instructions); 2 CT 254, 258, 338 (text of jury instructions). The remaining jurors committed misconduct in failing to follow the trial court's instruction to report misconduct immediately. 13 RT 2331-33.

murder during penalty phase deliberations. *See Oliver v. Quarterman*, 541 F.3d 329, 339-40 (5th Cir. 2008) (noting that all but one circuit to consider the issue has ruled that the Bible is an improper external influence on jury deliberations; "when a juror brings a Bible into the deliberations and points out to her fellow jurors specific passages that describe the very facts at issue … the juror has crossed an important line"); *McNair v. Campbell*, 416 F.3d 1291, 1308 (11th Cir. 2005) (presuming prejudice where juror read aloud from the Bible during deliberations and led the other jurors in prayer); *Coe v. Bell*, 161 F.3d 320, 351 (6th Cir. 1998) (acknowledging presence of a Bible in the jury room could be problematic); *Kemp*, 706 F. Supp. at 1558-60 (jury obligated to apply state law, "not … its own interpretation of precepts of the Bible, in determining whether the petitioner should live or die."). Mr. Jones's allegations entitle him to a hearing to discover and present the details of Mr. Botros's misconduct and its prejudicial effect. *See, e.g.*, *Remmer*, 347 U.S. at 229; *Tanner*, 483 U.S. at 120.

3) Mr. Jones's medications

During the guilt phase, the defense presented the testimony of Dr. Eugene Kunzman, a psychiatrist with the Los Angeles County Jail. 23 RT 3558. Dr. Kunzman testified about the antipsychotic and antidepressant medications, Haldol and Sinequan, prescribed for Mr. Jones by jail staff after his arrest for the capital crime. *Id.* at 3558-59. Dr. Kunzman explained the reasons such drugs would be prescribed, their potency, and the effect on a person's testimony if they were over- or undermedicated. *Id*. at 3560-65. For example, Dr. Kunzman explained that an undermedicated person's symptoms, such as paranoia or hearing voices, could persist; an overmedicated person might appear sleepy and sedated, with slurred speech. *Id*. at 3564-65. This testimony was relevant to the jurors' consideration of Mr. Jones's testimony and credibility and to the defense's argument that Mr.

Jones's need for psychiatric medications shortly after the crime supported his mental state defense. *See, e.g.*, 26 RT 3952.[34] During the penalty phase, the defense expert Dr. Thomas also discussed the effects of Haldol and Sinequan prescribed for Mr. Jones in jail. 30 RT 4453. This testimony served to bolster Dr. Thomas's diagnosis and conclusions about Mr. Jones's mental functioning.

Juror Omar Muhammad was a physician's assistant at the Metropolitan Federal Prison in Los Angeles. He recalled, "During trial, Mr. Jones had a far away look in his eyes … I know from my experience with psychiatric medications that Mr. Jones looked like someone who was medicated with anti-depressants. I recognized the names of the anti-depressants that Mr. Jones was taking and told the other jurors what I knew about the medications." Ex. 138 at 2689; *see also* Ex. 122 at 2475 (the jurors discussed Mr. Jones's "possible mental illness" during penalty phase deliberations). Mr. Muhammad's specialized knowledge of psychiatric medications and prison mental health services improperly positioned him to counter or authoritatively comment on defense testimony by Drs. Kunzman and Thomas. The extraneous influence of his specialized knowledge tainted the jury's deliberations. *Tanner*, 483 U.S. at 117, 120; *Mach v. Stewart*, 137 F.3d 630, 634 (9th Cir. 1997) (granting relief where potential juror with specialized experience in child sexual abuse cases stated before jury venire that she had never been involved in a case where a child made untrue accusations); *Jeffries v. Wood*, 114 F.3d 1484, 1490 (9th Cir. 1997) (when "a juror communicates objective extrinsic facts regarding the defendant or the alleged crimes to other jurors, the juror becomes an unsworn witness within the meaning of the Confrontation

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[34] The prosecution vigorously challenged this testimony by trying to establish that jail mental health staff would have given Mr. Jones or any other inmate antipsychotic medication upon request, without any clinical verification of psychiatric need. *See* section II.B.2.b, *supra.*

Clause"), *partially overruled on other grounds by Gonzalez v. Arizona*, 677 F.3d 383, 388 (9th Cir. 2012); *Kemp*, 706 F. Supp. at 1560.

4) Other factors responsible for Mr. Jones's actual sentence

The jurors felt it was "was not difficult … to vote for the death penalty, because regardless of our verdict, we knew that Ernest would end up getting life. We talked about how his drug use would save him from ever being executed." Ex. 9 at 96. It is unclear whether the jurors considered Mr. Jones's medication regimen in jail (including Mr. Muhammad's opinions), his substance use on the streets, or both, in improperly relying on extrinsic knowledge that Mr. Jones would end up with a life sentence. Their consideration of the belief that Mr. Jones would not actually be executed even if they sentenced him to death violated Mr. Jones's Sixth Amendment, Due Process, and Eighth Amendment rights. *See, e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 328-29, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985) ("it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."); *Marino v. Vasquez*, 812 F.2d 499, 505 (9th Cir. 1987) ("When a jury considers facts that have not been introduced in evidence … [i]t is impossible to offer evidence to rebut it, to offer a curative instruction, to discuss its significance in argument to the jury, or to take other tactical steps that might ameliorate its impact.").

A presumption of bias exists as to each of the four above-described instances in which Mr. Jones's jurors were exposed to extrinsic evidence. A court may not dismiss such allegations of juror exposure to extrinsic evidence on the pleadings, but instead must hold an evidentiary hearing. *Remmer*, 347 U.S. at 229; *Tanner*, 483 U.S. at 120. At the hearing, the government bears the "heavy burden" to establish that the exposure was harmless to the defendant. *Remmer*, 347 U.S. at 229. The government must demonstrate that *no* jurors were affected by their exposure to extrinsic evidence: "The number of jurors affected … does not weigh

heavily in the prejudice calculus for even a single juror's improperly influenced vote deprives the defendant of an unprejudiced, unanimous verdict." *Lawson v. Borg*, 60 F.3d 608, 613 (9th Cir. 1995).

c. A juror slept during the defense's penalty phase presentation.

Juror Emil Ruotolo slept during the testimony of the defense's sole mental health expert, Dr. Thomas: "His testimony was impossible to pay attention to, and I kept falling asleep." Ex. 9 at 95. Mr. Ruotolo's belief that the defense presented no relevant testimony on the critical issue of Mr. Jones's mental illness further illustrates that he slept through substantial portions of Dr. Thomas's testimony.

For example, Mr. Ruotolo complained, "The doctor did not explain why Mr. Jones did what he did. He talked about some mental problem that Mr. Jones had, but he never said what the mental problem was." *Id*. Dr. Thomas answered this question, however, testifying that "Mr. Jones suffers from a major psychiatric disorder of a psychotic nature … called schizoaffective schizophrenia." 30 RT 4413-14; *see also id.* at 4419-20, 4424. He explained that the capital crime was a "dissociative killing related to childhood socialization in areas of sex." 30 RT 4461-62; *see also id.* at 4439-40 (Mr. Jones's dissociation during the capital crime was linked to multiple traumatic childhood experiences in which he saw his mother in bed with another man). Dr. Thomas further explained that when triggered by high emotionality, Mr. Jones "responds to an inner reality as if it were external reality. The inner reality … being the world the way it was when he was growing up and subjected to the sadistic punishment of a domineering and promiscuous and alcoholic mother." *Id*. at 4465; *see also id.* at 4444, 4438-39.

"The duty to listen carefully during the presentation of evidence at trial is among the most elementary of a juror's obligations … [O]therwise, litigants could be deprived of the complete, thoughtful consideration of the merits of their cases to which they are constitutionally entitled." *Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 410-11, 185 Cal. Rptr. 654 (1982) (citing Sixth and Seventh Amendments of

U.S. Constitution and finding prima facie improper conduct where some jurors did crossword puzzles and another read a book). Mr. Ruotolo's sleeping during the testimony of the sole mental health expert was a constructive absence during trial that violated Mr. Jones's Sixth Amendment and Due Process rights.[35] *See, e.g.*, *Jordan v. Massachusetts*, 225 U.S. at 176; *Peters v. Kiff*, 407 U.S. at 501; *United States v. Barrett*, 703 F.2d 1076, 1082-83 (9th Cir. 1982) (finding abuse of discretion and remanding for evidentiary hearing where juror admitted to sleeping during trial, but trial court failed to hold hearing on misconduct). Mr. Jones is entitled to an evidentiary hearing to establish Ruotolo's misconduct and the resulting prejudice. *See Remmer*, 347 U.S. at 229; *Tanner*, 483 U.S. at 120; *United States v. Barrett*, 703 F.2d 1076, 1082-83 (9th Cir. 1982) (finding abuse of discretion and remanding for hearing where juror admitted to sleeping during trial, but trial court failed to hold hearing on misconduct).

3. Respondent disputed key facts in state court.

In response to Mr. Jones's allegations that jurors prematurely discussed the case and prematurely decided his penalty, Respondent contended that his claim was insufficiently alleged. The allegations were "conclusory and unsupported, as there are no facts establishing that the case was actually discussed by jurors prematurely" and insufficient basis to believe that any juror refused to deliberate, based their decision on extraneous evidence, or failed to consider all of the penalty phase evidence and instructions. Inf. Resp. at 44-46.

In response to Mr. Jones's allegations about Mr. Botros's improper injection of his priest's comments and Biblical teachings into deliberations, Respondent stated without citation to authority that there was no substantial likelihood of

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[35] Mr. Ruotolo's inattention is further evidence of the prejudice that Mr. Jones suffered from the jurors' deciding their vote as to Mr. Jones's penalty well before the start of penalty phase deliberations and their resulting refusal to deliberate.

prejudice or bias because the expression "an eye for an eye" was commonly used outside the Biblical context, the Biblical reference appeared isolated, and it was insufficiently alleged that the priest endorsed any particular Biblical passage. Inf. Resp. at 44. In response to Mr. Jones's allegations that juror Muhammad improperly shared his personal knowledge of Mr. Jones's medications, Respondent contended that there was no substantial likelihood of prejudice because it was insufficiently alleged that Mr. Muhammad shared information with the other jurors that was materially different than the trial evidence. Inf. Resp. at 46.

Finally, as to Mr. Jones's allegations that Mr. Ruotolo admitted to sleeping during Dr. Thomas's penalty phase testimony, Respondent contended that Mr. Ruotolo's statement relates to his mental processes and cannot be used to impeach the verdict, or alternatively, that the claim was insufficiently alleged because it does not indicate how long Mr. Ruotolo slept, how many times he slept, or whether he slept during testimony favorable to Mr. Jones. Inf. Resp. at 46-47.[36]

4. Section 2254 does not bar relief on this claim.

To the extent the state court's summary denial reflects its determination that Mr. Jones failed to plead sufficient facts that, if proven, would entitle him to a hearing or relief, the state court's decision is contrary to and an unreasonable application of CEFL under section 2254(d)(1). In the alternative, the state court unreasonably determined the facts under section 2254(d)(2) by finding facts and resolving disputes without any adjudicative procedure.

