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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ERNEST DEWAYNE JONES, Petitioner, **v.** **KEVIN CHAPPELL, Warden, California State Prison at San Quentin,** Respondent.	CV-09-2158-CJC **OPPOSITION TO PETITIONER'S OPENING 2254(D) BRIEF ON EVIDENTIARY HEARING CLAIMS** **CAPITAL CASE** The Honorable Cormac J. Carney U.S. District Judge

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
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TABLE OF AUTHORITIES
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TABLE OF AUTHORITIES
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Page

TABLE OF AUTHORITIES
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TABLE OF AUTHORITIES
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TABLE OF AUTHORITIES
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TABLE OF AUTHORITIES
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TABLE OF AUTHORITIES
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Page

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

COURT RULES

OTHER AUTHORITIES

Respondent Kevin Chappell, the Warden of the California State Prison at San Quentin, California, hereby submits this Opposition to Petitioner's Opening 2254(d) Brief on Evidentiary Hearing Claims.

In this Opposition, Respondent addresses the application of 28 U.S.C. § 2254(d) to each of the thirty claims in the Petition. Respondent briefs all thirty claims pursuant to the parties' Joint Stipulation Re: Schedule for Merits Briefing Under 28 U.S.C. § 2254(d)(1) and 2254(d)(2), filed on April 12, 2012, and this Court's Order Re: Schedule for Merits Briefing Under 28 U.S.C. § 2254(d)(1) and 2254(d)(2), filed on April 16, 2012. Respondent notes that Petitioner's Opening 2254(d) Brief addresses only ten of the thirty claims in the Petition, in violation of the parties' Joint Stipulation and this Court's Order requiring briefing on all claims, and despite Petitioner having eight months to complete the briefing. Petitioner's failure to brief the application of 28 U.S.C. § 2254(d) to twenty of the thirty claims in the Petition should be deemed a forfeiture of Petitioner's right to brief those claims.

Dated: June 13, 2013

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Following a jury trial, Petitioner was convicted of and sentenced to death for the forcible rape and first degree murder of Julia Ann Miller. In 2003, the California Supreme Court affirmed the judgment of conviction and death sentence in a published opinion on direct appeal in *People v. Jones*, 29 Cal. 4th 1229, 131 Cal. Rptr. 2d 468 (2003). (NOL B4.)[1] On March 11, 2009, the California Supreme Court issued an order denying Petitioner's first habeas corpus petition in case number S110791. (NOL C7.) On that same date, the California Supreme Court issued an order denying Petitioner's second habeas corpus petition in case number S159235. (NOL D6.)[2]

On March 10, 2010, Petitioner filed a Petition for Writ of Habeas Corpus in this case containing thirty claims for relief. As explained below, some of the claims are procedurally defaulted and some of the claims are barred by *Teague v. Lane*, 489 U.S. 288, 310, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). In addition, all of the claims are barred by 28 U.S.C. § 2254(d).

STANDARD OF REVIEW

As amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d) constitutes a "threshold restriction," *Renico v. Lett*, 130 S. Ct. 1855, 1862 n.1, 176 L. Ed. 2d 678 (2010), on federal habeas corpus relief which "bars relitigation of any claim 'adjudicated on the merits' in state

[1] References to documents beginning with "NOL" are to the documents contained in the Notice of Lodging that Respondent filed in this case on April 6, 2010.

[2] On April 6, 2010, Respondent filed an Answer in this case. The Answer contains a detailed statement of the state court proceedings. (Answer at 1-2.) The Answer also contains a recitation of the facts as contained in the California Supreme Court's opinion on direct appeal. (Answer at 5-14.) A recitation of the facts that includes citations to the reporter's transcript is also included in the respondent's brief that was filed in connection with Petitioner's direct appeal in the California Supreme Court. (NOL B2 at 3-22.)

court" subject to two narrow exceptions. *Harrington v. Richter*, 131 S. Ct. 770, 784, 178 L. Ed. 2d 624 (2011). These exceptions require a petitioner to show that the state court's previous adjudication of the claim either (1) was "'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,'" or (2) was "'based on an unreasonable determination of the facts in light of the evidence presented at the State Court proceeding.'" *Id*. at 783-84 (quoting 28 U.S.C. § 2254(d)). "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id*. at 786 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). Accordingly, to overcome the bar of § 2254(d), a petitioner is required to show at the threshold that "the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.; see also Johnson v. Williams*, 133 S. Ct. 1088, 1091, 1094, 185 L. Ed. 2d 105 (2013) (standard of § 2254(d) is "difficult to meet" and "sharply limits the circumstances in which a federal court may issue a writ of habeas corpus to a state prisoner whose claim was 'adjudicated on the merits in State court proceedings'").

As discussed below, many of Petitioner's claims were summarily denied by the California Supreme Court on habeas corpus. In California, a habeas petition is assessed to determine whether the petition states a prima facie case for relief -- that is, whether, assuming the factual allegations in the petition to be true, the allegations would entitle the petitioner to relief. *People v. Duvall*, 9 Cal. 4th 464, 475, 886 P. 2d 1252 (1995). Only if a petitioner meets this initial pleading requirement does an order to show cause issue, requiring development of legal and factual issues. *Id*. at 475-79. In making these initial factual assumptions, however, a California habeas court does not simply accept as true any asserted fact. For

factual allegations to be accepted at the prima-facie-case stage, they must be stated "fully and with particularity," and they must be supported by "copies of reasonably available documentary evidence. . . , including pertinent portions of trial transcripts and affidavits or declarations." *Id*. at 474; *People v. Karis*, 46 Cal. 3d 612, 656, 758 P. 2d 1189 (1988). Double hearsay cannot support a prima facie case for relief. *People v. Madaris*, 122 Cal. App. 3d 234, 242, 175 Cal. Rptr. 869 (1981), disapproved on other grounds in *People v. Barrick*, 33 Cal. 3d 115, 127, 187 Cal. Rptr. 716 (1982). Further, "[c]onclusory allegations made without any explanation of the basis for the allegations do not warrant relief." *People v. Duvall*, 9 Cal. 4th at 474; *see also Cullen v. Pinholster*, 131 S. Ct. 1388, 1402-03 n.12, 179 L. Ed. 2d 557 (2011).[3]

ARGUMENT

I. CLAIM ONE IS BARRED BY § 2254(D)

In Claim One, Petitioner contends that trial counsel rendered ineffective assistance. (Pet. at 21-92.) This claim is barred by § 2254(d).

A. The Applicable Law

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's conduct fell below an objective standard of reasonableness, and that the defendant was prejudiced by counsel's acts or omissions. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (*Strickland*); *accord Richter*, 131 S. Ct. at 787.

The first prong of the *Strickland* test – deficient performance – requires a showing that counsel's performance was "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. "A court considering a claim

[3] It is generally not possible to conclude that a state court made "an unreasonable determination of the facts" when it denies a claim without explaining the basis for its denial. As most of Petitioner's claims were summarily denied by the California Supreme Court on habeas corpus, § 2254(d)(2) is generally not applicable.

of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Richter*, 131 S. Ct. at 787 (citing *Strickland*, 466 U.S. at 689).

The second prong of the *Strickland* test – prejudice – requires a showing of a "reasonable probability that, but for counsel's unprofessional errors, the result of the [trial] would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id*.; *see also Woodford v. Visciotti*, 537 U.S. 19, 22, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002). "The likelihood of a different outcome must be substantial, not just conceivable." *Richter*, 131 S. Ct. at 792 (citing *Strickland*, 466 U.S. at 693).

Judicial review of a *Strickland* claim is "highly deferential," and "doubly deferential when it is conducted through the lens of federal habeas." *Yarborough v. Gentry*, 540 U.S. 1, 6, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003) (per curiam); *see also Delgado v. Lewis*, 223 F.3d 976, 981 (9th Cir. 2000) (*Strickland* standard is "very forgiving"). "'Surmounting *Strickland*'s high bar is never an easy task[,]'" and "[e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Richter*, 131 S. Ct. at 788 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010)).

B. Investigating Petitioner's Mental State

In Claim One, subpart (2), Petitioner contends that trial counsel rendered ineffective assistance during the guilt phase of the trial because he failed to investigate and present evidence concerning Petitioner's mental state. He contends that counsel should have presented expert and lay witness testimony concerning Petitioner's history of mental illness and the connection between his mental health history and his mental state at the time of the crime in order to show that he lacked the specific intent to rape. (Pet. at 22-37.) Petitioner presented part of this claim in his opening brief on appeal in the California Supreme Court. Specifically, he claimed on appeal that trial counsel was ineffective for failing to call Dr. Thomas to

testify at the guilt phase of the trial. (NOL B1 at 136-43.) The California Supreme Court rejected this claim in its reasoned opinion on appeal. (NOL B4; *People v. Jones*, 29 Cal. 4th at 1254-55.) Petitioner presented the entire claim of ineffective assistance in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 92-158.) The California Supreme Court summarily rejected the claim on the merits in its order denying the petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

The record shows that counsel had a psychiatrist appointed prior to trial to evaluate Petitioner's mental health history and mental state at the time of the crime. That expert was Dr. Claudewell Thomas, who testified at the penalty phase of the trial. Dr. Thomas met with Petitioner at least three times. (30RT[4] at 4413.) He reviewed various documents and reports concerning Petitioner's mental health, including the reports of numerous mental health experts who had previously evaluated Petitioner. (30RT at 4414-32.) Dr. Thomas concluded that Petitioner suffered from schizoaffective schizophrenia. (30RT at 4413-14.) At no time during Dr. Thomas's pretrial interviews of Petitioner did Petitioner ever tell him the story that he later testified to at trial, i.e., that he flashbacked to his childhood and blacked out during the crime. (30RT at 4529.) Instead, Petitioner told Dr. Thomas that he had consensual sex with Mrs. Miller. He then later told Dr. Thomas that he had non-consensual sex with Mrs. Miller. (30RT at 4438, 4472-73, 4483-84.)

In its reasoned opinion on appeal, the California Supreme Court rejected Petitioner's claim that counsel rendered ineffective assistance for not presenting Dr. Thomas's testimony at the guilt phase, finding that counsel may have had several valid tactical reasons for not presenting his testimony. *People v. Jones,* 29 Cal. 4th at 1254-55. First, the California Supreme Court reasonably determined that counsel may have wanted to avoid the introduction of evidence at the guilt phase

[4] "RT" refers to the reporter's transcript from Petitioner's trial. (NOL A2.)

concerning Petitioner's prior rape of Kim Jackson. Dr. Thomas's opinion regarding Petitioner's mental disease was based in part on the Kim Jackson rape. (*See* 30RT at 4414, 4465-67, 4524-25.) Therefore, if Dr. Thomas had testified about Petitioner's mental illness at the guilt phase, the prosecutor would have been permitted to question him about the foundation for his opinion, including the damaging evidence concerning the Kim Jackson rape. *See* Cal. Evidence Code §721(a).

Second, the California Supreme Court reasonably determined that counsel may have wanted to avoid the jury hearing about Petitioner's statements to Dr. Thomas. If Dr. Thomas had testified at the guilt phase, the prosecutor could have elicited damaging testimony that Petitioner told Dr. Thomas he had consensual sex with Mrs. Miller and then later admitted he had non-consensual sex with her, and never told Dr. Thomas the story he testified to at trial, namely, that he flashbacked to his childhood and had no recollection of raping Mrs. Miller.

To the extent Petitioner raised this same claim of ineffective assistance in the state habeas proceedings (NOL C1 at 153), the California Supreme Court reasonably rejected it. In the state habeas proceedings, Petitioner submitted three declarations from trial counsel. (Exs.[5] 12, 150, & 181.) However, none of the declarations explained counsel's reason for not calling Dr. Thomas to testify at the guilt phase. Therefore, the California Supreme Court reasonably could have rejected Petitioner's claim as conclusory and unsupported. *See People v. Duvall*, 9 Cal. 4th at 474 (petitioner must provide reasonably available documentary to support claim); *People v. Karis*, 46 Cal. 3d at 656 (conclusory allegations of ineffective assistance made without any basis for the allegations do not warrant

[5] "Ex." and "Exs" refer to the exhibits Petitioner submitted with his first and second habeas corpus petitions in the California Supreme Court. (NOL C2 and D1.)

relief); *see also James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) (rejecting conclusory allegation of ineffective assistance of counsel).

The California Supreme Court also reasonably could have determined that Petitioner suffered no prejudice from counsel's alleged ineffectiveness for not calling Dr. Thomas at the guilt phase. As discussed above, if Dr. Thomas had testified at the guilt phase, the prosecutor would have elicited damaging evidence concerning the Kim Jackson rape and damaging testimony about Petitioner's prior statements to Dr. Thomas. In addition, the record shows that Dr. Thomas's testimony was offered at the penalty phase yet failed to persuade the jury not to impose the death penalty. If Dr. Thomas's testimony had convinced the jury that Petitioner suffered from a mental illness that caused him to be unable to form the intent to rape and kill Mrs. Miller, it is doubtful the jury would have chosen the death penalty. The fact the jury choose the death penalty shows that it was not persuaded by Dr. Thomas's testimony.

In addition, the evidence that Petitioner specifically intended to rape and kill Mrs. Miller was overwhelming. The evidence showed that Petitioner tied Mrs. Miller's arms over her head with a telephone cord and purse strap and bound her legs with a nightgown and electrical cord. (17RT at 2684; 18RT at 2838-39.) He also gagged her mouth with two rags. (17RT at 2685; 18RT at 2839.) It appears Petitioner gathered these items from around the house to minimize resistance from Mrs. Miller and prevent her from screaming and alerting others to the attack. Petitioner also stabbed Mrs. Miller more than fifteen times in various parts of her body. (17RT at 2777, 2787-96.) There were numerous knives and pieces of knives in and around Mrs. Miller's body which suggested that Petitioner went to the kitchen to retrieve additional knives. (17RT at 2691.) Petitioner also engaged in sexual intercourse with Mrs. Miller and ejaculated inside her. In light of this evidence, it is highly unlikely that Dr. Thomas's testimony would have persuaded the jury that Petitioner was in an unconscious state and unaware of what he was

doing when he raped and killed Mrs. Miller. In addition, the evidence showed that Petitioner had previously tied up and raped the mother of a former girlfriend in a similar fashion to the way he tied up and raped Mrs. Miller. Neither the victim nor Petitioner testified that he blacked out or was in some unconscious state when he committed that crime. This was further evidence supporting a finding that Petitioner specifically intended to rape Mrs. Miller. For all of these reasons, the California Supreme Court reasonably could have determined that Petitioner was not prejudiced by counsel's alleged ineffective assistance for not presenting Dr. Thomas's testimony at the guilt phase.

Petitioner also contends that counsel was ineffective for failing to produce the testimony of other mental health experts at the guilt phase, including a neuropsychologist and substance abuse expert. (Pet. at 27-29.) The California Supreme Court reasonably rejected this claim. Before trial, counsel had a psychologist appointed -- Dr. William A. Spindell -- to conduct neuropsychological testing of Petitioner. Counsel stated in his declaration that he did not present Dr. Spindell's testimony at trial because he was not satisfied with his work and did not have confidence in his findings. (Ex. 150 at 2732.) Counsel also consulted with a substance abuse expert, Dr. Ronald Siegel. (Pet. at 29.) None of counsel's declarations explains why he did not call Dr. Siegel to testify. However, since counsel consulted with Dr. Siegel but did not present his testimony, counsel presumably determined his opinion would not have been helpful to the defense.

To the extent Petitioner contends that counsel should have conducted additional investigation to locate other mental health experts whose testimony might have been more favorable to the defense (Pet. at 28, 34), the California Supreme Court reasonably could have determined that counsel was not ineffective for failing to "shop" for additional experts. *See Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990) ("It is certainly within the 'wide range of professionally competent assistance' for an attorney to rely on properly selected experts"); *Walls*

v. Bowersox, 151 F.3d 827, 835 (8th Cir. 1998) ("counsel is not required to 'continue looking for experts just because the one he has consulted gave an unfavorable opinion'"); *People v. Williams*, 44 Cal. 3d 883, 945, 245 Cal. Rptr. 336 (1988) ("Competent representation does not demand that counsel seek repetitive examinations of the defendant until an expert is found who will offer a supportive opinion"); *see also Marcrum v. Luebbers*, 509 F.3d 489, 511 (8th Cir. 2007) ("The fact that a later expert, usually presented at habeas, renders an opinion that would have been more helpful to the defendant's case does not show that counsel was ineffective for failing to find and present that expert"). As for Petitioner's contention that counsel was ineffective for failing to provide mental health experts adequate materials and information to make their assessments (Pet. at 27), the California Supreme reasonably could have determined that counsel had no such duty. *See Hendricks v. Calderon*, 70 F.3d 1032, 1038-39 (9th Cir. 1995) (absent a request, counsel have no duty to acquire sufficient background information to assist their experts).

The California Supreme Court also reasonably rejected Petitioner's claim that counsel was ineffective at the guilt phase for failing to produce lay witness testimony from Petitioner's family, friends, and others concerning Petitioner's social and mental health history. (Pet. at 22-25.) At trial, counsel sought to have Petitioner testify about his history of mental problems, drug use, and difficult childhood, but the trial court precluded such evidence absent expert testimony showing the relevance of the evidence to Petitioner's mental state on the night of the murder. (22RT at 3358, 3405-14.) Had counsel sought to introduce the testimony of family members and other lay witnesses on these same subjects, the trial court would no doubt have issued the very same ruling, namely, that the evidence was inadmissible absent expert testimony showing its relevance to

Petitioner's mental state on the night of the murder.[6] The California Supreme Court reasonably could have determined that counsel was not ineffective for failing to produce the testimony of lay witnesses concerning Petitioner's mental illness because the trial court would have excluded such evidence. Furthermore, even if such testimony had been admitted at the guilt phase, it is not reasonably probable it would have affected the jury's verdict. As discussed above, there was overwhelming evidence that Petitioner specifically intended to rape and kill Mrs. Miller. Accordingly, the California Supreme Court reasonably could have found that Petitioner was not prejudiced by counsel's alleged ineffectiveness.

C. Presenting a Defense to the Rape Charge

In Claim One, subpart (3), Petitioner contends that trial counsel rendered ineffective assistance during the guilt phase of the trial because he failed to present a defense to the rape charge, rape felony murder theory, and rape special circumstance. Petitioner contends that counsel should have presented a defense that Mrs. Miller died before he sexually penetrated her.[7] (Pet. at 37-47.) Petitioner presented this claim of ineffective assistance in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 70-72, 84-88.) The California Supreme Court summarily rejected the claim on the merits in its order denying the petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

In his declaration, counsel stated that he did not recall investigating whether Mrs. Miller died prior to the sexual contact. (Ex. 181 at 3161.) The California Supreme Court reasonably could have determined that counsel was not ineffective for not investigating such a defense because there was simply no evidence to support it. Petitioner has never produced a declaration from any medical expert

[6] In his declaration, counsel stated, "I did not consider putting lay witnesses on the stand to testify to Mr. Jones's background and to previous instances in which Mr. Jones had entered a similar trance-like state. Mr. Jones was capable of, and legally permitted to give evidence on his own." (Ex. 12 at 107-08.)

[7] Under California law, rape requires a live victim. *People v. Lewis*, 46 Cal. 4th 1255, 1299, 96 Cal. Rptr. 3d 512 (2009).

who would have opined that sexual penetration occurred after Mrs. Miller died.[8] Petitioner contends that the condition of Mrs. Miller's nightgown -- that it was raised when her body was found and had slashes that corresponded to knife wounds on her lower body -- was evidence that sexual penetration occurred last. (Pet. at 40-41.) Not so. There could have been numerous reasons why Mrs. Miller's nightgown was raised that were unrelated to sexual penetration. For example, Petitioner could have raised the nightgown in order to inflict the knife wound to Mrs. Miller's vagina. (*See* 17RT at 2796-97.) Also, there were piles of clothing and a pillow on top of Mrs. Miller's body when she was discovered. (17RT at 2685-86.) The placement or removal of these items could have moved or disturbed the condition of her nightgown. Petitioner also contends that the evidence that Mrs. Miller had no injuries where her wrists and ankles were bound was evidence that sexual penetration occurred after she died. Petitioner contends that the lack of injuries at those sites showed that Mrs. Miller did not struggle and was therefore dead. (Pet. at 42-45.) Petitioner's contention is not persuasive. First, the evidence showed that Mrs. Miller *did* have a bruise on her wrist at the binding site. (17RT at 2775-76.) Second, Mrs. Miller might have not struggled because she was too weak, or because she believed struggling was futile, or because Petitioner hurt her when she resisted.

Lastly, the evidence that Petitioner raped Mrs. Miller before he killed her was compelling. The evidence showed that Petitioner bound Mrs. Miller's arms and legs. (17RT at 2684, 2686; 18RT at 2838-39.) The logical inference is that Petitioner was attempting to minimize resistance from Mrs. Miller while he raped her; if Petitioner killed Mrs. Miller before he raped her, he would not have needed to bind her. Further, the evidence of Petitioner's prior sexual assault on Mrs. Harris

[8] Petitioner produced a declaration from a doctor who could not ascertain when sexual penetration occurred. The doctor stated that there was no medical evidence to ascertain whether sexual intercourse occurred before death and that it was "as likely" that sexual intercourse occurred after death. (Ex. 177 at 3086.)

showed that Petitioner bound her hands and legs and then raped her. (20RT 3164-68.) It can be strongly inferred from this evidence that Petitioner raped Mrs. Miller in a similar fashion before killing her. Accordingly, the California Supreme Court reasonably could have rejected Petitioner's claim of ineffective assistance.

D. Conceding the Rape Charge

In Claim One, subpart (4), Petitioner contends that trial counsel rendered ineffective assistance for conceding the rape charge during his guilt phase closing argument. (Pet. at 47-48.) Petitioner presented this claim of ineffective assistance in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 164.) The California Supreme Court summarily rejected the claim on the merits in its order denying the petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

The record shows that counsel conceded during his guilt phase closing argument that Petitioner raped Mrs. Miller, but argued that Petitioner lacked the specific intent to rape for purposes of rape felony-murder.[9] (26RT at 3926-28.) In his declaration, counsel stated, "Because the DNA evidence demonstrated that sexual intercourse had occurred, I believed I would lose the rape charge anyway. Admitting the rape charge would be consistent with the scientific evidence, and make Mr. Jones more credible overall." (Ex. 12 at 107.)

The California Supreme Court reasonably determined that counsel did not perform deficiently in conceding the rape charge. In light of the DNA evidence showing the presence of Petitioner's semen in Mrs. Miller's vagina, it was undisputed that Petitioner had sexual intercourse with Mrs. Miller. Conceding the rape charge was a way for the defense to gain credibility with the jury without conceding that he committed a felony-murder that exposed him to a death sentence.

[9] Under California law, rape is a general intent crime. However, the defendant must have the specific intent to rape for purposes of rape felony-murder. *People v. Jones*, 29 Cal. 4th at 1256-57.

See United States v. Thomas, 417 F.3d 1053, 1058-59 (9th Cir. 2005) (no ineffectiveness for conceding guilt on count for which there was overwhelming evidence in order to enhance credibility on counts where the evidence was less clear and the penalties significantly greater); *see also Stenson v. Lambert*, 504 F.3d 873, 890 (9th Cir. 2007) ("When the evidence against a defendant in a capital case is overwhelming and counsel concedes guilt in an effort to avoid the death penalty, 'counsel cannot be deemed ineffective for attempting to impress the jury with his candor[.]'") (citation omitted). Furthermore, the California Supreme Court reasonably could have determined that the concession did not prejudice Petitioner since the evidence that Petitioner raped Mrs. Miller was overwhelming.

E. Challenging the Admissibility of the DNA Testimony

In Claim One, subpart (5), Petitioner contends that trial counsel rendered ineffective assistance for failing to effectively challenge the admissibility of the DNA testimony. (Pet. at 48-58.) Petitioner presented this claim of ineffective assistance in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 72-84.) The California Supreme Court summarily rejected the claim on the merits in its order denying the petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

The record shows that counsel challenged the admissibility of the DNA evidence. Prior to trial, counsel filed a motion to exclude the DNA evidence on the ground that it did not satisfy the applicable standard regarding the admissibility of evidence arising from new scientific methodology. (1 Supp II CT[10] at 106-23.) In California, a party offering evidence arising from new scientific methodology must

[10] "CT" refers to the clerk's transcript from Petitioner's trial, which consists of three volumes (volume three being the probation report which was separately lodged under seal). "Supp I CT" refers to the "Supplemental I" clerk's transcript from Petitioner's trial, which consists of one volume. "Supp II CT" refers to the "Supplemental II" clerk's transcript from Petitioner's trial, which consists of twenty-two volumes. "Supp III CT" refers to the "Supplemental III" clerk's transcript from Petitioner's trial, which consists of one volume. (NOL A1.)

satisfy what is known as the *Kelly* rule or *Kelly-Frye* rule, derived from *People v. Kelly*, 17 Cal. 3d 24, 130 Cal. Rptr. 144 (1976) and *Frye v. United States*, 293 F. 1103 (D.C. Cir. 1923). The rule requires the party to show that the reliability of the new technique has gained general acceptance in the relevant scientific community, that the expert testifying to that effect is qualified to do so, and that correct scientific procedures were used. *People v. Roybal*, 19 Cal. 4th 481, 505, 79 Cal. Rptr. 2d 487 (1998).[11]

A hearing was held on the matter and the trial court ruled that the scientific procedure used for the DNA testing -- the modified ceiling principle -- was generally accepted in the scientific community. (1RT at 664-65.) Later, another hearing was held and the trial court ruled that the scientific procedures used in the case were proper and that the DNA evidence was admissible. (19RT at 3079.)

In challenging the admissibility of the DNA evidence, counsel was assisted by the Los Angeles County Public Defender's forensics consultant, Walter Krstulja. (Ex. 12 at 106-07; *see* 1RT at 601-02.) Mr. Krstulja assisted counsel in preparing some of the pleadings. (*See* 3 Supp II CT at 581-88, 631-34.) At the hearings, Mr. Krstulja conducted most of the litigation, including the cross-examination of the prosecution's DNA expert and the presentation of most of the legal arguments. (*See* 1RT at 604-09, 614-16, 636-48, 655-56, 662-64; 19RT at 2900-02, 2917-19, 2931-91, 2999-3035, 3059-68, 3076-79.) Furthermore, counsel consulted with Dr. Simon Ford, a DNA expert. Dr. Ford provided advice to both counsel and Mr. Krstulja about the case. (Ex. 176 at 3077-84.)

Petitioner contends that counsel was ineffective for not obtaining the services of a qualified expert to challenge the DNA evidence. (Pet. at 48.) However, the California Supreme Court reasonably could have determined that counsel acted

[11] The state and federal standards concerning the admissibility of scientific evidence are different. *See Cooper v. Brown*, 510 F.3d 870, 944 n.28 (9th Cir. 2007).

within the wide range of reasonable professional assistance in relying on his office's forensics consultant and a DNA expert in litigating the admissibility of the DNA evidence. Significantly, Petitioner never alleged or presented any evidence in the California Supreme Court that Mr. Krstulja was less than fully qualified to litigate the DNA issues. *See Harris v. Vasquez*, 949 F.2d at 1525 ("It is certainly within the 'wide range of professionally competent assistance' for an attorney to rely on properly selected experts").

Petitioner also contends that counsel was ineffective with respect to the DNA evidence for failing to have the samples retested by a defense expert (Pet. at 50), failing to present expert testimony when challenging the admissibility of the DNA evidence (Pet. at 51, 53), and failing to object to the legal standard applied by the trial court (Pet. at 52). None of counsel's declarations, however, addressed the reasons he took or did not take any specific action with respect to the DNA evidence. The California Supreme Court reasonably could have determined that counsel properly relied on Mr. Krstulja's advice about such issues. (*See* Ex. 150 at 2730 (counsel stated that his knowledge of DNA issues was "at best rudimentary" so he asked Mr. Krstulja to assist him).) Counsel was not ineffective for relying on the advice of his expert. *See Murtishaw v. Woodford*, 255 F.3d 926, 947 (9th Cir. 2001).[12]

The California Supreme Court also reasonably could have determined that Petitioner was not prejudiced by counsel's alleged ineffective assistance with respect to the DNA evidence. Although Petitioner contends that there were additional challenges to the DNA evidence that could have been presented, he failed to establish that any such challenges would have been successful.

[12] To the extent Petitioner contends that counsel should have challenged the testimony of the prosecution's DNA expert when it was presented at trial (Pet. at 54), the California Supreme Court reasonably could have determined that counsel made a tactical decision not to do so because the defense had determined by then that it was going to concede the rape charge.

Specifically, Petitioner has failed to show that the modified ceiling principle was not generally accepted in the scientific community at the time of the trial, or that the prosecution's DNA expert was not sufficiently qualified, or that the scientific procedures that were used were incorrect. Further, as the California Supreme recognized in its opinion on appeal, it had previously found in another case (*People v. Venegas*, 18 Cal. 4th 47, 74 Cal. Rptr. 2d 262 (1998)) that the modified ceiling principle was generally accepted in the scientific community in 1992, two years before the trial in Petitioner's case. *People v. Jones*, 29 Cal. 4th at 1251.

F. Presenting a Defense of Not Guilty by Reason of Insanity

In Claim One, subpart (6), Petitioner contends that trial counsel rendered ineffective assistance for failing to enter a plea of not guilty by reason of insanity and for failing to investigate and present such a defense. (Pet. at 58-60.) Petitioner presented this claim of ineffective assistance in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 162-63.) The California Supreme Court summarily rejected the claim on the merits in its order denying the petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

None of counsel's declarations explained why he did not present an insanity defense. Thus, the California Supreme Court reasonably could have rejected Petitioner's claim as conclusory and unsupported. *See People v. Duvall*, 9 Cal. 4th at 474. Furthermore, the California Supreme Court reasonably could have determined that counsel investigated an insanity defense but did not present such a defense because no mental health expert opined that Petitioner was insane at the time of the offense. The record shows that counsel had several mental health experts appointed to evaluate Petitioner, including Dr. Thomas. When counsel asked Dr. Thomas to evaluate Petitioner, he specifically asked him to opine whether Petitioner was legally insane at the time of the offense. (Ex. 154 at 2748.) Petitioner, however, has never alleged or produced any evidence that Dr. Thomas or any other mental health expert found that Petitioner was legally insane at the time

of the offense or told counsel that Petitioner was legally insane at the time of the offense.[13] Therefore, the California Supreme Court reasonably could have concluded that counsel had no basis for presenting an insanity defense.

The California Supreme Court also could have reasonably determined that Petitioner was not prejudiced by counsel's alleged ineffectiveness for failing to present an insanity defense. Under California law, a person is legally insane if, at the time of the offense, he was incapable of knowing or understanding the nature of his act or of distinguishing right from wrong. *People v. Hernandez*, 22 Cal. 4th 512, 520, 93 Cal. Rptr. 2d 509 (2000); *see* Cal. Penal Code § 25(b). It is the defendant's burden to prove that he was insane at the time of the offense. *People v. Hernandez*, 22 Cal. 4th at 521. Petitioner presented no evidence in the California Supreme Court that any defense expert was able and willing to testify at trial that Petitioner was legally insane at the time of the offense. Although Petitioner did present a declaration from Dr. Thomas that indicated he would have been willing to testify that Petitioner was not in control of any of his actions during the crime and was therefore "not in a position to appreciate the moral quality of his behavior, or distinguish right from wrong in those moments" (Ex. 154 at 2754-55), this did not mean that it was reasonably probable that the jury would have found him insane, particularly since this opinion fell short of concluding that Petitioner insane. In addition, in convicting Petitioner of first degree murder and finding the special circumstance true, the jury rejected Petitioner's defense that he was in an altered mental state at the time of the crime and lacked the specific intent to rape and kill.

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[13] The fact a person may have a mental illness, such as schizophrenia, does not mean he is legally insane. *People v. Coddington*, 23 Cal. 4th 529, 608, 97 Cal. Rptr. 2d 528 (2000), overruled on another ground in *Price v. Superior Court*, 25 Cal. 4th 1046, 1069 n.13, 108 Cal. Rptr.2d 409 (2001) ("'Mental illness and mental abnormality, in whatever form either may appear, are not necessarily the same as legal insanity. A person may be mentally ill or mentally abnormal and yet not be legally insane'"]; *see also United States v. Keen*, 104 F.3d 1111, 1117 (9th Cir. 1996 (under federal law, mental disease or defect does not by itself show that a person is legally insane).

Further, in sentencing Petitioner to death, it is clear that the jury rejected Dr. Thomas's testimony that Petitioner suffered from a mental illness that made him unable to control his behavior. It is therefore highly unlikely that Dr. Thomas's testimony would have convinced the jury that Petitioner was legally insane. *See Knowles v. Mirzayance*, 556 U.S. 111, 128, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009) ("It was highly improbable that a jury, which had just rejected testimony about Mirzayance's mental condition when the State bore the burden of proof, would have reached a different result when Mirzayance presented similar evidence at the [sanity] phase").

G. Voir Dire of Potential Jurors

In Claim One, subpart (7), Petitioner contends that trial counsel rendered ineffective assistance for failing to conduct an adequate voir dire of potential jurors and ensuring the selection of a jury capable of making a fair and reliable determination of guilt and penalty. (Pet. at 60-63.) Petitioner presented this claim of ineffective assistance in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 67-70.) The California Supreme Court summarily rejected the claim on the merits in its order denying the petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

A defense attorney engages in voir dire in order to "identify and ferret out jurors who are biased against the defense." *Miller v. Francis*, 269 F.3d 609, 615 (6th Cir. 2001). "The conduct of voir dire 'will in most instances involve the exercise of a judgment which should be left to competent defense counsel.'" *Hovey v. Ayers*, 458 F.3d 892, 910 (9th Cir. 2006). Here, the record shows that each of the prospective jurors completed a twenty-four page juror questionnaire designed to determine whether he or she could sit as an impartial juror. (*See* 3 Supp II CT at 677 to 19 Supp II CT at 5483.) In addition, the trial court and the attorneys engaged in extensive questioning of the prospective jurors to determine whether they were qualified and unbiased. (*See* 4RT at 924 to 13RT at 2328.)

Petitioner contends that counsel was ineffective for failing to object to use of a defective juror questionnaire, failing to conduct a meaningful examination of potential jurors to discover potential biases and determine whether they could return a sentence of life without the possibility of parole, and failing to ensure that prospective jurors were provided with accurate statements of the law. (Pet. at 61-63.) None of counsel's declarations in the California Supreme Court sheds any light on his voir dire strategy. Thus, the California Supreme Court reasonably could have rejected Petitioner's claim as conclusory and unsupported. *See People v. Duvall*, 9 Cal. 4th at 474. Furthermore, the California Supreme Court reasonably could have determined that, notwithstanding any alleged defects in the juror questionnaires, or existence of additional questions that counsel could have asked during voir dire, or alleged misstatements of law, counsel reasonably could have determined that he was able to make an informed decision about the prospective jurors' ability to be fair and unbiased based on the rest of the extensive and thorough voir dire examination of the prospective jurors.

Additionally, the California Supreme Court reasonably could have determined that Petitioner failed to show he was prejudiced by counsel's alleged deficient performance during voir dire because Petitioner did not allege that counsel's performance resulted in an unbiased juror sitting on his jury.[14] *See Davis v. Woodford*, 384 F.3d 628, 643 (9th Cir. 2004) ("Establishing *Strickland* prejudice in the context of juror selection requires a showing that, as a result of trial counsel's failure to exercise peremptory challenges, the jury panel contained at least one juror who was biased"). To the extent Petitioner contends that there were misstatements of the law during voir dire, the California Supreme Court reasonably could have determined that Petitioner suffered no prejudice because the jurors were presumed

[14] Although Petitioner alleged in the California Supreme Court that jurors based their verdicts on their emotional reaction to the case rather than the law (NOL C6 at 59), he did not allege that the jurors had biases that could have been discovered during voir dire.

to have followed the law that was contained in the trial court's instructions at the end of the trial. *See Weeks v. Angelone*, 528 U.S. 225, 234, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000) ("A jury is presumed to follow its instructions").

H. Investigating Whether Prosecution Witnesses Received Deals

In Claim One, subpart (8), Petitioner contends that trial counsel rendered ineffective assistance for failing to investigate whether prosecution witnesses Shamaine Love and Pam Miller received "deals" in criminal cases against them in exchange for their testimony against Petitioner and for failing to attack their credibility with evidence of such deals. (Pet. at 64-67.) Petitioner presented this claim of ineffective assistance in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 90-91.) The California Supreme Court summarily rejected the claim on the merits in its order denying the petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

Neither the record on appeal nor counsel's declarations in the California Supreme Court showed that counsel did not investigate whether Love and Miller received deals for their testimony. In addition, Petitioner failed to produce any evidence in the California Supreme Court that Love and Miller received deals in exchange for their testimony. Accordingly, the California Supreme Court reasonably could have rejected Petitioner's claim as conclusory and unsupported. *See People v. Duvall*, 9 Cal. 4th at 474.

I. Investigating Petitioner's Prior Crimes

In Claim One, subpart (9), Petitioner contends that trial counsel rendered ineffective assistance for failing to investigate Petitioner's prior crimes, develop a strategy to address the prosecution's use of the prior crimes evidence, and ensure that the jury was not impermissibly influenced by the prior crimes evidence. (Pet. at 67-71.) Petitioner presented this claim of ineffective assistance in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 158-59; NOL C6 at 103-08.) The California Supreme Court summarily rejected the claim on the merits

in its order denying the petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

At the guilt phase of the trial, the prosecution introduced evidence of Petitioner's prior sexual assault of Doretha Harris. (20RT at 3160-75.) When Petitioner testified at the guilt phase, he admitted that he sexually assaulted Mrs. Harris and that he pled guilty to criminal charges arising from the incident. (22RT at 3371-72; 23RT at 3518-27.) During the defense's guilt phase closing argument, counsel argued that Petitioner's behavior during the Harris incident showed that he was not normal. Counsel argued that Petitioner did not get needed psychiatric treatment when he was released from prison after the crime. (26RT at 3951-52.)

During the penalty phase of the trial, the prosecution introduced evidence of Petitioner's prior sexual assault of Kim Jackson. (28RT at 4175-87.) During counsel's cross-examination of Jackson, counsel elicited testimony that Petitioner's eyes were big and glassy and he appeared to be in a trance during the rape. (28RT at 4194.) He also elicited testimony that Jackson had asked authorities to get psychiatric treatment for Petitioner. (28RT at 4198.) During the defense's penalty phase case, counsel elicited testimony from Dr. Thomas that the probation officers in the Harris and Jackson cases had recommended mental health treatment for Petitioner. (30RT at 4414-16.) Counsel also elicited testimony from Dr. Thomas that Kim Jackson's description of Petitioner's demeanor during the sexual assault was consistent with Petitioner being in an altered state of consciousness. (30RT at 4466-67.) In addition, counsel elicited testimony from Dr. Thomas that Petitioner was psychotic during the attack on Mrs. Harris. (30RT at 4442.) During the defense's penalty phase closing argument, counsel argued that the Harris and Miller crimes showed that there was something "radically wrong" with Petitioner (31RT at 4681) and that the Jackson incident was consistent with Dr. Thomas's psychiatric diagnosis (31RT at 4690).

Petitioner contends that counsel was ineffective for failing to investigate the Harris and Jackson crimes. He contends that counsel could have discovered evidence that mitigated those crimes and corroborated his mental state defense. Specifically, Petitioner contends that counsel could have discovered evidence that Petitioner suffered a psychotic break during the Harris and Jackson incidents that was preceded by a perceived threat to his safety. (Pet. at 67-70.) To support this claim, Petitioner relies on the declaration of a psychiatrist who conducted a post-conviction examination of Petitioner at the request of habeas counsel. The psychiatrist opined that in both the Harris and Jackson incidents Petitioner experienced a dissociative episode triggered by a stressful situation and that Petitioner acted as if he were in great danger.[15] (Ex. 178 at 3155-56.)

Counsel's declarations in the California Supreme Court did not explain the extent of his investigation concerning the Harris and Jackson crimes or the reason he did or not did conduct such investigation. Thus, the California Supreme Court reasonably could have rejected Petitioner's claim of ineffective assistance as conclusory and unsupported. *See People v. Duvall*, 9 Cal. 4th at 474. Furthermore, the record shows that counsel had Dr. Thomas appointed to evaluate Petitioner's mental health history and mental state at the time of the crime. Dr. Thomas reviewed reports concerning the Harris and Jackson incidents and considered those incidents when reaching his opinion concerning Petitioner's mental health. (30RT at 4413-17, 4441-44, 4446-47.) The California Supreme Court reasonably could have determined that counsel was not ineffective for relying on Dr. Thomas's evaluation of the Harris and Jackson incidents and the significance of those incidents when diagnosing Petitioner's mental condition. *See Harris v. Vasquez*,

[15] Petitioner contends that evidence Mrs. Harris was armed with a nine-inch knife when she encountered Petitioner was never introduced at trial. (Pet. at 68.) However, the police report from the incident upon which Petition relies indicated that Petitioner picked up a nine-inch knife, not that Mrs. Harris was armed with the knife. (Ex. 136 at 2670.)

949 F.2d at 1525 ("It is certainly within the 'wide range of professionally competent assistance' for an attorney to rely on properly selected experts"). In addition, counsel need not have continued looking for a mental health expert in the hope that another expert might provide a more favorable opinion. *Walls v. Bowersox*, 151 F.3d at 835 ("counsel is not required to 'continue looking for experts just because the one he has consulted gave an unfavorable opinion'"); *Marcrum v. Luebbers*, 509 F.3d at 511 ("The fact that a later expert, usually presented at habeas, renders an opinion that would have been more helpful to the defendant's case does not show that counsel was ineffective for failing to find and present that expert").

The California Supreme Court also reasonably could have determined that Petitioner suffered no prejudice as a result of counsel's alleged failure to investigate the prior crimes. Dr. Thomas testified that Petitioner was in a psychotic state when he attacked Mrs. Harris (30RT at 4442) and was in an altered state of consciousness when he attached Kim Jackson (30RT at 4466-67). It is doubtful that additional expert testimony that Petitioner was in a psychotic or dissociative state related to a perceived threat during the incidents would have affected the jury's evaluation of Petitioner's mental state.

Petitioner also contends that counsel was ineffective because his alleged failure to adequately investigate the Harris crime caused him to erroneously concede during his guilt phase closing argument that Petitioner went to the Harris household with the intention of raping Mrs. Harris. (Pet. at 70.) However, the record shows that counsel conceded only that Petitioner burglarized Mrs. Harris's home and attacked her.[16] The California Supreme Court reasonably could have

[16] Counsel stated, "[W]e were talking about burglary, and there is no doubt that when Mr. Jones entered Mrs. Harris'[s] house about ten years ago, there was a burglary. [¶] He rattled the gate and broke a window. He broke in, grabbed Mrs. Harris and brutally attacked her. There is no question about that and Mr. Jones admits that. (26RT at 3925.)

determined that the concession was tactically reasonable in light of Petitioner's admissions concerning the crime and the evidence that he was convicted of first-degree burglary, rape, sodomy, and residential robbery following the crime (RT at 3148). *See United States v. Thomas*, 417 F.3d at 1058-59 (no ineffectiveness when concession is supported by overwhelming evidence). For the same reasons, the California Supreme Court reasonably could have determined that the concession was harmless.

J. Presenting Petitioner's Testimony

In Claim One, subpart (10), Petitioner contends that trial counsel rendered ineffective assistance for failing to advise Petitioner about possible ramifications stemming from his testimony and failing to prepare Petitioner for testifying. (Pet. at 71-75.) Petitioner presented this claim of ineffective assistance in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 159-60; NOL C6 at 108-11.) The California Supreme Court summarily rejected the claim on the merits in its order denying the petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

The essence of Petitioner's claim appears to be that counsel was ineffective for presenting Petitioner's testimony during the guilt phase of the trial. However, the California Supreme Court reasonably could have determined that counsel was not ineffective for presenting Petitioner's testimony. In counsel's declaration in the California Supreme Court, counsel explained the reason he presented Petitioner's testimony. Counsel determined that Petitioner's testimony was "vital" to show that he lacked the specific intent required for the rape special circumstance. In light of the DNA evidence that showed sexual intercourse had occurred, counsel needed Petitioner to testify that he was in an altered mental state at the time of the crime and thus lacked the requisite intent. (Ex. 12 at 107.) Counsel's decision to present Petitioner's testimony was reasonable under the circumstances since Petitioner was the only person who could have testified about his mental state at the time of the

crime. *See Allen v. Woodford*, 395 F.3d 979, 1000 (9th Cir. 2005) (counsel's decision to put defendant on stand was not deficient where there was overwhelming evidence of guilt and defendant's testimony may have been only way to potentially rebut the evidence). Furthermore, the California Supreme Court reasonably could have determined that Petitioner was not prejudiced by counsel's decision to present Petitioner's testimony since it is not reasonably probable that Petitioner would have received a better outcome had he not testified.

To the extent Petitioner contends that counsel was ineffective for failing to advise Petitioner about his testimony or prepare him for testifying, the California Supreme Court reasonably could have rejected the claim on the ground that it was conclusory and unsupported. Nothing in the record shows that counsel failed to discuss with Petitioner the possible ramifications of his testimony or failed to prepare him before he took the witness stand. *See People v. Duvall*, 9 Cal. 4th at 474; *People v. Karis*, 46 Cal. 3d at 656; *James v. Borg*, 24 F.3d at 26. In addition, the California Supreme Court reasonably could have determined that Petitioner was not prejudiced in light of the overwhelming evidence of guilt.

K. Requesting Jury Instructions and Verdict Forms

In Claim One, subpart (11), Petitioner contends that trial counsel rendered ineffective assistance for failing to request necessary jury instructions and verdict forms during the guilt phase. (Pet. at 75-81.) Petitioner presented this claim of ineffective assistance in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 164.) The California Supreme Court summarily rejected the claim on the merits in its order denying the petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

Petitioner contends that counsel rendered ineffective assistance for failing to seek an instruction limiting the use of the prior crimes evidence. He contends that the instructions on the prior crimes evidence that were given did not prevent the jury from considering the evidence for the improper purpose of showing propensity.

(Pet. at 76-77.) Counsel's declarations in the California Supreme Court did not explain the reason he did not seek limiting instructions on the prior crimes evidence. Thus, the California Supreme Court reasonably could have rejected Petitioner's claim as conclusory and unsupported. *See People v. Duvall*, 9 Cal. 4th at 474.

Moreover, the record shows that the trial court instructed the jury with CALJIC No. 2.50, the standard jury instruction that limits the use of prior crimes evidence. That instruction told the jury, in relevant part, that the prior crimes evidence "may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes."[17] (2CT at 270.) The California Supreme Court reasonably could have determined that counsel believed this instruction was adequate to prevent the jury from using the prior crimes evidence for proving propensity. Alternatively, the California Supreme Court reasonably could have determined that counsel believed a request for an additional limiting instruction concerning the prior crimes evidence would have been futile since the trial court gave the standard limiting instruction. *See People v. Thompson*, 49 Cal. 4th 79, 122, 109 Cal. Rptr. 3d 549 (2010) (counsel is not ineffective for failing to make frivolous or futile motions); *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994) ("Counsel's failure to make a futile motion does not constitute ineffective assistance of counsel"). The California Supreme Court also reasonably could have determined that Petitioner suffered no prejudice from counsel's alleged ineffectiveness because the standard instruction adequately covered the issue. *See People v. Hayes*, 52 Cal. 3d 577, 625, 276 Cal. Rptr. 874 (1990) ("We must assume . . . that the jury obeyed the express language of the instruction not to use the other-crimes evidence to establish defendant's character or his disposition to commit crimes"). Additionally, the California Supreme Court reasonably could have

[17] The instruction is set forth in its entirety in Argument X, below

determined that there was no prejudice because the jury would have reached the same guilt phase verdict regardless of the prior crimes evidence. As discussed above, there was overwhelming evidence that Petitioner specifically intended to rape and kill Mrs. Miller, given the nature of his attack on her.

Petitioner also contends that counsel rendered ineffective assistance for failing to seek an instruction that required the victim had to be alive for the crime of rape to occur. (Pet. at 77-79.) Counsel's declarations in the California Supreme Court did not explain the reason he did not seek such an instruction. Thus, the California Supreme Court reasonably could have rejected Petitioner's claim as conclusory and unsupported. *See People v. Duvall*, 9 Cal. 4th at 474. Moreover, the California Supreme Court reasonably could have determined that counsel did not seek such an instruction because he was not relying on a defense that Mrs. Miller was dead when sexual intercourse occurred. *See Butcher v. Marquez*, 758 F.2d 373, 377 (9th Cir. 1985) (defense counsel need not request instructions inconsistent with the defense's trial theory). The California Supreme Court also reasonably could have determined that Petitioner suffered no prejudice from counsel's alleged ineffectiveness for failing to request an instruction that the victim had to be alive for the crime of rape to occur. The jury was instructed that the crime of rape had to be accomplished against the victim's will. (2CT at 314.) The California Supreme Court has found that this adequately conveys the requirement of a live victim because a dead body cannot have a "will." *People v. Carpenter*, 15 Cal. 4th 312, 391, 63 Cal. Rptr. 2d 1 (1997); *see also People v. Jones*, 29 Cal. 4th at 1259 (finding that Petitioner's jury would have understood from its instructions that the intent to rape had to be formed before the murder). Additionally, the California Supreme Court reasonably could have determined that there was no prejudice because, as discussed above, there was no evidence that sexual penetration occurred after Mrs. Miller died.

Petitioner also contends that counsel was ineffective for failing to ensure that the verdict forms were accurate and complete. Specifically, Petitioner contends that

counsel was ineffective for failing to object that the verdict forms did not include a special circumstance finding by the jury. (Pet. at 79-81.) The relevant verdict from shows that the jury made a finding that Petitioner was guilty of first degree murder. Then, on the same verdict form, the jury found "true" the allegation that "[t]he crime of murder of the first degree of which you have found the defendant guilty was a murder committed in the commission of rape." It also found "not true" the allegations that "[t]he crime of murder of the first degree of which you have found the defendant guilty was a murder committed in the commission of burglary" and "[t]he crime of murder of the first degree of which you have found the defendant guilty was a murder committed in the commission of robbery." (2CT at 365.)

On appeal, Petitioner claimed that the verdict forms were deficient because it was unclear whether the jury was finding that Petitioner was guilty of first degree murder on a rape-felony-murder theory or whether it was finding true the rape-felony-murder special circumstance. (NOL B1 at 165-72.) The California Supreme Court rejected the claim, finding that it was "unmistakably clear" that the jury intended to find true the rape-felony-murder special circumstance. The California Supreme Court found the jury's intent to be clear because the jury had been instructed as follows: "If you find the defendant in this case guilty of murder of the first degree, you must then determine if one or more of the following special circumstances are true or not true: Murder during the commission of a Burglary, Rape and/or Robbery. [¶] . . .[¶] *You will state your special finding as to whether this special circumstance is or is not true on the form that will be supplied*." (2CT at 307, italics added.) In addition, the prosecutor reiterated during his closing argument that the jury was to indicate on the verdict form whether it found the special circumstance allegations true or not. (26RT at 3894.) The California Supreme Court also observed that the jury stated on its penalty phase verdict form that it had found the special circumstance true. (2CT at 428.) *People v. Jones*, 29 Cal. 4th at 1259.

Counsel's declarations in the California Supreme Court did not explain the reason he did not object to the verdict forms. Thus, the California Supreme Court reasonably could have rejected Petitioner's claim of ineffective assistance as conclusory and unsupported. *See People v. Duvall*, 9 Cal. 4th at 474. Furthermore, in light of the California Supreme Court's finding that it was unmistakably clear that the jury intended to find the rape-felony-murder special circumstance true, the California Supreme Court reasonably could have found that counsel also believed the jury's intent in this regard was clear and that there was no basis to object that the verdict form was deficient or ambiguous. *See People v. Price*, 1 Cal. 4th 324, 387, 3 Cal. Rptr. 2d 106 (1991) (counsel does not render ineffective assistance by failing to make futile motions or objections); *Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005) (counsel cannot be ineffective for failing to raise a meritless objection). In addition, the California Supreme Court reasonably could have found that Petitioner suffered no prejudice from counsel's alleged ineffectiveness because the trial court would have denied any challenge to the verdict forms on the ground that it was clear the jury intended to find the rape-felony-murder special circumstance true. Alternatively, the California Supreme Court reasonably could have found that Petitioner suffered no prejudice because any effort to clarify the jury's verdict form would have resulted in the jury indicating that it had intended to find the rape-felony-murder special circumstance true.

L. Objecting to Prosecutorial Misconduct

In Claim One, subpart (12), Petitioner contends that trial counsel rendered ineffective assistance for failing to object to numerous instances of alleged prosecutorial misconduct. (Pet. at 81-89.) Petitioner presented this claim of ineffective assistance in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 164-66.) The California Supreme Court summarily rejected the claim on the merits in its order denying the petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

Petitioner contends that counsel was ineffective for failing to object to several instances of prosecutorial misconduct during the prosecutor's guilt phase closing argument. Petitioner contends that the prosecutor misstated the law during his argument by arguing (1) that if the jury were to find Petitioner guilty of a lesser included offense then it was accepting Petitioner's story (26RT at 3907), and (2) that the jury should "accept that [Petitioner] formed the specific intent to rape the same way he did it with Mrs. Harris, and to come back with the first degree murder" (27RT at 3991-92). (Pet. at 81-83.) Petitioner contends that the prosecutor argued facts not in evidence during his argument when he (1) responded to counsel's argument about prosecution witnesses' timelines being different by stating, "Are any of these people wearing watches do you think? Do you think they keep track of things like that?" (27RT at 3973), (2) argued that, because of overcrowded jails and budget cuts affecting mental health treatment for inmates, a jail psychiatrist might prescribe medications to an inmate simply because he asked for it (27RT at 3970-71), (3) asked whether it was possible Petitioner was palming his pills or giving them to another inmate (27RT at 3972), and (4) pointed out that the defense did not present the testimony of a psychiatrist that Petitioner was suffering from a mental disorder (26RT at 3905; 27RT at 3972). (Pet. at 83-84.) Petitioner contends that the prosecutor made improper appeals to the emotions of the jury when he (1) responded to counsel's argument that the prosecutor had asked Petitioner unfair questions at trial by stating, "Do you think if Julia Miller were here she would have . . . a few pointed questions for Mr. Jones when he says she attacked him?" (27RT at 3975), and (2) commented, "[Petitioner] comes into this courtroom, two and a half years later and attempts to steal [Julia Miller's] dignity and her reputation" and "Don't let him get away with that last theft" (27RT at 3992). (Pet. at 85-86.)

None of counsel's declarations in the California Supreme Court explained why he did not object to the above instances of alleged improper argument. Thus, the

California Supreme Court reasonably could have rejected Petitioner's claim of ineffective assistance as conclusory and unsupported. *See People v. Duvall*, 9 Cal. 4th at 474. Moreover, the California Supreme Court reasonably could have found that counsel made a reasonable tactical decision not to object. Many trial lawyers will refrain from objecting during closing argument to all but the most egregious misstatements. *United States v. Necoechea*, 986 F.2d 1273, 1281 (9th Cir. 1993); *United States v. Molina*, 934 F.2d 1440, 1448 (9th Cir. 1991). None of the above comments could be characterized as an egregious misstatement. Instead, the prosecutor's arguments properly invited the jury to use the prior offense evidence to find intent, properly encouraged the jury to make reasonable inferences from the evidence based on common sense and experience, properly commented on Petitioner's failure to present expert testimony in his defense, and properly asked the jury not to let Petitioner get away with his crime. *See Fields v. Brown*, 431 F.3d 1186, 1206 (9th Cir. 2005) ("Attorneys are given wide latitude during closing arguments"); *Ceja v. Stewart*, 97 F.3d 1246, 1253 (9th Cir. 1996) ("'[C]ourts must allow the prosecution to strike hard blows based on the evidence presented and all reasonable inferences therefrom'"); *see also Necoechea*, 986 F.2d at 1282 ("A prosecutor is entitled to comment on a defendant's failure to present witnesses so long as it is not phrased to call attention to the defendant's own failure to testify"); *United States v. Candelaria*, 704 F.2d 1129, 1132 (9th Cir. 1983) (counsel may argue matters within common knowledge of all reasonable people).

Furthermore, the California Supreme Court reasonably could have found that Petitioner was not prejudiced by counsel's alleged ineffectiveness for failing to object to the prosecutor's argument because the jury was instructed that it had to accept and follow the law as stated by the court (2CT at 254), that it had to determine the facts from the evidence received at trial and not from any other source (2CT at 254), that it was not to be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling (2CT at 254-55), that

the prior crimes evidence could only be used for certain limited purposes (2CT at 270), that the statements of the attorneys were not evidence (2CT at 257), and that the jurors had to follow the court's instructions if anything said by the attorneys in their arguments conflicted with those instructions (2CT at 254). *See Weeks v. Angelone*, 528 U.S. at 234 ("A jury is presumed to follow its instructions"); *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 898 (9th Cir. 1996) (the arguments of counsel are generally accorded less weight by the jury than the court's instructions); *see also Comer v. Shriro*, 463 F.3d 934, 960-61 (9th Cir. 2006) (any prejudice from prosecutor's objectionable remarks was significantly limited by instructions to jurors). The California Supreme Court also could have reasonably found no prejudice in light of the overwhelming evidence of Petitioner's guilt. Petitioner admitted raping and killing Mrs. Miller, but claimed he blacked out and had no memory of the incident. However, as discussed above, the evidence showed that Petitioner engaged in a protracted attack on Mrs. Miller, which belied his testimony that he was unaware of what he was doing. Furthermore, Petitioner had previously engaged in a similar sexual assault of Mrs. Harris. As the California Supreme Court stated in its opinion on appeal:

> The evidence is overwhelming that defendant had an independent purpose to rape Mrs. Miller. He tied her hands and feet, had intercourse with her, and ejaculated inside her. He had previously done the same thing to Mrs. H., whom he did not kill. Clearly, defendant obtained perverse sexual gratification from raping the mothers of his girlfriends, whether or not he killed them.

People v. Jones, 29 Cal. 4th at 1260.

Petitioner also contends that counsel was ineffective for failing to object when the prosecutor, during his cross-examination of Petitioner, suggested that Petitioner was wrong about the number of the bus line for the bus he took to Shamaine Love's house (23RT at 3432-33). (Pet. at 84-85.) None of counsel's declarations in the

California Supreme Court explained why he did not object the prosecutor's questioning. Thus, the California Supreme Court reasonably could have rejected Petitioner's claim as conclusory and unsupported. *See People v. Duvall*, 9 Cal. 4th at 474. Moreover, the California Supreme Court reasonably could have determined that counsel made a tactical choice not to object because the questioning related to a trivial matter. *See Palmes v. Wainwright*, 725 F.2d 1511, 1523 (11th Cir. 1984) ("Attorneys have many legal tools to use in their *discretion* to properly defend a person. The sixth amendment right to effective assistance of counsel does not require counsel to raise every objection without regard to its merits" (italics in original).) The California Supreme Court also reasonably could have determined that Petitioner suffered no prejudice from counsel's alleged ineffectiveness, since it is inconceivable that the jury's verdict was affected by the prosecutor's question on such a trivial matter.

Petitioner also contends that counsel was ineffective for failing to object to several instances of alleged prosecutorial misconduct during the prosecutor's penalty phase closing argument. Petitioner contends that the prosecutor urged the jury to consider non-statutory aggravating evidence when he argued that Petitioner's lack of participation in a mental health treatment program showed he did not really have a problem (31RT at 4640-41), argued facts not in evidence when he asked the jury to consider whether blood was going into Mrs. Miller's mouth during the attack (31RT at 4661), and made highly inflammatory arguments when he urged the jury to show the same sympathy to Petitioner that Petitioner showed to Mrs. Miller (31RT at 4643, 4657). (Pet. at 86-89.) None of counsel's declarations in the California Supreme Court explained why he did not object to the above instances of alleged improper argument. Thus, the California Supreme Court reasonably could have rejected Petitioner's claim as conclusory and unsupported. *See People v. Duvall*, 9 Cal. 4th at 474. Moreover, the California Supreme Court reasonably could have found that counsel made a reasonable tactical decision not to

object since, as noted above, many trial lawyers refrain from objecting during closing argument to all but the most egregious misstatements and none of the prosecutor's comments was an egregious misstatement. The prosecutor's comment about Petitioner's lack of participation in a mental health treatment program was relevant to the aggravating factor concerning whether Petitioner was impaired as a result of mental disease or defect (*see* 2CT at 411). The prosecutor's question whether Mrs. Miller had blood in her mouth was based on a fair inference from the evidence. And the prosecutor's comment about sympathy was proper at the penalty phase. *See Fields v. Brown*, 431 F.3d at 1204 n.9, 1206 (prosecutor properly argued that when defendant asks for mercy jury should consider mercy that defendant showed victim); *People v. Gonzales*, 54 Cal. 4th 1234, 1295, 144 Cal. Rptr. 3d 757 (2012) ("[A]t a penalty phase, an appeal for sympathy with the victim is not out of place").

Furthermore, the California Supreme Court reasonably could have found that Petitioner was not prejudiced by counsel's alleged ineffectiveness for failing to object to the prosecutor's comments. Specifically, the California Supreme Court reasonably could have determined that the jury would have returned a death verdict regardless of the prosecutor's comments given the overwhelming aggravating evidence presented at the penalty phase, including Petitioner's brutal rape and murder of Mrs. Miller and his history of violent sexual assaults. *See Sinisterra v. United States,* 600 F.3d 900, 911-12 (8th Cir. 2010) ("In light of the evidence against him, [defendant] has failed to show that, had counsel objected [to the prosecutor's improper argument], he would not have received the death sentence").

Petitioner also contends that counsel was ineffective for failing to object to the prosecutor's cross-examination of James Park, a prison consultant who testified for the defense at the penalty phase that Petitioner would likely be a good prisoner and not engage in violence. Petitioner contends that counsel should have objected when the prosecutor asked Park about an incident in which Petitioner admitted that he had

started a prison fight "over Crip business" because it characterized Petitioner as a gang member (29RT at 4307-08). (Pet. at 87-88.) None of counsel's declarations in the California Supreme Court explained why he did not object to this line of questioning. Thus, the California Supreme Court reasonably could have rejected Petitioner's claim as conclusory and unsupported. See *People v. Duvall*, 9 Cal. 4th at 474. Furthermore, the California Supreme Court reasonably could have found that counsel made a reasonable tactical decision not to object because the prosecutor's line of questioning was intended to test Park's opinion that Petitioner would not engage in violence, which was proper. *See People v. Earp*, 20 Cal. 4th 826, 894, 85 Cal. Rptr. 2d 857 (1999) (prosecutor can properly explore on cross-examination the basis for expert's prediction that capital defendant will pose no future danger if sentenced to life without parole); *see also Juan H. v. Allen*, 408 F.3d at 1273 (counsel cannot be ineffective for failing to raise a meritless objection). Furthermore, the California Supreme Court reasonably could have found that Petitioner was not prejudiced by counsel's alleged ineffectiveness for failing to object to the prosecutor's line of questioning because any objection would have been overruled. In addition, the California Supreme Court reasonably could have found that Petitioner was not prejudiced because Park testified that, based on his review of the evidence, Petitioner was *not* a Crips gang member. (29RT at 4310.)

M. Conflict of Interest

In Claim One, subpart (13), Petitioner contends that trial counsel rendered ineffective assistance as a result of a disabling conflict of interest. (Pet. at 89-91.) Petitioner presented this claim of ineffective assistance in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 66-67.) The California Supreme Court summarily rejected the claim on the merits in its order denying the petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

Petitioner contends that trial counsel rendered ineffective assistance as a result of a disabling conflict of interest, namely, that counsel was the only attorney assigned by the Los Angeles County Public Defender's Office to represent Petitioner. Petitioner contends that the case was too complex to be handled by a single attorney. (Pet. at 89-91.) The California Supreme Court reasonably rejected the claim. Counsel's declaration in the California Supreme Court indicated that he was an experienced trial attorney who had worked for the Los Angeles County Public Defender's Office for many years and had handled at least ten capital cases prior to Petitioner's case. Counsel had the assistance of an investigator and a paralegal in Petitioner's case. He was also able to consult with other attorneys in the office while he was handling the case. In addition, counsel had the assistance of his office's forensics consultant, Walter Krstulja. Mr. Krstulja assisted counsel with DNA and mental health issues. (Ex. 12 at 105-06, 108; Ex. 150 at 2731.) None of counsel's declarations in the California Supreme Court indicated that he needed additional assistance. Further, Petitioner presented no evidence in the California Supreme Court that counsel's alleged deficient performance was the result of counsel being the only attorney assigned to the case. Accordingly, the California Supreme Court reasonably could have rejected Petitioner's claim of ineffective assistance.

N. Cumulative Error

In Claim One, subpart (14), Petitioner contends that the alleged instances of ineffective assistance of trial counsel had the cumulative effect of rendering counsel's performance constitutionally deficient. (Pet. at 91-92.) Petitioner presented this claim of ineffective assistance in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 425-26.) The California Supreme Court summarily rejected the claim on the merits in its order denying the petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

The California Supreme Court reasonably could have rejected Petitioner's cumulative error claim on the ground that, since each individual claim of ineffective assistance of counsel lacked merit, there was no cumulative prejudice. *See People v. Cole*, 33 Cal. 4th 1158, 1235-36, 17 Cal. Rptr. 3d 532 (2004) ("'We have either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial. We reach the same conclusion with respect to the cumulative effect of any assumed errors'").

Therefore, Claim One is barred by § 2254(d).

II. CLAIM TWO IS BARRED BY § 2254(D)

In Claim Two, Petitioner contends that the trial court failed to conduct an adequate inquiry into whether he and his attorney had an irreconcilable conflict. (Pet. at 92-98.) Petitioner presented this claim in his opening brief on appeal in the California Supreme Court. (NOL B1 at 96-108.) The California Supreme Court rejected the claim in its reasoned opinion on appeal. (NOL B4; *People v. Jones*, 29 Cal. 4th at 1244-46.) As explained below, the claim is barred by § 2254(d).

A. The Relevant Proceedings

During pretrial proceedings, Petitioner declared that he had a conflict with his appointed attorney. He complained that he and his attorney were not "getting along" and were "constantly into it." He also complained that his attorney failed to do everything on the "long list" of tasks that Petitioner gave to him. (1RT at 18-19.) The trial court construed Petitioner's complaints as a *Marsden* motion.[18] It dismissed the prosecutor from the courtroom and asked Petitioner what else was wrong with counsel's representation. (1RT at 20-21.) Petitioner said that his attorney believed he was guilty and had "hinted" at Petitioner taking a "deal" of fifteen years to life. (1RT at 21.)

[18] In California, a motion for substitute counsel is referred to as a "*Marsden* motion." *See People v. Marsden*, 2 Cal. 3d 118, 84 Cal. Rptr. 156 (1970).