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

Taken as true, Mr. Jones made a prima facie showing of juror misconduct,

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[36] The state court did not accept Respondent's contention that certain subclaims were insufficiently alleged. If it had, it would have denied the subclaims pursuant to *Swain*, 34 Cal. 2d at 303-04, indicating that "claims have not been alleged with sufficient particularity." *Swain* denials are without prejudice, *Kim*, 799 F.2d at 1319, so Mr. Jones could have cured any deficiency.

alleging that jurors: (1) prejudged the sentence by deciding on the death penalty before the penalty phase; (2) ignored the trial court's repeated, forceful admonitions; (3) discussed their decision to impose the death penalty throughout guilt phase proceedings and during social gatherings; and (4) were exposed to several extrinsic influences; and (5) slept during the penalty phase.[37] *See* section II.D.2, *supra.* The state court's summary denial of this claim thus was contrary to federal law requiring a state court to ascertain facts reliably before denying adequately presented federal claims. *See* section I.B.1, *supra*; Reply Br. on *Pinholster* at 12-17.

Clearly established Supreme Court precedent also forbids denial of Mr. Jones's prima facie allegations at the pleading stage, prior to an evidentiary hearing. *Remmer*, 347 U.S. at 229; *Tanner*, 483 U.S. at 120; *Phillips*, 455 U.S. at 215. Because the state court prematurely denied his petition, Mr. Jones was not able to access the fact-development mechanisms that would have fully developed his claim: juror depositions and subpoena power necessary to present each juror's testimony at an evidentiary hearing. *Cf. Wellons v. Hall*, 558 U.S. 220, 130 S. Ct. 727, 729-30, 175 L. Ed. 2d 684 (2010) (reversing where diligent petitioner was not permitted—in state or federal court—discovery and an evidentiary hearing to factually support his jury and judicial misconduct claims); *Gapen v. Bobby*, No. 08-280, 2011 WL 5166566, *3-4 (S.D. Oh. Oct. 31, 2011) (authorizing federal depositions of jurors in capital habeas case where petitioner alleged that one juror had researched Biblical teachings on the death penalty and shared his research with other jurors). Accordingly, the state court's summary denial was contrary to and an unreasonable application of Supreme Court precedent that requires factual development and an evidentiary hearing prior to resolving juror misconduct claims.

[37] Mr. Jones provided the state court with supporting extra-record evidence, including jurors' and alternates' declarations, Exs. 9, 23, 122, 127, 133, 138-40.

Although the state court's silent denial of Mr. Jones's juror misconduct claim deprives this Court of its reasoning, its resolution of claims concerning a juror's exposure to extrinsic influence is also contrary to federal law because it fails to presume prejudice from such exposure, as required by the U.S. Supreme Court's decision in *Mattox v. United States*, 146 U.S. 140 (1892), and its progeny. Instead, the state court holds that the "mere showing of [improper] communication does not raise a presumption that the juror was improperly influenced"; a defendant must show that the communication "related to the trial" before it will presume prejudice. *People v. Cobb*, 45 Cal. 2d 158, 161, 287 P.2d 752, 753 (1955) (ruling that trial court's failure to inquire into juror's communication with one of the defendant's family members was not error); *see also People v. Cowan*, 50 Cal. 4th 401, 507, 236 P.3d 1074, 1153 (2010) (relying on *Cobb* to rule that extrinsic contacts will not be presumed prejudicial unless shown to relate to trial). The Ninth Circuit has ruled that California state law is contrary to the "bright-line rule" established by *Mattox*, which requires a presumption of prejudice following extrinsic contacts. *Caliendo v. Warden of California Men's Colony*, 351 F.3d 691, 697 (9th Cir. 2004) (ruling that state court's failure to presume prejudice in *Cobb* was contrary to clearly established federal law under 28 U.S.C. § 2254(d)(1)).

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

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

- Prejudged the penalty phase and were firmly fixed in their opinions prior to deliberations;
- Demonstrated bias by ignoring the trial court's admonitions and prematurely discussing their decisions on Mr. Jones's penalty, including the frequency and effect of those discussions;
- Demonstrated bias when one juror discussed Mr. Jones's sentence with

his priest, contrary to the trial court's explicit instructions;

- Were exposed to Juror Botros's descriptions of Biblical verses mandating the death penalty and Juror Muhammad's personal knowledge of Mr. Jones's medications, including the circumstances, extent of, and prejudicial effect of the exposure;
- Were constructively absent by sleeping during significant portions of the only defense expert's penalty phase presentation; and
- Demonstrated bias by failing to report repeated instances of misconduct to the trial court.

If the state court denied Mr. Jones's juror misconduct claim on any of these factual bases on the pleadings, it unreasonably determined the facts under section 2254(d)(2) by failing to provide Mr. Jones with (1) process to develop and present supporting evidence; or (2) notice of and an opportunity to be heard on the factual issues that the state court intended to resolve. *Lor*, 2012 WL 1604519 at *4-5; *see also Williams*, 859 F. Supp. 2d at 1160; *Plummer*, 2012 WL 3216779 at *9.

E. Mr. Jones's Constitutional Rights Were Violated when the State Inappropriately and Involuntarily Medicated Him.

Mr. Jones presented the California Supreme Court with a prima facie showing that he was involuntarily and inappropriately medicated with potent antipsychotic and antidepressant drugs that had serious side effects, including psychosis, paranoia, slurred speech, drowsiness, stiff muscles, and restlessness. Mr. Jones tried to refuse the medication, and certainly never consented to it being abruptly started and stopped for a significant period of time in the middle of trial, thus increasing the detrimental side effects. This inappropriate medication regimen prejudicially interfered with Mr. Jones's appearance during trial and his ability to

participate in the trial and his defense. State Pet. at 254-61; Reply at 211-12.[38]

1. Controlling U.S. Supreme Court Precedent.

In *Riggins v. Nevada*, 504 U.S. 127, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992), the Supreme Court held that a defendant's "interest in avoiding involuntary administration of antipsychotic drugs was protected under the Fourteenth Amendment's Due Process Clause." *Id*. at 134. The Court ruled that interference with a person's liberty is "particularly severe" in the context of unwanted antipsychotic medication. *Id.*; *see also id*. at 139 (Kennedy, J., concurring) ("[A]bsent an extraordinary showing by the State, the Due Process Clause prohibits prosecuting officials from administering involuntary doses of antipsychotic medicines"). As Justice Kennedy explained, "[w]hen the State commands medication during the pretrial and trial phases of the case for the avowed purpose of changing the defendant's behavior, the concerns are much the same as if it were alleged that the prosecution had manipulated material evidence." *Id.* at 139.

The Court ruled that constitutional rights are impinged when a medication regimen affects "not just [the defendant's] outward appearance, but also the content of his testimony on direct or cross-examination, his ability to follow the proceedings, or the substance of his communication with counsel." *Id*. at 137. Improper impact from medication includes side effects that cause "drowsiness or confusion." *Id.* The Court subsequently held that an unwanted medication regimen may be constitutionally allowed under limited circumstances where "the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-

[38] This claim was Claim Six in state court and is Claim Five in federal court. State Pet. at 254-61; Fed. Pet. at 124-30.

related interests." *Sell v. United States*, 539 U.S. 166, 179, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003). The Court in *Sell* further explained that "medically appropriate" administration of drugs requires that the medication administered is "in the patient's best medical interest in light of his medical condition," and is "substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense." *Id*. at 181.

2. Prima Facie Allegations Before the State Court.

During Mr. Jones's trial, jail medical staff prescribed Atarax, an anti-anxiety medication; Haldol, an antipsychotic medication; Sinequan, an antidepressant; Theodrine, a barbiturate; and Cogentin, an anticholinergic medication used to control extrapyramidal disorders caused by neuroleptic drugs. State Pet. at 254; Reply at 211; Exs. 33, 34. As one of the jail psychiatrists, Dr. Kunzman, explained, Haldol may cause "distressing side effects, stiff muscles, restlessness and the drooling, and the use of the Cogentin assists in counteracting those particular side effect symptoms." 23 RT 3549. Dr. Kunzman also described Sinequan as "primarily an antidepressant that is very sedating that is used . . . to a considerable extent as a sedative for sleeping." *Id.* at 3550. Dr. Kunzman stated that if medication was not properly titrated, an individual "would have slurred speech, would be drowsy, would appear to be stiff, sleepy" or "might demonstrate the paranoia and suspiciousness and may not be able to attend to what is going on and appear to responding [sic] to voices from someplace else." *Id.*

Jail medical records demonstrated that Mr. Jones received Atarax daily from at least June 1993 through December 1994. State Pet. at 255; Exs. 33, 34. Mr. Jones also received Haldol and Cogentin daily from at least June 1993 until November 1, 1994, at which point they were abruptly discontinued until January 24, 1995, the day that Mr. Jones concluded his testimony in the guilt phase of the trial. State Pet. at 255; Exs. 33, 34. Mr. Jones received the Sinequan from at least November 5, 1992, through trial and sentencing and until April 15, 1995. State

Pet. at 256. Jail records contain several notations indicating that Mr. Jones tried to refuse his medication. *See, e.g.*, Ex. 33 at 595 ("Refused meds w out reason"), 603 ("refused AM meds"), 607 ("refused meds"), 621 ("'don't want the Cogentin & Haldol'").[39] Medication logs, however, indicate that they were administered with only periodic interruption in spite of Mr. Jones's complaints. *See, e.g.*, *id.* at 596, 600, 602. Though medication continued, Mr. Jones missed scheduled doses at random times due to lockdowns or because he was absent at the time medication was distributed. *See, e.g.*, *id.* at 595, 597, 601, 615.

The medication regimen apparent in Mr. Jones's jail records thus was inconsistently carried out, abruptly stopped in the middle of trial and then started again, and continued against Mr. Jones's wishes. In addition to implicating the many prejudicial effects recognized in *Riggins* and *Sell*, it is also apparent that such haphazard administration of powerful drugs with serious side effects was not in Mr. Jones's "best medical interest in light of his medical condition." *Sell*, 539 U.S. at 181. Mr. Jones's trial counsel observed that Mr. Jones "seemed more than normally tired, and had more trouble responding to the district attorney's questions than one would expect." Ex. 150 at 2733. As the defense psychiatrist, Dr. Thomas, explained, "it was extremely important for someone with Mr. Jones's mental impairments to receive regular and proper medications, particularly to decrease psychotic symptoms as much as possible. Haldol is a difficult drug to take, and often has significant side effects." Ex. 154 at 2754 (adding that Theodrine also can produce psychosis). Mr. Jones's medication regime, however, was inappropriately administered and not based on his medical needs. As a result, Mr. Jones experienced deleterious effects of the medication and the improper drug

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[39] Mr. Jones also alleged that even if he agreed to take the medication, he was incapable of "voluntarily" assenting to the medication because his mental illness prevented him from validly consenting. Reply at 213.

regimen he was forced to follow. As Justice Kennedy observed in *Riggins*, "[a]t all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial." 504 U.S. at 142.