The trial court asked Petitioner's attorney to respond to Petitioner's complaints. Counsel said that he had discussed possible sentences with Petitioner but there had been no offer. Counsel also indicated that he had performed extensive investigation in the case. He said that he had visited Petitioner numerous times while he was in custody and discussed the evidence with him. He said that although he and Petitioner had some disagreements, he saw no reason why he could not continue to represent him. The trial court then denied Petitioner's *Marsden* motion (1RT at 21-23.) After the court's ruling, Petitioner continued to complain that he and counsel did not "get along." (1RT at 24.) Petitioner said, "I'd be happy if you gave me the lawyer of my choice to represent me." (1RT at 26.) The trial court said it was not going to give Petitioner another lawyer. (1RT at 27.)

On appeal, Petitioner claimed that the trial court violated his constitutional rights by denying him a full *Marsden* hearing. (NOL B1 at 96-108.) The California Supreme Court found that Petitioner was given an adequate opportunity to explain why he was dissatisfied with his attorney. The California Supreme Court also found that Petitioner had failed to demonstrate inadequate representation or an irreconcilable conflict. *People v. Jones*, 29 Cal. 4th at 1245.

B. The California Supreme Court Reasonably Rejected the Claim

The Sixth Amendment right to counsel contains a correlative right to representation that is free from conflicts of interest. *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981); *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). A trial court must make an inquiry into a conflict when the trial court knows or reasonably should know that a particular conflict exists. *Wood v. Georgia*. 450 U.S. at 272 n.18. The Supreme Court has never delineated the precise scope of the required inquiry. The Ninth Circuit has said that the inquiry "need only be 'as comprehensive as the

circumstances reasonably would permit.'" *King v. Rowland*, 977 F.2d 1354, 1357 (9th Cir. 1992).

Here, the record shows that the trial court made an inquiry into Petitioner's allegations that he had a conflict with his attorney. The trial court held a *Marsden* hearing, listened to Petitioner's complaints, and allowed counsel to respond. Ultimately, it appeared Petitioner wanted a new attorney because he was not "getting along" with his appointed counsel. But this did not entitle Petitioner to new counsel. Although a criminal defendant is entitled to adequate representation, he is not entitled to a "meaningful relationship" with his attorney. *Morris v. Slappy*, 461 U.S. 1, 13-14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983); *see United v. Cassel*, 408 F.3d 622, 638 (9th Cir. 2005) (defendant's frustration with and lack of trust in his attorney did not indicate a conflict or breakdown in attorney-client relationship warranting the appointment of new counsel). The California Supreme Court's determination that the trial court held an adequate inquiry into the alleged conflict was not contrary to or an unreasonable application of Supreme Court precedent or based on an unreasonable determination of the facts.

Therefore, Claim Two is barred by § 2254(d).

III. PART OF CLAIM THREE IS *TEAGUE* BARRED AND PROCEDURALLY DEFAULTED; THE ENTIRE CLAIM IS BARRED BY § 2254(D)

In Claim Three, Petitioner contends that the prosecutor failed to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). (Pet. at 98-107.) Part of this claim is barred by *Teague v. Lane*, 489 U.S. 288, and part of it is procedurally defaulted. Further, the entire claim is barred by § 2254(d).

A. The Applicable Law

In *Brady*, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith

or bad faith of the prosecution." *Id*., 373 U.S. at 87. Since *Brady*, the Supreme Court has held that the duty to disclose such evidence is applicable even though there has been no request by the accused, that the duty encompasses impeachment evidence as well as exculpatory evidence, and that the duty encompasses evidence known only to police investigators and not to the prosecutor. *Strickler v. Greene*, 527 U.S. 263, 280-81, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

"There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler*, 527 U.S. at 281-82. Prejudice in this context is the same as materiality. *See id*. at 282. Evidence is material under *Brady* "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id*. at 280. The requisite "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). A defendant has the burden of showing that the withheld evidence was material. *United States v. Si*, 343 F.3d 1116, 1122 (9th Cir. 2003).

B. Emergency Room Report

In Claim Three, subpart (4), Petitioner contends that the prosecutor violated *Brady* when he failed to disclose a report of an emergency room doctor who examined Petitioner after the Kim Jackson rape in 1984. (Pet. at 100-03.) Petitioner presented this claim in his second habeas corpus petition in the California Supreme Court. (NOL D1 at 5-10.) The California Supreme Court summarily rejected the claim on the merits in its order denying the petition. (NOL D6.) As explained below, the claim is barred by § 2254(d).

The report at issue is a one-page report prepared by an emergency room doctor at the Beverly Hills Medical Center. The doctor examined Petitioner when the

police brought him to the emergency room following his arrest for the Kim Jackson rape in 1984. The report indicated that Petitioner was in stable condition and could be booked. The report contained a few lines of partially legible handwritten notes under the section entitled "history and physical examination." Those notes appear to state that Petitioner was a nineteen-year-old male rape suspect with a two-year history of transient memory loss with a longest period of three minutes. The notes also appear to state that Petitioner had no history of head trauma, seizures, or drugs and did not take medications. Under the heading "diagnosis," the report appears to state "rape suspect" and "transient lapse memory." (Ex. 180 at 3159.) Petitioner contends that the report was exculpatory and material because it indicated that Petitioner had a history of transient memory loss and this would have supported Petitioner's defense that he blacked out during his attack on Mrs. Miller and had no memory of raping or killing her. He alleges that the District Attorney's Office did not disclose the emergency room report to the defense until post-conviction discovery proceedings. (Pet. at 101.)

The California Supreme Court reasonably could have rejected Petitioner's *Brady* claim on the ground that the statements in the emergency room report about transient memory loss would have been inadmissible at trial and were therefore not material. *See Smith v. Baldwin*, 510 F.3d 1127, 1148 (9th Cir. 2007 (since results of polygraph test were inadmissible, they did not constitute material evidence for *Brady* purposes). It appears that the doctor's notation regarding Petitioner's history of transient memory loss was based on Petitioner's own statements to the doctor. The statements were not based on facts that were observable by the doctor. Nor was there any evidence that the emergency room doctor knew Petitioner or had any personal knowledge that Petitioner had experienced transient memory loss through information other than Petitioner's self-report. Because the notations were based on Petitioner's own statements, they were inadmissible under California law: "[A] history given by a patient to his physician is admissible only as a basis for the

expert opinion of the latter and never as substantive proof of the facts so stated to him by the patient. [Citations.] The same rule necessarily is applicable to such statements found in a hospital record when offered as affirmative proof of their truth." *People v. Williams*, 187 Cal. App. 2d 355, 365, 9 Cal. Rptr. 722 (1960); *accord People v. Alexander*, 49 Cal. 4th 846, 876, 113 Cal. Rptr. 3d 190 (2010) (statement in optometrist's records that defendant had not previously worn glasses would have been inadmissible because it was based on defendant's statements to doctor rather than doctor's personal knowledge).

Furthermore, the California Supreme Court reasonably could have determined that the prosecution did not have to disclose the report since any history of transient memory loss would have been a matter within Petitioner's own personal knowledge and experience. *See Raley v. Ylst*, 470 F.3d 792, 804 (9th Cir. 2006) (where defendant is aware of essential facts enabling him to take advantage of exculpatory evidence, government need not bring the evidence to the attention of the defense).

Lastly, the California Supreme Court reasonably could have determined that Petitioner was not prejudiced by the prosecution's alleged failure to disclose the report. As discussed above, the statements in the report were inadmissible. Thus, they would have not affected the jury's verdict or the outcome of the trial.

C. Jail Medical Records

In Claim Three, subpart (5), Petitioner contends that the prosecutor violated *Brady* when he failed to disclose jail medical records concerning the reason Petitioner was prescribed the medication Haldol when he was in jail awaiting trial. Petitioner contends that the records would have established that he genuinely suffered from mental illness. (Pet. at 103-04.) Petitioner presented this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 265-66.) The California Supreme Court summarily rejected the claim on the merits in its order denying the petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

First, the California Supreme Court reasonably could have determined that the prosecutor's duty of disclosure did not extend to information possessed by doctors who were treating Petitioner in jail. Under *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. at 437. The Supreme Court has not precisely defined what is meant by "acting on the government's behalf in the case." Many courts have held that the obligation to disclose extends only to information possessed by the prosecution team, which includes investigative and prosecutorial personnel. *See Avila v. Quarterman*, 560 F.3d 299, 308 (5th Cir. 2009); *United States v. Reyeros*, 537 F.3d 270, 281 (3rd Cir. 2008); *Moon v. Head*, 285 F.3d 1301, 1309 (11th Cir. 2002). The California Supreme Court reasonably could have concluded that the doctors treating Petitioner in jail were not involved in the investigation or prosecution of the case and thus were not part of the prosecution team. *See United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996) (*Kyles* cannot "be read as imposing a duty on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue).

Second, the California Supreme Court reasonably could have determined that the prosecutor had no duty to disclose the information because Petitioner was aware that he was receiving medical treatment in jail and could have obtained his medical records himself with reasonable diligence. *Raley v. Ylst*, 470 F.3d at 804 (no *Brady* violation for failing to disclose jail medical records because defendant knew of their existence); *Le Croy v. Sec'y, Fla. Dep't of Corr*., 421 F.3d 1237, 1268 (11th Cir. 2005) (no *Brady* violation for failing to turn over state's medical and school records for defendant because defense counsel could have obtained the records with reasonably diligence).

Third, the California Supreme Court reasonably could have rejected Petitioner's *Brady* claim because Petitioner failed to produce the medical records in

question, failed to allege any facts concerning the content of those medical records, and failed to allege any facts indicating that the medical records would have been exculpatory or material. *See People v. Duvall*, 9 Cal. 4th at 474 (petitioner must set forth fully and with particularity the facts supporting each claim and provide all reasonably available documentary evidence).

D. Statements Made by Shamaine Love and Johnnie Anderson

In Claim Three, subpart (6), Petitioner contends that the prosecutor violated *Brady* when he failed to disclose statements made by Shamaine Love and Johnnie Anderson. (Pet. at 104-06.) Petitioner presented this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 262-64.) The California Supreme Court summarily rejected the claim on the merits in its order denying the petition. It also found the portion of the claim concerning Johnnie Anderson's statement to be procedurally barred. (NOL C7.) As explained below, the portion of the claim concerning Johnnie Anderson's statement is barred by *Teague v. Lane*. 489 U.S. at 310, and is procedurally defaulted. Further, the entire claim is barred by § 2254(d).

1. Shamaine Love

Petitioner contends that the prosecutor violated *Brady* when he failed to disclose a written statement by Shamaine Love. The document in question is a handwritten statement that has a signature on it that is barely legible. The letter appears to state, "I really don't think there's anymore to add if I'm wrong on any account which I don't think I am I'll add it during the testimony at court other than that he guilty." The letter appears to be dated either June 11, 1992, or June 11, 1993. (Ex. 169 at 3028.) Petitioner contends that the letter shows Love was willing to alter her testimony to ensure Petitioner's conviction. (Pet. at 104.)

There are several reasons why the California Supreme Court reasonably could have rejected Petitioner's claim that the prosecutor committed *Brady* error in failing to disclose the document. First, Petitioner failed to allege any facts in the

California Supreme Court showing that the document was ever possessed by the prosecution team. *See United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991) (prosecution is under no obligation to turn over materials not under its control). Second, the California Supreme Court reasonably could have found that the statements in the document were far too vague to be considered exculpatory. Indeed, there is nothing to indicate that the statements even related to Petitioner or his trial. *See Barker v. Fleming*, 423 F.3d 1085, 1099 (9th Cir. 2005) ("'The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.'"). Third, even if Love could have been impeached with the letter, the California Supreme Court reasonably could have found that it was not reasonably probable such impeachment would have affected the jury's verdict since Love's credibility was already impeached with evidence that she was a drug dealer. (16RT at 2621.) In addition, the California Supreme Court reasonably could have found that Petitioner was not prejudiced in light of the overwhelming evidence of Petitioner's guilt. Petitioner's defense was that he blacked out during the attack on Mrs. Miller and thus lacked the specific intent to rape and kill her. However, as discussed above, the nature of Petitioner's protracted attack on Mrs. Miller showed that he was fully aware of what he was doing. In addition, the evidence that Petitioner had previously engaged in a similar sexual assault upon Mrs. Harris strongly suggested that Petitioner intended to sexually assault Mrs. Miller.

2. Johnnie Anderson

The record on appeal shows that Johnnie Anderson, who was Pamela Miller's godmother, told the police that she loved Pam very much but "Pam lies." (21RT at 3199, 3213.) The record shows that the prosecutor disclosed the statement to the defense. (*See* 21RT at 3199-3200, 3213-14.) Petitioner claims that the prosecutor committed *Brady* error because he disclosed the statement verbally rather than disclosing it as part of a written police report. (Pet. at 105-06.)

a. The Claim is Barred by *Teague*

Petitioner's claim is barred by *Teague*. In *Teague*, the Supreme Court held that a new rule of constitutional law cannot be applied retroactively on federal collateral review unless the new rule forbids criminal punishment of primary, individual conduct or is a "watershed" rule of criminal procedure. *Caspari v. Bohlen*, 510 U.S. 383, 396, 114 S. Ct. 948, 127 L. Ed. 2d 236 (1994). "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government," or "if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 489 U.S. at 301 (plurality opinion).

The Supreme Court has made it clear that federal habeas courts must decide at the outset whether *Teague* is implicated if the state argues that the petitioner seeks the benefit of a new rule. *Caspari v. Bohlen*, 510 U.S. at 389. This is true regardless of whether the case is governed by the AEDPA. *Horn v. Banks*, 536 U.S. 266, 272, 122 S. Ct. 2147, 153 L. Ed. 2d 301 (2002). The Ninth Circuit has held that, in order to properly assert a *Teague* claim, at a minimum: (1) *Teague* should be identified as an issue, indeed the first issue; (2) the new rule of constitutional law that falls within its proscription should be articulated; (3) the reasons why such a rule would not have been compelled by existing precedent should be explained with particular reference to the appropriate universe of precedent; and (4) an argument should be made why the rule contended for is not within one of *Teague*'s exceptions. *Arredondo v. Ortiz*, 365 F.3d 778, 781-82 (9th Cir. 2004).

Teague bars relief in this case. First, granting relief on this claim would require that a new rule of constitutional law be announced, i.e., that a prosecutor must disclose *Brady* materials in writing rather than verbally in order to fulfill his disclosure obligations under *Brady*. However, a survey of the relevant case law indicates that this rule was not compelled by existing precedent at the time

Petitioner's conviction became final, as the Supreme Court has never held that a prosecutor must disclose *Brady* materials in writing. *See United States v. Wooten*, 377 F.3d 1134, 1142 (10th Cir. 2004) (*Brady* does not require the prosecution to disclose information in a specific form or manner); *Spears v. Mullin*, 343 F.3d 1215, 1256 (10th Cir. 2003) (rejecting defendant's claim that prosecutor was required under *Brady* to turn over typewritten summary of audio taped statement where defense counsel was aware of and listened to audio taped statement prior to trial).

Neither of *Teague*'s exceptions applies here. The first exception applies to those rules that "plac[e] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague v. Lane*, 489 U.S. at 307 (plurality opinion, internal quotation marks omitted). This exception is clearly inapplicable here, since the rule that Petitioner urges be adopted herein would not place conduct beyond the reach of criminal law or "decriminalize" any class of conduct. *See Saffle v. Parks*, 494 U.S. at 495.

Teague's second exception is a narrow one which permits the retroactive application of "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding. *Teague v. Lane*, 489 U.S. at 311 (plurality opinion). This exception is also inapplicable in this case. The new rule at issue herein simply cannot be said to be one which falls into that "small core of rules requiring 'observance of those procedures that . . . are implicit in the concept of ordered liberty.'" *Graham v. Collins*, 506 U.S. 461, 478, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993) (quoting *Teague*, 489 U.S. at 311).

Because the rule urged by Petitioner is "new" within the meaning of *Teague* and does not fall into one of *Teague*'s exceptions, the claim is barred.

b. The Claim is Procedurally Defaulted

Petitioner's claim is also procedurally defaulted. A federal court may not review a state prisoner's habeas claim if the claim was previously rejected by a

state court on a state-law ground that is independent of the federal question and adequate to support it. *Beard v. Kindler*, 558 U.S. 53, 130 S. Ct. 612, 614, 175 L. Ed. 2d 417 (2009) (citing *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)). A state procedural bar is independent of federal law unless it appears to rest primarily on federal law or appears to be interwoven with federal law. *Id*. at 733-34. A state procedural bar is adequate if it is "'firmly established and regularly followed' by the time as of which it is to be applied." *Ford v. Georgia*, 498 U.S. 411, 424, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991); *accord Beard v. Kindler*, 130 S. Ct. at 617-18 (holding that "a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review"). A habeas petitioner who has failed to meet the state's procedural requirements for presenting federal claims has deprived the state courts of an opportunity to address those claims in the first instance, just like a petitioner who has failed to exhaust state remedies. *Coleman v. Thompson*, 501 U.S. at 732.

When the California Supreme Court denied Petitioner's first habeas corpus petition, it denied all of the claims on the merits and also found several of the claims procedurally barred. (NOL C7.) As to some of the claims that it found procedurally barred, the California Supreme Court stated, "To the extent they were not raised on appeal, and except insofar as they allege ineffective assistance of counsel, [the claims] are barred by *In re Harris* (1993) 5 Cal.4th 813, 825 & fn. 3, 826-829, and *In re Dixon* (1953) 41 Cal.2d 756, 759." One of the claims listed therein was the claim in paragraph 1 of Claim "G" of the petition, which was the instant *Brady* claim concerning Anderson's statement that "Pam lies." (*See* NOL C1 at 262-64.) That claim was not raised on appeal and did not allege ineffective assistance.

The California Supreme Court's finding that the claim was barred by *Harris* and *Dixon* means the claim is procedurally defaulted for purposes of these federal habeas corpus proceedings. The general rule in California is that "habeas corpus

cannot serve as a substitute for an appeal." *Dixon*, 41 Cal. 2d at 759; *see Harris*, 5 Cal. 4th at 825 n.3 (the "'*Dixon* rule' . . . generally prohibits raising an issue in a postappeal habeas corpus petition when that issue was not, but could have been, raised on appeal"). The rule applied to Petitioner's habeas claim because it "arose during his trial and was apparent from the record." *Park v. California*, 202 F.3d 1146, 1151 (9th Cir. 2000). The *Dixon* bar is both independent and adequate. *See Bennett v. Mueller*, 322 F.3d 573, 586 (9th Cir. 2003); *Sanchez v. Ryan*, 392 F. Supp. 2d 1136, 1138-39 (C.D. Cal. 2005) (respondent adequately pled the independence and adequacy of the *Dixon* rule and petitioner did not meet the burden to place the procedural bar defense in issue, and thus his federal claim was procedurally barred); *Protsman v. Pliler*, 318 F. Supp. 2d 1004, 1008-09 (S.D. Cal. 2004) (finding California's *Dixon* bar to be independent and adequate).[19]

Because the *Dixon* bar is independent and adequate, the claim is presumptively barred in federal court. Petitioner may overcome the bar only by making a showing of both cause for the default and prejudice resulting from it, or a showing of a fundamental miscarriage of justice. *Harris v. Reed*, 489 U.S. 255, 262, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989). Petitioner has not made any of these showings.

To demonstrate cause, Petitioner must show that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986*); see also McCleskey v. Zant*, 499 U.S. 467, 497, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991) ("cause," in excusing apparent abuse of writ or procedural

[19] In *Park*, the Ninth Circuit held that California's *Dixon* bar was not independent of federal law prior to the California Supreme Court's August 3, 1998 opinion in *In re Robbins*, 18 Cal. 4th 770, 77 Cal. Rptr. 2d 153 (1998). *Park*, 202 F.3d at 1152-53. Since the *Dixon* bar in this case was imposed on in 2009, *Park* is inapplicable.

default, is external impediment such as government interference or reasonable unavailability of claim's factual basis).

Here, Petitioner does not demonstrate cause for failing to raise the claim on direct appeal.[20] Even if Petitioner could show cause, he would also have to show that prejudice resulted from his inability to raise his claims. Prejudice is not just the possibility of prejudice from alleged trial errors; it is the likelihood that the alleged errors worked to Petitioner's substantial disadvantage and infected the entire trial with error of constitutional dimensions. *Carrier*, 477 U.S. at 494; *United States v. Frady*, 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989). Nothing in the Petition suggests Petitioner's ability to make this showing.

In order to demonstrate the exceptional circumstance of a "fundamental miscarriage of justice," Petitioner must show that a constitutional violation has "probably resulted" in conviction of one who is "actually innocent" of the crimes of which he was convicted. *Sawyer v. Whitley*, 505 U.S. 333, 339-40 & n.6, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992). Reliable evidence, which was not presented at trial, must be submitted to establish Petitioner's actual innocence. *Calderon v. Thompson*, 523 U.S. 538, 559, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998); *Schlup v. Delo*, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). Petitioner makes no such showing.

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[20] In Claim Twenty-Eight, Petitioner contends that appellate counsel rendered ineffective assistance for failing to raise claims on appeal and then recites a laundry list of claims that appellate counsel should have raised. (Pet. at 418-21.) To the extent Petitioner may be relying on his allegations of ineffective assistance of appellate counsel in Claim Twenty-Eight to establish cause for a procedural default under *Dixon*, the allegations are insufficient to establish such cause, as Petitioner does not discuss how appellate counsel's performance was deficient or how he was prejudiced by counsel's alleged deficient performance. *See Williamson v. Jones*, 936 F.2d 1000, 1006 (8th Cir. 1991) (mere allegations of ineffective assistance of post-conviction counsel are insufficient to establish cause for a procedural default).

c. The Claim is Barred by § 2254(d)

Further, the claim is barred by § 2254(d). The California Supreme Court reasonably could have determined that there was no *Brady* violation because the record shows that the prosecutor disclosed the statement to the defense. As noted above, there is no Supreme Court authority that requires *Brady* material to be disclosed in any particular form, such as in a police report. In addition, the California Supreme Court reasonably could have determined that any failure to properly disclose Anderson's statement that "Pam lies" was not prejudicial because Anderson testified at trial that Pam had a reputation for dishonesty the year before Mrs. Miller was killed (22RT at 3240).

E. DNA Testing

In Claim Three, subpart (7), Petitioner contends that the prosecutor violated *Brady* by withholding impeaching information relevant to DNA testing. (Pet. at 106-07.) Petitioner presented this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 264.) The California Supreme Court summarily rejected the claim on the merits in its order denying the petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

Petitioner contends that the prosecutor failed to disclose "Los Angeles County Police Department Criminalist William Moore's bench notes and reports documenting Cellmark's fallibilities and the unreliability of the methodology and procedures used to analyze the samples in this case." (Pet. at 107.) The California Supreme Court reasonably could have rejected Petitioner's *Brady* claim because Petitioner failed to produce the bench notes and reports in question, failed to allege how the bench notes and reports showed that the methodology and procedures used during the DNA testing were unreliable, and failed to allege any facts showing that the bench reports and notes would have been exculpatory or material. *See People v. Duvall*, 9 Cal. 4th at 474 (petitioner must set forth fully and with particularity the

facts supporting each claim and provide all reasonably available documentary evidence).

Therefore, Claim Three is barred by § 2254(d).

IV. CLAIM FOUR IS BARRED BY § 2254(D)

In Claim Four, Petitioner contends that due to mental illness, lifelong mental disabilities, and a drug regimen imposed during his detention at the Los Angeles County Jail, he was incompetent to stand trial. He contends that the nature and extent of his impairments either were, or should have been, readily evident to the trial court -- which should have *sua sponte* ordered a competency hearing -- the prosecutor, and his own attorney -- who was ineffective for failing to adequately investigate and raise the issue of Petitioner's competency. (Pet. at 107-24.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 240-53.) The California Supreme Court summarily rejected the claim on the merits in its order denying the first habeas corpus petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

It is beyond debate that "[a] defendant has a due process right not to be tried while incompetent." *Stanley v. Cullen*, 633 F.3d 852, 860 (9th Cir. 2011); *accord Indiana v. Edwards*, 554 U.S. 164, 170, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008). To be competent to stand trial, the defendant must have "a rational as well as factual understanding of the proceedings against him" and a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." *Cooper v. Oklahoma*, 517 U.S. 348, 354, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996) (internal quotation marks and citation omitted); *Dusky v. United States*, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960) (per curiam) (same); *Stanley v. Cullen*, 633 F.3d at 860; *see also Medina v. California*, 505 U.S. 437, 449, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992) (the state must provide an adequate procedure to protect a defendant from being tried while incompetent)

(citing *Drope v. Missouri*, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); Cal. Penal Code § 1368.

Where the evidence before the trial court raises a bona fide doubt as to a defendant's competence to stand trial, the judge on his own motion must conduct a competency hearing. *Pate v. Robinson*, 383 U.S. 375, 385, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966); *Stanley v. Cullen*, 633 F.3d at 860; *Maxwell v. Roe*, 606 F.3d 561, 568 (9th Cir. 2010). The test for such a bona fide doubt is whether a reasonable judge, situated as was the trial court judge whose failure to conduct a hearing is being reviewed, should have experienced doubt with respect to competency to stand trial. *Maxwell v. Roe*, 606 F.3d at 568 (citation omitted). 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, and one of the factors standing alone may, in some circumstances, be sufficient. *Drope v. Missouri*, 420 U.S. at 180; *Maxwell v. Roe*, 606 F.3d at 568.

A habeas petitioner alleging a substantive competency claim "must present evidence 'sufficient to positively, unequivocally, and clearly generate a real, substantial and legitimate doubt as to [his] mental capacity'" at the time of trial. *Williams v. Calderon*, 48 F. Supp. 2d 979, 990 (C.D. Cal. 1998) (quoting *Watts v. Singletary*, 87 F.3d 1282, 1290 (11th Cir. 1996) and *Bruce v. Estelle*, 483 F.2d 1031, 1043 (5th Cir. 1973)); *see Hernandez v. Ylst*, 930 F.2d 714, 716 (9th Cir. 1991). He bears the burden of proving he was incompetent at the time of trial, *De Kaplany v. Enomoto*, 540 F.2d 975, 983 n.9 (9th Cir. 1976) ("a history of mental disorders, or evidence showing a present disorder which does not bear on defendant's competency to stand trial, is not enough"), by a preponderance of the evidence. Cal. Penal Code § 1369(f); *see also Medina v. California*, 505 U.S. at 440 (upholding constitutionality of Cal. Penal Code §1367); *Boag v. Raines*, 769 F.2d 1341, 1342 (9th Cir. 1985).

Defense counsel is in the best position to evaluate a petitioner's competence. *Hernandez v. Ylst*, 930 F.2d at 718. Where counsel has obtained a mental health expert's opinion, he is entitled to rely upon that opinion and need not search for a different one. *Payton v. Cullen*, 658 F.3d 890, 896 (9th Cir. 2011) (counsel who obtains a qualified expert's opinion has no duty to "seek others"); *Winfield v. Roper*, 460 F.3d 1026, 1041 (8th Cir. 2006) ("Counsel is not required to shop for experts who will testify in a particular way"); *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998) (counsel discharged his duty to retaining medical experts whom he thought were well-qualified); *Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995) (counsel was reasonable in relying on mental health experts' reports in deciding not to pursue a mental defense); *Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990).

Retrospective expert opinions regarding competence "are of dubious probative value and therefore, disfavored." *Deere v. Woodford*, 339 F.3d 1084, 1086 (9th Cir. 2003); *accord Boyde v. Brown*, 404 F.3d 1159, 1166-67 (9th Cir. 2005); *Williams v. Woodford*, 384 F.3d at 609; *Davis v. Woodford*, 384 F.3d 628, 647 (9th Cir. 2004) (report of psychiatric examination seven years later was "rank speculation").

As set forth relative to Ground One, to establish a claim of ineffective assistance of counsel, a petitioner must demonstrate that counsel's conduct fell below an objective standard of reasonableness, and that the defendant was prejudiced by counsel's acts or omissions. *Strickland*, 466 U.S. at 687; *accord Richter*, 131 S. Ct. at 770. Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Strickland*, 466 U.S. at 690-91. The relevant inquiry is not what counsel could have pursued, but whether the choices that were made were reasonable. *Turner v. Calderon*, 281 F.3d 851, 877 (9th Cir. 2002); *Siripongs v. Calderon*, 133 F.3d 732, 736 (9th Cir. 1998). "Counsel's failure to move for a competency hearing violates

the defendant's right to effective assistance of counsel when 'there are sufficient indicia of incompetence to give objectively reasonable counsel reason to doubt the defendant's competency, and there is a reasonable probability that the defendant would have been found incompetent to stand trial had the issue been raised and fully considered.'" *Stanley v. Cullen*, 633 F.3d at 862 (quoting *Jermyn v. Horn*, 266 F.3d 257, 283 (3d Cir. 2001)); *Deere v. Cullen*, 713 F. Supp. 2d at 1029 (quoting same).

First, Petitioner fails to demonstrate that the California Supreme Court had no reasonable basis for concluding that he had a rational and factual understanding of the proceedings against him, and that he had sufficient ability to consult with his lawyer with a reasonable degree of rational understanding. On March 8, 1993, trial counsel requested the appointment of two mental health experts "to examine [Petitioner] regarding his present sanity and competency to proceed with trial." (1RT at 14.) Counsel wanted the experts appointed on a confidential basis, and did not formally declare a doubt as to Petitioner's competence pursuant to California Penal Code section 1368. (*See* 1RT at 14-15.) The trial court appointed two mental health experts -- Drs. John Stalberg and John Mead -- to evaluate Petitioner pursuant to California Evidence Code sections 730, 952, and 1017.[21] (1RT at 14.) On April 14, 1993, Dr. Stalberg was replaced by Dr. William Vicary. (1RT at 17-20.) Drs. Mead and Vicary both evaluated Petitioner, and both submitted reports to trial counsel opining that Petitioner was competent to stand trial.[22] (28RT at 4088.)

[21] These sections govern the appointment of an expert by the court (Cal. Evid. Code § 730), the attorney-client privilege (Cal. Evid. Code § 952), and the confidentiality available between a court-appointed psychotherapist and a defendant (Cal. Evid. Code § 1017).

[22] Petitioner complains that these evaluations were incomplete because the doctors examined only a portion of the available material relating to Petitioner's mental status, and their evaluations predated Los Angeles County jail staff's observations of Petitioner's psychosis in June 1993. However, Petitioner proffers absolutely no evidence supporting his claims. Based on the state court record, trial counsel asked that the doctors perform a confidential evaluation of Petitioner's sanity and competence to stand trial, yet he never formally declared a doubt about (continued…)

Moreover, Petitioner's conduct in the courtroom and his ability to coherently participate in the proceedings demonstrate his competence. For example, on the very day trial counsel requested the appointment of mental health experts to evaluate Petitioner, Petitioner made a *Marsden* motion. (1RT at 19-24.) He wanted an attorney of his choosing appointed because he and trial counsel could not "come to agreement" regarding the case.[23] (1RT at 24.) Clearly, he and trial counsel had different views about defending the case, which indicate that Petitioner was aware of the nature of the proceedings against him and could rationally participate in his defense. Additionally, Petitioner was sworn and testified to the locking configuration on his residence door (15RT at 2481-84), interacted with the court on the issue of getting to court on time (18RT at 2830), and in requesting a court order for a shower and haircut he was able to provide and spell the name of the Senior Deputy overseeing his jail module, and provide the number of his assigned jail module (30RT at 4480-81, 4559-61). In each of these instances, Petitioner was coherent and lucid. Finally, and perhaps most telling, Petitioner testified

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(…continued)
Petitioner's competence. (*See* 1RT at 14-15.) Thus, the doctors' reports, which presumably included the material they actually reviewed in opining upon Petitioner's competence as well as specific details regarding their findings, remained confidential and were not included in the state court record. Petitioner never provided those reports to any state court, nor has he provided them to this Court in support of the instant Petition. In any event, Petitioner fails to demonstrate that additional information was necessary for the doctors to make an adequate determination of whether he was able to understand the nature of the proceedings and assist in his defense. He also fails to show that jail and medical records or additional information regarding petitioner's social history would have changed the doctors' opinions.

[23] Petitioner points to his misunderstanding with trial counsel about entering a plea rather than going to trial as evidence of his incompetence. (Pet. § 2254(d) Br. at 112-13.) There is nothing to indicate that Petitioner's confusion was anything more than that -- confusion. On the contrary, Petitioner's vehemence about wanting new counsel, presumably because he believed himself innocent and wanted to go to trial, evidences rational understanding of the proceedings. Moreover, Petitioner had the presence of mind to request a copy of the transcript of the *Marsden* hearing (1RT at 25), further confirming Petitioner's lucidity.

extensively in his own behalf. (22RT at 3289-3538; 23RT at 3415-3538, 3572-75; 24RT at 3586-3683.)

Petitioner points out that in the fall of 1994 he was examined by Thomas who concluded that Petitioner suffered from a life-long schizoaffective disorder, was paranoid and psychotic, and experienced auditory hallucinations and referential thinking. (Pet. at 117-18.) In November 1994, Petitioner was administered an incomplete battery of psychological tests by William Spindell, PhD, who concluded that Petitioner suffered from schizophrenia. (30RT at 4432; Ex. 150 at ¶¶ 8-10.) Petitioner argues these doctors' opinions bolster his claim of incompetence to stand trial.[24] On the contrary, at that point neither expert offered an opinion on Petitioner's competence to stand trial. Rather, they were retained to explore Petitioner's ability to form the specific intent required for the charged crimes. (Ex. 150 at ¶¶ 5-10; Ex. 154 at ¶ 8; 22 Supp II CT at 6312 ("The reason for referral was to identify any possible major mental illness in the accused and, if feasible, the mental status of the accused at the time of the offense with which he is charged.").) At any rate, simply being diagnosed with schizophrenia does not render a petitioner incompetent to stand trial. *See United States v. Mackovich*, 209 F.3d 1227, 1233 (10th Cir. 2000) (psychiatrist's diagnosis of defendant with a schizoaffective disorder and recommendation for psychiatric treatment and antipsychotic drugs did not preclude finding of competence to stand trial); *United States v. Kohlmann*, 491

[24] In a declaration signed nearly nine years after trial began, and after reviewing additional material not available to him prior to trial, Dr. Thomas stated that in his opinion Petitioner was incompetent to stand trial. (Ex. 154 at ¶¶ 24, 25.) Although Dr. Thomas had the opportunity to observe Petitioner relatively contemporaneously with the trial, his opinions regarding Petitioner's competency nine years later after reviewing new material should be viewed with skepticism. *See Boyde v. Brown*, 404 F.3d at 1166-67; *Williams v. Woodford*, 384 F.3d at 609; *Davis v. Woodford*, 384 F.3d at 647; *Deere v. Woodford*, 339 F.3d at 1086. Similarly, Dr. Zakee Matthews, a psychiatrist retained by Petitioner's state habeas counsel, and Natasha Khazanov, PhD., also retained by state habeas counsel, both of whom evaluated Petitioner in 2003 and opined him to be significantly impaired prior to and during trial (Ex. 175; Ex. 178) should be viewed critically.

F.2d 1250, 1252 (5th Cir. 1974) (an accused may have a mental disorder or deficiency and still be mentally competent).

Likewise, Petitioner's "history of disturbed behavior," which includes two prior sexual assaults, does not support his claim of incompetence (*see* Pet. § 2254(d) Br. at 113-14) because they do not directly bear upon his mental status at the time of trial. Nor does his history of suicide attempts, and his attempted suicide before being seized by authorities immediately after raping and murdering Julia Miller (Pet. at 109-10), standing alone prove Petitioner's incompetence. *Drope v. Missouri*, 420 U.S. at 181.

Petitioner also contends that the drug regimen he was placed on while housed at the Los Angeles County Jail, and the fact that he was abruptly taken off of, and put back on, medications during his guilt phase testimony, affected his ability to understand the proceedings and assist in his defense. (Pet. at 110-14.) The mere fact that Petitioner was being medicated does not necessarily mean he was incompetent to stand trial. Indeed, the administration of those medications may have improved Petitioner's mental condition. Instead, additional evidence -- such as how the drug affected the petitioner's thought processes -- is required to demonstrate incompetence resulting from medication. *See Sturgis v. Goldsmith*, 796 F.2d 1103, 1109-10 (9th Cir. 1986) (stating that failure to present evidence of "how [the medication] might have affected his competence at trial" failed to raise a bona fide doubt as to petitioner's competence to stand trial); *Corsetti v. McGrath*, 2004 WL 724951, *9 (N.D. Cal. 2004) (concluding that the fact that the petitioner was taking Ativan and Thorazine did not demonstrate that he was incompetent to plead guilty because petitioner did not show that the drugs affected his thought processes); *People v. Medina*, 11 Cal. 4th 694, 733, 47 Cal. Rptr. 2d 165 (1995) ("Nothing in the record establishes that the Thorazine or other medication taken by defendant . . . rendered him unable to understand the proceedings or cooperate with his counsel). Petitioner has not proffered any expert opinion affirming that the

medication or the changes in his drug regimen had any effect, let alone a negative one, upon his mental status.[25] And the fact that Petitioner offered extensive, coherent testimony in his own behalf belies his contentions.

Based on the above, the trial court neither held, nor reasonably should have held, a bona fide doubt as to Petitioner's competence to stand trial. Thus, the trial court did not violate Petitioner's due process rights when it did not *sua sponte* hold a hearing to determine Petitioner's competence, and there was a reasonable basis for the California Supreme Court's summary denial of relief on this claim.

In Petitioner's Opening § 2254(d) Brief, he argues that the California Supreme Court's decision was contrary to clearly established Supreme Court precedent because (1) California Penal Code section 1367 requires a defendant's incompetence be attributable to "a diagnosed mental illness" whereas the test set forth in *Dusky* does not (Pet. § 2254(d) Br. at 119-20), and (2) his allegations of entitlement to a competency hearing are indistinguishable from those set out in *Drope* and *Pate*, yet the state court here found Petitioner's allegations to be insufficiently pled (Pet. § 2254(d) Br. at 120). He also faults the state court for failing to hold an evidentiary hearing to resolve this claim (Pet. § 2254(d) Br. at 120), and takes issue with state court's findings of fact that a competency hearing was not required (Pet. § 2254(d) Br. at 120-21).

In response to Petitioner's first argument, the fact that in California a defendant's incompetence must be the result of a "diagnosed mental illness" has no bearing on the California Supreme Court's rejection of this claim. There is no evidence, and Petitioner points to none, suggesting that the California Supreme Court applied any rule of law other than the federal standards for competence in denying Petitioner relief. Indeed, in presenting this claim to the state supreme

[25] Dr. Thomas opined generally about the various medications Petitioner was taking and their purported side effects. (Ex. 154 at ¶ 25.) He did not proffer any opinion regarding the effect of these drugs on Petitioner in particular. (*Id.*)

court, Petitioner grounded his claim upon *Dusky* and the federal standards. (*See* NOL C6 at 202-03.) Second, the California Supreme Court denied this claim on the merits; it did not find that Petitioner failed to plead the claim with sufficient particularity, as Petitioner erroneously argues in his second point. (*See* NOL C7.) Third, there is nothing in *Dusky* or *Pate* requiring a state court to hold an evidentiary hearing on a claim of incompetence where, as here, the evidence presented in the trial court neither did, nor should have, reasonably raised a bona fide doubt in the judge's mind as to the petitioner's competence to stand trial.[26] *See Pate v. Robinson*, 383 U.S. at 385; *Dusky v. United States*, 362 U.S. at 402-03. And finally, the California Supreme Court made no factual finding that there was insufficient evidence presented to the trial court to require a competency hearing. (*See* NOL C7.) Indeed, trial counsel did not formally declare a doubt as to Petitioner's competence to stand trial (1RT at 14-15), and as discussed above, there is nothing in the record to suggest that the trial court held, or reasonably should have held, a bona fide doubt as to Petitioner's competence.

Finally, Petitioner contends counsel was ineffective for failing to conduct an adequate investigation into Petitioner's competence and to declare a doubt as to his competence to stand trial. (Pet. at 116-18.) The California Supreme Court had reasonable grounds to reject this claim. Trial counsel did, in fact, express some concern about Petitioner's mental health to the trial court, and obtained two experts to evaluate Petitioner. (1RT at 14-15.) Once trial counsel received those evaluations and the doctors' conclusions that Petitioner was competent to continue with the criminal proceedings, he was entitled to rely upon those opinions. *See Payton v. Cullen*, 658 F.3d at 896; *Winfield v. Roper*, 460 F.3d at 1041; *Babbitt v.*

[26] Although the defense theory was that Petitioner could not have formed the specific intent necessary at the time of the offenses, it was, more specifically, that Petitioner had a single episode triggered by something the victim said and fueled by illicit drugs and alcohol, rather than being in a constant and unwavering state of psychosis. (*See* 26RT at 3945, 3950-52.)

Calderon, 151 F.3d at 1174; *Hendricks v. Calderon*, 70 F.3d at 1038; *Harris v. Vasquez*, 949 F.2d at 1525. Moreover, as previously discussed, Petitioner's behavior in the courtroom and his ability to follow the criminal proceedings, which are borne out by the record, would have led a reasonable attorney to believe that he was, indeed, competent to stand trial.

Accordingly, Claim Four is barred by § 2254(d).

V. CLAIM FIVE IS *TEAGUE* BARRED AND BARRED BY § 2254(D)

In Claim Five, Petitioner contends that he was involuntarily medicated during trial, thus depriving him of a variety of constitutional rights. (Pet. at 124-30.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 254-61.) The California Supreme Court summarily rejected the claim on the merits in its order denying the first habeas corpus petition. (NOL C7.) As explained below, the claim is barred by *Teague v. Lane*, 489 U.S. 288. The claim is also barred by § 2254(d).

A. The Claim is Barred by *Teague*

Petitioner's allegations that by medicating him the state violated his constitutional rights to counsel and to confront witnesses under the Sixth Amendment, to a reliable death judgment and to be free of cruel and unusual punishment under the Eighth Amendment, to present witnesses and defenses, and to compulsory process are barred by *Teague v. Lane*, 489 U.S. 288. A survey of the relevant case law at the time Petitioner's conviction became final on October 14, 2003, indicates that the Supreme Court had not held that a petitioner's Sixth or Eighth Amendment rights are violated when he is involuntarily medicated for trial. Furthermore, such a rule was not compelled by the existing precedent, as the only clearly established Supreme Court precedent existing during the relevant time addressed whether involuntary medication violated a petitioner's due process rights under the Fourteenth Amendment. *See Washington v. Harper*, 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990); *Riggins v. Nevada*, 504 U.S. 127, 112 S. Ct.

1810, 118 L. Ed. 2d 479 (1992); *Kulas v. Valdez*, 159 F.3d 453, 458 (9th Cir. 1998) (Wallach, J., dissenting) (noting that "the right of inmates in regard to forced medication had been clearly established in [*Washington*] and [*Riggins*].").

In any event, Petitioner cannot hurdle § 2254(d) for the same reason: at the time Petitioner's conviction became final on October 14, 2003, there was no clearly established Supreme Court precedent governing these claims; thus, the basis for the California Supreme Court's rejection of these claims was not an unreasonable application of, and not inconsistent with, clearly established Supreme Court precedent. *See Wright v. Van Patten*, 552 U.S. 120, 125-26, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008) ("clearly established federal law" is limited to Supreme Court authority that "squarely addresses" the claim at issue and provides a "clear answer"); *Jackson v. Giurbino*, 364 F.3d 1002, 1005 (9th Cir. 2004) (holding the relevant law must have been clearly established at the time petitioner's conviction became final).

To the extent Petitioner is arguing that he was not permitted to refuse antipsychotic medication, and the evidence demonstrates that without such medication he would have been incompetent to stand trial, his claims fail for the same reasons. *See Riggins v. Nevada*, 504 U.S. at 136 ("The question whether a competent criminal defendant may refuse antipsychotic medication if cessation of medication would render him incompetent at trial is not before us.").

B. The Claim is Barred by § 2254(d)

Furthermore, Petitioner's due process claim is barred by § 2254(d). "[A Petitioner's] interest in avoiding involuntary administration of antipsychotic drugs [is] protected under the Fourteenth Amendment's Due Process Clause." *Riggins v. Nevada*, 504 U.S. at 133; *accord Washington v. Harper*, 494 U.S. at 229. A state is justified in forcibly administering drugs when the treatment is medically appropriate and, considering less intrusive alternatives, is either essential for the petitioner's safety or the safety of others, or is necessary for the adjudication of the

petitioner's guilt. *Riggins v. Nevada*, 504 U.S. at 135; *see also Washington v. Harper*, 494 U.S. at 227. At the time Petitioner's conviction became final and in the context of administering psychotropic medications, the Supreme Court had not squarely addressed when an inmate is voluntarily taking medications.[27] *See Benson v. Terhune*, 304 F.3d 874, 882 (9th Cir. 2002) (". . . *Riggins* does not explicitly define what makes the administration of medicine voluntary -- it holds only that continued medication over a prisoner's affirmative act to refuse or discontinue the medication makes the administration of medication involuntary . . . .")

The record shows that Petitioner was prescribed several medications while housed at the Los Angeles County Jail before and during trial: Atarax (an anti-anxiety medication), Haldol (an antipsychotic medication), Cogentin (to counteract the side effects of Haldol), Sinequan (an antidepressant), and Theodrine (an anti-asthmatic). (23RT at 3547-50.) Significantly, Petitioner *requested* Haldol. (23RT at 3547, 3552.) Despite this, Petitioner points to several instances where he refused medications as evidence of being involuntarily medicated. (Pet. § 2254(d) Br. at 108; Ex. 33 at 595, 603, 607, 621.) Dr. Kunzman, Petitioner's treating psychiatrist at the Los Angeles County Jail, testified to gaps in Petitioner's medication, but he could not tell from the records whether they were stopped because the prescription ran out or because Petitioner refused to take them. (23RT at 3551.) Either way, there is nothing in the records to suggest that after refusing the medications Petitioner was forced to take them, as was the case in *Riggins*. In *Riggins*, the defendant unequivocally objected to being administered psychotropic medication, evidenced by his attorney's request for a court order halting the medication. The trial court denied the request and Riggins was involuntarily made to continue the

[27] To the extent the *Riggins* holding can be extended to include cases where a defendant cannot object to the medication or ask for information about the medication because of the effects of the medication, *see Benson v. Terhune*, 304 F.3d at 884-85 (Pet. § 2254(d) Br. at 108 n.39), Petitioner fails to demonstrate that such was his case. And indeed, there is no indication in the record to support such an argument.

medications. *Riggins v. Nevada*, 504 U.S. at 133. In contrast, here, the jail records demonstrate that when Petitioner refused medications, he was not thereafter forced to take them. (23RT at 3551; Ex. 33 at 595, 603, 607, 621.)

Based on the record before the California Supreme Court, it was reasonable for it to conclude that Petitioner did not involuntarily take any medications while housed at the Los Angeles County Jail. Moreover, since *Harper* and *Riggins* were the only clearly established Supreme Court authority at the relevant time, and neither case addressed what would amount to voluntary ingestion of psychotropic medications, the state court did not unreasonably apply them. Nor was the California Supreme Court's denial of relief inconsistent with the holdings in *Riggins* or *Harper*, as the facts of Petitioner's case are significantly different from those in either *Riggins* or *Harper*.

Putting aside the fact of Petitioner's apparent voluntariness in taking the medications, Petitioner has not shown that the treatment was not medically appropriate. *See Riggins v. Nevada*, 504 U.S. at 135; *see also Washington v. Harper*, 494 U.S. at 227. Dr. Kunzman testified that Petitioner himself informed the doctor that he had taken Haldol previously, and Dr. Kunzman stated that he prescribed that medication again because it apparently worked for Petitioner in the past. (23RT at 3547, 3552.) Even Petitioner's own expert, Dr. Thomas, who described Haldol as a "powerful drug" and stressed the importance of a proper medication regimen, did not once state in his declaration that he believed the drug regimen Petitioner was on while at county jail was medically inappropriate. (*See* Ex. 154.) And as far as Petitioner's argument that the medications negatively affected his outward appearance, the only support he offers for that claim are biased declarations from defense team members (*see, e.g.*, Exs. 144, 150).

Petitioner also claims that trial counsel was ineffective for failing to investigate and object to the drug regimen Petitioner was placed on, failing to object to proceeding with a capital criminal trial while Petitioner was medicated,

and failing to assert Petitioner's right to present himself to the jury in an unmedicated state. (Pet. at 129-30.) First, trial counsel knew that Petitioner was being medicated during trial but was unaware of the disruption in his medication. (Ex. 150 at ¶ 11.) Counsel obtained some of Petitioner's medical records, but not those revealing the disruption. (*Id*.) However, it is not clear from the record that it was counsel's fault for not obtaining those records, as opposed to an oversight by the jail in not sending them. Further, a reasonable attorney is not going to search for records he does not know exist. Second, where counsel believes Petitioner is receiving appropriate medication and that the medication has stabilized him and rendered him competent for trial, there are no reasonable grounds to challenge the continuance of the criminal proceedings. Third, there is no suggestion in the record that Petitioner told trial counsel he wished to appear before the jury in an unmedicated state, much less that he had such a right. Finally, even assuming counsel was somehow deficient, Petitioner cannot demonstrate prejudice. Two doctors evaluated Petitioner before trial and found him competent to stand trial, and counsel presented testimony from Dr. Kunzman during the guilt phase, and Dr. Thomas during the penalty phase, regarding Petitioner's mental illness and the medications he was taking, as well as the possible side effects of those medications (*see* 23RT at 3558-70 (Kunzman); 30RT at 4414-75, 4482-4553 (Thomas)). Given the evidence presented to the jury, it was not reasonably probable that absent counsel's alleged failings the result of the trial would have been different.

Accordingly, Claim Five is barred by § 2254(d).

VI. CLAIM SIX IS BARRED BY § 2254(D)

In Claim Six, Petitioner contends that Judge Trammell had a conflict of interest and disabling psychological condition that made him a biased decision-maker. (Pet. at 130-34.) Petitioner presented this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 378-82.) The California

Supreme Court summarily rejected the claim on the merits in its order denying the petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

Judge Edward A. Ferns presided over Petitioner's trial. However, Judge George Trammel presided over many of the pretrial proceedings in the case, from 1993 to 1994. In 2000, Judge Trammel pleaded guilty to criminal charges in federal court in case number CR 00-962-AHM arising from his sexual relationship with a defendant in a criminal case that he had presided over in state court. That case was unrelated to Petitioner's case. The sexual relationship occurred in 1996, after Judge Trammel's involvement in Petitioner's case had ended. (Ex. 137 at 2672-88.) Petitioner contends that the same "disabling pathology" that underlay Judge Trammel's criminal conduct in case number CR 00-962-AHM caused him to make biased rulings in Petitioner's case that favored the prosecution.

Due process requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of the case. *Bracy v. Gramley*, 520 U.S. 899, 905-05, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997). "To succeed on a judicial bias claim, however, the petitioner must 'overcome a presumption of honesty and integrity in those serving as adjudicators.'" *Larson v. Palmateer*, 515 F.3d 1057, 1067 (9th Cir. 2008), quoting *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975). "In the absence of any evidence of some extrajudicial source of bias or partiality, neither adverse rulings nor impatient remarks are generally sufficient to overcome the presumption of judicial integrity . . . ." *Id*.

Here, Petitioner makes no showing that any of Judge Trammel's rulings were the result of some extrajudicial bias. Petitioner fails to establish any connection whatsoever between Judge Trammel's conduct in case number CR 00-962-AHM and his rulings in Petitioner's case. The California Supreme Court reasonably could have rejected Petitioner's claim of judicial bias as conclusory and unsupported. *See People v. Duvall*, 9 Cal. 4th at 474.

Therefore, Claim Six is barred by § 2254(d).

VII. CLAIM SEVEN IS PROCEDURALLY DEFAULTED AND IS BARRED BY § 2254(D)

In Claim Seven, Petitioner challenges the trial court's conduct of the voir dire, asserting that the trial court permitted an improper one-sided voir dire, failed to oversee the jury questionnaire process and adequately review the final questionnaire, refused to permit defense questions on Petitioner's criminal history and history of sexual offenses, misadvised the jury that it may consider some penalty phase evidence as aggravating, and failed to correct counsel's misstatements regarding mitigating and aggravating evidence during the penalty phase. He also argues that trial counsel was ineffective for failing to: object to the trial court's misstatements of law, adequately oversee the jury selection process, and state the law correctly during voir dire; and that appellate counsel was ineffective for failing to litigate the trial court's errors on direct review. (Pet. at 134-37.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 282-84 (Claim "L").) The California Supreme Court summarily rejected the claim on the merits in its order denying the first habeas corpus petition. In that same order, the California Supreme Court also rejected the claim on the ground that, to the extent it was not raised on direct appeal, and except insofar as it alleged ineffective assistance of counsel, it was barred by *In re Harris*, 5 Cal. 4th at 825 & n.3, 826-29 and *In re Dixon*, 41 Cal. 2d at 759. As explained below, Claim Seven is procedurally defaulted. In addition, the claim is barred by § 2254(d).

A. The Claim is Procedurally Defaulted

The California Supreme Court found that the claim (with the exception of the ineffective assistance of counsel claims) was barred by *Harris* and *Dixon* because it was not raised on appeal. As discussed above (Arg. III), the *Dixon* bar -- that habeas corpus cannot serve as a substitute for an appeal -- is both independent and

adequate. Petitioner fails to show cause for the default and prejudice resulting from it, or a fundamental miscarriage of justice.[28] In light of the *Dixon* bar, the claim is procedurally defaulted.

B. The Claim is Barred by § 2254(d)

Furthermore, the claim is barred by § 2254(d). Judges are "accorded ample discretion in determining how best to conduct [jury] voir dire." *Rosales-Lopez v. United States*, 451 U.S. 182, 189, 101 S. Ct. 1629, 68 L. Ed. 2d 22 (1981); *accord Mu'Min v. Virginia*, 500 U.S. 415, 427, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991) (acknowledging Supreme Court cases "have stressed the wide discretion granted to the trial court in conducting voir dire in the area of pretrial publicity and in other areas of inquiry that might tend to show juror bias"); *Ham v. South Carolina*, 409 U.S. 524, 528, 93 S. Ct. 848, 851, 35 L. Ed. 2d 46 (1973) (recognizing "the traditionally broad discretion accorded to the trial judge in conducting voir dire. . . ."); *Aldridge v. United States*, 283 U.S. 308, 310, 51 S. Ct. 470, 75 L. Ed. 1054 (1931) ("[T]he questions to the prospective jurors were put by the court, and the court had a broad discretion as to the questions to be asked").

Only two specific inquiries of voir dire are constitutionally compelled: inquiries into a juror's racial prejudice against a defendant charged with a violent crime against a person of a different racial group, *Mu'Min v. Virginia*, 500 U.S. at 424, and, in a capital case, inquiries into a juror's views on capital punishment, *Morgan v. Illinois*, 504 U.S. 719, 730, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992). In all other instances, the trial court retains great latitude in deciding questions to be asked on voir dire. *See Mu'Min*, 500 U.S. at 424.

Petitioner argues that the trial court permitted an improper one-sided voir dire, failed to oversee the jury questionnaire process and adequately review the final

[28] As for Petitioner's claim that appellate counsel rendered ineffective assistance for failing to raise the claims on appeal, the claim fails for the reasons discussed below, and does not establish cause for the default.

questionnaire, and refused to permit defense questions on Petitioner's criminal history and history of sexual offenses, yet he fails to cite any authority to support his claims. Here, the trial court was well within its broad discretion in determining the extent to which it would take part in the jury questionnaire process and the manner in which it would conduct voir dire. The court was also within its discretion in determining into what subject areas the parties could delve.[29] *See Ristaino v. Ross*, 424 U.S. 589, 594-95, 96 S. Ct. 1017, 1020, 47 L. Ed. 2d 258 (1976) ("The Constitution does not always entitle a defendant to have questions posed during voir dire specifically directed to matters that conceivably might prejudice veniremen against him."); *id*. ("Voir dire 'is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.' [Citations.] "); *id*. at 595 ("[T]he State's obligation to the defendant to impanel an impartial jury generally can be satisfied by less than an inquiry into a specific prejudice feared by the defendant."). Accordingly, the California Supreme Court reasonably denied relief on these claims.

Petitioner also takes issue with the trial court's explanation, during voir dire, of how jurors may perceive penalty phase evidence differently. He argues that much of the penalty phase evidence may only be considered for its mitigating value. (Pet. at 136.) Petitioner is incorrect. "In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to *aggravation*, mitigation, and sentence . . . ." Cal. Penal Code § 190.3 (emphasis added). It was entirely proper for the trial court to explain to prospective jurors what they might expect when it came to hearing penalty phase evidence and in deliberating upon a sentence.

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[29] Petitioner does not contend that the trial court failed to inquire into racial prejudice of the prospective jurors, or into their views on capital punishment. Racial prejudice did not appear to be an issue in the case, and, as evidenced by the record, the prospective jurors were questioned extensively about their views on the death penalty.

Likewise, Petitioner challenges trial counsel's statements to prospective jurors that: if the jury found substantial aggravation and no mitigation, then the death penalty was mandatory; and the lack of mitigating evidence is a factor in aggravation. He faults the trial court for failing to correct these alleged misstatements of law. (Pet. at 136-37.) Petitioner errs again. The trier of fact "*shall* impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." Cal. Penal Code § 190.3 (emphasis added). Counsel's comment that if the jury found substantial aggravation and no mitigation then the death penalty was mandatory is in keeping with the statutory language.

The statements Petitioner construes as trial counsel informing prospective Juror Wilson that a lack of mitigating evidence is a factor in aggravation are, at best, vague. In context, counsel was educating prospective Juror Wilson about how to consider evidence presented during the penalty phase given that there is no burden of proof during that phase. (8RT at 1638-39.) Counsel then said, "You understand also even if we didn't put on any evidence in that stage that would be an aggravating thing and you could exercise mercy if you wanted to?" (8RT at 1638-39.) Prospective Juror Wilson responded, "Yes." (8RT at 1639.) It does not follow that trial counsel would have told the juror that if he put on no mitigating evidence then the juror should construe it as a factor in aggravation, *and then have mercy on Petitioner*. Counsel had just informed the juror that if the factors in aggravation outweighed those in mitigation, then the death penalty *must* be imposed. But in any event, Prospective Juror Wilson did not serve on Petitioner's jury (*see* CT at 229) and Petitioner cannot show the comments had a substantial or injurious effect on his verdict. *Fry v. Pliler*, 551 U.S. 112, 121-22, 127 S. Ct. 2321, 168 L. Ed. 2d 16 (2007); *Brecht v. Abrahamson*, 507 U.S. 619, 637-38, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).

Finally, Petitioner argues ineffective assistance of trial counsel for the failures described above, and ineffective assistance of appellate counsel for failing to litigate the trial court's errors. For the reasons already set forth, the California Supreme Court reasonably could have concluded that there was no error on the trial court's part, trial counsel's performance was not deficient, and Petitioner failed to show prejudice in order to meet the *Strickland* standard. *Strickland v. Washington*, 466 U.S. at 687; *Richter*, 131 S. Ct. at 787.

Accordingly, Claim Seven is barred by § 2254(d).

VIII. CLAIM EIGHT IS BARRED BY § 2254(D) AND, TO THE EXTENT IT IS UNEXHAUSTED, FAILS UNDER DE NOVO REVIEW

In Claim Eight, Petitioner challenges the trial court's rulings to excuse certain prospective jurors for cause. He argues that prospective jurors Rich and Uzan were improperly excused for cause; their voir dire indicated that neither juror possessed views that would "substantially impair the performance of his duties as a juror." He further maintains that the trial court excused prospective jurors who were "pro-life," and denied for-cause challenges to jurors who were "pro-death," based on an arbitrary basis, that is, body language. (Pet. at 137-42.)

Petitioner raised this claim in his opening brief on appeal in the California Supreme Court. (NOL B1 at 35-61.) The California Supreme Court rejected the claim on the merits in its reasoned published opinion on appeal. (NOL B4; *People v. Jones*, 29 Cal. 4th at 1246-50.) As explained below, the claim is barred by § 2254(d). It appears that the remainder of Petitioner's claim, specifically relating to prospective jurors Labbee and Okamuro, was never presented to the California Supreme Court and is therefore unexhausted. As explained below, this unexhausted portion of the claim fails under de novo review. *See* § 2254(b)(2) (habeas relief may be denied on merits notwithstanding failure to exhaust).

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A. The Applicable Law

A prospective juror may be excluded for cause if the juror's views on capital punishment "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985) (*Witt*). California applies the same standard. *People v. Rodrigues*, 8 Cal. 4th 1060, 1146, 36 Cal. Rptr. 2d 235 (1994). In applying this standard, reviewing courts are to accord deference to the trial court. *Uttecht v. Brown*, 551 U.S. 1, 7, 127 S. Ct. 2218, 167 L. Ed. 2d 1014 (2007); *see also Rosales-Lopez v. United States*, 451 U.S. at 188 (comparing trial judge during voir dire and jurors later on in the case, saying "[b]oth must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions."); *id*. (acknowledging that appellate courts cannot "easily second-guess the conclusions of the decision-maker who heard and observed the witnesses."). "The requirements of the [AEDPA], of course, provide additional, and binding, directions to accord deference." *Id*. at 10.

B. Prospective Jurors Rich and Uzan

As the California Supreme Court observed, both prospective Juror Rich's and prospective Juror Uzan's statements regarding the death penalty were conflicting and equivocal. *People v. Jones*, 29 Cal. 4th at 1247-50. Prospective Juror Uzan stated in his jury questionnaire that he was "against capital punishment" (14 Supp II CT at 3920) and would *always* reject the death penalty where the defendant was found guilty of intentional first degree murder with special circumstances of rape, burglary, or robbery (14 Supp II CT at 3922). He affirmed these beliefs during voir dire, but later stated that his opinions were not "black and white" (11RT at 2194) and he could impose death in an appropriate case (11RT at 2197). However, during that same discussion, he also admitted that he would "probably" vote for life imprisonment over death "no matter what the evidence was." (11RT at 2193.)

Defense counsel even conceded that prospective Juror Uzan made statements in his questionnaire that showed he could never imposed the death penalty. (11RT at 2199.) In response to the prosecution's cause challenge, the trial judge presiding over voir dire found prospective Juror Uzan to be substantially impaired based on what the judge observed and heard. (11RT at 2199-2200.)

Unlike prospective Juror Uzan, most of prospective Juror Rich's responses were unremarkable, except two. In his written questionnaire he stated that the death penalty should only be applied when there is "no doubt" about the defendant's guilt (10 Supp II CT at 2918), and answered "yes" to the prosecutor's question when asked if he would require proof "beyond all possible doubt" in the penalty phase (9RT at 1786). But in response to defense counsel's questions, he stated that he would not require absolute certainty of guilt to impose the death penalty (9RT at 1788-90), and explained that he had been confused when answering the written questions (9RT at 1789). The trial judge granted the prosecution's cause challenge, finding prospective Juror Rich substantially impaired because he felt that Rich had been "dragged back across the line" and was "trying to tailor his answers to come out with the correct answers." (9RT at 1792.) In short, the trial judge found Rich's verbal answers during voir dire to be less credible than his written responses to the jury questionnaire.

Given the record and the trial court's credibility determination, which is entitled to deference because it is based on substantial evidence in the record, *Uttecht v. Brown*, 551 U.S. at 7, the California Supreme Court reasonably applied *Wainwright v. Witt* in concluding that prospective Jurors Uzan and Rich held views on capital punishment that would "prevent or substantially impair the performance of [their] duties" as jurors. *Wainwright v. Witt*, 469 U.S. at 424. And although Petitioner would have it otherwise, there is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity. *Wainwright v. Witt*, 469 U.S. at 424. Thus, § 2254 bars relief on this claim.

C. Prospective Jurors Labbee and Okamuro

Next, Petitioner argues that prospective Jurors Labbee and Okamuro should have been dismissed for cause because they held views that would have substantially impaired their performance as jurors, but were allowed to remain based on the trial judge's method of determining fitness based on body language. (Pet. at 140-42.) Under de novo review, Petitioner's claim lacks merit.

As to Prospective Juror Labbee, the record supports the trial court's conclusion that she was not substantially impaired. Although Petitioner cherry-picks bits and pieces of comments during her individual voir dire to make his case, if read in context of her entire voir dire those comments prove Labbee was not substantially impaired. For example, Labbee responded in her jury questionnaire that she supported the death penalty (7 Supp II CT at 1840), but everything else about her questionnaire indicated that she would be fair and impartial, she would not vote for death without considering the evidence presented during the penalty phase of trial, and she would follow the court's instructions. In writing, Labbee was confused by the question whether she would be more inclined to find Petitioner guilty because he is facing the death penalty. (7 Supp II CT at 1842.) During her individual voir dire, after the question was clarified by the trial court, Labbee responded that she would not be more inclined to find Petitioner guilty, agreeing that there is a place in society for the death penalty and for life without parole. (7RT at 1340.) In her questionnaire, Labbee also commented that she believed a defendant's background was irrelevant to a current criminal case. (7 Supp II CT at 1843.) When asked by defense counsel if she still felt that way, Labbee responded affirmatively. (7RT at 1343.) However, when the prosecutor followed up on her answer, and provided some clarification about what the question was really getting at, Labbee agreed that she would follow the court's instructions and consider any background evidence presented during the penalty phase. (7RT at 1344-45.) Thus, as the record bears out, Prospective Juror Labbee was not substantially impaired by

her views on capital punishment, and the trial court properly rejected Petitioner's challenge for cause.

Petitioner likewise takes Prospective Juror Okamuro's comments out of context and misconstrues the record relative to the parties' challenges and the trial court's action. In the context of her entire jury questionnaire and her individual voir dire, Okamuro's responses did not suggest substantial impairment. (*See* 7 Supp II CT at 2003-27; 7RT at 1451-59.) However, the prosecutor challenged her for cause. (7RT at 1460.) Contrary to what Petitioner argues, he did not join in the challenge; rather, he submitted without argument. (7RT at 1460.) The trial court disallowed the challenge, finding her not to be substantially impaired. (*Id*.) Then, also contrary to what Petitioner argues, after the parties stipulated to excusing Okamura the trial court assented. (7RT at 1460-61 (by defense counsel: "Well, your honor, we would stipulate that she can be excused. The Court: Okay."). In any event, neither Prospective Juror Labbee nor Prospective Juror Okamuro sat on the jury that convicted Petitioner. Petitioner has failed to show that any error in denying challenges for cause to these prospective jurors who did not sit on his jury violated his right to an impartial jury. *See Ross v. Oklahoma*, 487 U.S. 81, 86, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988) (any claim that a jury was impartial must focus on the jurors who ultimately sat). Thus, this claim fails under de novo review.

Accordingly, Claim Eight is barred by § 2254(d) and, to the extent it is unexhausted, fails under de novo review.