3. Respondent Disputed Key Facts in State Court.

In response to Mr. Jones's claim, Respondent contended that there was no evidence that Mr. Jones "was ever given the medications against his will." Inf. Resp. at 28. Respondent also stated that Mr. Jones's claim that the medications "negatively affected his appearance before the jury is speculative and unsupported. Nothing indicates that petitioner received an improper dosage of the medications, that that his mental state was impaired rather than improved by the medications, or that the medications adversely rather than beneficially affected his demeanor." *Id.* Respondent also asserted that Mr. Jones failed to show that the "medications adversely affected his ability to understand the proceedings or assist in his defense." *Id*. at 29.

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

In 2009, the state court summarily denied Mr. Jones's habeas claim as failing to state a prima facie case for relief. This decision was contrary to federal law because Mr. Jones's allegations that his rights were violated by the unwanted and medically inappropriate regimen of drugs he received during trial are "materially indistinguishable" from those set out in *Riggins* and *Sell*, and yet the state court determined that he did not sufficiently plead a claim for relief. *See, e.g.*, *Williams*, 529 U.S. at 405 (O'Connor, J., concurring). The state court's failure to engage in fact finding to resolve Mr. Jones's sufficiently pled claim is contrary to federal law that obligates state courts to resolve properly presented federal constitutional claims. *See* section I.B.1, *supra.* By failing to engage in any fact finding or adversarial proceeding to resolve Mr. Jones's claim, the state court decision also

was an unreasonable application of *Riggins* and *Sell*. *See Panetti*, 551 U.S. at 954; section I.B.1, *supra*.

Alternatively, the state court may have resolved key factual issues, such as whether Mr. Jones was medicated involuntarily, the effect of starting and stopping Haldol and Cogentin, the impact of medication on Mr. Jones's appearance and participation in trial and his defense, or whether the medication regimen was medically appropriate. To the extent that the state court settled these questions or other factual questions, its decision was an unreasonable determination of facts. *See Hurles v. Ryan*, 650 F.3d at 1312; *Williams v. Woodford*, 859 F. Supp. 2d at 1159; section I.B.2, *supra.*

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

Mr. Jones presented the California Supreme Court with a prima facie showing that the trial court failed to hold a hearing to determine his competence in spite of substantial evidence that it was warranted, including (1) his treatment by jail mental health staff with antipsychotic and antidepressant medication; (2) the defense psychiatrist's conclusion that Mr. Jones suffered from a psychotic disorder and opinion that Mr. Jones was not competent to stand trial; (3) the opinion of a second defense expert that Mr. Jones suffered from schizophrenia; (4) Mr. Jones's unusual behavior in court and irrational interactions with trial counsel; and (5) Mr. Jones's history of irrational and disturbed behavior before, during, and after the capital crime, including his attempted suicide. Mr. Jones also made a prima facie showing that he was, in fact, incompetent to stand trial, submitting the declaration of the defense psychiatrist who so concluded and the declarations of additional experts and lay witnesses confirming and corroborating that opinion. State Pet. at

240-53; Reply at 202-08.[40]

1. Controlling U.S. Supreme Court Precedent.

The Supreme Court has "repeatedly and consistently recognized that the criminal trial of an incompetent defendant violates due process." *Cooper v. Oklahoma*, 517 U.S. 348, 354, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996). The test for competence is whether a defendant has (1) "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and (2) "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960); *see also Drope v. Missouri*, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975) (competence requires a defendant "to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense"). The right "is sufficiently important to merit protection even if the defendant has failed to make a timely request for a competency determination." *Cooper v. Oklahoma*, 517 U.S. at 369.

A defendant's right to a fair trial is violated when the state court fails to invoke "procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial." *Drope*, 420 U.S. at 172; *see also Pate v. Robinson*, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). Conducting a constitutionally adequate inquiry is required, for example, when the defendant has a "long history of disturbed behavior." *Pate*, 383 U.S. at 378. In *Pate*, the Court held that Mr. Robinson's history of mental disturbance was sufficient to require a competency hearing even though the expert who evaluated him, Dr. Haines, found him sane. *Id*. at 386. As the Court explained, "Dr. Haines' testimony was some evidence of Robinson's ability to assist in his defense. But . . . on the facts

[40] This claim was Claim Five in state court and is Claim Four in federal court. State Pet. at 240-53; Fed. Pet. at 107-23.

presented to the trial court it could not properly have been deemed dispositive." *Id.* (recounting Robinson's history of unusual behavior, prior irrational crime, and suicide attempt); *see also Drope*, 420 U.S. at 180 ("evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but [] even one of these factors standing alone may, in some circumstances, be sufficient").

2. Prima Facie Allegations Before the State Court.

a. The trial court violated Mr. Jones due process rights by failing to conduct a competency hearing.

Throughout the proceedings, the trial court was aware that Mr. Jonessuffered from psychiatric problems affecting his ability to understand the proceedings and to assist counsel. In March 1993, trial counsel requested that the trial court appoint two experts to evaluate Mr. Jones's competence to proceed. 1 RT 14-15. By June 1993, at the latest, jail mental health staff began treating Mr. Jones with Haldol, a strong antipsychotic medication for treating auditory hallucinations, delusions, and paranoia, because he was hearing voices. 23 RT 3547, 3549; 24 RT 3619 (testifying that Mr. Jones began taking Haldol in late 1992). Jail staff also treated Mr. Jones with antidepressants. *Id.* at RT 3549. After the defense psychiatrist, Claudewell Thomas, Ph.D., M.D., examined Mr. Jones in 1994, Ex. 154 at 2751-52, trial counsel requested funds for further examination, notifying the court that Dr. Thomas "has found that that the defendant suffers from a major dissociative process as part of a chronic schizophrenic disorder." II Supp. 23 CT 6520. The defense neuropsychologist also concluded that Mr. Jones suffered from schizophrenia. 30 RT 4432.

The trial court also was aware that at the outset of the case Mr. Jones had significant conflicts with his lawyer. 1 RT 18. Among other things, Mr. Jones believed that his trial counsel was arranging a plea of fifteen to life, even though

1 no deal had been offered and trial counsel had been attempting to explain
2 something else when Mr. Jones became concerned about a deal. 1 RT 21-22.
3 Although trial counsel explained this to Mr. Jones, he remained upset, telling trial
4 counsel "you're not going to represent me. I don't care what nobody say. And you
5 know what you're doing, man." *Id.* at 24. Mr. Jones's behavior in the courtroom
6 similarly put the trial judge on notice of his significant mental impairments. In one
7 early proceeding, Mr. Jones spoke out, saying "leave me alone, leave me alone,"
8 when no one appeared to be addressing him. 1 RT 6. During his testimony at trial,
9 Mr. Jones's presentation was abnormally sluggish and he had difficulty responding
10 to the prosecutor's questions. Ex. 150 at 2733; 23 RT 3481. In the courtroom, Mr.
11 Jones at times had a "blank expression and faraway look in his eyes" like a "closed
12 curtain." Ex. 144 at 2707. In the penalty phase, the defense expert, Dr. Thomas,
13 testified, among other things, that Mr. Jones suffered from "a major psychiatric
14 disorder of a psychotic nature." 30 RT 4413-14.

15 In addition to these clear indications of Mr. Jones's mental problems, the
16 trial court was aware of Mr. Jones's history of disturbed behavior. Before the
17 capital crime, Mr. Jones had been arrested for two sexual assaults. One was
18 against a long-time friend, Kim Jackson, who after the incident asked law
19 enforcement "to get him psychiatric treatments." 28 RT 4196. In the other case,
20 Mr. Jones assaulted a girlfriend's mother, Mrs. Harris, and was referred for
21 psychiatric care following that crime. 22 RT 3349. The capital crime involved a
22 disorganized and chaotic attack against another girlfriend's mother, Mrs. Miller,
23 who was stabbed over a dozen times with two knives and bound with a telephone
24 cord, a nightgown, a purse strap, and an electric cord. Ex. 172 at 3053; 17 RT
25 2775. At some point, sexual intercourse occurred. *See* section II.A.2.b., *supra*
26 (describing evidence of post-mortem sexual contact). Mr. Jones did not remember
27 killing Mrs. Miller or having sexual intercourse with her. 22 RT 3335-36. After
28 the crime, he heard voices telling him that someone was coming to get him and

believed someone was going to kill him. *Id.* at 3338. He first barricaded himself in his apartment and later shot himself in the chest. *Id.* at 3343-45.

In spite of the evidence that Mr. Jones suffered from severe psychiatric conditions that, inter alia, impaired his understanding of the proceedings and his interactions with trial counsel, the trial court violated Mr. Jones's due process rights by failing to hold a hearing to determine whether Mr. Jones was competent to proceed. *See Drope*, 420 U.S. at 180 (holding evidence of defendant's suicide attempt created a sufficient doubt of his competence to require further inquiry); *Pate*, 383 U.S. at 378 (holding that in spite of expert opinion that Mr. Robinson was sane, trial court was obligated to hold competence hearing in light of Mr. Robinson's history of unusual behavior, treatment for paranoia and hearing voices, prior irrational crime, and suicide attempt); *McMurtrey v. Ryan*, 539 F.3d 1112, 1125 (9th Cir. 2008) (ruling that evidence of treatment with antipsychotic and anti-anxiety medications while in jail, suicide attempt, and unusual behavior raised sufficient doubt about competence and overcame expert opinion to the contrary from a brief interview conducted four months before trial); *Moore v. United States*, 464 F.2d 663, 665-66 (9th Cir. 1972) (holding that evidence of suicide attempts, hallucination, and psychiatric treatment sufficient to warrant competency hearing in spite of expert report finding defendant competent).[41]

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[41] Mr. Jones also alleged that trial counsel was ineffective for failing to request a competency hearing. *See, e.g.*, Reply at 209-11. In December 1994, before trial started, Dr. Thomas informed trial counsel that he had serious concerns about Mr. Jones's competence to stand trial and the status of his mental health treatment in jail. Ex. 154 at 2754. In spite of this information and the numerous other indications of Mr. Jones mental problems, trial counsel unreasonably failed to seek a hearing to determine Mr. Jones's competence. *See Stanley v. Cullen*, 633 F.3d 852, 862 (9th Cir. 2011) (ruling that counsel's failure to seek competency hearing ineffective "when there are sufficient indicia of incompetence to give objectively reasonable counsel reason to doubt the defendant's competency, and there is a reasonable probability that the defendant

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b. Mr. Jones was incompetent to stand trial.

Had a competency hearing been conducted, the evidence would have established that Mr. Jones was incompetent to stand trial. Dr. Thomas, who evaluated Mr. Jones at the time of trial, would have opined that Mr. Jones was not competent to stand trial. Ex. 154 at 2754. Dr. Thomas observed that Mr. Jones's treatment in jail with Haldol was an indication of "serious competency issues." *Id.* As Dr. Thomas explained, "Haldol is a difficult drug to take, and often has significant side effects, so it is not prescribed unless an individual is severely impaired. In addition, it can be given in doses as low as 1.25 milligrams or 2 milligrams; Mr. Jones received Haldol in doses of 5 milligrams per dose." *Id.* Following his clinical evaluation of Mr. Jones, Dr. Thomas concluded that Mr. Jones "suffered from a Schizoaffecitve Disorder (or Schizophrenia, with a depressive cast) that had been worsening over time. . . . As with any type of psychosis, Mr. Jones's psychiatric condition waxes and wanes, and can be more or less apparent or active at any given time." *Id.* at 2750-51.