IX. CLAIM NINE IS PROCEDURALLY DEFAULTED AND IS BARRED BY § 2254(D)

In Claim Nine, Petitioner contends that there was insufficient evidence to support the rape conviction, rape felony murder conviction, and rape special circumstance. (Pet. at 143-44.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 279-81 (Claim "K").)

The California Supreme Court summarily rejected the claim on the merits in its order denying the first habeas corpus petition. In that same order, the California Supreme Court also rejected the claim on the ground that, to the extent it was not raised on direct appeal, and except insofar as it alleged ineffective assistance of counsel, it was barred by *In re Harris*, 5 Cal. 4th at 825 & n.3, 826-29 and *In re Dixon*, 41 Cal. 2d at 759. In addition, in that same order, the California Supreme Court also rejected the claim on the ground that, to the extent it alleged insufficiency of the evidence, it was not cognizable on habeas corpus, citing *In re Lindley*, 29 Cal. 2d 709, 723, 177 P.2d 918 (1947). (NOL C7.) As explained below, Claim Nine is procedurally defaulted. In addition, the claim is barred by § 2254(d).

A. The Claim is Procedurally Defaulted

The California Supreme Court found that the claim was barred by *Harris* and *Dixon* because it was not raised on appeal. As discussed above (Arg. III), the *Dixon* bar -- that habeas corpus cannot serve as a substitute for an appeal -- is both independent and adequate. Petitioner fails to show cause for the default and prejudice resulting from it, or a fundamental miscarriage of justice. In light of the *Dixon* bar, the claim is procedurally defaulted.

The claim is also procedurally defaulted in light of the California Supreme Court's citation to *In re Lindley*, 29 Cal. 2d at 723. In *Lindley*, the California Supreme Court held that a habeas petitioner may not raise claims of insufficient evidence; rather, such claims must be raised on appeal. *Id*. at 723. The Ninth Circuit has recognized that *Lindley* is an independent state ground that is regularly applied in California. *Carter v. Giurbino*, 385 F.3d 1194, 1197-98 (9th Cir. 2004). The bar against raising sufficiency claims on habeas corpus is both independent and adequate. *See Bennett v. Mueller*, 322 F.3d 573, 586 (9th Cir. 2003).

Because Petitioner did not raise on appeal the instant claim challenging the sufficiency of the evidence, the state procedural bar forecloses federal review of

this claim. Petitioner fails to show cause for the default and prejudice resulting from this record-based claim, or a fundamental miscarriage of justice. Therefore, the claim is procedurally defaulted under *Lindley*.

B. The Claim is Barred by § 2254(d)

Furthermore, the claim is barred by § 2254(d). It is well established that evidence is sufficient to support a conviction if, viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. at 319; *accord McDaniel v. Brown*, 558 U.S. 120, 133, 130 S. Ct. 665, 175 L. Ed. 2d 582 (2010) (per curiam); *see also In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged). Under *Jackson*, the only question to be asked about a jury's finding was whether it was "so insupportable as to fall below the threshold of bare rationality." *Coleman v. Johnson*, 132 S. Ct. 2060, 2065, 182 L. Ed. 2d 978 (2012) (per curiam). The same standard is used by California courts in determining the sufficiency of evidence. *See People v. Johnson*, 26 Cal. 3d 557, 575-78, 162 Cal. Rptr. 431 (1980).

Under § 2254(d)(1), the issue is whether the state court's decision reflected an unreasonable application of *Jackson* and *Winship* to the facts of a particular case. *Emery v. Clark*, 643 F.3d 1210, 1213-14 (9th Cir. 2011); *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005). *Jackson* claims "face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference." *Coleman v. Johnson*, 132 S. Ct. at 2062; *Juan H. v. Allen*, 408 F.3d at 1275 (acknowledging the deference owed to the trier of fact and, correspondingly, the sharply limited nature of constitutional sufficiency review).

Petitioner contends that there was insufficient evidence to support the rape conviction, rape felony murder conviction, and rape special circumstance because

there was insufficient evidence that Petitioner raped Mrs. Miller. The California Supreme Court reasonably could have rejected Petitioner's claim. The evidence showed that Petitioner had sexual intercourse with Mrs. Miller. DNA testing proved that Petitioner's semen was inside of Mrs. Miller's vagina. (20RT at 3129.) The evidence also showed that the sexual intercourse was not consensual. When Mrs. Miller's body was discovered, her arms and legs were bound and she was gagged. (17RT at 2684-85.) Further, Petitioner testified that he and Mrs. Miller were fighting, that he stabbed her, and that he must have had sexual intercourse with her, even though he had no memory of it. (22RT at 3330-36.) During his closing argument in the guilt phase, Petitioner's attorney conceded that Petitioner raped Mrs. Miller. (26RT at 3927.) This evidence was more than sufficient to establish that Petitioner raped Mrs. Miller.

Therefore, Claim Nine is barred by § 2254(d).

X. PART OF CLAIM TEN IS PROCEDURALLY DEFAULTED; THE ENTIRE CLAIM IS BARRED BY § 2254(D)

In Claim Ten, Petitioner contends that inflammatory propensity evidence was erroneously admitted during the guilt phase of his trial, the trial court failed to properly instruct the jury on the limited purpose of the evidence, trial counsel acted unreasonably with regard to the evidence, and the prosecutor committed misconduct with regard to the evidence. (Pet. at 144-54.) As explained below, part of this claim is procedurally defaulted. Further, the entire claim is barred by § 2254(d).

A. Admission of Prior Crimes Evidence

Prior to trial, the prosecutor sought to admit evidence relating to Petitioner's prior rape of Doretha Harris in 1985. (1 Supp II CT at 1-62; 3 Supp II CT at 606-09.) Petitioner opposed the motion. (3 Supp. II CT at 610-28.) A hearing was held in which the trial court ruled that the evidence was admissible under California Evidence Code section 1101(b) to prove identity, common plan or design, and

intent. (1RT at 688.) However, as to the admissibility of the evidence under California Evidence Code section 352, which permits the exclusion of evidence if its probative value is substantially outweighed by the danger of undue prejudice, the trial court stated that it was deferring its ruling until it heard the evidence in the case. (1RT at 688.) In a later pretrial proceeding, Petitioner's attorney asked the trial court to reconsider its ruling regarding the evidence. The court explained that it had not yet ruled because it was waiting to hear the prosecution's evidence. Petitioner's attorney then withdrew his objection to the evidence. (2RT at 723-25.) When a new judge took over the case (Judge Ferns), Petitioner's attorney renewed his objection to the prior crimes evidence. (13RT at 2349.) The judge said that he could not make a ruling until he heard the prosecution's evidence. (14RT at 2376-77, 2379, 2382.) Petitioner's attorney again withdrew his objection to the evidence. (14RT at 2382-83.) The prosecutor thereafter introduced the evidence relating to Petitioner's prior rape of Doretha Harris. (20RT at 3146-53, 3160-74.)

1. The Claim is Procedurally Defaulted

Petitioner's claim that the prior crimes evidence was erroneously admitted is procedurally defaulted. Petitioner raised this claim on appeal in the California Supreme Court. (NOL B1 at 62-79.) In its reasoned opinion on appeal, the California Supreme Court found that Petitioner had waived the claim by expressly withdrawing his objection to the evidence at trial. (NOL B4; *People v. Jones*, 29 Cal. 4th at 1255.)

A classic example of a procedural default barring federal consideration of an issue is failure to object at trial. *See Wainwright v. Sykes*, 433 U.S. 72, 86-87, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977) (Supreme Court held that the failure to object at trial to the admission of an inculpatory statement precluded a federal court from entertaining in a habeas proceeding the claim that the statement was involuntary); *Paulino v. Castro*, 371 F.3d 1083, 1092-93 (9th Cir. 2004) (California Court of Appeal's finding that instructional error claim was waived procedurally barred

claim in federal habeas review, given petitioner's failure to allege that California's contemporary-objection rule is unclear, inconsistently applied, or not well-established); *Vansickel v. White*, 166 F.3d 953, 957 (9th Cir. 1999) (failure to object in the trial court to denial of defendant's statutory allotment of peremptory challenges procedurally barred claim); *Bonin v. Calderon*, 59 F.3d at 842-43 (procedural bar found where California Supreme Court concluded that defendant had failed to raise properly any objection during trial). The failure to object is a state procedural ground that is both independent and adequate, and is also consistently applied by California courts. *People v. Cleveland*, 32 Cal. 4th 704, 736, 11 Cal. Rptr. 3d 236 (2004) ("The issue is not cognizable on appeal because defendants did not ask the court to dismiss the venire[;][d]efendants cannot proceed with the jury selection before this same panel without objection, gamble on an acquittal, then, after they are convicted, claim for the first time the panel was tainted"); *People v. Medina*, 11 Cal. 4th 694, 743-44, 47 Cal. Rptr. 2d 165 (1995); *People v. Saunders*, 5 Cal. 4th 580, 590, 20 Cal Rptr. 2d 638 (1993) ("'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' [Citation.]").

Here, the California Supreme Court found that Petitioner's claim that the prior crimes evidence was erroneously admitted was forfeited because Petitioner withdrew his objection to the evidence at trial. *People v. Jones*, 29 Cal. 4th at 1255. The procedural bar resulting from Petitioner's ultimate decision not to object to the evidence precludes federal relief in this case. *See Paulino v. Castro*, 371 F.3d at 1092-93. Petitioner fails to show cause for the default and prejudice resulting from

it, or a fundamental miscarriage of justice.[30] Therefore, the claim is procedurally defaulted.

2. The Claim is Barred by § 2254(d)

Furthermore, the claim is barred by § 2254(d). In his first habeas corpus petition in the California Supreme Court, Petitioner claimed that the admission of the prior crimes evidence violated his constitutional rights. (NOL C1 at 54-65.) The California Supreme Court summarily rejected the claim on the merits in its order denying the petition. (NOL C7.)

The California Supreme Court's rejection of Petitioner's constitutional challenge to the admission of the prior crimes evidence was reasonable. The erroneous admission of evidence warrants habeas relief only when it results in the denial of a fundamentally fair trial in violation of due process. *See Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). In *Holley v. Yarborough*, 568 F.3d 1091 (9th Cir. 2009), the Ninth Circuit Court of Appeals explained that the erroneous admission of evidence will generally not entitle a petitioner to habeas corpus relief under § 2254(d):

> Under AEDPA, even clearly erroneous admissions of evidence that render a trial fundamentally unfair may not permit the grant of federal habeas corpus relief if not forbidden by "clearly established Federal law," as laid out by the Supreme Court. 28 U.S.C. § 2254(d). In cases where the Supreme Court has not adequately addressed a claim, this court cannot use its own precedent to find a state court ruling unreasonable.
>
> The Supreme Court has made very few rulings regarding the admission of evidence as a violation of due process. Although the Court has been clear that a writ should be issued when constitutional errors

[30] As for Petitioner's claim that trial counsel rendered ineffective assistance for withdrawing his objection to the prior crimes evidence (Pet. at 152), the claim fails for the reasons discussed below, and does not establish cause for the default.

> have rendered the trial fundamentally unfair, . . . it has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ. Absent such "clearly established Federal law," we cannot conclude that the state court's ruling was an "unreasonable application." Under the strict standards of AEDPA, we are therefore without power to issue the writ . . . .

Id. at 1101 (citations and footnote omitted).

In *Larson v. Palmateer*, 515 F.3d 1057 (9th Cir. 2008), the Ninth Circuit Court of Appeals determined that habeas relief was barred on a claim that the admission of prior crimes evidence violated the defendant's due process rights:

> Our review of evidentiary rulings is confined to "determining whether the admission of evidence rendered the trial so fundamentally unfair as to violate due process." The Supreme Court has expressly reserved the question of whether using evidence of the defendant's past crimes to show that he has a propensity for criminal activity could ever violate due process.[31] Because the Court has "expressly left this issue an 'open question,' " the state court did not unreasonably apply clearly established federal law in determining that the admission of evidence of Larson's criminal history did not violate due process.

Id. at 1066 (citations omitted). Because the Supreme Court has never held that the admission of prior crimes evidence to show propensity violates a defendant's due process rights, the California Supreme Court's rejection of Petitioner's claim was reasonable.

[31] In *Estelle v. McGuire*, 502 U.S. at 75 n.5, the Supreme Court stated, "we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime."

Moreover, due process is not violated by the admission of evidence if there are permissible inferences that the jury may draw from the evidence. *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991). Here, there were several permissible inferences the jury could draw from the prior crimes evidence. For example, the jury could have determined that the evidence showed a common scheme or plan by Petitioner to bind and rape his girlfriend's mothers. The jury also could have inferred that Petitioner intended to rape Mrs. Miller since he had previously intended to rape Mrs. Harris. Because there were permissible inferences from the evidence, there was no due process violation. *See Boyde v. Brown*, 404 F.3d 1159, 1172-73 (9th Cir. 2005) (finding it constitutionally permissible to admit prior crimes evidence to show modus operandi). Accordingly, the California Supreme Court reasonably rejected Petitioner's claim.

B. Instruction on Prior Crimes Evidence

Petitioner contends that the trial court did not properly instruct the jury on the limited purpose for which the prior crimes evidence was admitted. (Pet. at 151.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 63-64.) The California Supreme Court summarily rejected the claim on the merits in its order denying the petition. (NOL C7.)

The California Supreme Court's rejection of Petitioner's constitutional challenge to the prior crimes instruction was reasonable. To obtain federal habeas relief on a claim of instructional error, a petitioner must show that the instructional error so infected the entire trial that the resulting conviction violates due process. *Estelle v. McGuire*, 502 U.S. at 72. The question is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution. *Id*.

The prior crimes instruction given at Petitioner's trial stated the following:

> Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial. [¶]

> Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. [¶] Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show: [¶] The existence of the intent which is a necessary element of the crime charged; [¶] The identity of the person who committed the crime, if any, of which the defendant is accused; [¶] A motive for the commission of the crime charged; [¶] The crime charged is a part of a common scheme or plan. [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.

(2CT at 270.) Petitioner contends that the instruction was defective because it failed to prevent the jury from drawing improper propensity inferences from the evidence. (Pet. at 151.) Not so. The instruction expressly told the jury that the prior crimes evidence could not be considered to prove bad character or disposition. Therefore, the California Supreme Court reasonably determined that the instruction did not violate due process.

C. Waiver of Objection to Prior Crimes Evidence

Petitioner contends that trial counsel rendered ineffective by withdrawing his objection to the prior crimes evidence. (Pet. at 152.) The California Supreme Court rejected the claim in its reasoned opinion on appeal. (NOL B4; *People v. Jones*, 29 Cal. 4th at 1255.)

The California Supreme Court's rejection of Petitioner's claim was reasonable. The record shows that Petitioner's attorney had a tactical reason for withdrawing his objection to the prior crimes evidence. Counsel told the trial court that he had discussed the matter extensively with Petitioner and decided to withdraw his objection to the prior crimes evidence because if the evidence were

admitted for the first time during the penalty phase it would have a "devastating effect on my chances to convince [the jury] to have life without parole instead of death." (2RT at 724-25.) The California Supreme Court acknowledged counsel's tactical reason for withdrawing his objection to the prior crimes evidence and refused to """second-guess reasonable, if difficult, tactical decision in the harsh light of hindsight."""" *People v. Jones*, 29 Cal. 4th at 1255. The California Supreme Court's rejection of Petitioner's ineffective assistance of counsel claim was reasonable. *See Strickland*, 466 U.S. at 689 (counsel has wide latitude in making tactical decisions and judicial scrutiny of counsel's performance should be highly deferential).

D. Prosecutorial Misconduct

Petitioner contends that the prosecutor committed misconduct with respect to the prior crimes evidence. He contends that the prosecutor encouraged the jury to infer from the prior crimes evidence that Petitioner specifically intended to rape Mrs. Miller. (Pet. at 152-53.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 61-63.) The California Supreme Court summarily rejected the claim on the merits in its order denying the petition. (NOL C7.)

The California Supreme Court's rejection of Petitioner's claim was reasonable. To establish a constitutional violation based on prosecutorial misconduct, it must be shown that a prosecutor's improper conduct "so infected the trial with unfairness as to make the resultant conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986). As determined by the trial court in this case, the prior crimes evidence was admissible under California Evidence Code section 1101(b) to prove intent. (1RT at 688.) Because the evidence was admissible to prove intent, and because the jury was instructed that it could consider the evidence on the issue of intent, the prosecutor's comments encouraging the jury to infer from the evidence that

Petitioner specifically intended to rape Mrs. Miller were proper and did not constitute misconduct. *See Menendez v. Terhune*, 422 F.3d 1012, 1037 (9th Cir. 2005) (where there was no error in prosecutor's argument, state court properly rejected Petitioner's prosecutorial misconduct claim). Furthermore, the California Supreme Court reasonably could have determined that any improper comments did not affect the fairness of the trial since the jury was instructed that it had to determine the facts from the evidence received at trial and not from any other source (2CT at 254) and that the statements of the attorney were not evidence (2CT at 257). *See Weeks v. Angelone*, 528 U.S. at 234 ("A jury is presumed to follow its instructions").

Therefore, Claim Ten is barred by § 2254(d).

XI. CLAIM ELEVEN IS BARRED BY § 2254(D)

In Claim Eleven, Petitioner contends that the trial court violated his right to present a defense when it refused to permit him to testify about his mental health history at the guilt phase of the trial. (Pet. at 154-61.) Petitioner raised this claim in his opening brief on appeal in the California Supreme Court. (NOL B1 at 109-25.) The California Supreme Court rejected the claim on the merits in its reasoned opinion on appeal. (NOL B4; *People v. Jones*, 29 Cal. 4th at 1252-53.) As explained below, the claim is barred by § 2254(d).

A. The Relevant Proceedings

During the guilt phase of the trial, Petitioner's attorney sought to introduce, by way of Petitioner's testimony, extensive evidence concerning Petitioner's family and personal history that counsel described as "the incidents in Petitioner's life which gave rise to" the stabbing death of Mrs. Miller. (23RT at 3407.) Counsel's offer of proof consisted of a laundry list of items that included "black[]outs" and "hearing voices." (23RT at 3407-09.) Counsel argued that the evidence was relevant to the issue of specific intent to rape. (23RT at 3409.) The trial court asked counsel whether he intended to call an expert to testify on the matter.

Counsel said no. Based on counsel's representation in this regard, the trial court excluded the evidence. (23RT at 3413-14.)

On appeal, Petitioner claimed that the trial court violated his right to present a complete defense when it precluded him from testifying about his history of hearing voices and experiencing flashbacks and blackouts. Petitioner argued that the evidence was necessary to show that he lacked the specific intent to rape Mrs. Miller. He argued that the testimony that he had experienced blackouts and auditory hallucinations would have shown that his testimony that he blacked out when he attacked Mrs. Miller was not fabricated. (NOL B1 at 109-25.) The California Supreme Court found that the trial court did not err in excluding the testimony. It determined that testimony that Petitioner had a history of hearing voices was irrelevant to the question whether he specifically intended to rape Mrs. Miller because Petitioner testified he heard voices *after* he raped and killed Mrs. Miller, not before. The California Supreme Court also found that any error was harmless. It observed that Dr. Thomas, the mental health expert who testified at the penalty phase about Petitioner's mental condition, did not testify that Petitioner had any history of flashbacks and blackouts, and thus Petitioner's testimony about alleged flashbacks and blackouts would have been a recent fabrication. *People v. Jones*, 29 Cal. 4th at 1252-53.

B. The California Supreme Court Reasonably Rejected the Claim

The California Supreme Court did not explicitly address Petitioner's constitutional claim, namely, that the exclusion of Petitioner's testimony that he had a history of hearing voices and experiencing flashbacks and blackouts violated his constitutional right to present a defense. However, it is presumed that the California Supreme Court implicitly denied the constitutional claim on the merits. *See Johnson v. Williams*, __ U.S. __, 133 S. Ct. 1088, 1091, __ L.Ed.2d __ (2013) (when defendant raises a federal claim in state court, and state court rules against

defendant and issues an opinion that does not expressly address the federal claim, it is presumed the state court adjudicated the federal claim on the merits). The California Supreme Court's denial of the claim was reasonable.

A criminal defendant has a constitutional right to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a 'meaningful opportunity to present a complete defense'") (citations omitted). However, the right to present a complete defense is not unlimited. "Rather, the right itself is only implicated when the evidence the defendant seeks to admit is 'relevant and material, and . . . vital to the defense.'" *Jackson v. Nevada*, 688 F.3d 1091, 1096 (9th Cir. 2012) (quoting *Washington v. Texas*, 388 U.S. 14, 16, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)). The Ninth Circuit Court of Appeals has explained that a constitutional violation will occur only where the excluded defense evidence "was necessary for the defendant to refute a critical element of the prosecution's case" or "was essential to the defendant's alternative theory of the case." *United States v. Pineda-Doval*, 614 F.3d 1019, 1032-33 (9th Cir. 2010).

Here, Petitioner's right to present a complete defense was not violated because the excluded evidence was not vital to Petitioner's defense or essential for Petitioner to defend against the prosecution's case. Petitioner's defense was that he blacked out at the time he attacked Mrs. Miller, had no memory of raping and killing her, and lacked the intent to rape. Petitioner presented this defense through his testimony, describing his mental state at the time of the crime. By providing testimony about the incident and his mental state when he attacked Mrs. Miller, Petitioner was able to present his defense.

The excluded testimony would have had little relevance to Petitioner's defense. Petitioner's testimony that he heard voices or experienced blackouts or

flashbacks at *other* times in his life would have had little bearing on his mental state *at the time of the crime*. Further, the testimony would have had little relevance to Petitioner's credibility since the testimony would have come from *Petitioner himself*. If the jury disbelieved Petitioner's uncorroborated testimony that he blacked out at the time of the crime, it presumably also would have disbelieved his uncorroborated testimony that he had a history of blacking out. Therefore, the exclusion of the testimony did not deprive Petitioner of his right to present a defense.

Accordingly, Claim Eleven is barred by § 2254(d).

XII. PART OF CLAIM TWELVE IS PROCEDURALLY DEFAULTED; THE ENTIRE CLAIM IS BARRED BY § 2254(D)

In Claim Twelve, Petitioner claims federal constitutional violations on the ground that the guilt phase jury instructions and guilt phase verdict forms were "conflicting, confusing, inaccurate, and incomplete." (Pet. at 161-73.) Part of this claim is procedurally defaulted. Further, the entire claim is barred by § 2254(d).

A. Instruction on Prior Crimes Evidence

Petitioner contends that the trial court did not properly instruct the jury on the limited purpose for which the prior crimes evidence was admitted. (Pet. at 162-63.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 63-64.) The California Supreme Court summarily rejected the claim on the merits in its order denying the petition. (NOL C7.) As discussed above (Arg. X), the California Supreme Court's rejection of Petitioner's constitutional challenge to the prior crimes instruction was reasonable.

B. Instruction on Intent to Rape While Victim is Alive

Petitioner contends that the trial court erred in not instructing the jury that the perpetrator must harbor the intent to rape while the victim is alive in order for the crime of rape to occur. (Pet. at 163-64.) Petitioner raised this claim in his opening brief on appeal in the California Supreme Court. (NOL B1 at 154.) The California

Supreme Court rejected the claim on the merits in its reasoned opinion on appeal. (NOL B4; *People v. Jones*, 29 Cal. 4th at 1258-59.)

The California Supreme Court's rejection of Petitioner's claim was reasonable. To obtain federal habeas relief on a claim of instructional error, a petitioner must show that the instructional error so infected the entire trial that the resulting conviction violates due process. *Estelle v. McGuire*, 502 U.S. at 72. When the claim is that the trial court erroneously omitted an instruction, the petitioner's burden is "especially heavy" because "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Henderson v. Kibbe*, 431 U.S. 145, 155, 97 S. Ct. 1730, 52 L. Ed 2d 203 (1977). In rejecting Petitioner's claim that the trial court erred in not instructing the jury that the specific intent to rape must occur before the act of violence, the California Supreme Court observed that the trial court gave the standard jury instruction on felony murder which stated that a killing "which occurs during the commission or attempted commission of the crime as a direct causal result of Burglary, Rape and/or Robbery is murder of the first degree when the perpetrator had the specific intent to commit such crime." (2CT at 291.) The California Supreme Court concluded that "[a] reasonable juror would necessarily have understood from this instruction that defendant was guilty of rape felony murder only if the intent to rape was formed before the murder occurred." *People v. Jones*, 29 Cal. 4th at 1259. The California Supreme Court's conclusion in this regard was reasonable. Further, the record shows that the jury was instructed that the crime of rape had to be accomplished against the victim's will. (2CT at 314.) The jury also would have understood from this instruction that the intent to rape had to exist at the time the victim was alive. Therefore, the California Supreme Court's rejection of Petitioner's claim was reasonable.

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C. Instruction on Specific Intent to Rape

Petitioner contends that the trial court failed to adequately instruct the jury that it had to find a specific intent to rape to find Petitioner guilty of felony murder rape or to find the felony murder rape special circumstance true. (Pet. at 164-66.) Petitioner raised this claim in his opening brief on appeal in the California Supreme Court. (NOL B1 at 149.) The California Supreme Court rejected the claim on the merits in its reasoned opinion on appeal. (NOL B4; *People v. Jones*, 29 Cal. 4th at 1257-58.)

The California Supreme Court's rejection of the claim was reasonable. To prevail on such a claim of instructional error, a petitioner must show both that the instruction was ambiguous and that there was "a reasonable likelihood" that the jury applied the instruction in a way that relieved the prosecution of its burden of proving every element of the crime beyond a reasonable doubt. *Waddington v. Sarausad*, 555 U.S. 179, 190-91, 129 S. Ct. 823, 172 L. Ed. 2d 532 (2009). In making such a determination, the instructions are considered as a whole and in the context of the trial record. *Id*. at 191. The question is whether the instructional error so infected the entire trial that the resulting conviction violates due process. *Estelle v. McGuire*, 502 U.S. at 72.

The California Supreme Court observed that the jury was instructed with CALJIC No. 8.21, which required the jury to find that Petitioner had the specific intent to rape for felony murder rape. The instruction stated the following:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of a crime as a direct causal result of Burglary, Rape and/or Robbery is murder of the first degree when the perpetrator had the specific intent to commit such crime. [¶] The specific intent to commit Burglary, Rape and/or Robbery and the commission or attempted commission of such crime must be proved beyond a reasonable doubt.

(2CT at 291.) The California Supreme Court also noted that the specific intent requirement was reinforced by the instruction on voluntary intoxication and specific intent, which stated, in pertinent part, the following: "In order to find the defendant guilty of First Degree Murder on a Felony Murder theory, of which the defendant is accused in Count[ ] 1, a necessary element is the existence in the mind of the defendant of the specific intent to commit the crime of Burglary, Rape and/or Robbery." (2CT at 285.)

Further, the California Supreme Court observed that both the prosecutor and defense counsel repeatedly emphasized during their arguments to the jury that felony murder rape required a specific intent to rape. (*See* 26RT at 3891-92, 3926-28; 27RT at 3965.) The California Supreme Court also found that a question asked by the jury showed that it understood the specific intent requirement. *People v. Jones*, 29 Cal. 4th at 1258. The jury asked, "To find the defendant had the specific intent to commit rape, is it necessary to believe he had that intent when he entered the house? [CALJIC No.] 8.21." (1CT at 249.) In light of the instructions and the trial record as a whole, the California Supreme Court reasonably determined that the jury was adequately instructed that it had to find a specific intent to rape for felony murder rape.

D. Instruction on Impaired Mental State and Intoxication

Petitioner contends that the trial court failed to instruct the jury that Petitioner's impaired mental state and intoxication could negate the specific intent to rape. (Pet. at 166-67.) Petitioner raised this claim in his opening brief on appeal in the California Supreme Court. (NOL B1 at 147-49.) The California Supreme Court rejected the claim on the merits in its reasoned opinion on appeal. (NOL B4; *People v. Jones*, 29 Cal. 4th at 1258.)

The California Supreme Court's rejection of the claim was reasonable. The California Supreme Court noted that the jury was instructed that felony murder rape required the specific intent to rape, and that where specific intent is an essential

element of a crime, the defendant's voluntary intoxication or mental disorder should be considered in determining whether he possessed the requisite specific intent.[32] The California Supreme Court also observed that the prosecutor emphasized in his argument to the jury that voluntary intoxication and mental disease could negate the specific intent for felony murder rape (*see* 26RT at 3903; 27RT at 3973). *People v. Jones*, 29 Cal. 4th at 1258. In light of the instructions and the prosecutor's argument, the California Supreme Court reasonably rejected Petitioner's claim that the jury was not properly instructed that voluntary intoxication and mental state could negate the specific intent to rape.

E. Instruction on Interpreting Evidence of Specific Intent to Rape

Petitioner contends that the trial court erred in not instructing the jury that if it found Petitioner possessed the specific intent to rape, and there were two reasonable interpretations of the evidence of specific intent to rape, it must adopt the interpretation that points to the absence of specific intent to rape. (Pet. at 167-68.) Petitioner raised this claim in his opening brief on appeal in the California Supreme Court. (NOL B1 at 154.) Although the California Supreme Court did not expressly address the claim in its opinion on appeal, it implicitly rejected the claim when it affirmed the judgment on appeal. (NOL B4.) *People v. Jones*, 29 Cal. 4th 1229; *see Johnson v. Williams*, 133 S. Ct. at 1091.

The California Supreme Court's rejection of Petitioner's claim was reasonable. The record shows that the jury received an instruction on the sufficiency of circumstantial evidence generally, which stated, in pertinent part, "if

[32] In pertinent part, the jury was instructed: [W]here a specific intent or mental state is an essential element of a crime . . . you should consider the defendant's voluntary intoxication or mental disorder in your determination of whether the defendant possessed the required specific intent or mental state at the time of the commission of the alleged crime" (2CT at 284) and "If the evidence shows a defendant was intoxicated or suffered from a mental disorder at the time of the alleged crime, you should consider that fact in determining whether or not the defendant had such specific intent and/or mental state" (2CT at 285).

the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt." (2CT at 260.) Although the instruction did not specifically state that it applied to circumstantial evidence of specific intent to rape, it is reasonable to presume that the jury understood it applied to such evidence. Moreover, even if the jury did not understand that the instruction applied to circumstantial evidence of specific intent to rape, the jury was instructed that specific intent to rape had to be proven beyond a reasonable doubt. (2CT at 291.) In light of this instruction, Petitioner cannot show that the alleged instructional error so infected the entire trial that the resulting conviction violates due process. *Estelle v. McGuire*, 502 U.S. at 72. Therefore, the California Supreme Court reasonably rejected this claim of instructional error.

F. Verdict Forms

Petitioner contends that the guilt phase verdict forms were incomplete because they failed to provide for the special circumstance allegations. (Pet. at 168-72.) The claim is procedurally defaulted and is barred by § 2254(d).

1. The Claim is Procedurally Defaulted

Petitioner's claim that the guilt phase verdict forms were incomplete is procedurally defaulted. Petitioner raised this claim on appeal in the California Supreme Court. (NOL B1 at 165-72.) In its reasoned opinion on appeal, the California Supreme Court found that Petitioner had waived the claim by failing to object at trial to the verdict forms. (NOL B4; *People v. Jones*, 29 Cal. 4th at 1259.) As discussed above (Arg. X), the failure to object at trial is a procedural default that is both independent and adequate and bars federal consideration of an issue. Petitioner fails to show cause for the default and prejudice resulting from it, or a

fundamental miscarriage of justice.[33] Therefore, the claim is procedurally defaulted.[34]

2. The Claim is Barred by § 2254(d)

Furthermore, the claim is barred by § 2254(d). On the verdict form for the murder charge, the jury found true the allegation that "[t]he crime of murder of the first degree of which you have found the defendant guilty was a murder committed in the commission of RAPE." (2CT at 365.) On appeal in the California Supreme Court, Petitioner argued that it was unclear whether the jury was finding Petitioner guilty of first degree felony murder rape or was finding the felony murder rape special circumstance true. (NOL B1 at 165-72.) In addressing the claim, the California Supreme Court cited California law that provides that technical defects in a verdict may be disregarded if the jury's intent to convict of a specified offense within the charges is unmistakably clear, and the accused's substantial rights suffered no prejudice. *People v. Jones*, 29 Cal. 4th at 1259. The California Supreme Court then determined that the jury's intent to find the felony murder rape special circumstance true was unmistakably clear because: the jury was instructed that if it found Petitioner guilty of first degree murder, it then had to determine whether the special circumstances were true, and needed to "state your special finding as to whether this special circumstance is or is not true on the form that will

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[33] As for Petitioner's claim that trial counsel rendered ineffective assistance with respect to the verdict forms (Pet. at 79-81), the claim of ineffective assistance fails for the reasons discussed above (Arg. I), and does not establish cause for the default.

[34] Although the California Supreme Court also rejected the claim on the merits (*People v. Jones*, 29 Cal. 4th at 1259-60), its alternative holding in this regard does not affect the applicability of the procedural default. *See Sochor v. Florida*, 504 U.S. 527, 534, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992) (United States Supreme Court found itself to be without authority to address jury instruction claims where the Supreme Court of Florida noted that the claims were not preserved for appeal because defendant had failed to object to instructions at trial, and in any event had no merit); *Towery v. Schriro*, 641 F.3d 300, 312 n.3 (9th Cir. 2010) (federal habeas relief barred where claim was subject to independent and adequate state procedural default rule; result was "unaffected by the fact that [the state court] also addressed the merits of the claim").

be supplied" (2CT 307); in his closing argument to the jury, the prosecutor reiterated that the jury was to indicate on the verdict form whether it found the special circumstance allegations true or not true (26RT at 3894); and the jury's penalty phase verdict stated that it found the special circumstance true (2CT at 429). *Id*.

The California Supreme Court also found that any error concerning the verdict form was harmless beyond a reasonable doubt. It noted that, once the jury found that Petitioner had committed a murder during the commission of a rape, the only additional finding it needed to find the special circumstance true was that Petitioner had an independent purpose for the commission of the rape, i.e., that the rape was not "merely incidental" to the murder. (*See* 2CT at 308.) The California Supreme Court then found that the evidence was overwhelming that Petitioner had an independent purpose to rape Mrs. Miller. *People v. Jones*, 29 Cal. 4th at 1260.

The California Supreme Court reasonably rejected Petitioner's claim. First, it reasonably determined that the jury's intent to find the special circumstance true was unmistakably clear in light of the instructions, the prosecutor's closing argument, and the jury's penalty phase verdict. Because there is no Supreme Court precedent that precludes a court from reasonably interpreting a jury's verdict when it contains a technical defect or is ambiguous, the California Supreme Court's rejection of the claim was reasonable. Second, the California Supreme Court reasonably determined that any error was harmless beyond a reasonable doubt. *See Mitchell v. Esparza*, 540 U.S. 12, 18, 124 S. Ct. 7, 157 L. Ed. 2d 263 (2003) (per curiam) (determining that state court's application of harmless error review was not objectively unreasonable); *Towery v. Schriro*, 641 F.3d 300, 307 (9th Cir. 2010) ("When a state court has found a constitutional error to be harmless beyond a reasonable doubt, a federal court may not grant habeas relief unless the state court's determination is objectively unreasonable"); *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Once the jury found that Petitioner had

committed a murder during the commission of a rape, the only additional finding it needed to make to find the special circumstance true was that the rape was not "merely incidental" to the murder. (*See* 2CT at 308.) In light of the overwhelming evidence that Petitioner had an independent purpose to rape Mrs. Miller, including evidence that he tied her hands and feet, had sexual intercourse with her, and ejaculated inside her, and including evidence that he derived independent pleasure from raping his girlfriends' mothers, the California Supreme Court reasonably determined any error in the verdict forms was harmless.

Accordingly, Claim Twelve is barred by § 2254(d).

XIII. CLAIM THIRTEEN IS BARRED BY § 2254(D)

In Claim Thirteen, Petitioner contends that unreliable and prejudicial DNA evidence was erroneously admitted at his trial. (Pet. at 173-96.) As explained below, the claim is barred by § 2254(d).

A. The Relevant Proceedings

During pretrial proceedings, the prosecutor sought to admit DNA evidence to establish that the semen found in Mrs. Miller's vagina came from Petitioner. (RT at 532.) The parties litigated whether the DNA evidence satisfied the foundational requirements for the admission of new scientific evidence under the *Kelly* rule.[35] (1 Supp II CT at 106-23, 134A-134O.) The trial court held hearings on the matter, took judicial notice of various materials submitted by the prosecution, and concluded that the DNA evidence satisfied *Kelly* and was admissible. (1RT at 556-79, 587-613, 628-59, 665.) The DNA evidence was then admitted at trial. (20RT at 3092-3130.)

[35] As discussed in Argument I, the *Kelly* rule requires the party seeking to admit the evidence to show that the reliability of the new technique has gained general acceptance in the relevant scientific community, that the expert testifying to that effect is qualified to do so, and that correct scientific procedures were used. *People v. Roybal*, 19 Cal. 4th at 505.

On appeal, Petitioner claimed that the trial court made various procedural errors in making its *Kelly* determination. (NOL B1 at 80-95.) The California Supreme Court rejected the claim on the merits in its reasoned published opinion on appeal. It determined that the trial court's conclusion that the DNA procedures satisfied the *Kelly* rule was correct. It also determined that there were no procedural errors and/or that any alleged procedural errors were harmless. *People v. Jones*, 29 Cal. 4th at 1251-52.

In his first habeas corpus petition in the California Supreme Court, Petitioner argued that the trial court violated his constitutional rights in determining the admissibility of the DNA evidence, in concluding that the DNA evidence satisfied the *Kelly* rule, and in admitting unreliable and prejudicial DNA evidence. (NOL C1 at 20-53.) The California Supreme Court summarily rejected the claim on the merits in its order denying the petition. (NOL C7.)

B. The California Supreme Court Reasonably Rejected the Claim

The California Supreme Court reasonably rejected Petitioner's constitutional challenges to the DNA evidence. First, Petitioner's claim that the trial court committed procedural errors in determining the admissibility of the DNA evidence, and his claim that the trial court erred in concluding that the DNA evidence satisfied the *Kelly* rule, are not cognizable in these proceedings because they concern procedures for admitting evidence under state law. Mere errors of state law do not constitute a denial of due process. *Swarthout v. Cooke*, __ U.S. __, 131 S. Ct. 859, 863, 178 L. Ed. 2d 732 (2011). "'[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules.'" *Estelle v. McGuire*, 502 U.S. at 72, quoting *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6, 103 S. Ct. 843, 74 L. Ed. 2d 646 (1983). The admissibility of the DNA evidence under *Kelly* is a purely state law question that is not cognizable in these proceedings. *Windham v. Merkle*, 163 F.3d 1092, 1103 (9th

Cir. 1998) ("We have no authority to review alleged violations of a state's evidentiary rules in a federal habeas proceeding).[36]

Furthermore, Petitioner's claim that the DNA evidence was erroneously admitted does not entitle him to habeas corpus relief. The erroneous admission of evidence warrants habeas relief only when it results in the denial of a fundamentally fair trial in violation of due process. *See Estelle v. McGuire*, 502 U.S. at 67-68. The Supreme Court has never held that the erroneous admission of DNA evidence violates a defendant's due process rights. In addition, the jury could have permissibly inferred from the DNA evidence that Petitioner was the person who raped Mrs. Miller. *See Jammal v. Van de Kamp*, 926 F.2d at 920. Furthermore, Petitioner cannot possibly show that the admission of the DNA evidence rendered his trial fundamentally unfair. In light of Petitioner's concession that he raped Mrs. Miller, the DNA evidence identifying him as the contributor of the semen could not have affected the jury's verdict.

Accordingly, Claim Thirteen is barred by § 2254(d).

XIV. PART OF CLAIM FOURTEEN IS PROCEDURALLY DEFAULTED; THE ENTIRE CLAIM IS BARRED BY § 2254(D)

In Claim Fourteen, Petitioner contends that the prosecutor committed various acts of misconduct during the guilt and penalty phases of the trial. (Pet. at 196-207.) As explained below, portions of the claim are procedurally defaulted. In addition, the entire claim is barred by § 2254(d).

A. Vaginal Wound

In Claim Fourteen, subpart (2), Petitioner contends that the prosecutor falsely stated that Mrs. Miller suffered a knife wound to her vagina and then improperly

[36] The standards for the admissibility of scientific evidence under *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) apply to federal trials only and are not binding on the state courts. *See Kinder v. Bowersox*, 272 F.3d 532, 545 n.9 (8th Cir. 2001); *Milone v. Camp*, 22 F.3d 693, 702 n.9 (7th Cir. 1994).

argued that Mrs. Miller had been raped with a knife. (Pet. at 197-98.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 268-69 (paragraph 2 of Claim "H").) The California Supreme Court denied the claim on the ground that Petitioner had failed to raise it in the trial court, citing *In re Seaton*, 34 Cal. 4th 193, 17 Cal. Rptr. 3d 633 (2004). The California Supreme Court also summarily denied the claim on its merits. (NOL C7.)

1. The Claim is Procedurally Defaulted

The claim is procedurally defaulted. At trial, Petitioner never objected to the alleged prosecutorial misconduct. (*See* 17RT at 2804; 26RT at 3892.) *In re Seaton*, 34 Cal. 4th 193, stands for the proposition that the failure to object to an error at trial forfeits the claim of error when it is raised on habeas corpus. *Id*. at 197-201. As discussed above (Arg. X), the denial of a claim based on the failure to object at trial is a state procedural ground that is both independent and adequate and consistently applied by California courts. Petitioner fails to show cause for the default and prejudice resulting from it, or a fundamental miscarriage of justice.[37] Therefore, the claim is procedurally defaulted.

2. The Claim is Barred by § 2254(d)

Furthermore, the claim is barred by § 2254(d). To establish a constitutional violation based on prosecutorial misconduct, it must be shown that a prosecutor's improper conduct "so infected the trial with unfairness as to make the resultant conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986). "[I]t 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.'" *Id*. "[T]he touchstone

[37] To the extent Petitioner contends that trial counsel rendered ineffective assistance for not objecting to the alleged prosecutorial misconduct (Pet. at 207), the claim is conclusory and unsupported, as Petitioner does not discuss how counsel's performance was deficient or how he was prejudiced by counsel's alleged deficient performance. Therefore, the claim does not establish cause for the procedural default.

of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982).

Petitioner contends that the prosecutor committed misconduct by falsely stating that Mrs. Miller suffered a knife wound to her vagina and arguing that she had been raped with a knife. (Pet. at 197-98.) The California Supreme Court reasonably rejected the claim. At trial, the coroner testified that Mrs. Miller had a stab wound that penetrated her vagina. (17RT at 2797.) It was thus wholly proper for the prosecutor to describe the wound as a vaginal wound. (*See* 17RT at 2804.) Furthermore, the prosecutor never argued that Mrs. Miller had been raped with a knife. Instead, during his closing argument at the guilt phase, the prosecutor argued that Petitioner's use of knives to stab Mrs. Miller to death was part and parcel of the rape. It was in this context that the prosecutor argued that the killing "was a direct result of his rape with the knives . . . ." (26RT at 3892.) But even if the prosecutor had argued that Mrs. Miller was raped with a knife, it would not have rendered the trial fundamentally unfair since it was clear that the basis of the rape charge and rape special circumstance was Petitioner's forcible sexual intercourse with Mrs. Miller.

B. Wrist Injuries

In Claim Fourteen, subpart (3), Petitioner contends that the prosecutor elicited false testimony from the coroner about Mrs. Miller's wrist injuries and then falsely argued that the evidence showed sexual intercourse occurred before death. (Pet. at 198-200.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 267-68 (paragraph 1 of Claim "H").) The California Supreme Court denied the claim on the ground that Petitioner had failed to raise it in the trial court, citing *In re Seaton*, 34 Cal. 4th 193, 17 Cal. Rptr. 3d 633 (2004). The California Supreme Court also summarily denied the claim on its merits. (NOL C7.)

1. The Claim is Procedurally Defaulted

The claim is procedurally defaulted. At trial, Petitioner never objected to the alleged prosecutorial misconduct. (*See* 17RT at 2775-76.) The California Supreme Court denied Petitioner's claim because he failed to raise it in the trial court, citing *In re Seaton*. As discussed above (Arg. X), the denial of a claim based on the failure to object at trial is a state procedural ground that is both independent and adequate and consistently applied by California courts. Petitioner fails to show cause for the default and prejudice resulting from it, or a fundamental miscarriage of justice. Therefore, the claim is procedurally defaulted.

2. The Claim is Barred by § 2254(d)

Furthermore, the claim is barred by § 2254(d). Petitioner contends that the prosecutor committed misconduct by eliciting false testimony from the coroner about Mrs. Miller's wrist injuries and falsely arguing that the evidence showed sexual intercourse occurred before death. (Pet. at 198-200.) The California Supreme Court reasonably rejected the claim. At trial, the coroner testified that there was a bruising or abrasion on Mrs. Miller's left wrist that could have been caused by the bindings. (17RT at 2775-76.) Petitioner contends that this testimony was false because the coroner's autopsy report does not indicate there was bruising on Mrs. Miller's left wrist (Ex. 171 at 3038). (Pet. at 199.) But the fact the autopsy report does not indicate such bruising does not mean the coroner's testimony was false or the prosecutor knew it was false. The coroner may have simply forgotten to include it in his report. *See United States v. Croft*, 124 F.3d 1109, 1119 (9th Cir. 1997) ("The fact that a witness may have made an earlier inconsistent statement . . . does not establish that the testimony offered at trial was false"). Moreover, the prosecutor did not improperly use the evidence to establish that sexual intercourse occurred before death. Indeed, the issue whether sexual intercourse occurred before death was never seriously in dispute and was never a focus of the defense at trial.

Therefore, the California Supreme Court reasonably could have concluded that any alleged misconduct did not affect the fairness of the trial.

C. Barricade

In Claim Fourteen, subpart (4), Petitioner contends that the prosecutor falsely argued that Petitioner's barricade prevented law enforcement from entering the apartment. (Pet. at 200-01.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 270-71 (paragraph 4 of Claim "H").) The California Supreme Court found that the claim was barred by *In re Harris*, 5 Cal. 4th at 825 & n.3, 826-29, and *In re Dixon*, 41 Cal. 2d at 759, because was it not raised on appeal. The California Supreme Court also summarily denied the claim on its merits. (NOL C7.)

1. The Claim is Procedurally Defaulted

The California Supreme Court found that the claim was barred by *Harris* and *Dixon* because it was not raised on appeal. As discussed above (Arg. III), the *Dixon* bar -- that habeas corpus cannot serve as a substitute for an appeal -- is both independent and adequate. Petitioner fails to show cause for the default and prejudice resulting from it, or a fundamental miscarriage of justice. In light of the *Dixon* bar, the claim is procedurally defaulted.

2. The Claim is Barred by § 2254(d)

Furthermore, the claim is barred by § 2254(d). Petitioner contends that the prosecutor committed misconduct by falsely arguing that Petitioner's barricade prevented law enforcement from entering the apartment. (Pet. at 200-01.) The California Supreme Court reasonably rejected the claim. The evidence showed that Petitioner barricaded the front door of his apartment with a mattress, box spring, and stereo speakers, and barricaded the back door of his apartment with a washer and dryer. (16RT at 2585; 17RT at 2729.) Therefore, the prosecutor's argument that Petitioner had barricaded himself in the apartment (26RT at 3968) was properly based on the evidence. Furthermore, whether or not law enforcement was hindered

or prevented from entering the apartment because of the barricades was irrelevant to any issue in the case. Therefore, even assuming the prosecutor's comments were somehow improper, the California Supreme Court reasonably could have concluded that they did not affect the fairness of the trial.

D. Mental Health Expert

In Claim Fourteen, subpart (5), Petitioner contends that the prosecutor committed misconduct by commenting on Petitioner's failure to call a mental health expert at the guilt phase of the trial. (Pet. at 201.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 273 (paragraph 2 of Claim "I").) The California Supreme Court found that the claim was barred by *In re Harris*, 5 Cal. 4th at 825 & n.3, 826-29, and *In re Dixon*, 41 Cal. 2d at 759, because was it not raised on appeal. The California Supreme Court also summarily denied the claim on its merits. (NOL C7.)

1. The Claim is Procedurally Defaulted

The California Supreme Court found that the claim was barred by *Harris* and *Dixon* because it was not raised on appeal. As discussed above (Arg. III), the *Dixon* bar -- that habeas corpus cannot serve as a substitute for an appeal -- is both independent and adequate. Petitioner fails to show cause for the default and prejudice resulting from it, or a fundamental miscarriage of justice. In light of the *Dixon* bar, the claim is procedurally defaulted.

2. The Claim is Barred by § 2254(d)

Furthermore, the claim is barred by § 2254(d). Petitioner contends that the prosecutor committed misconduct by commenting on his failure to call a mental health expert at the guilt phase of the trial. (Pet. at 201.) The California Supreme Court reasonably rejected the claim. In *Griffin v. California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), the Supreme Court held that the Fifth Amendment forbids comment by a prosecutor on a criminal defendant's *failure to testify*. But the Supreme Court has never held that a prosecutor may not comment

on the defendant's failure to call witnesses. *See United States v. Castillo*, 866 F.2d 1071, 1083 (9th Cir. 1988) (a prosecutor may properly comment on a defendant's failure to present witnesses so long as it is not phrased to call attention to defendant's own failure to testify). At trial, Petitioner testified that he had a flashback to his childhood at the time of the crime and had no memory of raping and killing Mrs. Miller. (22RT at 3335-36.) During the prosecutor's guilt phase argument to the jury, the prosecutor commented on Petitioner's failure to call a mental health expert to support his testimony that he suffered from a mental disorder at the time of the crime. (26RT at 3905; 27RT at 3972.) Since the prosecutor commented on Petitioner's failure to call a witness rather than Petitioner's failure to testify, the prosecutor did not commit misconduct. Indeed, the prosecutor could not have improperly commented on Petitioner's failure to testify since he *did* testify. Furthermore, the evidence strongly suggested that Petitioner was fully aware of what he was doing when he bound, gagged, raped, and murdered Mrs. Miller. Therefore, the California Supreme Court reasonably could have concluded that the prosecutor's comments did not infect the trial with unfairness.

E. Special Circumstance

In Claim Fourteen, subpart (6), Petitioner contends that the prosecutor committed misconduct by mischaracterizing the intent element of the special circumstance. (Pet. at 201-02.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 273 (paragraph 3 of Claim "I").) The California Supreme Court found that the claim was barred by *In re Harris*, 5 Cal. 4th at 825 & n.3, 826-29, and *In re Dixon*, 41 Cal. 2d at 759, because was it not raised on appeal. The California Supreme Court also summarily denied the claim on its merits. (NOL C7.)

1. The Claim is Procedurally Defaulted

The California Supreme Court found that the claim was barred by *Harris* and *Dixon* because it was not raised on appeal. As discussed above (Arg. III), the *Dixon* bar -- that habeas corpus cannot serve as a substitute for an appeal -- is both independent and adequate. Petitioner fails to show cause for the default and prejudice resulting from it, or a fundamental miscarriage of justice. In light of the *Dixon* bar, the claim is procedurally defaulted.

2. The Claim is Barred by § 2254(d)

Furthermore, the claim is barred by § 2254(d). Petitioner contends that the prosecutor committed misconduct when he made the following argument to the jury at the guilt phase: "apply . . . common sense to the law that is given to you. [¶] And in this case that is to reject the voluntary intoxication and mental disorder, to accept that he formed the specific intent to rape the same way he did it with Mrs. Harris, and to come back with first degree murder." (27RT at 3991-92.) Petitioner contends that the argument "prejudicially and erroneously equated the intent element of the crime of rape with the intent element for the special circumstance of felony murder rape." (Pet. at 201.) But Petitioner does not explain how the argument was improper, how it mischaracterized the intent element of the special circumstance, or how it was prejudicial. Accordingly, the California Supreme Court reasonably could have rejected the claim as vague and conclusory. *See People v. Duvall*, 9 Cal. 4th at 474; *James v. Borg*, 24 F.3d at 26.

F. Victim Impact Arguments

In Claim Fourteen, subpart (7), Petitioner contends that the prosecutor committed misconduct by making prejudicial victim impact arguments. (Pet. at 202.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 273-74 (paragraph 4 of Claim "I").) The California Supreme Court found that the claim was barred by *In re Harris*, 5 Cal. 4th at 825 & n.3, 826-29, and *In re Dixon*, 41 Cal. 2d at 759, because was it not raised on

appeal. The California Supreme Court also summarily denied the claim on its merits. (NOL C7.)

1. The Claim is Procedurally Defaulted

The California Supreme Court found that the claim was barred by *Harris* and *Dixon* because it was not raised on appeal. As discussed above (Arg. III), the *Dixon* bar -- that habeas corpus cannot serve as a substitute for an appeal -- is both independent and adequate. Petitioner fails to show cause for the default and prejudice resulting from it, or a fundamental miscarriage of justice. In light of the *Dixon* bar, the claim is procedurally defaulted.

2. The Claim is Barred by § 2254(d)

Furthermore, the claim is barred by § 2254(d). Petitioner contends that the prosecutor committed misconduct when he asked the jurors during his guilt phase closing argument whether they believed Mrs. Miller "would have a few pointed questions for [Petitioner] when he says she attacked him" (27RT at 3976) and when he told the jurors not to let Petitioner steal Mrs. Miller's dignity and reputation by claiming that she precipitated the events (27RT at 3992). (Pet. at 202.) The California Supreme Court reasonably rejected Petitioner's claim of prosecutorial misconduct. First, the comments were not improper. Prosecutors are given wide latitude during closing argument and "have considerable leeway to strike 'hard blows' based on the evidence . . . ." *United States v. Wilkes*, 662 F.3d 524, 538 (9th Cir. 2011). Petitioner fails to cite any Supreme Court law that establishes that the type of comments made by the prosecutor violate due process. *See Gonzalez v. Wong*, 667 F.3d 965, 994-95 (9th Cir. 2011) (rejecting claim of prosecutorial misconduct based on prosecutor's statements in penalty phase closing argument where petitioner was "unable to point to any clearly established federal law from the Supreme Court that establishes any of these statements as a deprivation of due process under federal law, as required by the AEDPA"). Second, the jurors were instructed to base their decision on the facts and the law (2CT at 254) and that

statements made by the attorneys are not evidence (2CT at 257). In light of these instructions and the compelling evidence of Petitioner's guilt, the comments did not infect the trial with unfairness. *See Allen v. Woodford*, 395 F.3d 979, 998 (9th Cir. 2005) (finding that prosecutorial misconduct did not amount to due process violation where trial court gave instruction that attorneys' statements were not evidence and where there was substantial evidence of defendant's guilt).

G. Facts Not In Evidence

In Claim Fourteen, subpart (8), Petitioner contends that the prosecutor committed misconduct by referring to facts not in evidence during his guilt phase closing argument. (Pet. at 202-03.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 274-75 (paragraph 5 of Claim "I").) The California Supreme Court found that the claim was procedurally defaulted and also summarily denied the claim on its merits. (NOL C7.)

1. The Claim is Procedurally Defaulted

Petitioner contends that the prosecutor referred to facts not in evidence when he stated: (1) that the first part of the county budget to get cut is mental health for inmates (27RT at 3970-71); (2) that the testimony of Shamaine Love and Pam Miller differed because they did not wear watches (27RT at 3973); and (3) that RTD busses often run late (27RT at 3978). (Pet. at 203.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 274-75 (paragraph 5(a), 5(b), & 5(c), respectively, of Claim I).) The California Supreme Court found that the first two parts of the claim were barred by *In re Harris*, 5 Cal. 4th at 825 & n.3, 826-29, and *In re Dixon*, 41 Cal. 2d at 759, because they were not raised on appeal, and that the third part of the claim was barred by *In re Seaton*, 34 Cal. 4th 193, because Petitioner failed to raise it in the trial court. (NOL C7.)

The California Supreme Court found that Petitioner's claims regarding the prosecutor's statements about county budget cuts and Love and Miller not wearing watches were barred by *Harris* and *Dixon* because they were not raised on appeal. As discussed above (Arg. III), the *Dixon* bar -- that habeas corpus cannot serve as a substitute for an appeal -- is both independent and adequate. Petitioner fails to show cause for the default and prejudice resulting from it, or a fundamental miscarriage of justice. In light of the *Dixon* bar, the claims are procedurally defaulted.

As for the prosecutor's statement about RTD busses running late, Petitioner did not object to the statement at trial. The California Supreme Court denied Petitioner's claim of prosecutorial misconduct because he failed to raise it in the trial court, citing *In re Seaton*. As discussed above (Arg. X), the denial of a claim based on the failure to object at trial is a state procedural ground that is both independent and adequate and consistently applied by California courts. Petitioner fails to show cause for the default and prejudice resulting from it, or a fundamental miscarriage of justice. Therefore, the claim is procedurally defaulted.

2. The Claim is Barred by § 2254(d)

Furthermore, the claim is barred by § 2254(d). Due process requires that guilt be determined only on the evidence adduced at trial. *Taylor v. Kentucky*, 436 U.S. 478, 485-86, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978). However, "[i]t is expected that jurors will bring their life experiences to bear on the facts of a case." *Hard v. Burlington N. R. Co.*, 870 F.2d 1454, 1462 (9th Cir. 1989) (citing *Head v. Hargrave*, 105 U.S. 45, 49, 26 L. Ed. 1028 (1881)). In their closing arguments, attorneys are entitled to make reference to matters within the common knowledge of all reasonable people. *United States v. Candelaria*, 704 F.2d 1129, 1132 (9th Cir. 1983). They are also entitled to argue reasonable inferences from the evidence. *United States v. Gray*, 876 F.2d 1411, 1417 (9th Cir. 1989).

The California Supreme Court reasonably rejected Petitioner's claim of prosecutorial misconduct. First, the prosecutor's comments were proper. His references to county budget cuts and busses running late concerned matters of common knowledge. As for the comment about witnesses not wearing watches, the prosecutor was responding to the defense pointing out that some of the witnesses' testimony differed as to the precise timing of events. The prosecutor argued, "No surprise really. Are any of these people wearing watches do you think? Do you think they keep track of things like that?" (27RT at 3973.) This argument was based on common sense and reasonable inferences.

Second, even assuming the prosecutor's remarks were improper, they did not infect the trial with unfairness because none of the comments concerned any material issue. In addition, the California Supreme Court reasonably could have concluded that the remarks were harmless in light of the overwhelming evidence of guilt.

H. Misstating the Law

In Claim Fourteen, subpart (9), Petitioner contends that the prosecutor committed misconduct by misstating the law. (Pet. at 203-04.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 275-76 (paragraph 6 of Claim "I").) The California Supreme Court found that the claim was barred by *In re Harris*, 5 Cal. 4th at 825 & n.3, 826-29, and *In re Dixon*, 41 Cal. 2d at 759, because was it not raised on appeal. The California Supreme Court also summarily denied the claim on its merits. (NOL C7.)

1. The Claim is Procedurally Defaulted

The California Supreme Court found that the claim was barred by *Harris* and *Dixon* because it was not raised on appeal. As discussed above (Arg. III), the *Dixon* bar -- that habeas corpus cannot serve as a substitute for an appeal -- is both independent and adequate. Petitioner fails to show cause for the default and

prejudice resulting from it, or a fundamental miscarriage of justice. In light of the *Dixon* bar, the claim is procedurally defaulted.

2. The Claim is Barred by § 2254(d)

Furthermore, the claim is barred by § 2254(d). Petitioner contends that the prosecutor misstated the law when he told the jurors that if they convicted Petitioner of a lesser included offense it meant they believed his testimony. (*See* 26RT at 3907; 27RT at 3987.) The California Supreme Court reasonably rejected the claim. First, the prosecutor did not misstate the law. The law was set forth in the jury instructions and the prosecutor's remarks in no way contradicted or misstated any principle contained in those instructions. Second, even assuming the remarks were improper, they did not infect the trial with unfairness. The jury was instructed as follows: "You must accept and follow the law as I state it to you, whether or not you agree with the law. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions." (2CT at 254.) The California Supreme Court reasonably could have concluded that the jury followed this instruction. *See Weeks v. Angelone*, 528 U.S. at 234 ("A jury is presumed to follow its instructions"). In addition, the California Supreme Court reasonably could have determined that the prosecutor's remarks were harmless because the prosecutor was simply asking the jurors not to believe Petitioner's testimony and to convict him of the charged crimes.

I. Victim Impact Evidence

In Claim Fourteen, subpart (10), Petitioner contends that the prosecutor introduced irrelevant and inflammatory victim impact evidence at the penalty phase. (Pet. at 204.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 318.) The California Supreme Court summarily denied the claim on its merits. (NOL C7.)

The California Supreme Court's denial of the claim was reasonable. Petitioner incorporates by reference his arguments in Claim Fifteen, in which he contends that evidence that Petitioner told his sister that he "didn't give a fuck about Pam or her family" was erroneously admitted at the penalty phase. However, as explained below (Arg. XV), the evidence was relevant and properly admitted. Therefore, the prosecutor did not commit misconduct in introducing it. *See United States v. Reyes*, 660 F.3d 454, 463 (9th Cir. 2011) ("because we conclude . . . that the . . . [e]vidence was properly admitted, [defendant] cannot rely on the admission of that evidence to demonstrate prosecutorial misconduct"). Moreover, the California Supreme Court reasonably could have concluded that Petitioner's trial was not rendered fundamentally unfair by the admission of the evidence given the overwhelming aggravating evidence presented at the penalty phase, including the brutal rape and murder of Mrs. Miller and Petitioner's history of violent sexual assaults.

J. Gang Membership

In Claim Fourteen, subpart (11), Petitioner contends that the prosecutor committed misconduct at the penalty phase by prejudicially characterizing Petitioner as a gang member. (Pet. at 204-06.) Petitioner raised this claim in his opening brief on appeal in the California Supreme Court. (NOL B1 at 202-11.) In its reasoned opinion on appeal, the California Supreme Court determined that Petitioner failed to preserve the issue because he did not object to the alleged misconduct at trial. (NOL B4; *People v. Jones*, 29 Cal. 4th at 1262-63.) Petitioner also raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 320-23.) The California Supreme Court summarily denied the claim on its merits. (NOL C7.)

1. The Claim is Procedurally Defaulted

Petitioner's claim that the prosecutor committed misconduct by prejudicially characterizing him as a gang member is procedurally defaulted. The California

Supreme Court determined that Petitioner failed to preserve the claim because he did not object to the alleged misconduct at trial. *People v. Jones*, 29 Cal. 4th at 1262-63. As discussed above (Arg. X), the failure to object at trial is a procedural default that is both independent and adequate and bars federal consideration of an issue. Petitioner fails to show cause for the default and prejudice resulting from it, or a fundamental miscarriage of justice.[38] Therefore, the claim is procedurally defaulted.

2. The Claim is Barred by § 2254(d)

Furthermore, the claim is barred by § 2254(d). Petitioner contends that the prosecutor committed misconduct by prejudicially characterizing him as a gang member. (Pet. at 204-06.) The California Supreme Court reasonably rejected the claim.

The record shows that prison consultant James Park testified for the defense at the penalty phase that Petitioner would not pose a danger to others in prison. During his direct testimony, Park testified that Petitioner had previously been in a fight with a gang member when he was in prison. (29RT at 4277-78.) During the prosecutor's cross-examination of Park, he asked Park about the fight and whether Petitioner was fighting over "Crip business." Park testified that the fight was not necessarily over gang business and that he did not believe Petitioner was a gang member. (29RT at 4307-10.)

The prosecutor's cross-examination of Park was proper because the prosecutor was permitted to explore the basis of Park's opinion that Petitioner would not pose a danger to others in prison. *See* Cal. Evidence Code §721(a); *People v. Earp,* 20 Cal. 4th 826, 894, 85 Cal. Rptr. 2d 857 (1999) (a prosecutor can properly explore on cross-examination the basis for an expert's prediction that a capital defendant

[38] As for Petitioner's claim that trial counsel rendered ineffective assistance for not objecting, the claim of ineffective assistance fails for the reasons discussed above (Arg. I), and does not establish cause for the default.

will pose no future danger if sentenced to life without parole). Gang membership was relevant to Park's opinion. Furthermore, even if the prosecutor's cross-examination of Park was improper, it did not render the trial fundamentally unfair. Park testified that he did not believe Petitioner was a gang member (29RT at 4310), no evidence was admitted at trial that Petitioner was a gang member, and prosecutor never mentioned gang membership in his argument to the jury. It is thus highly unlikely that the issue affected the jury's penalty determination or the fairness of the trial.

K. Failure to Take Advantage of Psychiatric Help

In Claim Fourteen, subpart (12), Petitioner contends that the prosecutor committed misconduct by commenting during his penalty phase argument on Petitioner's failure to take advantage of psychiatric help that had been offered to him. (Pet. at 206.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 323-24.) The California Supreme Court summarily denied the claim on its merits. (NOL C7.)

The California Supreme Court reasonably rejected Petitioner's claim of prosecutorial misconduct. During his penalty phase argument, the prosecutor commented on Petitioner not going along with or participating in mental health treatment that had been offered to him in the past. (31RT at 4640-41.) Petitioner does not cite any Supreme Court law that establishes that such types of comments violate due process. *See Gonzalez v. Wong*, 667 F.3d at 994-95. Moreover, the comments were clearly harmless and could not have rendered the penalty trial fundamentally unfair in light of the overwhelming aggravating evidence presented at the penalty phase.

L. Victim Sympathy

In Claim Fourteen, subpart (13), Petitioner contends that the prosecutor committed misconduct during his penalty phase argument by appealing to the jury to show sympathy for the victim. (Pet. at 206-07.) Petitioner raised this claim in

his first habeas corpus petition in the California Supreme Court. (NOL C1 at 324-25.) The California Supreme Court summarily denied the claim on its merits. (NOL C7.)

The California Supreme Court reasonably rejected Petitioner's claim of prosecutorial misconduct. During his penalty phase argument, the prosecutor asked the jurors to consider what Mrs. Miller went through when she was killed and to show the same sympathy to Petitioner that he showed to Mrs. Miller. (31RT at 4643, 4657, 4661.) The argument did not constitute misconduct because it was proper under California law. "[A]t a penalty phase, an appeal for sympathy with the victim is not out of place." *People v. Gonzales*, 54 Cal. 4th 1234, 1295, 144 Cal. Rptr. 3d 757 (2012). Furthermore, Petitioner fails to cite any Supreme Court law that establishes that prosecutorial comments concerning sympathy for the victim at the penalty phase of a trial violate due process. *See Gonzalez v. Wong*, 667 F.3d at 994-95. Lastly, the comments were harmless and could not have rendered the penalty trial fundamentally unfair in light of the overwhelming aggravating evidence presented to the jury.

Accordingly, Claim Fourteen is barred by § 2254(d).