Dr. Thomas would have opined that Mr. Jones's severe psychiatric conditions impaired his ability to consult with his lawyer and understand the proceedings. In his interviews with Mr. Jones, Dr. Thomas observed that Mr. Jones "was not a quick thinker. In conversation, Mr. Jones was generally non-reactive, and a concrete thinker. His affect was depressed and relatively flat, and at times inappropriate to expressed ideational content, remaining unchanged across a range of conversational topics." *Id.* at 2751. As a result of his impairment, Mr. Jones "often has difficulty confronting the reality of what has occurred, and as a result, often strongly held, confabulatory beliefs about what happened emerge instead."

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would have been found incompetent to stand trial had the issue been raised and fully considered"). As demonstrated in the following section, had a hearing been conducted, Mr. Jones would have been found incompetent to stand trial.

Id.; *see also id.* at 2761 ("Mr. Jones exhibited memory impairments, concrete thinking, and an inability to shift topics, and at times confusion and confabulation of events"). Associated with these findings was Dr. Thomas opinion that Mr. Jones's "multiple mental impairments, including his memory impairments, his lack of insight, and his major dissociative status, did not make him an appropriate testifying witness." *Id.* at 2754.

Moreover, had he been properly informed of Mr. Jones's medication being abruptly discontinued during trial, Dr. Thomas would have determined that the "inappropriate medical change" also "adversely affected [Mr. Jones's] ability to attend, concentrate, assist his attorneys, and testify." *Id.* at 2762. A multi-generational history of mental illness in Mr. Jones's family, including records of institutionalization, treatment with prescription medication for anxiety and depression, and suicide among family members, would have further corroborated Dr. Thomas's conclusions and highlighted Mr. Jones's "genetic predisposition to mental illness." *Id.* at 2759; *see also id.* at 2757.

Expert evaluation of Mr. Jones during state post-conviction proceedings confirm and corroborate Dr. Thomas's findings and demonstrate Mr. Jones's long-standing impairment in communication, comprehension, attention, and cognition. Zakee Matthews, M.D., a psychiatrist retained by Mr. Jones's state habeas counsel, made the following observations, among others, after his evaluation of Mr. Jones:

- "He could not always remember periods of time, and he could not always focus on a single topic of conversation during our discussions. Ernest had much difficulty responding to anything but the most basic questions. Any complex questions that required him to delve into memory easily vexed him;"
- "Ernests's eagerness to act appropriately and not disappoint at times produces answers that exhibit evidence of confabulation. . . . Frequently, he does not appear to have sufficient insight to understand that his

answers are not accurate;"

- "Ernest also exhibited signs of rigid, perseverative thinking. Once he had decided that things were a certain way, no suggestion of facts to the contrary could affect his conclusions."

Ex. 178 at 3154-55.

Natasha Khazanov, Ph.D., conducted neuropsychological testing of Mr. Jones during state post-conviction proceedings. *See generally* Ex. 175. In testing to evaluate Mr. Jones's short-term memory and working memory, which both affect his ability to attend to and concentrate on events and information, Mr. Jones exhibited extreme deficits, falling into the lowest percentile of scoring. *Id.* at 3064. A number of other tests similarly demonstrated problems in attention and concentration and revealed significant signs of brain damage. *Id.* at 3065-66. Dr. Khazanov further determined that:

> One striking pathognomic sign of frontal lobe dysfunction was Mr. Jones's greater difficulty recalling a story that had been read to him than recalling a list of unrelated words. His prose recall was in only the 5th percentile. Individuals with unimpaired frontal lobes organize the story in a logical way to facilitate recall, and thus perform better on recalling a story than an unrelated list of words. Individuals with frontal lobe damage are unable to utilize such techniques, and have better recall of unrelated words.

Id. at 3069. Overall, neuropsychological testing documented Mr. Jones's severe level of mental impairment; he "suffers from such severe brain damage that he is unable to function at the same level as 99 percent of those in his age category." *Id.* at 3072. Dr. Khazanov's review of information about Mr. Jones's background further led her to conclude that his brain damage and resulting impairments existed prior to his arrest in 1992. *Id.* at 3076.

Expert findings about Mr. Jones's functioning at the time of trial were

confirmed by those in contact with Mr. Jones at the time. Wanda Barrow, an acquaintance of Mr. Jones's who saw him in jail, said that when she visited Mr. Jones during the trial, "[h]e seemed like he was really climbing the walls, and was not actually understanding all of what was going on." Ex. 24 at 246. Mr. Jones's trial counsel was not in regular contact with him during the trial; instead, the defense paralegal, Rhonda Cameron, was the primary contact with Mr. Jones. Ex. 19 at 206; Ex. 12 at 106. Her role was "to act as a parent figure and make [Mr. Jones] feel comfortable discussing painful or sensitive information with me." Ex. 19 at 206. Mr. Jones had difficulty recalling events in his life in order to assist the paralegal in her work. *Id.* When the paralegal told Mr. Jones what his legal team was doing, he had difficulty understanding her. *Id.* at 207. "I found myself having the same conversation with him to ensure that he understood what we were doing." *Id.* During his interactions with the paralegal, Mr. Jones did not express emotion or give her any indication of his reaction to their conversation, but had a "motionless, stony face and glassy eyes that looked right through you." *Id.* In the courtroom, there were times Mr. Jones became agitated over irrelevant information or testimony; he had difficulty ignoring the things that distracted and bothered him and focusing on the more important aspects of the trial. Ex. 144 at 2707.

Mr. Jones's allegations and supporting documentary material before the state court made a prima facie showing that he was incompetent to stand trial; specifically, Mr. Jones was unable effectively to communicate with or assist trial counsel, comprehend key aspects of the trial and defense, or attend to and recall the proceedings of the trial from day to day. *See Dusky*, 362 U.S. at 402; *Drope*, 420 U.S. at 171; *Odle v. Woodford*, 238 F.3d 1084, 1089 (9th Cir. 2001) (ruling that competence to stand trial "requires the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense") (citing *Dusky*, 362 U.S. at 402).

3. Respondent Disputed Key Facts in State Court.

In response to Mr. Jones's claim that the trial court should have held a hearing to determine whether he was competent, and that trial counsel was ineffective for failing to move for one, Respondent stated, "Respondent disagrees. Both counsel and the trial court reasonably relied on the competency findings of Dr. Stalberg and Mead." Inf. Resp. at 27. Respondent contended that Mr. Jones's testimony "belies the contention that petitioner was unable to understand the nature of the proceedings and assist in his defense." *Id*. Respondent also urged the state court to conclude that Dr. Thomas's determination that Mr. Jones suffered from schizophrenia "does not mean that petitioner was incompetent to stand trial. . . . Indeed, the administration of antipsychotic medications may have improved petitioner's mental condition." *Id*.

4. Section 2254 does not bar relief on this claim.

In 2009, the state court summarily denied Mr. Jones's habeas claim as failing to state a prima facie case for relief. To the extent the state court's ruling reflects its determination that Mr. Jones failed to plead sufficient facts to establish his claim, the state court's decision is (1) contrary to clearly established federal law and (2) an unreasonable application of *Dusky*, *Drope*, and *Pate*, under section 2254(d)(1). In the alternative, the state court unreasonably determined the facts under section 2254(d)(2) by finding facts and resolving disputes without adequate procedures.

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

The state court summary denial of Mr. Jones's claim was both contrary to and an unreasonable application of Supreme Court precedent. First, contrary to clearly established federal law, the California Supreme Court, relying on California Penal Code section 1367, has long required that a defendant's incompetence to stand trial must be attributable to "a diagnosed mental illness." *People v. Taylor*, 47 Cal. 4th 850, 864, 220 P.3d 872 (2010); *see also People v. Dunkle*, 36 Cal. 4th

861, 885, 116 P.3d 494 (2005), *partially overruled on other grounds by People v. Doolin*, 45 Cal. 4th 390, 198 P.3d 11 (2009) (stating competency for due process purposes as whether "as a result of mental disorder or developmental disability, [the defendant] is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner"); *People v. Rodrigues*, 8 Cal. 4th 1060, 1110, 885 P.2d 1 (1994) (rejecting defendant's claim due to the lack of a disorder or disability). This modification and addition to the test for competency under *Dusky* satisfies section 2254(d)(1). *See Williams*, 529 U.S. at 405-06 (holding state court decision contrary to clearly established law for adding to prejudice requirement of *Strickland*).

The state court decision also is contrary to federal law because Mr. Jones's allegations that he was entitled to a competency hearing are "materially indistinguishable" from those set out in *Drope* and *Pate*, and yet the state court determined that he did not sufficiently plead a claim for relief. *Williams*, 529 U.S. at 405 (O'Connor, J., concurring). The state court's failure to engage in fact finding to resolve Mr. Jones's sufficiently pled claim is contrary to federal law that obligates state courts to resolve properly presented federal constitutional claims. *See* section I.B.1, *supra.* By failing to engage in any fact finding or adversarial proceeding to resolve Mr. Jones's competency claims, the state court decision also was an unreasonable application of *Dusky* and *Pate*. *See Panetti v. Quarterman*, 551 U.S. at 954; section I.B.1, *supra*; *see also Miller v. Fenton*, 474 U.S. 104, 116-17, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985) (ruling that "assessments of credibility and demeanor" are "crucial" to finding competency to stand trial).

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

"A state court's finding that the evidence before the trial court did not require a competency hearing under *Pate* is a finding of fact." *Maxwell v. Roe*, 606 F.3d 561, 567 (9th Cir. 2010). Resolution of the question of a defendant's competence also requires fact finding. *See*, *e.g.*, *Miller v. Fenton*, 474 U.S. at 116-

17; *Evans v. Raines*, 800 F.2d 884, 887 (9th Cir. 1986). Therefore to the extent that the state court settled these questions, its decision is an unreasonable determination of facts. *See Hurles v. Ryan*, 650 F.3d at 1312; *Williams v. Woodford*, 859 F. Supp. 2d at 1159; section I.B.2, *supra.*

G. Mr. Jones Is Ineligible For The Death Penalty.

Mr. Jones presented the California Supreme Court with a prima facie showing that his intellectual disabilities and mental impairments render him ineligible for the death penalty under the Eighth Amendment. State Pet. at 347-70; Reply at 320-30.[42] Mr. Jones presented the state court with lay and expert declarations and records documenting his subaverage intellectual functioning and significant limitations in adaptive skills that qualify him as intellectually disabled and that make him ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). Furthermore, Mr. Jones established that his mental impairments significantly diminished his capacity to control his behavior and therefore make him one of the morally less culpable offenders the Eighth Amendment excludes from capital punishment.