XV. PART OF CLAIM FIFTEEN IS *TEAGUE* BARRED AND PROCEDURALLY DEFAULTED; THE ENTIRE CLAIM IS BARRED BY § 2254(D)

In Claim Fifteen, Petitioner contends that the prosecution gave the defense inadequate notice of evidence in aggravation, that evidence in aggravation was improperly admitted at the penalty phase, and that trial counsel rendered ineffective assistance in relation to the evidence in aggravation. (Pet. at 207-23.) As explained below, portions of the claim are barred by *Teague v. Lane*, 489 U.S. 288, and are procedurally defaulted. In addition, the entire claim is barred by § 2254(d).

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A. Kim Jackson Rape

1. Notice

At the penalty phase, the prosecution introduced evidence of Petitioner's prior rape of Kim Jackson. (28RT at 4175-98.) Petitioner contends that the prosecutor gave the defense inadequate notice of the evidence. (Pet. at 208-09.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 372-73 (Claim U).) The California Supreme Court found that the claim was barred by *In re Harris*, 5 Cal. 4th at 825 & n.3, 826-29, and *In re Dixon*, 41 Cal. 2d at 759, because was it not raised on appeal. The California Supreme Court also summarily denied the claim on its merits. (NOL C7.)

a. The Claim is Barred by *Teague*

Petitioner's claim is barred by *Teague v. Lane*, 489 U.S. 288. Granting relief on this claim would require that a new rule of constitutional law be announced, i.e., that a prosecutor is required to give advance notice of the evidence it intends to use at trial. This rule was not compelled by existing precedent at the time Petitioner's conviction became final.

The Supreme Court's decision in *Gray v. Netherland*, 518 U.S. 152, 167-68, 116 S. Ct. 2074, 135 L. Ed. 2d 457 (1996) establishes that the claim is *Teague* barred. In *Gray*, the habeas petitioner claimed that he was denied due process because the government did not give him adequate notice of evidence it intended to use against him at the penalty hearing of a capital murder trial. The Supreme Court determined that the claim was barred by *Teague* because it had never held that due process requires the government to give the defense advance notice of the evidence it plans to use at trial and thus "petitioner's notice-of-evidence claim would require the adoption of a new constitutional rule." *Id*. at 166-70. The Supreme Court also held that neither of *Teague*'s exceptions applied, since the rule did not place a class of private conduct beyond the power of the state to proscribe and was not a

watershed rule of criminal procedure. *Id*. at 170. Accordingly, the instant claim is *Teague* barred.

b. The Claim is Procedurally Defaulted

The California Supreme Court found that the claim was barred by *Harris* and *Dixon* because it was not raised on appeal. As discussed above (Arg. III), the *Dixon* bar -- that habeas corpus cannot serve as a substitute for an appeal -- is both independent and adequate. Petitioner fails to show cause for the default and prejudice resulting from it, or a fundamental miscarriage of justice. In light of the *Dixon* bar, the claim is procedurally defaulted.

c. The Claim is Barred by § 2254(d)

Furthermore, the claim is barred by § 2254(d). Petitioner contends that the prosecutor violated his constitutional rights because he gave the defense inadequate notice of the evidence of the Kim Jackson rape. (Pet. at 208-09.) The California Supreme Court reasonably rejected the claim because the Supreme Court has never held that the government is constitutionally compelled to give advance notice of the evidence it intends to use at trial. *See Gray v. Netherlan*d, 518 U.S. at 168; *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1976) ("[t]here is no general constitutional right to discovery in a criminal case"). Further, there is nothing in the record that shows the defense lacked adequate notice concerning the evidence. On February 1, 1995, the prosecutor stated that he would be calling Kim Jackson to testify at the penalty phase. (27RT at 4064.) The penalty phase trial began on February 6, 1995. (28RT at 4126.) Thus, the defense was given five days advance notice of the evidence. Trial counsel never complained that he lacked sufficient notice of the evidence or needed more time to prepare for the penalty phase trial. Therefore, the California Supreme Court reasonably rejected Petitioner's claim that he lacked sufficient notice of the evidence.

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2. Ineffective Assistance

Petitioner contends that trial counsel rendered ineffective assistance in relation to the evidence of the Kim Jackson rape because he failed to object that he lacked sufficient notice of the evidence and failed to investigate the evidence. (Pet. at 209-13.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 167-68, 371-74; NOL C6 at 332-40.) The California Supreme Court summarily rejected the claim on the merits in its order denying the first habeas corpus petition. (NOL C7.)

The California Supreme Court reasonably rejected the claim. First, nothing in the record shows that counsel lacked sufficient notice of the evidence of the Kim Jackson rape. Indeed, the record shows that counsel was aware of the Kim Jackson rape long before trial, as he possessed reports of the incident and gave them to Dr. Thomas prior to his pretrial evaluation of Petitioner. (*See* 22 Supp II CT at 6319-25; Ex. 154 at 2749.) Therefore, it appears there was no basis for an objection that counsel lacked sufficient notice of the evidence. *See James v. Borg*, 24 F.3d at 27 (counsel's failure to make a futile motion does not constitute ineffective assistance). Furthermore, since nothing in the record shows that counsel lacked sufficient notice of the evidence, Petitioner cannot show that he was prejudiced by counsel's failure to object to the evidence on this ground.

Second, the record does not show that counsel was ineffective for failing to investigate the Kim Jackson rape. As noted above, counsel was aware of the Kim Jackson rape long before trial, as he possessed reports of the incident and gave them to Dr. Thomas. Furthermore, counsel was prepared to use aspects of the incident to support his penalty phase defense. During the defense's cross-examination of Jackson at the penalty phase, counsel elicited testimony from Jackson that Petitioner's demeanor changed during his attack on her, that his eyes became big and glassy, and that he appeared to be in a trance. She testified that Petitioner "seemed to snap back" after the attack. (28RT at 4194.) Counsel also elicited

testimony from Jackson that she told a probation officer that she believed Petitioner had a lot of family problems, that the incident was a cry for help, and that Petitioner needed psychiatric treatment. (28RT at 4195-96.) When the defense called Dr. Thomas at the penalty phase, he testified that he was familiar with the Kim Jackson rape incident. (30RT at 4414.) He testified that Jackson's testimony about Petitioner being in a trance was consistent with his diagnosis and showed that Petitioner entered altered states of consciousness during the different rape episodes. (30RT at 4466-67.) Therefore, since counsel used part of the Kim Jackson rape incident to support his defense, the California Supreme reasonably could have determined that counsel adequately investigated the incident.

The California Supreme Court also reasonably could have found that Petitioner's allegations that he was prejudiced by the alleged lack of investigation of the incident were conclusory and unsupported. For example, Petitioner alleges that counsel failed to locate and interview witnesses concerning the incident (Pet. at 211), yet he fails to identify any such witnesses or indicate what their testimony would have been. *See United States v. Murray*, 751 F.2d 1528, 1535 (9th Cir. 1985) (rejecting claim of ineffective assistance for failing to call defense witnesses where defendant did not identify any witnesses who should have been called); *United States v. Berry*, 814 F.2d 1406, 1409 (9th Cir. 1987) (claim of ineffective assistance for not calling witnesses fails where defendant does not indicate what their testimony would have been or how their testimony might have changed the outcome of the proceeding). Petitioner contends that counsel's failure to investigate resulted in counsel not presenting mitigating facts concerning the incident, yet the only mitigating fact Petitioner cites is that he voluntarily turned himself in to the police the morning after the incident. (Pet. at 212.) But this fact had little mitigating value; Petitioner may have turned himself in simply because he knew the police were looking for him and would eventually find him. Petitioner also contends that counsel failed to present meaningful mental health expert

testimony about the incident. (Pet. at 213.) But counsel relied on Dr. Thomas's testimony, including Dr. Thomas's evaluation of the incident and its relevance to Petitioner's mental health. Counsel was not ineffective for relying on his expert to testify about the significance of the incident. *See Harris v. Vasquez*, 949 F.2d at 1525 ("It is certainly within the 'wide range of professionally competent assistance' for an attorney to rely on properly selected experts").

B. Petitioner's Statement to Gloria Hanks

1. Notice

At the penalty phase, the prosecutor introduced evidence that Petitioner told his sister Gloria Hanks shortly before trial that he "didn't give a fuck about Pam or her family." (28RT at 4150-51, 4154.) Petitioner contends that the prosecutor gave the defense inadequate notice of the evidence. (Pet. at 213-16.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 372-73 (Claim "U").) The California Supreme Court found that the claim was barred by *In re Harris*, 5 Cal. 4th at 825 & n.3, 826-29, and *In re Dixon*, 41 Cal. 2d at 759, because was it not raised on appeal. The California Supreme Court also summarily denied the claim on its merits. (NOL C7.)

a. The Claim is Barred by *Teague*

Petitioner's claim that his constitutional rights were violated by the prosecutor's alleged failure to give him timely notice of the evidence is barred by *Teague v. Lane*, 489 U.S. 288. As discussed above, the claim that due process requires the government to give the defense advance notice of the evidence it plans to use at trial would require the adoption of a new constitutional rule and *Teague*'s exceptions do not apply. *Gray v. Netherland*, 518 U.S. at 167-70.

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b. The Claim is Procedurally Defaulted

The California Supreme Court found that the claim was barred by *Harris* and *Dixon* because it was not raised on appeal.[39] As discussed above (Arg. III), the *Dixon* bar -- that habeas corpus cannot serve as a substitute for an appeal -- is both independent and adequate. Petitioner fails to show cause for the default and prejudice resulting from it, or a fundamental miscarriage of justice. In light of the *Dixon* bar, the claim is procedurally defaulted.

c. The Claim is Barred by § 2254(d)

Furthermore, the claim is barred by § 2254(d). Petitioner contends that the prosecutor violated his constitutional rights because he gave the defense inadequate notice of the evidence concerning Petitioner's statement to Gloria Hanks. (Pet. at 213-16.) However, as discussed above, the Supreme Court has never held that the government is constitutionally compelled to give advance notice of the evidence it intends to use at trial. Therefore, the California Supreme Court reasonably rejected the claim. Moreover, the record shows that Petitioner's statement to Hanks was made shortly before trial and the prosecutor informed the defense about the statement as soon as he learned about it. (28RT at 4083, 4078-79, 4115.) Five days before the penalty phase trial, the prosecutor stated that he might present evidence of the statement on rebuttal. (27RT at 4064.) Although defense counsel objected that notice of the statement did not comply with California Penal Code section 190.3, he never claimed that he lacked sufficient notice to prepare for the penalty phase trial. Therefore, the California Supreme Court reasonably rejected Petitioner's claim that notice of the evidence was constitutionally inadequate.

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[39] Petitioner claimed on appeal that the prosecutor gave him inadequate notice of the evidence under California Penal Code section 190.3, but he never alleged that the inadequate notice violated his constitutional rights. (NOL B1 at 188-90.)

2. Admissibility

Petitioner contends that admission of the evidence violated his constitutional rights because the evidence was irrelevant and prejudicial. (Pet. at 217-18.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C6 at 343-34.) The California Supreme Court summarily rejected the claim on the merits in its order denying the first habeas corpus petition. (NOL C7.)

The erroneous admission of evidence at the penalty phase will give rise to a constitutional violation only if it results in a decision that is "predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'" *Johnson v. Mississippi*, 486 U.S. 578, 585, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988); *see also Gregg v. Georgia*, 428 U.S. 153, 188, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) ("Because of the uniqueness of the death penalty . . . it [can]not be imposed under sentencing procedures that create[ ] a substantial risk that it would be inflicted in an arbitrary and capricious manner"). The evidence that Petitioner told his sister before trial that he "didn't give a fuck about Pam or her family" was relevant to show Petitioner's lack of remorse. *See People v. Crittenden*, 9 Cal. 4th 83, 146, 36 Cal. Rptr. 2d 474 (1994) ("We repeatedly have commented that the presence or absence of remorse is a factor 'universally' deemed relevant to the jury's penalty determination"). On appeal, the California Supreme Court held that the statement was properly admitted because it was offered to rebut evidence of remorse that Petitioner had introduced during his testimony in the guilt phase of the trial. *People v. Jones*, 29 Cal. 4th at 1265-66. Petitioner cites no Supreme Court precedent that holds that the admission of evidence of a defendant's lack of remorse at the penalty phase violates due process. Therefore, the California Supreme Court reasonably rejected the claim.

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3. Ineffective Assistance

Petitioner contends that trial counsel rendered ineffective assistance because he failed to adequately investigate Petitioner's statement to Hanks. (Pet. at 218-23.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C6 at 345-50.) The California Supreme Court summarily rejected the claim on the merits in its order denying the first habeas corpus petition. (NOL C7.)

Petitioner contends that counsel rendered ineffective assistance for failing to investigate and mitigate the effect of Petitioner's statement to Hanks. The California Supreme Court reasonably could have found that counsel was not ineffective in this regard because Petitioner's statement that he "didn't give a fuck about Pam or her family" was unambiguous and the jury would have rejected any attempt to try to minimize its plain meaning as a desperate defense tactic. *See Clozza v. Murray*, 913 F.2d 1092, 1099 (4th Cir. 1990) ("The strategy to maintain credibility with the jury was reasonable . . . .") For the same reason, the California Supreme Court reasonably could have found that Petitioner was not prejudiced by counsel's alleged ineffectiveness, since the jury would have rejected any attempt to minimize the plain meaning of the statement. In addition, the California Supreme Court reasonably could have found that Petitioner was not prejudiced because, regardless of Petitioner's statement to Hanks, the jury still would have returned a death verdict in light of the gruesome and disturbing manner in which Petitioner raped and killed Mrs. Miller and because of his history of violent sexual assaults.

Accordingly, Claim Fifteen is barred by § 2254(d).

XVI. CLAIM SIXTEEN IS BARRED BY § 2254(D)

In Claim Sixteen, Petitioner contends that trial counsel rendered ineffective assistance at the penalty phase. (Pet. at 223-339.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 167-239.) The California Supreme Court summarily rejected the claim on the merits in its

order denying the petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

A. The Defense's Penalty Phase Evidence

The record shows that defense counsel presented the following evidence at the penalty phase.

1. Petitioner's Childhood

Counsel presented the testimony of several of Petitioner's family members concerning Petitioner's traumatic childhood. Petitioner's aunt Geraldine Jones testified that Petitioner's childhood was a "living hell." (31RT at 4569.) Petitioner's parents were alcoholics and frequently fought with each other. When Petitioner's father found his mother in bed with another man, he began beating her regularly. Petitioner's mother showed Geraldine bruises she had on her vagina. (31RT at 4568, 4570-71.) Petitioner's parents physically abused their children. Petitioner's mother would hit Petitioner in the head with her fists to discipline him. She once put her daughter in a chokehold and held a knife to her. (31RT at 4568, 4578.) The children were neglected and often had no food. (31RT at 4567, 4579.) Drugs were used in front of them. (31RT at 4575.) One of Petitioner's sisters had an ulcer and another used drugs and tried to kill herself. (31RT at 4571-72.) Petitioner once heard his mother tell his father that Petitioner was not his son. Petitioner had nightmares that caused him to scream. (31RT at 4573-74.)

Tonya Jones, Petitioner's younger sister, testified that her home life was very violent. Her parents fought all the time and her mother once stabbed her father in the head. Her parents were heavy drinkers. (29RT at 4237-39.) The children in the family were often hungry. (29RT at 4244-45.) On one occasion, Petitioner came home when their mother was away with her boyfriend and there was no food in the house. Petitioner got into a fight with the boyfriend and returned home with food for the family. (29RT at 4239-40.) Petitioner saw his brother Carl's dead body

following his death in a gang-related incident; Petitioner became a very quiet person after seeing the body. (29RT at 4247-48.)

Petitioner's father Ernest Lee Jones ("Jones") testified that there was always chaos in the family. (29RT at 4360.) Jones and Petitioner's mother were both alcoholics (29RT at 4361) and Petitioner's mother had no interest in raising the children (29RT at 4360). She had several affairs. (29RT at 4362.) On one occasion, Jones came home and found her in bed with one of Jones's friends. Petitioner and one of his sisters were in bed with them. Jones was certain that there were other occasions when Petitioner saw his mother in bed with another man. (29RT at 4363-64.) Jones and Petitioner's mother had rough fights in the presence of their children. (29RT at 4366.) Jones moved in and out of the house and eventually moved out permanently when Petitioner's mother got a restraining order against him. (29RT at 4368, 4371, 4374.) Petitioner's mother once came to Jones's apartment, crawled through the window, and stabbed Jones in the hand. The police came and arrested her. (29RT at 4379-80.) Jones testified that Petitioner's mother and her boyfriend would sometimes drink so much that there was no money for food. (29RT at 4375.) Jones testified that his father had some mental problems and that Petitioner's maternal aunt committed suicide. (29RT at 4387.)

Herman Evans, one of Petitioner's school friends, testified that Petitioner's mother drank a lot and there was sometimes no food or electricity at Petitioner's house. (29RT at 4253.) Petitioner's mother was verbally abusive toward her children. (29RT at 4260.)

2. Mental Health Expert

Counsel also presented the testimony of a mental health expert, Dr. Claudewell Thomas. Dr. Thomas testified that he examined Petitioner several times. (30RT at 4413.) He concluded that Petitioner suffered from schizoaffective schizophrenia. (30RT at 4410-14.) He testified that schizophrenia is a major

psychiatric disorder that is characterized by psychotic responses, whereby a person's reality-oriented judgment is disrupted. It is also characterized by "dissociation," whereby thoughts and feelings function independently. The person may be unable to control the "normal functioning self." (30RT at 4433-35.) The disorder is genetic. (30RT at 4452.) In arriving at his conclusions regarding Petitioner's mental condition, Dr. Thomas reviewed reports and evaluations of several mental health experts who had previously evaluated Petitioner, a diagnostic study of Petitioner that was performed when he was previously in prison, and testing performed on Petitioner while he was in jail awaiting trial in this case. (30RT at 4417, 4424, 4429-32.)

Dr. Thomas characterized Petitioner's childhood as extremely troubled and destructive. Petitioner's parents were both alcoholics. Petitioner's mother was "sadistically abusive" and Petitioner was beaten with electrical cords. Petitioner's mother also had promiscuity problems. (30RT at 4436-37.) Petitioner's father was often absent and Petitioner's mother was the main authority figure. (30RT at 4448.) Dr. Thomas believed that Petitioner suffered from a simultaneous sexual attraction to and hatred of his mother; such ambivalent feelings are characteristic of schizophrenia. (30RT at 4438-40.) The object of Petitioner's attacks on Mrs. Harris and Mrs. Miller was his mother. (30RT at 4444.) Dr. Thomas was aware of the incident in which Petitioner's father found his mother in bed with another man and Petitioner was in bed with them. Dr. Thomas believed that the incident would be traumatic and was a reason for the dissociation that occurred during the crimes in this case. (30RT at 4439-40.)

Dr. Thomas gave Petitioner a "draw a person" test. The test showed Petitioner had gender identity confusion. The results were consistent with Dr. Thomas's schizophrenia diagnosis. (30RT at 4444-48.) Dr. Thomas analogized Petitioner's mental condition to Dr. Jekyll and Mr. Hyde – Petitioner was an ethical, decent person on the outside; however, his inner reality was a result of the sadistic

punishment of a domineering, promiscuous, and alcoholic mother. (30RT at 4464-65.) Dr. Thomas believed that the nature of Petitioner's attack on Mrs. Miller, as testified to by Petitioner, was consistent with his diagnosis. (30RT at 4457-59.)

3. Petitioner's Future as a Prison Inmate

Counsel also presented the testimony of a corrections consultant (James Park) who reviewed Petitioner's state prison record and opined that Petitioner would be a good prisoner who would not pose a danger of violence while incarcerated. (29RT at 4271-85.)

B. Social History Evidence

Petitioner contends that trial counsel rendered ineffective assistance at the penalty phase for failing to investigate and present extensive social history evidence relating to Petitioner's immediate and extended family, including additional evidence of Petitioner's abusive upbringing and mental impairments. (Pet. at 224-326.) The California Supreme Court reasonably rejected the claim.

In his declaration, trial counsel states that he had no strategic reason for not conducting additional social history investigation. (Ex. 150 at 2733-34.) The California Supreme Court reasonably could have concluded that counsel's investigation was sufficient in light of the extensive social history evidence that he presented at trial. Further, the California Supreme Court reasonably could have concluded that Petitioner suffered no prejudice from the alleged deficient performance. As discussed above, trial counsel presented substantial evidence of Petitioner's traumatic upbringing and mental health problems. The evidence included testimony from Petitioner's father, aunt, sister, and a friend about Petitioner's abusive childhood and dysfunctional family life. The evidence also included extensive testimony from a mental health expert who discussed Petitioner's abusive childhood and mental impairments. Given the nature of the mitigating evidence that was presented at the penalty phase, it is doubtful that the admission of *more* evidence of the *same type* would have affected the jury's penalty

determination. *See Wong v. Belmontes*, 558 U.S. 15, 130 S. Ct. 383, 388, 175 L. Ed. 2d 328 (2009) (since sentencing jury was well acquainted with defendant's background and potential humanizing features, "additional evidence on these points would have offered an insignificant benefit, if any at all"); *Rose v. McNeil*, 634 F.3d 1224, 1246 (11th Cir. 2011) (no prejudice from counsel's failure to present additional mitigation evidence where, inter alia, "the new mitigation is simply an extension of what the jury had heard"); *Durr v. Mitchell*, 487 F.3d 423, 436 (6th Cir. 2007) ("the failure to present additional mitigating evidence that is 'merely cumulative' of that already presented does not establish prejudice"). Indeed, the presentation of massive quantities of evidence concerning Petitioner's disturbing family life and mental impairments might have caused the jury to conclude that Petitioner had become a desensitized and incurable sociopath. In this respect, the evidence was a "two-edged sword" (*Pinholster*, 131 S. Ct. at 1410) that might have been more aggravating than mitigating. *See id*. ("The new evidence relating to Pinholster's family -- their more serious substance abuse, mental illness, and criminal problems . . . is also by no means clearly mitigating, as the jury might have concluded that Pinholster was simply beyond rehabilitation"). Thus, the California Supreme Court reasonably could have concluded that it was not reasonably probable it would have affected the jury's penalty determination.[40]

Further, the jury heard evidence concerning Petitioner's abusive upbringing and cognitive impairments but still chose the death penalty. It likely determined that the brutal sexual assault and stabbing death of Mrs. Miller and Petitioner's history of violent sexual assaults were so aggravating that they substantially outweighed the mitigating evidence. The evidence showed that Petitioner bound Mrs. Miller's arms and legs, gagged her, raped her, stabbed her more than fifteen

[40] As for social history evidence relating to Petitioner's extended family, such as Petitioner's grandparents, aunts, and uncles, it would have had little relevance to Petitioner himself and little if any mitigating value.

times, including stabbing her in her vagina, and thrust two knives into her neck. The evidence also showed that Petitioner bound and gagged Mrs. Harris, choked her, hit her, and then raped her. In addition, the evidence showed that Petitioner put a knife to the throat of Kim Jackson, threatened to kill her, and then raped her. In light of the overwhelming aggravating evidence, the California Supreme Court reasonably could have concluded that it was not reasonably probable that *additional* social history evidence or *additional* evidence of Petitioner's mental impairments would have affected the jury's penalty determination. *See Wong v. Belmontes,* 130 S. Ct. at 391 ("It is hard to imagine" expert testimony about defendant's mental state and additional evidence of defendant's difficult childhood outweighing the facts of the murder); *Strouth v. Colson*, 680 F.3d 596, 604 (6th Cir. 2012) ("the brutality of the murder would have completely overwhelmed any mitigation evidence stemming from a difficult childhood") (internal quotation marks omitted).

C. Expert Testimony

Petitioner contends that trial counsel rendered ineffective assistance at the penalty phase by failing to present adequate expert testimony concerning Petitioner's mental disease. (Pet. at 327-37.) The California Supreme Court reasonably rejected the claim.

The record shows that counsel presented the testimony of Dr. Thomas concerning Petitioner's mental disease. In order to diagnose Petitioner and prepare for his testimony, Dr. Thomas met with trial counsel several times and reviewed materials submitted by Petitioner's family members. (30RT at 4413, 2247.) He also reviewed a report prepared by Dr. Maloney, a psychologist who had previously administered tests to Petitioner, including a Rorschach test and the Minnesota Multiphasic Personality Inventory (MMPI). (30RT at 4417-22.) In addition, Dr. Thomas reviewed a report prepared by Dr. Vicary, a psychiatrist who had previously evaluated Petitioner and made treatment recommendations. (30RT at 4422-23.) Dr. Thomas also reviewed a diagnostic study of Petitioner performed

while he was in prison. (30RT at 4424.) He also reviewed a report prepared by Dr. Hazel, a psychologist who met with Petitioner four or five times after he was released on parole. Dr. Thomas also contacted and spoke to Dr. Hazel about Petitioner. (30RT at 4425-26.) Dr. Thomas also interviewed Petitioner several times and requested that additional testing be done of Petitioner. (30RT at 4413, 4428-29.) The testing was performed by Dr. Spindell, a psychologist who met with Petitioner in jail. Dr. Spindell performed the Rorschach test, the MMPI, Wechsler's memory test, a neuropsychological color test, and a memory scale test, among others. (30RT at 4429.) Dr. Thomas concluded that Petitioner suffered from schizoaffective schizophrenia. (30RT at 4413-14.) During his testimony, Dr. Thomas explained Petitioner's mental disease and how it affected his mental state. He also described Petitioner's troubled childhood and discussed Petitioner's crimes in the context of his mental disease. (30RT at 4433-44, 4448, 4452-54, 4457-67.)

The California Supreme Court reasonably could have rejected Petitioner's claim that counsel rendered ineffective assistance by failing to present adequate expert testimony concerning Petitioner's mental disease. The record shows that counsel presented testimony from a mental health expert who was provided substantial information concerning Petitioner's background and mental health history, who evaluated Petitioner and diagnosed him with a serious mental disease, and who explained to the jury how Petitioner's mental disease affected his mental state and behavior. Nothing in the record shows that counsel had reason to believe Dr. Thomas's diagnosis of Petitioner was incorrect or that there were material omissions or mistakes in his testimony concerning the nature of Petitioner's mental disease or the effect it had on his behavior. Counsel's presentation of Dr. Thomas's testimony concerning Petitioner's mental disease fell within the wide range of reasonable professional assistance. *See Stokley v. Ryan*, 659 F.3d 802, 812 (9th Cir. 2011) (rejecting claim on habeas corpus that counsel was ineffective for failing to adequately investigate and present evidence concerning defendant's mental health

at capital sentencing proceeding where record showed that counsel "generally undertook 'active and capable advocacy' on [defendant's] behalf").

The California Supreme Court also reasonably could have determined that Petitioner was not prejudiced. Petitioner fails to show that trial counsel could have presented expert testimony concerning Petitioner's mental disease that would have been materially more mitigating than the testimony offered by Dr. Thomas.

D. Victim Impact Evidence

Petitioner contends that trial counsel rendered ineffective assistance at the penalty phase by failing to investigate and challenge the prosecution's victim impact evidence. (Pet. at 337-38.) The California Supreme Court reasonably rejected the claim.

At the penalty phase, the prosecution introduced victim impact evidence, including evidence that Mrs. Miller's daughter Deborah began using alcohol and drugs after Mrs. Miller died (28RT at 4140), that Mr. Miller blamed his daughter Pam for Mrs. Miller's death (28RT at 4137), and that Mr. Miller "grieved himself to death" after Mrs. Miller died (28RT at 4138). Petitioner contends that counsel was ineffective for failing to object to this evidence. (Pet. at 337-38.) The California Supreme Court reasonably could have concluded that an objection was not warranted because the evidence was admissible. Under California law, victim impact evidence is relevant as a circumstance of the crime. *People v. McDowell*, 54 Cal. 4th 395, 419, 143 Cal. Rptr. 3d 215 (2012). "The People are . . . entitled to present the full impact of the victim's death on his or her survivors." *People v. Tully*, 54 Cal. 4th 952, 1032, 145 Cal. Rptr. 3d 146 (2012). This includes evidence of strain and substance abuse among surviving family members. *People v. McDowell*, 54 Cal. 4th at 419-20; *People v. Panah*, 35 Cal. 4th 395, 495, 25 Cal. Rptr. 3d 672 (2005). Since the evidence was admissible, counsel did not render ineffective assistance for failing to object. *See People v. Price*, 1 Cal. 4th at 387 (counsel does not render ineffective assistance by failing to make futile motions or

objections); *Juan H. v. Allen*, 408 F.3d at 1273 (counsel cannot be ineffective for failing to raise a meritless objection). Moreover, the California Supreme Court reasonably could have determined that Petitioner was not prejudiced by counsel's alleged deficient performance. Since the testimony in question was brief and relatively benign compared to the other aggravating evidence, including the brutal stabbing death of Mrs. Miller, it is not reasonably probable that it affected the jury's penalty determination.

Therefore, Claim Sixteen is barred by § 2254(d).

XVII. CLAIM SEVENTEEN IS BARRED BY § 2254(D)

In Claim Seventeen, Petitioner contends that his constitutional rights were violated when the trial court, during the penalty phase, permitted the prosecution to elicit evidence concerning Petitioner's minor, nonviolent jail infractions and precluded Petitioner from presenting evidence to mitigate such evidence. (Pet. at 339-43.) Petitioner raised this claim in his opening brief on appeal in the California Supreme Court. (NOL B1 at 191-201.) The California Supreme Court rejected the claim on the merits in its reasoned published opinion on appeal. (NOL B4; *People v. Jones*, 29 Cal. 4th at 1260-62.) As explained below, the claim is barred by § 2254(d).

A. The Relevant Proceedings

During the penalty phase, prison consultant James Park testified for the defense that Petitioner would be a good prisoner who would not pose a danger of violence while incarcerated. (29RT at 4271-85.) Over Petitioner's objection, the trial court permitted the prosecutor to cross-examine Park about Petitioner's disciplinary violations when he was in prison, including incidents in which Petitioner fought with another inmate (29RT at 4307), yelled at a food server (29RT at 4312), made alcohol in his cell (29RT at 4314-17), and committed other disciplinary infractions such as refusing to obey guards and going to the prison dentist to avoid work (29RT at 4306). The trial court permitted the prosecutor to

cross-examine Park on these matters to test the basis of his opinion. (29RT at 4219.) The trial court precluded Petitioner from introducing testimony from Park about the conditions of confinement for an inmate serving a life sentence without the possibility of parole. (29RT at 4219.)

On appeal, Petitioner claimed that the trial court erred in allowing the prosecutor to cross-examine Park about nonviolent disciplinary incidents and in precluding Park from testifying about the conditions of confinement. He claimed that the errors violated his due process and Eight Amendment rights. (NOL B1 at 191-201.) The California Supreme Court rejected the claim, finding that the evidence of the disciplinary incidents was relevant to Park's testimony that Petitioner would not be violent in prison and the evidence of conditions of confinement was irrelevant to the jury's penalty determination. *People v. Jones*, 29 Cal. 4th at 1260-62.

B. The California Supreme Court Reasonably Rejected the Claim

Although the California Supreme Court did not specifically address Petitioner's constitutional claim, it presumably rejected the claim on the merits. *See Johnson v. Williams*, 133 S. Ct. at 1091 (presuming state court adjudicated federal claim on merits even if it did not expressly address federal claim). Its implicit rejection of the claim was reasonable.

First, the admission of evidence at the penalty phase of Petitioner's minor, nonviolent disciplinary incidents in prison did not violate his constitutional rights. The erroneous admission of evidence at the penalty phase will give rise to a constitutional violation only if it results in a decision that is "predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'" *Johnson v. Mississippi*, 486 U.S. at 585. The evidence of Petitioner's prior disciplinary incidents in prison was relevant to the issue whether he would pose a danger of violence in prison. Even if some of the

incidents were nonviolent, they were still relevant since it is reasonable to conclude that an inmate with a violent background and impulse control problems is more likely to engage in violence if he is willing to break rules of behavior and disregard authority. Therefore, the evidence was relevant and properly admitted. Petitioner fails to cite any Supreme Court authority that holds that such evidence is not admissible at the penalty phase of a capital trial.

Next, the exclusion of evidence of the conditions of confinement for an inmate serving a life sentence without the possibility of parole did not violate Petitioner's constitutional rights. At the penalty phase, the court need only allow the defendant to present mitigating evidence "bearing on the defendant's character, prior record, or the circumstances of the offense." *Lockett v. Ohio*, 438 U.S. 586, 604 n.12, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). The conditions of confinement do not relate to Petitioner's character, prior record, or the circumstances of his offense. Further, notwithstanding the trial court's ruling, the record shows that Park *did* testify about the conditions of confinement for a person serving a sentence of life without the possibility of parole. (29RT at 4272-73, 4294, 4324, 4335.) Therefore, Petitioner's constitutional rights were not violated.

Accordingly, Claim Seventeen is barred by § 2254(d).

XVIII. CLAIM EIGHTEEN IS BARRED BY § 2254(D)

In Claim Eighteen, Petitioner contends that several instances of juror misconduct violated his federal constitutional rights. (Pet. at 343-58.) Petitioner presented this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 293-316.) The California Supreme Court summarily rejected the claim on the merits in its order denying the petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

A. The Applicable Law

The Sixth Amendment right to a jury trial "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366

U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). Due process requires that the defendant be tried by "a jury capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). Because "evidence developed against a defendant must come from the witness stand[,]" *Fields v. Brown*, 503 F.3d 755, 779 (9th Cir. 2007), extraneous influences on a jury can, under some circumstances, require the reversal of a conviction, *Parker v. Gladden*, 385 U.S. 363, 364-65, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966).