1. Controlling U.S. Supreme Court Precedent.

The Eighth Amendment requires that "[c]apital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." *Roper v. Simmons*, 543 U.S. 551, 568, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (internal quotations omitted). For this reason, the execution of individuals who "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct" is prohibited as cruel and unusual punishment. *Atkins*, 536 U.S. at 306; *see also id.* at 311 (recognizing that the "Eighth Amendment succinctly

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[42] This claim was Claim Twenty in state court and is Claim Twenty-three in federal court. State Pet. at 347-70; Fed. Pet. at 382-94.

prohibits excessive sanctions"). The Eighth Amendment prohibition on executing individuals of lesser moral culpability has long been reflected in the Supreme Court's jurisprudence. *See*, *e.g.*, *Roper*, 543 U.S. at 571 (prohibiting death penalty for those under eighteen years of age given characteristics of youth that make such offenders less culpable); *Atkins*, 536 U.S. at 306, 321 (prohibiting death penalty for those less culpable because of disabilities in areas of reasoning, judgment, and impulse control); *Enmund v. Florida*, 458 U.S. 782, 799, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982) (prohibiting death penalty for accomplice who does not kill or intend to kill); *Godfrey v. Georgia*, 446 U.S. 420, 433, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980) (prohibiting death penalty for an individual whose crime "cannot be said to have reflected a consciousness materially more depraved than that of any person guilty of murder").

The Court also has held that executing those of lesser moral culpability does not serve the dual social purposes of the death penalty: "retribution and deterrence of capital crimes by prospective offenders." *Atkins*, 536 U.S. at 319 (internal quotation omitted). "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished." *Roper*, 543 U.S. at 571; *see also Enmund*, 458 U.S. at 799 (ruling deterrent effect of death penalty inapplicable to less culpable offender; "it seems likely that capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation"). When the imposition of the death penalty does not contribute to either retribution or deterrence, "it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment." *Atkins*, 536 U.S. at 319 (internal quotation omitted). In determining whether punishment is constitutionally impermissible, the Court's rulings are informed by consensus as reflected in the deliberations of the "American public, legislators, scholars, and judges." *Id.* at 307.

In keeping with these Eighth Amendment principles, the Court in *Atkins* held

that when an individual is less culpable because of his mental impairments, the narrowing jurisprudence of the Eighth Amendment excludes him from eligibility for the death penalty. *Id.* Such impairments include diminished capacity to (1) understand and process information; (2) communicate; (3) abstract from mistakes and learn from experience; (4) engage in logical reasoning; (5) control impulses; and (6) understand the reactions of others. *Id.* at 318. In addition to the lack of deterrence or proportional retribution for this category of offender, the death penalty is inappropriate for individuals with such impairments because they "may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. *Id*. at 320-21. The Court in *Atkins* thus prohibited execution of individuals with mental retardation, now referred to as intellectual disability,[43] which is defined as "subaverage intellectual functioning" combined with "significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Id*. at 318.

2. Prima Facie Allegations Before the State Court.

a. Mr. Jones's intellectual disabilities make him ineligible for the death penalty.

Under California law, intellectual disability is defined as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18." Cal. Penal Code § 1376(a); *see also Atkins*, 536 U.S. at 317 (according individual states the task of defining intellectual disability to enforce constitutional restrictions on capital punishment); *In re Hawthorne*, 35 Cal. 4th 40, 48, 105 P.3d 552 (2005) (declining to interpret state statute as including any fixed IQ score; a "fixed cutoff is

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[43] *See, e.g.*, *Moormann v. Schriro*, 672 F.3d 644, 649 (9th Cir. 2012).

inconsistent with established clinical definitions"); *People v. Super. Ct. (Vidal)*, 40 Cal. 4th 999, 1013, 155 P.3d 259 (2007) (upholding trial court determination that defendant met the definition of Penal Code section 1376 when his Full Scale IQ scores over the course of several years ranged from 77 to 92).

Mr. Jones's detailed allegations and supporting documentary material clearly establish that he qualifies under this definition. From the beginning of elementary school, Mr. Jones's intellectual deficits were obvious. At the end of the first grade, he was tested and found to have a Full Scale IQ score of 68, squarely in the intellectually disabled range of functioning. Ex. 50 at 1103. School officials placed Mr. Jones in an Educable Mentally Retarded ("EMR") program from the first through third grades. Ex. 125 at 2552-53. His low scores on some of the tests "indicated problems with making appropriate decisions, caring for self, and responding age appropriately to social situations." Ex. 130 at 2599. After leaving the EMR program in elementary school, Mr. Jones "achieved virtually no academic success." *Id*. at 2601. He did not earn enough credits to graduate from junior high school and received a special transfer to high school. Ex. 125 at 2554. At Crenshaw High School, Mr. Jones participated in the Educationally Handicapped program. *Id.* at 2556. At the age of sixteen, Mr. Jones's academic achievement was "extremely poor, ranging from the second to the sixth grade level." Ex. 130 at 2601.

Dr. Khazanov's testing established that Mr. Jones "has markedly sub-average intelligence." Ex. 175 at 3063. He had a Verbal IQ score of 82 and a Performance IQ of 76. *Id.* Mr. Jones's Full Scale IQ of 77 "places him in the 6th percentile, meaning that 94 percent of those of Mr. Jones's age scored higher than he did." *Id.* Dr. Matthews, who reviewed a wide variety of materials pertaining to Mr. Jones's background, including institutional records and numerous lay witness declarations, concluded that Mr. Jones suffered from "significantly compromised adaptive functioning." Ex. 178 at 3155. Dr. Matthews explained that:

> [Mr. Jones] lacked the capacity to live independently or manage his own affairs. He never lived alone, except for the brief period when he lived in Mrs. Harris's garage after Glynnis ended their relationship, before he became homeless. He was homeless more than once, could not secure steady employment, and had no specific job skills; there is no known record of [Mr. Jones] even owning a driver's license. [Mr. Jones] was willing to work hard, loyal to friends and family, and polite—but these traits alone were insufficient for him to make his way in a world that only frightened and intimidated him.

Id.; *see also* Reply at 322-25 (describing additional details of Mr. Jones's adaptive functioning deficits). The expert declarations and extensive documentary support thus demonstrate that Mr. Jones's intellectual disability renders him ineligible for the death penalty under *Atkins*.

b. Mr. Jones's mental impairments make him ineligible for the death penalty.

In addition to his intellectual disability, Mr. Jones suffers from multiple mental impairments that diminish his moral culpability and further establish his ineligibility for the death penalty. Mr. Jones suffers from a "major active dissociative process as a part of his schizoaffective illness." Ex. 154 at 2750. As a result, in stressful or emotional situations, he experiences a psychotic break, "dissociating from external reality and rational consciousness, and responding instead only to an unconscious, internal world of memories and messages over which he had no control." *Id.*; *see also* Ex. 178 at 3152 ("emotionally intense or stressful situations triggered intrusive and dissociative mental states that further compromised [Mr. Jones's] ability to understand events and respond appropriately"). As Dr. Matthews explained:

> Having had the experience of abject terror, as [Mr. Jones] frequently did as a boy, he is at risk to dissociate when confronted by new experiences that are fear provoking. Situations of inescapable danger, real or perceived, as well as situations of stress or vulnerability may produce this reaction, often resulting in behavior that the person can neither control nor remember after the event.

Ex. 178 at 3153. Mr. Jones "also displayed symptoms of depression, impulsivity, and auditory and visual hallucinations." *Id.* at 3154. "Beyond his dissociation, [Mr. Jones] has problems with judgment, accomplishing objectives, planning, and initiative." *Id*. He has difficulty responding to anything but the most basic questions, engages in confabulation and does not understand that he is not accurate, and exhibits "rigid, perseverative thinking." *Id.* at 3155.

Mr. Jones's brain damage also seriously impairs his mental functioning. As Dr. Khazanov concluded, Mr. Jones suffers from frontal lobe damage that:

> has produced cognitive rigidity, distorted perception, and an inability to inhibit unwanted responses, deficits consistent with impulse control problems, poor emotional control, confabulation, diminished frustration tolerance, aggression, and disproportionate outbursts of anger. . . . The impairments in his visuo-spatial or nonverbal capacities similarly impede his ability to accurately perceive, process, and respond to visual information in many situations. . . . Finally, Mr. Jones is largely unaware of these problems; however, even if [he] could be made aware of them, he lacks the capacity to adapt to changed circumstances.

Ex. 175 at 3076.

In addition to individual impairments that diminish his moral culpability, Mr. Jones presented substantial information to the state court documenting California as an outlier among states, which largely prohibit death sentences for conduct an

individual was powerless to avoid. *See* State Pet. at 353-61. He also presented the conclusions of nearly every major mental health organization in the United States advocating either an outright ban on executing all mentally ill offenders, or a moratorium until a more comprehensive evaluation system can be implemented. *Id.* at 362-63. As in *Atkins* and the Court's other cases prohibiting the execution of morally less culpable offenders, the national consensus thus supports Mr. Jones's claim that his mental impairments render him ineligible for the death penalty. *See, e.g.*, *Atkins*, 536 U.S. at 313 (ruling that in "cases involving a consensus, [the Court's] own judgment is brought to bear by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators").

As a result of his mental impairments, Mr. Jones did not have "the ability to control the normal functioning self." 30 RT 4435; *see also id.* at 4465-67. Each mental health expert to conduct a thorough evaluation of Mr. Jones has concluded that he was not in control of his actions or behavior at the time of the crime. Ex. 154 at 2754-55; Ex. 178 at 3155-57. Specifically, he was unable to (1) understand and process information; (2) communicate; (3) abstract from mistakes and learn from experience; (4) engage in logical reasoning; (5) control impulses; and (6) understand the reactions of others. *Atkins*, 536 U.S. at 318. As a result, Mr. Jones is ineligible for the death penalty.

3. Respondent Disputed Key Facts in State Court.

In response to Mr. Jones's allegations, Respondent stated that the factual predicate for the claim—that Mr. Jones was unable to control his behavior and conform his conduct to the requirements of the law—"is erroneous." Inf. Resp. at 53 (citing jury's verdict necessarily finding that Mr. Jones acted with specific intent). Respondent urged the state court to disregard additional proffers by Mr. Jones regarding his mental impairments and functioning, contending that "the evidence does not establish that petitioner failed to act purposefully and with specific intent" at the time of the crime. *Id.* at 54.

4. Section 2254 Does Not Bar Relief on this Claim.

In 2009, the state court summarily denied Mr. Jones's habeas claim as failing to state a prima facie case for relief. To the extent the state court's ruling reflects its determination that Mr. Jones failed to plead sufficient facts to establish his claim, the state court's decision is (1) contrary to clearly established federal law and (2) an unreasonable application of *Atkins*, *Roper*, *Godfrey*, and *Enmund*. In the alternative, the state court unreasonably determined the facts under section 2254(d)(2) by finding facts and resolving disputes without adequate procedures.

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

The state court's summary denial of Mr. Jones's claim was both contrary to and an unreasonable application of Supreme Court precedent. The state court decision is contrary to federal law because Mr. Jones's allegations are "materially indistinguishable" from those set out in *Atkins*, but the state court determined that he did not sufficiently plead a claim for relief. *See, e.g.*, *Williams*, 529 U.S. at 405 (O'Connor, J., concurring). Moreover, the state court's failure to engage in fact finding to resolve Mr. Jones's sufficiently pled claim is contrary to federal law that obligates state courts to resolve properly presented federal constitutional claims. *See* section I.B.1, *supra.* Finally, the state court's denial of Mr. Jones's prima facie showing that he suffers from intellectual disability and mental impairment within the meaning of *Atkins* without allowing him the opportunity to develop his claim is an unreasonable application of *Atkins* and related Supreme Court precedent. *See, e.g.*, *Rivera*, 505 F.3d at 358 (citing *Panetti* in holding failure to allow *Atkins* hearing upon prima facie showing satisfied section 2254(d)(1)).

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

As the California Supreme Court has recognized, the measure of intellectual functioning under California Penal Code section 1376 is a factual question. *See Vidal*, 40 Cal. 4th at 1013. Therefore, to the extent that the state court settled this question, or other factual questions regarding Mr. Jones's mental impairments and

their effect on his volitional behavior and moral culpability, its decision is an unreasonable determination of facts. *See Hurles v. Ryan*, 650 F.3d at 1312; *Williams v. Woodford*, 859 F. Supp. 2d at 1159; section I.B.2, *supra.*

H. California's Death Penalty Statute Does Not Fulfill the Constitutional Mandate to Narrow the Class of Death-Eligible Defendants.

Mr. Jones presented the California Supreme Court with a prima facie claim that his death sentence is unconstitutional because he was sentenced under a California statute that does not comply with the Eighth Amendment requirement that a state's capital sentencing scheme genuinely narrow the class of defendants eligible for the death penalty ("death-eligible" defendants).[44] State Pet. at 383-408; Reply at 358-62.[45] Specifically, the Eighth Amendment requires a capital punishment statute to meet two obligations: (1) it must "genuinely narrow" the subclass of offenders who are death-eligible; and (2) it may not permit the "wanton" and freakish" imposition of a death sentence on only a small percentage of death-eligible defendants. *Zant v. Stephens*, 462 U.S. 862, 877, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983); *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 2932, 49 L. Ed. 2d 859 (1976) (plurality opinion); *see also Furman v. Georgia*, 408 U.S. 238, 309-10, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Stewart, J., concurring). Directly contrary to this constitutional mandate, California expansively defines (1) first-degree murder and (2) the "special circumstances" that identify death-eligible defendants, rendering the vast majority of murder defendants potentially death-eligible. It then imposes death sentences arbitrarily

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[44] Mr. Jones alleged his narrowing claim as Claim Twenty-Four in both state and federal court. State Pet. at 383-408; Fed. Pet. at 394-401.

[45] In state court, Mr. Jones supported his narrowing claim with five declarations that described the supporting empirical evidence and the drafting, adoption, and revision of California's death penalty statute. Exs. 184-88.

on only a small number of those defendants. This statutory scheme violates the Eighth Amendment and renders Mr. Jones's death sentence invalid.

1. Controlling U.S. Supreme Court Precedent

The Supreme Court first stated the Eighth Amendment's narrowing requirement in *Furman*, prescribing that the legislature's capital punishment scheme must provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." 408 U.S. at 313 (White, J., concurring); *Gregg*, 428 U.S. at 207 (plurality opinion) (observing that the Eighth Amendment requires the selection of death-eligible persons to be "circumscribed by . . . legislative guidelines"). The opinions of several Justices concurring in the judgment concluded that statutes that allowed the infrequent and seemingly random imposition of the death penalty upon only a small percentage of death-eligible criminal defendants violated the prohibition against cruel and unusual punishment because they permitted the death penalty "to be so wantonly and freakishly imposed." *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring) (infrequently imposed or random death sentences are "cruel and unusual in the same way that being struck by lightning is cruel and unusual."); *id.* at 313 (White, J., concurring); *id.* at 248 n.11 (Douglas, J., concurring); *id.* at 291-95 (Brennan, J., concurring); *id.* at 354 n.124 (Marshall, J., concurring); *see also Gregg*, 428 U.S. at 188.[46] Since *Furman*, the Court consistently has held that sentencing procedures violate the Eighth Amendment when they "create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." *Godfrey v. Georgia*, 446 U.S. 420, 427, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980); *see also Gregg*, 428 U.S. at 189.

[46] In *Furman*, the five justices in the majority wrote separately. The Court's holding is the position taken by the justices who concurred in the judgment on the narrowest grounds, Justices Stewart and White. *Gregg*, 428 U.S. at 169 n.15.

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To pass constitutional muster, then, a capital sentencing scheme must "genuinely narrow" the death-eligible class of persons and "must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Lowenfield v. Phelps*, 484 U.S. 231, 244, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988); *see also Tuilaepa v. California*, 512 U.S. 967, 982, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994); *Arave v. Creech*, 507 U.S. 463, 474, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1993); *Zant*, 462 U.S. at 877. The "narrowing function" may be accomplished in either of two ways: (1) the legislature may narrow the definition of capital offenses, such that a jury finding of guilt accomplishes narrowing, or (2) the legislature may define capital offenses more broadly and provide for narrowing by a penalty phase jury finding of aggravated circumstances. *Lowenfield*, 484 U.S. at 246. In contrast, a death penalty scheme that makes "almost every murder" potentially punishable by death, but punishes with death only a small percentage of death-eligible defendants, creates a substantial risk of arbitrary and capricious punishment and thus violates the Eighth Amendment. *Godfrey*, 446 U.S. at 428-29.

2. Prima Facie Allegations Before the State Court

Mr. Jones was arrested in 1992 and tried in 1995 on one count of felony murder and on three felony-murder special circumstances: rape, robbery, and burglary. 1 CT 91-92; 1 CT 236. The California statute under which he was sentenced purportedly satisfies the Eighth Amendment's requirements through *Lowenfield*'s second method described above; that is, the statute defines a broad class of first-degree murders, then purportedly "narrows" that class by requiring the jury to find true at least one "special circumstance" in California Penal Code section 190.2. *People v. Bacigalupo*, 6 Cal. 4th 457, 468, 24 Cal. Rptr. 2d 808 (1993) (holding that section 190.2 special circumstances "perform the same constitutionally required narrowing function" as other states' aggravating circumstances or factors.) However, as set forth below, the special circumstances

were not intended to, and do not, perform a narrowing function. California has thus created the very situation prohibited by the Eighth Amendment, in which "almost every murder" is potentially punishable by death, due to overbroad definitions of first-degree murder and the special circumstances, but only a small percentage of death-eligible defendants are arbitrarily and capriciously sentenced to die. *Godfrey*, 446 U.S. at 428-29.

a. First Degree Murder (Cal. Penal Code § 189)

At the time of the capital crime and Mr. Jones's trial, California Penal Code section 189 defined first-degree murder to include three broad types of murder: premeditated and deliberate murder,[47] murder committed by a listed means, and felony murder. Mr. Jones was convicted only of the last of these categories: felony murder based on rape.

At the time of the capital crime, felony murders included those committed in the perpetration or attempted perpetration of arson, rape, robbery, burglary, kidnapping, trainwrecking, or mayhem. California's felony-murder rule was (and

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[47] In 1981, the Legislature expanded section 189's definition of first-degree murder by eliminating the requirement that a defendant guilty of "deliberate and premeditated" murder have "maturely" and "meaningfully" reflected upon the gravity of his act. Cal. Penal Code § 189. This amendment, coupled with judicial expansion of the definition of premeditation and deliberation, made first-degree and second-degree murders indistinguishable from each other. *See* Suzanne Mounts, *Premeditation and Deliberation in California: Returning to a Distinction Without a Difference*, 36 U.S.F. L. Rev. 261, 308 (2001) (noting that no first-degree murder conviction has been reversed since 1986 based on insufficient evidence to establish premeditation and deliberation); *cf. People v. Perez*, 2 Cal. 4th 1117, 1130, 9 Cal. Rptr. 2d 577 (1992) (Mosk, J., dissenting); *People v. Ruiz*, 44 Cal. 3d 589, 614, 244 Cal. Rptr. 200 (1988) (first-degree murder based on lying-in-wait does not require premeditation, deliberation or intent to kill); *People v. Dillon*, 34 Cal. 3d 441, 477, 194 Cal. Rptr. 390 (1983) (unintended homicides are included in first-degree murder) *abrogated by statute on other grounds*.

remains) too broad to serve a narrowing function. First, California's felony-murder categories include most common felonies such as robbery and burglary, which are broadly defined crimes. Cal. Penal Code § 189. Second, California's felony-murder rule applies to killings that occur even after the underlying felony is completed. *See, e.g.*, *People v. Chavez*, 37 Cal. 2d 656, 669-70, 234 P.2d 632 (1951). Finally, the normal rules of causation do not apply under the felony-murder rule, which encompasses deaths that are accidental and unforeseeable, or result from recklessness or negligence. *Dillon*, 34 Cal. 3d at 477; *see* Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme*: *Requiem for Furman?* 72 N.Y.U. L. Rev. 1283, 1320-21 (1997) ("Shatz & Rivkind"); Steven F. Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 Fla. L. Rev. 719, 730-32 (2007).

b. The Special Circumstances (Cal. Penal Code § 190.2)

In 1977, the California Legislature enacted a new death penalty law ("1977 Law"), under which one of twelve section 190.2 special circumstances, each describing a different homicide, had to be proved beyond a reasonable doubt to make a murderer death-eligible. 1977 Cal. Stat. 1255-66. Under the 1977 Law, death eligibility was the exception, not the rule. Ex. 185 at 3314. The 1977 Law was superseded in 1978 by the enactment of the Briggs Initiative (the "1978 Law"). Proposition 7 § 6 (approved Nov. 7, 1978). The drafters of the 1978 Law sought to broaden death eligibility to the maximum extent, including for commission of all first-degree murders. Ex. 185 at 3314-15. The 1978 Law significantly expanded the number and scope of section 190.2's special circumstances, most significantly by eliminating the 1977 Law's mens rea requirement that all death-eligible defendants must have intended to commit

homicide.[48] Ex. 187 at 3329-51.

The California Supreme Court deems section 190.2 special circumstances to perform the constitutionally required narrowing. *Bacigalupo*, 6 Cal. 4th at 468. But given the expansive breadth of the special circumstances, no such narrowing occurs. As the Ninth Circuit has stated: "Where the Constitution demands a funnel narrowing the pool of defendants eligible for the death penalty, California gives us a bucket." *Morales v. Woodford*, 388 F.3d 1159, 1185 (9th Cir. 2004).

First, at the time of the capital crime, Penal Code sections 189 and 190.2 had nearly complete overlap, meaning that defendants were death-eligible for virtually all first-degree murders, including all felony-murders. Second, expansive judicial interpretations of the special circumstances heightened their already extraordinary breadth. *See, e.g.*, *Morales*, 388 F.3d at 1185 (noting that there is "virtually no line between lying-in-wait first degree murder and the special circumstance"); *People v. Webster*, 54 Cal. 3d 411, 463-68, 285 Cal. Rptr. 31 (1991) (Broussard, J., concurring and dissenting) (criticizing expansive definitions of robbery and robbery-murder special circumstance and observing that lying-in-wait special circumstance "does not meet minimum constitutional criteria"); *People v. Morales*, 48 Cal. 3d 527, 575, 257 Cal. Rptr. 64 (1989) (Mosk, J., concurring and dissenting) (noting that lying-in-wait special circumstance is "so broad in scope as to embrace virtually all intentional killings"); *People v. Anderson*, 43 Cal. 3d 1104, 1147, 240 Cal. Rptr. 585 (1987) (holding that special circumstances do not require a showing

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[48] The 1978 Law also expanded death eligibility in other ways. First, it eliminated the felony-murder mens rea requirement that the homicide itself must have been intentional. Second, it broadened the circumstances under which an accomplice could be death-eligible by eliminating the requirements that (1) the accomplice be personally present during the homicide and (2) have participated in the crime with the intent of causing the victim's death. *Compare* 1977 Cal. Stat. 316 § 9, *with* former Cal. Penal Code § 190.2 (West 1992.)

of "intent to kill" unless explicitly specified).

Finally, the legislative drafters of section 190.2 did not intend the special circumstances to serve a narrowing function. Ex. 187 at 3332-35; Ex. 185 at 3314-15. The extensive overlap that exists between the definition of first-degree murder and the list of special circumstances is intentional. The initiative was intended to create the "toughest" death penalty law by making it applicable to all murderers. Shatz & Rivkind, 72 N.Y.U. L. Rev. at 1307; Ex. 185 at 3314-15. Accordingly, the drafters of the 1978 Law and the voters eschewed their "constitutional responsibility to tailor" the law "in a manner that avoids the arbitrary and capricious infliction of the death penalty," *Godfrey*, 446 U.S. at 428, and to enact a "carefully drafted" statute, *Gregg*, 428 U.S. at 195.

c. Empirical Data

Mr. Jones presented the state court with three empirical studies, described below, that show that (1) the overwhelming majority of murders in California could be charged as capital murders and (2) in virtually all of them, at least one special circumstance could be proved. This renders California's death penalty statute in violation of the Eighth and Fourteenth Amendments: because there is no meaningful basis to distinguish the cases in which the defendant is sentenced to death, those death sentences are arbitrary and capricious.

First, Professor David Baldus studied California's death sentencing rate—the rate at which defendants who were factually eligible for the death penalty under 2008 California law actually received a death sentence. He analyzed over 27,000 first-degree murder, second-degree murder, and voluntary manslaughter convictions in California for crimes committed between January 1, 1978, and June 30, 2002 ("Baldus Study"). Ex. 184 at 3190. Of all defendants factually eligible for the death penalty, the death sentencing rate was 4.4 percent. *Id.* at 3217-18, 3222. Of defendants convicted of first-degree murder, 95 percent were factually eligible for a death sentence under 2008 law, but the death sentencing rate was only

8.7 percent. *Id*. at 3201-02, 3204, 3220. Comparing California's 95 percent death-eligibility rate for first-degree murders under 2008 law with the 100 percent of first-degree murders that were death-eligible under pre-*Furman* Georgia law, the resulting 5 percent narrowing rate illustrates that the section 190.2 special circumstances fail to limit death eligibility as required by *Furman* and the Eighth Amendment.[49] *Id.* at 3203-04, 3223-24.

Second, Mr. Jones presented a study conducted by Professor Steven Shatz and Nina Rivkind that surveyed first-and second-degree murder convictions in three California counties, Alameda, Kern, and San Francisco ("Statewide Study"). The Statewide Study analyzed 596 published and unpublished appellate decisions and 78 murder convictions that were not appealed from 1988-92. Of defendants convicted of first-degree murder, 87 percent were death-eligible, but their death sentencing rate was only 9.6 percent; the overall death sentence rate was approximately 11.0 percent. Ex. 186 at 3322-23; Shatz & Rivkind, 72 N.Y.U. L. Rev. at 1332.

Third, Mr. Jones presented a study conducted by Professor Shatz that surveyed 803 murder convictions in Alameda County ("Alameda Study"). The Alameda Study analyzed 803 murders, including all of the county's death penalty cases, from November 8, 1978 (the effective date of the 1978 Law) and November 7, 2001. Shatz, 59 Fla. L. Rev. at 737. Of defendants convicted of first-degree murder who were death-eligible, the death sentence rate was 12.6 percent. Ex. 186 at 3324. This rate is only slightly higher than the 9.6 percent rate found in the Statewide Study, and the disparity is likely attributable to Alameda County's status

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[49] Among persons convicted of first-degree murder, second-degree murder, and voluntary manslaughter between January 1978 and June 2002, 59 percent would have been death-eligible based on the facts of the offense under California law in 2008. Ex.184. at 3201-02. Comparing this rate with the rate under pre-*Furman* Georgia law leads to a narrowing rate of 35 percent. *Id.* at 3203-04.

as a "high death" county. *Id.* at 3322, 3324. Both the Statewide Study and the Alameda Study also demonstrate that the California statute fails to perform constitutionally required narrowing.

In addition to these three studies, Mr. Jones presented the state court with empirical evidence that California's death penalty scheme is broader than any other state's statute. California has the highest rate of death-eligibility of any death penalty jurisdiction; its rate is so much higher than the other jurisdictions' that it is a statistical outlier. Ex. 184 at 3210-15; Ex. 188 at 3371-73. Moreover, California's narrowing rate—the rate at which its death penalty statute narrows death-eligibility relative to pre-*Furman* Georgia law—is lower than other states' narrowing rates. Ex. 184 at 3209.

The *Furman* Court implicitly found a death sentencing rate of 15-20 percent sufficiently low to create a risk of arbitrariness and capriciousness that violated the Eighth Amendment. *Furman*, 408 U.S. at 386-87 n.11 (Burger, C.J., dissenting); *cf. Gregg*, 428 U.S. at 182 n.26 (plurality opinion) ("It has been estimated that before *Furman* less than 20% of those convicted of murder were sentenced to death in those States that authorized capital punishment."). Each of the three studies that Mr. Jones placed before the state court determined that California has a substantially lower death sentencing rate, which *a fortiori* violates the Eighth Amendment. Mr. Jones presented a prima facie case that section 190.2's special circumstances fail to accomplish constitutionally mandated narrowing, because they apply to an overwhelming proportion of first-degree murders and fail to narrow genuinely the class of death-eligible offenders.[50]

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[50] Several federal district courts have recognized that the facts and allegations that Mr. Jones presented to the California Supreme Court set forth a prima facie case for relief and warrant an evidentiary hearing on the merits of the claim. *See, e.g.*, Order re: Motion for Evidentiary Hearing at 149, *Ashmus v. Wong*, No. 3:93-cv-00594-TEH (N.D. Cal. Mar. 14, 2001) (granting an evidentiary hearing on

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3. Section 2254 does not bar relief on this claim.

In 2009, the state court summarily denied Mr. Jones's narrowing claim as failing to state a prima facie case for relief. To the extent the state court's ruling reflects its determination that Mr. Jones failed to plead sufficient facts that, if proven, would entitle him to Eighth Amendment relief, the state court's decision is contrary to and an unreasonable application of *Furman* and its progeny under section 2254(d)(1). In the alternative, the state court unreasonably determined the facts under section 2254(d)(2) by finding facts and resolving disputes without any adjudicative procedure.

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

The state court summarily denied Mr. Jones's narrowing claim without citation or a reasoned decision. However, the state court's published decisions make clear that it has unreasonably concluded that the U.S. Supreme Court resolved all narrowing challenges to the California statute in *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984), and *Tuilaepa v. California*, 512 U.S. 967, 973, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994). *See People v. Arias*, 13 Cal. 4th 92, 186-87, 51 Cal. Rptr. 2d 770 (1996) (relying on *Tuilaepa v. California* to find 1978 Law constitutional); *People v. Crittenden*, 9 Cal. 4th 83, 154-56, 36 Cal. Rptr. 2d 474 (1994) (reasoning that the U.S. Supreme Court upheld the constitutionality of the 1977 Law's special circumstances in *Pulley v. Harris* and concluding that the 1978 Law's special circumstances play an "essentially

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petitioner's narrowing claim because petitioner's allegations, if proven, could establish that the California statutory scheme imposed death sentences more infrequently than the schemes considered in *Furman* and thus violates the Eighth Amendment); Order, *Riel v. Goughnour*, No. 2:01-cv-00507-LKK-KJM (E.D. Cal. filed July 27, 2004); Order, *Frye v. Goughnour*, No. 2:99-cv-00628-LKK-KJM (E.D. Cal. filed July 27, 2004); Order, *Webster v. Ornoski*, No. 2:93-cv-0306-LKK-DAD (E.D. Cal. filed July 27, 2006).

identical" role in "thereby limiting the death sentence to a small subclass of murders," apparently despite the "greatly expanded" number of special circumstances). The state court has repeatedly cited *Arias* and *Crittenden* in denying subsequent narrowing challenges. *See, e.g.*, *People v. Sakarias*, 22 Cal. 4th 596, 632, 94 Cal. Rptr. 2d 17 (2000) (citing both cases).

Thus, the state court denied Mr. Jones's narrowing claim based on its belief that the U.S. Supreme Court had previously rejected the claim. In reality, neither *Pulley* nor *Tuilaepa* address the claim. *Pulley* held only that a death penalty statute need not include a proportionality review provision to be constitutional. 465 U.S. at 42-45. It rejected a facial challenge to California's 1977 Law because it had sufficient checks on arbitrariness to survive a *Furman* challenge, but implied that its conclusion could differ if given additional facts. *Id*. at 51, 53-54. The Court did not resolve any other constitutional questions pertaining to the 1977 Law—and more importantly, did not consider the constitutionality of the broader 1978 Law under which Mr. Jones was sentenced. Indeed, Mr. Jones's claim explicitly contrasts the 1977 Law's narrow special circumstances with the 1978 Law's overbroad special circumstances. In turn, *Tuilaepa* resolved the constitutionality of specific section 190.3 aggravating factors. 512 U.S. 969. The Supreme Court explicitly stated that it was not addressing issues concerning the eligibility stage of California's capital punishment scheme; narrowing is such an issue.[51] *Id*. at 975.

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[51] Indeed, in *Tuilaepa*, Justice Blackmun noted that the U.S. Supreme Court had not immunized the California statute from challenge based on its "extraordinary" breadth:

> The Court's opinion says nothing about the constitutional adequacy of California's eligibility process, which subjects a defendant to the death penalty if he is convicted of first degree murder and the jury finds the existence of one "special circumstance." By creating nearly 20 such special circumstances, California creates an extraordinary large death pool. Because petitioners mount no challenge to these

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The state court thus misapplied both *Pulley* and *Tuilaepa* and resultantly failed to apply the fact-dependent analysis of *Furman* and its progeny to the particular facts of the 1978 Law's sentencing scheme in rejecting Mr. Jones's narrowing claim. This was both contrary to and an unreasonable application of the Supreme Court's Eighth Amendment narrowing precedents. *See Taylor v. Workman*, 554 F.3d 879, 887 (10th Cir. 2009) (finding the state court decision "contrary to" federal law because the state court's analysis was "inconsistent with the inquiry demanded by" relevant precedent); *Brumley v. Wingard*, 269 F.3d 629, 638-39 (6th Cir. 2001) (finding section 2254(d) did not bar relief when the state court's error was simple failure to apply the controlling Supreme Court precedent).

As described above, Mr. Jones's allegations established a prima facie Eighth Amendment violation when taken as true. By summarily denying the claim, the state court did not require Respondent to respond formally to Mr. Jones's allegations or present any evidence opposing Mr. Jones's contentions. The state court ruling also denied Mr. Jones the opportunity to present evidence, subpoena witnesses, and prove his allegations. *See* section I.B.2, *supra*. The summary denial of this claim was thus contrary to federal law requiring a state court to ascertain facts reliably before denying adequately presented federal claims. *See* section I.B.1, *supra*; Reply. Br. on *Pinholster* at 12-17. Finally, to the extent that the state court determined for any other reason that Mr. Jones did not state a prima facie claim, its determination was an unreasonable application of the Supreme Court's narrowing jurisprudence. *See Williams*, 529 U.S. at 407-08 (holding section 2254(d)(1) is satisfied where a state court identifies the governing legal rule but applies it unreasonably to a particular case).

> circumstances, the Court is not called on to determine that they collectively perform sufficient, meaningful narrowing.

512 U.S. at 994 (Blackmun, J., dissenting) (citing *Zant*, 462 U.S. at 862).

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

In the alternative, the state court may have unreasonably determined that Mr. Jones's proffer of substantial empirical evidence, described *supra*, was irrelevant to its adjudication of the narrowing claim. Prior to the filing of Mr. Jones's habeas petition, in *People v. Sanchez*, the state court was first presented with some of the empirical statistical data that Mr. Jones also presented. 12 Cal. 4th 1, 60-61, 47 Cal. Rptr. 2d 843 (1995). Although *Sanchez* was the first case in which the state court had been presented with this empirical data, the state court determined that the claim was "identical" to the facial challenges it had previously considered.[52] The state court's determination that the statistical data did not alter the claim's factual support was necessarily a determination that the data lacked evidentiary value. To the extent that the state court applied *Sanchez*'s reasoning to Mr. Jones's claim, it unreasonably determined the facts. *Earp v. Ornoski*, 431 F.3d 1158, 1167 (9th Cir. 2005).

I. Considered Cumulatively, the Constitutional Errors in Mr. Jones's Case Require the Granting of Relief.[53]

Mr. Jones presented the California Supreme Court with a prima facie claim

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[52] The state court's faulty reasoning in *Sanchez* also suggests that the state court may not have taken Mr. Jones's factual allegations as true, as required at the pleading stage of a habeas proceeding. *See Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004) (a state court unreasonably determines facts by refusing to consider petitioner's relevant factual allegations).

[53] In this brief, Mr. Jones has demonstrated that he satisfies section 2254(d)'s limitations as to the claims on which he seeks a federal evidentiary hearing. In addition to these claims, Mr. Jones requested that the state court's cumulative error assessment consider the additional claims of constitutional error that Mr. Jones presented on habeas and on direct appeal. State Pet. at 425. This Court's assessment of cumulative error also must include Mr. Jones's remaining claims of record-based and extrarecord constitutional errors that are alleged in his petition but are not described in this brief due to space limitations.

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that his conviction and death sentence are unconstitutional because the constitutional errors that he identified on direct appeal and in his state habeas proceedings, viewed cumulatively, prejudicially altered the outcome of the guilt phase and penalty phase of his trial.[54] State Pet. at 425-26; Reply at 368-39.

1. Controlling U.S. Supreme Court Law

The combined effect of multiple trial court errors warrants habeas relief where the errors have infected the trial with unfairness so as to make the resulting conviction a denial of due process: *i.e.*, where the errors, considered together, had a substantial and injurious effect on the jury's verdict. *Chambers v. Mississippi*, 410 U.S. 284, 298, 302-03, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *Brecht*, 507 U.S. at 637; *see also Taylor v. Kentucky*, 436 U.S. 478, 487 n.15, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978). The cumulative effect of multiple errors may violate due process even where no single error rises to the level of a constitutional violation or independently warrants reversal. *Chambers*, 410 U.S. at 290 n.3.

In sum, when the combined effect of individually harmless errors renders a criminal defense "far less persuasive than it might [otherwise] have been," the resulting conviction violates due process. *Chambers*, 410 U.S. at 294, 302-03. An assessment of cumulative error as to the guilt determination and punishment imposed is especially appropriate in a capital case. *Beck v. Alabama*, 447 U.S. 625, 637-38, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980) (discussing special need for reliability in determining guilt in capital murder case); *Johnson v. Mississippi*, 486 U.S. 578, 584, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988) (same as to penalty).

2. Prima Facie Allegations Before the State Court

In his state habeas petition, Mr. Jones alleged that his need for a cumulative error assessment is especially pronounced because the errors in his case worked

[54] Mr. Jones's cumulative error claim was Claim Twenty-Seven in state court and is Claim Thirty in federal court. State Pet. at 425-26; Fed. Pet. at 428-29.

together to deprive him of a fair trial. State Pet. at 425-26. Specifically: Mr. Jones wrongly faced trial for the capital crime despite his incompetence to stand trial. The guilt phase outcome was prejudicially altered by the combined effect of (1) trial counsel's ineffective assistance; (2) the prosecution's *Brady* violations; and (3) the court's erroneous ruling that Mr. Jones could not fully testify to his own protracted symptoms of mental illness. These constitutional errors enabled the prosecution to argue that Mr. Jones fabricated his mental state defense and deprived the jury of the information it needed to conclude that Mr. Jones's mental state defense was meritorious. In particular, the jury was deprived of: (1) the wealth of corroborating evidence supporting Mr. Jones's mental state defense, including the mitigating evidence pertaining to both the Harris crime and capital crime; (2) the corroborating records the prosecution possessed describing Mr. Jones's long-standing mental illness and legitimate need for antipsychotic medication while incarcerated; and (3) the full extent of Mr. Jones's own testimony about his mental illness. Trial counsel's errors also prevented the jury from hearing the second defense that there was a reasonable doubt whether Mr. Jones had pre-mortem sexual contact with the victim. If the jurors had heard these two defenses in full, they would have acquitted Mr. Jones of rape and first-degree murder based on a rape felony-murder theory and found the rape special circumstance to be untrue. Instead, the jurors wrongly and prejudicially convicted Mr. Jones of a capital offense.

At the penalty phase, trial counsel's errors meant that the jury never heard readily available and compelling mitigating evidence that would have changed the penalty phase outcome, including the physical abuse, sexual abuse, brain damage, neglect, and homelessness that Mr. Jones suffered as a child and the testimony of a well-prepared expert describing Mr. Jones's debilitating mental illness. Trial counsel's failures were exacerbated by jurors' misconduct in prejudging Mr. Jones's sentence prior to penalty phase deliberations, considering multiple forms of

prejudicial extrinsic evidence, and in one juror's case, sleeping during critical portions of the defense's penalty phase presentation. Finally, at both phases of trial, forced medication and improper alterations in Mr. Jones's medication regimen inhibited his capacity to respond authentically to the proceedings, thus depriving the jury of critical information about his impaired mental functioning and mitigating expressions of remorse and compassion.

The combined effect of these constitutional errors rendered Mr. Jones's guilt phase and penalty phase defenses "far less persuasive than [they] might [otherwise] have been," *Chambers*, 410 U.S. at 294, 302-03. Thus, Mr. Jones's capital conviction and death sentence both violate due process.

3. Section 2254 does not bar relief on this claim.

In 2009, the state court summarily denied Mr. Jones's cumulative error claim as failing to state a prima facie case for relief. To the extent that the state court's ruling reflects its determination that Mr. Jones failed to plead sufficient facts to establish his claim, its decision is (1) contrary to clearly established federal law and (2) an unreasonable application of *Chambers* and subsequent Supreme Court jurisprudence under section 2254(d)(1). In the alternative, the state court unreasonably determined the facts under section 2254(d)(2) by finding facts and resolving disputes without adequate process.

The state court's ineffective assistance of counsel precedents demonstrate that it analyzes cumulative error contrary to clearly established Supreme Court law. As set forth *supra*, *Strickland* mandates that a court analyzing whether trial counsel's ineffectiveness was prejudicial should consider all of the instances of deficient performance and make a cumulative assessment of prejudice. 466 U.S. at 495. However, where a petitioner identifies multiple instances of deficient performance, the state court considers prejudice separately for each instance of deficient performance, *Robbins*, 18 Cal. 4th at 820-21 (Kennard, J., dissenting) (explaining the state court's failure to cumulate error), illustrating that its

assessment of cumulative error is contrary to Supreme Court law.

The state court's failure to engage in fact-finding to resolve Mr. Jones's adequately pled claim is also contrary to federal law that obliges state courts to resolve properly presented federal constitutional claims. *See* section I.B.1, *supra*. Finally, by rejecting Mr. Jones's prima facie claim of cumulative error without any fact-finding or adversarial proceeding, the state court unreasonably applied *Chambers* and its progeny.[55] *See Parle v. Runnels*, 505 F.3d 922, 927-28 (9th Cir. 2007) (murder conviction set aside due to cumulative errors including the trial court's erroneous exclusion of evidence probative of the central guilt issue, the mentally ill petitioner's mental state at the time of the crime); *Killian v. Poole*, 282 F.3d 1204, 1210 (9th Cir. 2002) (finding cumulative error and granting habeas relief based on, inter alia, the prosecution's failure to disclose *Brady* evidence).

As set forth *supra*, to the extent that the state court made factual findings at the pleading stage in resolving Mr. Jones's claim of cumulative error, those factual findings were unreasonable under section 2254(d)(2) and violated Mr. Jones's basic right to confront and rebut the evidence that formed the basis for the court's adverse decision. *See generally* Section I.B, *supra*. Moreover, the state court's rejection of Mr. Jones's prima facie claim of cumulative error is an unreasonable determination of the facts because the state court should have made a finding of fact but neglected to do so. *See, e.g.*, *Hurles*, 650 F.3d at 1312; *Williams*, 859 F. Supp. 2d at 1160.

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[55] Moreover, if this Court determines that the state court's resolution of one or more constitutional issues on direct appeal or habeas was unreasonable under section 2254(d)(1), this also renders the state court's cumulative error analysis unreasonable under section 2254(d)(1), because the cumulative error analysis depends on the correct identification of errors. *See Panetti*, 551 U.S. at 953 (section 2254(d)(1) is satisfied when the state court's adjudication of a claim "is dependent on an antecedent unreasonable application of federal law.")

CONCLUSION

Mr. Jones renews his motion for an evidentiary hearing on each of the above-briefed claims. On March 26, 2012, this Court denied Mr. Jones's Motion for an Evidentiary Hearing without prejudice, ruling that "Mr. Jones must first demonstrate that he has satisfied the requirements of the [AEDPA], 28 U.S.C. § 2254(d), based solely on the state court record, before this Court will consider his request for an evidentiary hearing." *See* ECF No. 75 at 2. In this brief, Mr. Jones has demonstrated that he satisfies the limitations of section 2254(d) with respect to each claim on which he seeks an evidentiary hearing. Moreover, Mr. Jones diligently sought an evidentiary hearing in state court. State Pet. at 427. Accordingly, no further obstacle precludes this Court from granting Mr. Jones an evidentiary hearing.

Dated: December 10, 2012

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

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