"However, not all extraneous information is *per se* prejudicial," *Tong Xiong v. Felker*, 681 F.3d 1067, 1076 (9th Cir. 2012); indeed, some information or contact may be so trivial that it may ultimately be found harmless. *See id*. (citing *Caliendo v. Warden of California Men's Colony*, 365 F.3d 691, 696 (9th Cir. 2004)). On habeas review, the petitioner bears the burden of establishing that a juror's consideration of extrinsic material had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. at 637; *accord Blair v. Chrones*, 452 Fed. Appx. 752, *1 (9th Cir. 2011) (applying harmless error standard to presumed juror misconduct); *Tedeschi v. Dexter*, 414 Fed. Appx. 88, *90 (9th Cir. 2011) (same); *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997), *overruled on other grounds by Gonzalez v. Arizona*, 677 F.3d 383, 390 n.4 (9th Cir. 2012) (applying harmless error standard on collateral review to trial errors affecting constitutional rights); *Rodriguez v. Marshall*, 125 F.3d 739, 745 (9th Cir. 1997), *overruled on other grounds by Payton v. Woodford*, 346 F.3d 1204, 1218 (9th Cir. 2003) (en banc), *reversed on other grounds by Brown v. Payton*, 544 U.S. 133, 125 S. Ct. 1432, 161 L. Ed. 2d 334 (2005); *Lawson v. Borg*, 60 F.3d 608, 613 (9th Cir. 1995); *see also Rushen v. Spain*, 464 U.S. 114, 115-19 & n.3, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983) (affirming state court's determination that a juror's ex parte communication was harmless beyond a reasonable doubt); *Thompson v. Borg*, 74 F.3d 1571, 1576 (9th Cir. 1996) (applying "harmless-error"

standard when a veniremember stated during voir dire that he had read in a newspaper that the defendant had "pleaded guilty at one time and changed it"); *cf. Caliendo v. Warden of California Men's Colony*, 365 F.3d 691, 695-98 (9th Cir. 2004) (stating that United States Supreme Court jurisprudence requires courts to presume prejudice in cases involving unauthorized contact between a juror and a witness or an interested party, but that it is a rebuttable presumption).

In establishing a claim of juror misconduct, a petitioner may not rely on the subjective thought processes of the jurors. As discussed in *Sassounian v. Roe*, 230 F.3d 1097 (9th Cir. 2000), juror testimony may be considered to demonstrate that extraneous evidence or information was introduced during the jury's deliberation, but not to show the subjective impact of that extraneous information. *Id*. at 1108-09. Evidence concerning the mental processes by which a juror arrived at his or her verdict is inadmissible to test the validity of that verdict. *See Tanner v. United States*, 483 U.S. 107, 117, 127, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987) ("[L]ong-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry.").

B. Media Coverage of Other Cases

Petitioner claims that the media coverage of the O.J. Simpson trial and the Heidi Fleiss trial, both of which took place at the same time and in the same courthouse as Petitioner's trial, adversely affected his jury. He argues that his jury was not restricted from watching the news, and claims that jurors who watched the news about the DNA evidence compared what they saw on television with the testimony from the DNA expert they heard in court. (Pet. at 343-47; Pet. § 2254(d) Br. at 87, 91-92.)

First and foremost, the information Petitioner complains about did not pertain to him or his trial. *See Mancuso v. Olivarez*, 292 F.3d at 953 ("The appropriate inquiry in whether there was a direct and rational connection between extrinsic material and the prejudicial jury conclusion, and whether the misconduct relates

directly to a material aspect of the case"). Instead, the media presence in the courthouse, and the concomitant news reports, was focused solely on two other unrelated trials that happened to be occurring at the same time. There was no direct, rational connection between the DNA evidence presented in the O.J. Simpson case and the DNA evidence presented in Petitioner's case. Thus, there was no juror misconduct. Indeed, on this basis alone Petitioner's claim fails as there is no clearly established Supreme Court authority addressing unrelated trials or media coverage and its potential impact on jurors. *See Knowles v. Mirzayance*, 556 U.S. at 121-22; *Wright v. Van Patten*, 552 U.S. at 123.

However, in an effort to skew the unrelated media attention and to cast a shadow over his trial, Petitioner presented declarations stating that during deliberations, jurors discussed how the DNA expert involved in Petitioner's case went to the same school as the expert in the Simpson case (which Petitioner characterizes as extraneous evidence). (*See* Pet. at 347.) To the extent that the declaration of Juror Emil Ruotolo[41] contains statements about his subjective mental process, it cannot be considered. *See Sassounian v. Roe*, 230 F.3d at 1108-09. After omitting such statements, what remains of the declaration is insufficient to demonstrate that whatever information jurors received through news reports of the Simpson and Fleiss trials affected the verdicts in Petitioner's case in any way. And in any event, Petitioner fails to demonstrate that the jurors' exposure to the information had a substantial and injurious effect on his verdicts. *See e.g.*, *Anderson v. Terhune*, 409 Fed. Appx. 175, *1-2 (9th Cir. 2011) (holding that although almanac information may have had a "slight tendency to undermine" an alibi witness's testimony, it was not enough "to surpass the harmless error threshold on collateral review").

[41] Juror Ruotolo stated, "After listening to [the DNA expert], I became a firm believer in DNA testing." (Ex. 9 at 93.)

Accordingly, the California Supreme Court had a reasonable basis, consistent with clearly established Supreme Court precedent, upon which to reject this claim.

C. Bible Quotations

Next, Petitioner claims that Juror Youssif Botros improperly quoted from the Bible during deliberations, thereby injecting extrinsic evidence into the jury deliberations. (Pet. at 350-51; Pet. § 2254(d) Br. at 95-96.) There is no clearly established Supreme Court law holding that reference to the Bible is extrinsic evidence, *Crittenden v. Ayers*, 624 F.3d 943, 973 (9th Cir. 2010), or holding that "reading and sharing biblical passages constitutes juror misconduct, *see Fields v. Brown*, 503 F.3d at 778, 781." *Crittenden v. Ayers*, 624 F.3d at 973. Accordingly, the California Supreme Court could reasonably conclude that there was no juror misconduct. In any event, in light of the overwhelming evidence of guilt, Petitioner has failed to demonstrate that the single and brief reference to the biblical teaching "eye for an eye" had a "substantial and injurious effect or influence in determining the jury's verdict" of death. *Id*. (quoting *Brecht*, 507 U.S. at 637).

For these reasons, the California Supreme Court had reasonable bases upon which to reject this claim.

D. Alleged Improper Discussion of the Case

Next, Petitioner claims that Juror Youssif Botros impermissibly discussed the case with his priest (Pet. at 350; Pet. § 2254(d) Br. at 95), and that other jurors prematurely discussed their feelings about the case with each other during lunch (Pet. at 351; Pet. § 2254(d) Br. at 92).

"Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Mattox v. United States*, 146 U.S. 140, 142, 13 S. Ct. 50, 36 L. Ed. 917 (1892); *accord Remmer v. United States*, 347 U.S. 227, 229, 74 S. Ct. 450, 98 L. Ed. 654 (1954) (holding that any "private communication, contact, or tampering, directly or

indirectly, with a juror during a trial about the matter pending before the jury" is deemed "presumptively prejudicial"). However, this does not mean that all extraneous information is *per se* prejudicial; certain extrinsic contact with witnesses may ultimately be found to be *de minimis* and not prejudicial. *See Caliendo v. Warden of California Men's Colony*, 365 F.3d at 696 (citing *Gonzales v. Beto*, 405 U.S. 1052, 92 S. Ct. 1503, 31 L. Ed. 2d 787 (1972) (memorandum dissent and concurrence)).

First, the only evidence provided to the California Supreme Court as to Juror Botros and his admissions about speaking to a priest prior to voting to impose a death sentence came from *other* jurors; thus, it was improper hearsay and failed to support Petitioner's claim in the California Supreme Court. Since there was no other evidence of Juror Botros' alleged contact with his priest, the California Supreme Court rightfully rejected the claim. *See People v. Cole*, 2009 WL 1508479, *4-5 (Cal. App. 1 Dist. 2009) (holding that a "sworn statement by a defense attorney about what a witness was willing to offer in evidence is hearsay, and *does not satisfy* Cole's burden to produce evidence to show his *prima facie case*" (emphasis added)); *In re Curtis C.*, 2006 WL 1682615, *11 (Cal. App. 1 Dist. 2006) ("Appellate counsel's declaration does not establish a prima facie case of ineffective assistance of counsel" because "the statements regarding what trial counsel and a juvenile hall supervisor said to appellate counsel are inadmissible hearsay"); *People v. Wilkinson*, 2005 WL 251422, *14-15 (Cal. App. 1 Dist. 2005) (finding no prima facie case where "appellant's petition fails to include any declaration from trial counsel addressing his decision not to seek a mistrial" and "appellant's statements regarding what his trial counsel told him are inadmissible hearsay" such that "there is nothing in the habeas petition shedding light on trial counsel's reasons for not requesting a mistrial"); *People v. Johnson*, 2004 WL 1770615, *8, 10 (Cal. App. 1 Dist. 2004) (finding no prima facie claim where "[d]efendant submitted only the declaration of his appellate counsel [] in support of

his petition" because "the declaration of appellate counsel is 'riddled with inadmissible evidence.' Specifically, appellate counsel's statements setting forth what trial counsel said to him are entirely inadmissible hearsay"); *People v. Fackrell*, 2002 WL 242540, *7-8 (Cal. App. 1 Dist. 2002) (finding no prima facie case where "[a]ppellate counsel Wilson's declaration is inadmissible hearsay *and thus does not support Fackrell's petition at all*" and there were gaps in the allegations) (emphasis added); *see also In re Torrez*, 2007 WL 2823940, *10 (Cal. App. 6 Dist. 2007) (habeas counsel's declaration about what trial counsel told him was inadmissible hearsay that could not support a prima facie case for habeas relief").

In any event, any contact Juror Botros had with his priest was likely *de minimis*. The priest allegedly advised Juror Botros to consult the Bible to deal with the difficulty he was having with the penalty phase. (Pet. at 350; Ex. 127 at 2565.) As explained above, there is no clearly established law holding that the Bible is extrinsic evidence, or that consulting the Bible is misconduct. *Crittenden v. Ayers*, 624 F.3d at 973. Furthermore, Petitioner has failed to establish that Juror Botros' contact with his priest involved a matter directly related to a material aspect of the case. *See Rodriguez v. Marshall*, 125 F.3d at 744 ("Juror misconduct which warrants relief generally relates directly to a material aspect of the case.") (internal quotation marks and citation omitted). It appears that the only advice the priest offered was to consult the Bible, which had nothing to do with the evidence presented against or by Petitioner. Thus, any effect from Juror Botros' conduct upon the penalty phase deliberations and verdict was immaterial; it did not have a substantial and injurious effect on Petitioner's sentencing verdict.

Second, Petitioner argues that several other jurors violated the trial court's admonition to refrain from discussing the case prior to deliberations. He cites to Alternate Juror Virginia Surprenant's declaration for support. (Pet. at 351.) Surprenant did not directly state that she and other jurors discussed the case prior to

deliberations; she only made a vague reference to her feelings. (Ex. 23 at 240.) And in any event, premature deliberations among jurors do not give rise to a presumption of prejudice (as do communications between jurors and third parties) because they are "not as serious as" private communication, outside contact, or tampering. *Davis v. Woodford*, 384 F.3d 628, 653 (9th Cir. 2004). "What is crucial is not that jurors keep silent with each other about the case but that each juror keep an open mind until the case has been submitted to the jury." *Id*. (internal quotation marks omitted). Thus, unless premature deliberations deprive a petitioner of a fair trial, they will not warrant habeas relief. *Belmontes v. Brown*, 414 F.3d 1094, 1124-25 (9th Cir. 2005), *overruled on other grounds by Ayers v. Belmontes*, 549 U.S. 7, 127 S. Ct. 469, 166 L. Ed. 2d 334 (2006). Here, because there was no evidence that any of Petitioner's jurors did not keep an open mind, the California Supreme Court reasonably concluded that Petitioner failed to demonstrate that the resulting prejudice was so severe so as to violate his right to a fair trial.

Accordingly, the California Supreme Court had reasonable bases, consistent with clearly established Supreme Court precedent, upon which to reject these claims.

E. Alleged Juror Misconduct During Deliberations

Next, Petitioner alleges that Alternate Juror Virginia Surprenant decided on penalty during the guilt phase, and that most or all of the other jurors discussed penalty during the guilt phase. (Pet. at 351; Pet. § 2254(d) Br. at 92-93.) Further, he claims that during deliberations, jurors impermissibly expressed emphatic opinions at the beginning of deliberations, and included alternate jurors (Alternate Juror Virginia Surprenant) in the deliberations. (Pet. at 351-54.) Finally, he argues that Jurors Richard Freed and Omar Muhammad improperly inserted their own untested knowledge of expert matters into the deliberations; namely, that Petitioner was not "that drunk" because he was able to become aroused and ejaculate, and

information about Petitioner's medications. (Pet. at 354-55; Pet. § 2254(d) Br. at 97-98.)

First, Alternate Juror Virginia Surprenant was not a voting member on Petitioner's jury. As discussed in more detail below, she did not participate in the deliberations, and she did not contribute to either the guilt-phase or penalty-phase verdicts. (*See* 27RT at 3998-4001.) Accordingly, the California Supreme Court could reasonably deny the claim because any misconduct on her part in deciding on penalty during the guilt phase was clearly harmless. *Brecht v. Abrahamson*, 507 U.S. at 637. Second, to the extent the declarations Petitioner submitted contained statements made by someone other than the declarant, they were hearsay and inadmissible, and the California Supreme Court properly disregarded them.[42] *See People v. Cole*, 2009 WL 1508479, *4-5; *In re Curtis C.*, 2006 WL 1682615, *11; *People v. Wilkinson*, 2005 WL 251422, *14-15; *People v. Johnson*, 2004 WL 1770615, *8, 10; *People v. Fackrell*, 2002 WL 242540, *7-8; *see also In re Torrez*, 2007 WL 2823940, *10. In any event, it was not misconduct for jurors to express their opinions *during deliberations*, no matter how early on in those deliberations. *See, e.g.*, *Crist v. Hall*, 2008 WL 5453424, *8 (C.D. Cal. 2008) (no prejudicial misconduct where juror expressed opinion after all evidence had been received but before final instructions). And in any event, the California Supreme Court reasonably rejected this claim because Petitioner has failed to show how the jurors' conduct in this regard had a substantial or injurious effect on the verdicts in his case, particularly where the case had already been submitted to the jury.

[42] For example, one declaration states, in part, "They said that Mr. Jones was guilty of these crimes and therefore he should get the death penalty." (Pet. at 352 (quoting Ex. 138 at 2690-91).) Another states that the sole African-American woman "was very vocal that the jury had no choice but to sentence him to death." (Pet. at 352 (quoting Ex. 23 at 240).) Yet another stated that "one of the other jurors told us that he had a wife and two daughters about the same age as the victim and her daughters. He said he could understand how upset the daughter was and said that if his two daughters found his wife like that, that would be it, he would get the death penalty. He said right then and there, after hearing the daughter, he knew he had to vote for death." (Pet. at 353-54 (quoting Ex. 9 at 93).)

Next, Petitioner complains that Alternate Juror Surprenant was permitted to be present in the jury room during deliberations. This allegation is based on the juror's declaration (Pet. at 353; Ex. 23 at 239 (the alternate jurors "had to sit on a couch in the Jury Room while the jury sat around a table deliberating. The alternates had to leave the room when the jurors voted on their guilty and penalty verdicts")), which is directly refuted by the record. In swearing in the bailiff, the courtroom clerk specifically admonished the bailiff to "take charge of the alternate jurors and keep them apart from the jury while they are deliberating on the cause until otherwise instructed by the court[.]" (27RT at 3998.) The court also advised the jurors that "[t]he two alternate jurors will not be in there at any time with you unless one of them is substituted in[.]" (27RT at 3999.) To the alternate jurors, the court instructed them to "wait out in the hall. The bailiff will come out and talk to you." (27RT at 4000.) All of the jurors then exited the courtroom, but the alternate jurors were permitted to retrieve their personal belongings from the jury room before exiting the courtroom into the hallway. (27RT at 4000-01; *see also* 27RT at 4054-55.) And further, it appears that one of the alternates was absent for several days due to illness. (27RT at 4010, 4020.) At no point was either of the alternate jurors substituted into deliberations, or ordered to be present in the jury room. Juror Surprenant's declaration is plainly contrary to the record, and the California Supreme Court appropriately disregarded it. *See People v. Johnson*, 47 Cal. 3d 1194, 1283, 255 Cal. Rptr. 569 (1989) (rejecting prosecutor's explanations in response to *Batson/Wheeler* motion because, in part, they were "directly contrary to the facts" in the record); *see also In re Serrano*, 10 Cal.4th 447, 456, 41 Cal. Rptr. 2d 695 (1995) (in assessing the factual allegations of a state habeas petition, the state court may refer to and rely upon court's own record in rejecting petitioner's allegations); *People v. Romero*, 8 Cal. 4th 728, 739, 35 Cal. Rptr. 2d 270 (1994) (considerations of Return and matters of record may convince court that state habeas petition lacks merit).

Moreover, there is no clearly established Supreme Court precedent holding that the mere presence of alternate jurors in the jury room during deliberations constitutes structural error that requires reversal of a criminal conviction. Absent such law, the California Supreme Court had a reasonable basis for denying relief. *See Knowles v. Mirzayance*, 556 U.S. at 121-22; *Wright v. Van Patten*, 552 U.S. at 123. In any event, Petitioner fails to show how the alleged presence of the alternate jurors affected the jury's deliberations or verdicts in any way. Alternate Juror Surprenant's declaration suggests that she and the alternate juror sat quietly on the couch while the other jurors deliberated, and then they left the room during the votes. (Ex. 23 at 239.) Their mere presence in the room, even if it occurred, did not implicate any of Petitioner's federal constitutional rights. *See United States v. Olano*, 507 U.S. 725, 740, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) (holding that deviation from federal statute prohibiting alternate jurors from being present during jury deliberations did not warrant setting aside verdict because alternates were instructed not to participate in deliberations and nothing suggested that alternate jurors' presence impacted jury's deliberations); *see also Melendez v. Cate*, 2011 WL 7477035, *2 (C.D. Cal. 2011) (holding that criminal verdict will be set aside only if the outside intrusion "affected the jury's deliberations and, thereby, its verdict.") So whether or not the alternate jurors were present in the room during deliberations, Petitioner failed to demonstrate prejudice.

Finally, Petitioner challenges two jurors' comments on the evidence. "[T]he general knowledge, opinions, feelings, and bias that every juror carries into the jury room" are properly considered during deliberations. *Hard v. Burlington Northern R. Co.*, 870 F.2d 1454, 1461 (9th Cir. 1989); *see also United States v. Navarro-Garcia*, 926 F.2d 818, 821-22 (9th Cir. 1991) ("[A] juror's past personal experiences may be an appropriate part of the jury's deliberations[,]" though "relevant only for purposes of interpreting the record evidence"). In such cases, no misconduct occurs. *See Rodriguez v. Marshall*, 125 F.3d at 745 (juror discussed

difficulty he had "discerning and recalling objects while driving at freeway speeds"); *McDowell v. Calderon*, 107 F.3d 1351, 1367 (9th Cir.) (juror argued during deliberations that "a sentence of life without parole . . . wouldn't mean 'without parole'"), *vacated en banc on other grounds*, 130 F.3d 833 (9th Cir. 1997); *Hard v. Burlington Northern R. Co.*, 870 F.2d 1454, 1462 (9th Cir. 1989) (juror made arguments during deliberations based on his prior military experience interpreting X-rays).

Here, Juror Freed's observation and mention about excessive intoxication affecting the ability to become aroused falls within the scope of general knowledge and, like those cases cited above, did not amount to misconduct. Juror Muhammad's comments about Petitioner's medications,[43] while perhaps not ordinarily a matter of general knowledge, *but see Hard v. Burlington Northern R. Co.*, 870 F.2d at 1462, *were* within *Juror Muhammed's* general knowledge. Petitioner's claim also fails because he fails to explain, and Juror Muhammad does not shed light on, what Juror Muhammad's comments actually were; the information he imparted could have been merely cumulative to the evidence presented by defense experts. Extrinsic evidence that is cumulative to evidence properly admitted at trial does not have a substantial or injurious effect on the jury's verdict. *See Mancuso v. Olivarez*, 292 F.3d at 952 (considering whether extraneous information was otherwise admissible or merely cumulative of other evidence adduced at trial); *Eslaminia v. White*, 136 F.3d 1234, 1239 (9th Cir. 1998) (same).

Accordingly, the California Supreme Court had reasonable bases upon which to reject these claims.

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[43] Specifically, Petitioner alleges that Juror Muhammad, a physician's assistant, recognized the "far away look" in Petitioner's eyes and knew from his "experience with psychiatric medications that [Petitioner] looked like someone who was medicated with anti-depressants." (Pet. § 2254(d) Br. at 98; Ex. 138 at 2689.) Juror Muhammad "recognized the names of the anti-depressants that [Petitioner] was taking and told the other jurors what I knew about the medications." (Ex. 138 at 2689.)

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F. Alleged Failure to Pay Attention and Follow the Court's Instructions

Lastly, Petitioner alleges that Juror Emil Ruotolo fell asleep during defense expert testimony presented at the penalty phase (Pet. at 356; Pet. § 2254(d) Br. at 100-01), jurors failed to follow the court's instructions relating to the meaning of a death sentence versus a sentence of life without parole (Pet. at 356-57), and jurors misapplied the law regarding the intent required for felony murder rape and the rape special circumstance. (Pet. at 357-59).

Again, to the extent Petitioner's evidence in support of this claim contains Juror Ruotolo's thoughts or impressions, or the effect of certain events on his thought processes, such evidence was properly disregarded by the California Supreme Court.[44] *See Tanner v. United States*, 483 U.S. at 117, 121, 125-26 (holding that Federal Rule of Evidence 606(b) bars evidence of juror incompetence, including "juror intoxication" and jurors "falling asleep all the time during the trial," because incompetence constitutes an "internal" rather than "external" influence); *Sassounian v. Roe*, 230 F.3d at 1108-09; *see also Anderson v. Terhune*, 409 Fed. Appx. 175, 178-79 (9th Cir. 2011).

Moreover, the California Supreme Court reasonably denied this claim. Petitioner failed to demonstrate how many times Juror Ruotolo fell asleep, or for what duration; indeed, he fails to establish that the juror missed any "essential" testimony. *See Anderson v. Terhune*, 409 Fed. Appx. at 179 (citing *United States v. Barrett*, 703 F.2d 1076, 1083 n.13 (9th Cir. 1983) ("[E]ven if the juror in the

[44] Examples include Juror Ruotolo's statements that "[t]he doctor who testified for the defense was difficult to understand . . . . His testimony was impossible to pay attention to . . . ." (Ex. 9 at 95), and "regardless of our verdict, we knew that [Petitioner] would end up getting life. We talked about how his drug use would save him from ever being executed. I just knew, as I still know, that there is no way they would actually execute him." (Ex. 9 at 96.)

present case is found to have been asleep during portions of the trial, a new trial may not be required if he did not miss essential portions of the trial and was able fairly to consider the case") and *United States v. Springfield*, 829 F.2d 860, 864 (9th Cir. 1987) (denying sleeping juror claim where trial court had found that juror missed only "insubstantial" portions of the trial)). Because Petitioner failed to show that Juror Ruotolo missed an essential portions of the defense experts' testimony, the California Supreme Court had a reasonable basis for denying this claim.

Next, Petitioner argues that jurors failed to follow the court's instructions relating to the meaning of a death sentence versus a sentence of life without parole. To support this claim, Petitioner cites to Juror Ruotolo's declaration. (*See* Pet. at 356-57; Ex. 9 at 96.) Again, to the extent it contains jurors' subjective thought processes, it could not be considered. (*See* Ex. 9 at 96 ("We talked about how his drug use would save him from ever being executed").) *See Sassounian v. Roe*, 230 F.3d at 1108-09. Further, at best, the juror's declaration on this point is vague and the California Supreme Court could have reasonably interpreted the declaration to simply be an off-hand remark that Petitioner would die from drug use before he could be executed. This in no way demonstrated that the jurors failed to follow the court's instructions. Since the declaration provides no proof that the jury failed to comprehend or follow the court's instructions, particularly in light of the presumption that a jury follows the court's instructions, *see Weeks v. Angelone*, 528 U.S. at 234, the California Supreme Court had a reasonable basis to reject this claim.

Lastly, Petitioner contends that the jurors committed misconduct by misapplying the law regarding the intent required for felony murder rape and the rape special circumstance. (Pet. at 357.) Petitioner's claim appears to be based on his argument in Claim Twelve that the jury instructions concerning specific intent were inadequate. (*See* Pet. at 164-66.) But as discussed above in the response to

Claim Twelve, not only were the instructions on specific intent adequate, the attorneys also repeatedly emphasized the specific intent requirement during their arguments to the jury. (*See* 26RT at 3891-92, 3926-28; 27RT at 3965.) Further, the jury asked the court the following question during the guilt phase deliberations: "To find the defendant had the specific intent to commit rape, is it necessary to believe he had that intent when he entered the house? [CALJIC No.] 8.21." (1CT at 249.) This shows that the jury understood it had to find the specific intent to rape. Accordingly, the California Supreme Court reasonably rejected this claim of juror misconduct.

Therefore, Claim Eighteen is barred by § 2254(d).

XIX. CLAIM NINETEEN IS BARRED BY § 2254(D)

In Claim Nineteen, Petitioner claims various federal constitutional violations on the ground that the jury was exposed to repeated outbursts by the victim's daughters. (Pet. at 359-63.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 290-92.) The California Supreme Court summarily rejected the claim on the merits in its order denying the first habeas corpus petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

"Clearly established federal law" is limited to Supreme Court authority that "squarely addresses" the claim at issue and provides a "clear answer." *Wright v. Van Patten*, 552 U.S. at 125-26; *see also Premo v. Moore*, 131 S. Ct. 733, 743, 178 L. Ed. 2d 649 (2011); *Knowles v. Mirzayance*, 556 U.S. at 121-22; *Carey v. Musladin*, 549 U.S. 70, 77, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). Where Supreme Court authority is not clearly established, a state court cannot have unreasonably applied it, or applied it in a contrary manner, so as to permit relief under § 2254(d). *See Wright v. Van Patten*, 552 U.S. at 123; *Carey v. Musladin*, 549 U.S. at 77.

The United States Supreme Court has expressly held that there is a dearth of clearly established Supreme Court authority when it comes to the potentially prejudicial effect of spectators' courtroom conduct. *Wright v. Van Patten*, 552 U.S. at 123; *Carey v. Musladin*, 549 U.S. at 76 ("In contrast to state-sponsored courtroom practices, the effect on a defendant's fair-trial rights of the spectator conduct to which Musladin objects is an open question in our jurisprudence. This Court has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial.").

For this reason, Petitioner's claim must fail. It cannot be concluded that the California Supreme Court, in rejecting Petitioner's claim, either unreasonably applied clearly established Supreme Court authority, or its conclusion was contrary to clearly established Supreme Court authority. *See Carey v. Musladin*, 549 U.S. at 77 ("Given the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here [wearing buttons], it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.' § 2254(d)(1). No holding of this Court required the California Court of Appeal to apply the test of *Williams*[45] and *Flynn*[46] to the spectators' conduct here. Therefore, the state court's decision was not contrary to or an unreasonable application of clearly established federal law.").

In any event, there is nothing in the record to suggest that the victim's daughters' conduct in the courtroom prejudiced Petitioner so as to deprive him of a fair trial. The two juror declarations that Petitioner relies upon merely acknowledge

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[45] In *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976), the Supreme Court addressed the effect of the state's courtroom practices on a defendant's right to a fair trial; specifically, whether a defendant "who is compelled to wear identifiable prison clothing at his trial by a jury is denied due process or equal protection of the laws." *Id*. at 502.

[46] In *Holbrook v. Flynn*, 475 U.S. 560, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986), the Supreme Court likewise addressed the effect of the state's conduct: whether seating "four uniformed state troopers" in the row of spectators' seats directly behind the defendant at trial denied him his right to a fair trial. *Id*. at 562.

that the victim's daughters were active in the courtroom. (*See* Ex. 9 at ¶ 9; Ex. 23 at ¶ 2.) And in fact, one of those jurors, Virginia Surprenant, was an alternate juror who did not contribute to the deliberations or the verdicts. (Ex. 23 at ¶ 1; 27RT at 3998-4001.) Further, prejudice will be limited if a "curative instruction was given or some other step taken to ameliorate the prejudice." *Sassounian v. Roe*, 230 F.3d at 1109 (internal quotation marks omitted); *see also Cox v. Ayers*, 414 Fed. Appx. 80, 85-86 (9th Cir. 2011) (quoting *Sassounian*); *Brown v. Ornoski*, 503 F.3d 1006, 1018 (9th Cir. 2007) ("The trial court properly instructed the jury to disregard any extraneous comments and to decide the case based only on the evidence at trial; juries are presumed to follow the court's instructions."). Here, during a brief recess and outside the presence of the jury, Deborah Harris was ordered to leave the courtroom. (22RT at 3271.) Thus, without calling the jury's attention to her conduct, the trial court addressed the issue. Additionally, the jurors were instructed that their verdicts were to be based solely on the evidence presented in the courtroom. (2CT at 254 ("[y]ou must determine the facts from the evidence received in the trial and not from any other source."), 258 & 427 ("You must decide all questions of fact in this case from the evidence received in this trial and not from any other source."). Jurors are presumed to follow instructions. *See Weeks v. Angelone*, 528 U.S. at 234. Accordingly, the California Supreme Court had a reasonable basis upon which to deny this claim.

Lastly, Petitioner claims ineffective assistance of trial counsel for failing to request judicial intervention at the outset of the daughters' conduct and move for a mistrial as the conduct escalated, and ineffective assistance of appellate counsel for failing to raise trial counsel's deficiencies on appeal. (Pet. at 363.) For the reasons set forth above, the California Supreme Court could reasonably conclude that trial counsel's performance was not deficient, and that Petitioner was not prejudiced. *Strickland v. Washington*, 466 U.S. at 687; *Richter*, 131 S. Ct. at 787. Moreover, since these claims were not supported by the trial record and lack merit, appellate

counsel did not render deficient performance in failing to raise them on appeal and Petitioner has not demonstrated that had they been raised, he would have prevailed on appeal. *See Morrison v. Estelle*, 981 F.2d 425, 429 (9th Cir. 1992) (appellate counsel not ineffective where argument would lose); *Miller v. Keeney*, 882 F.2d 1428, 1434 n. 9 (9th Cir. 1989).

Accordingly, Claim Nineteen is barred by § 2254(d).

XX. CLAIM TWENTY IS BARRED BY § 2254(D)

In Claim Twenty, Petitioner contends that his constitutional rights were violated by the admission of irrelevant and inflammatory photographs. (Pet. at 363-66.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 277-78.) The California Supreme Court summarily rejected the claim on the merits in its order denying the first habeas corpus petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

The record shows that the prosecutor sought to admit several crime scene photographs that showed Mrs. Miller's body and wounds. The prosecutor offered the photographs to show the circumstances of the crime, to show that the murder was integrally related to the rape, to show intent to kill, to explain why there was little blood at the crime scene or on Petitioner's clothing, and to show that Mrs. Miller had a defensive wound. (15RT at 2441-43, 2459-62, 2463.) The trial court excluded two of the photographs, but admitted several others. Some of the photographs showed Mrs. Miller's body the way it was discovered, with her hands tied over her head and knives protruding from her neck.[47]

The California Supreme Court reasonably rejected Petitioner's constitutional challenge to the admission of the crime scene photographs. The erroneous admission of evidence warrants habeas relief only when it results in the denial of a

[47] The trial court admitted photographs P-5A, P-5B, P-5D, P-5E, P-5F, P-5G, P-5H, P-7B, P-7C, P-7D, P-7E, P-7G1, P-7G2, P-7H1, P-7H2, and P-7H3. (Supp III CT at 3-4, 6-10, 13-16, 18-20.) It excluded photographs P-5C, P-7A, and P-7F. (Supp III CT at 5, 12; s*ee* 15RT at 2439-44, 2457-65; 20RT at 3138.)

fundamentally fair trial in violation of due process. *See Estelle v. McGuire*, 502 U.S. at 67-68. The Supreme Court has never held that the admission of graphic crime scene photographs violates a defendant's due process rights. *See Lyons v. Brady*, 666 F.3d 51, 56 (1st Cir. 2012) (rejecting claim under AEDPA that inflammatory autopsy photographs were erroneously admitted where defendant "has failed to bring to our attention any clearly established Supreme Court precedent holding that the admission of autopsy photographs violates due process rights"). Furthermore, the crime scene photographs were relevant to the jury's understanding of the circumstances of the crime and to such issues as intent and premeditation and deliberation. *See Jammal v. Van de Kamp*, 926 F.2d at 920 (due process is not violated by the admission of evidence if there are permissible inferences that the jury may draw from the evidence). In light of their relevance to the issues in the case and the jury's determination of guilt, the California Supreme Court reasonably could have determined that the crime scene photographs did not render Petitioner's trial fundamentally unfair. *See Gerlaugh v. Stewart*, 129 F.3d 1027, 1032 (9th Cir. 1997) (admission of gruesome photographs of decedent in capital murder case did not "[raise] the spectre of fundamental unfairness such as to violate federal due process of law"); *Batchelor v. Cupp*, 693 F.2d 859, 865 (9th Cir. 1982) (admission of gruesome photographs of murder victim's naked body did not violate due process).

Therefore, Claim Twenty is barred by § 2254(d).

XXI. CLAIM TWENTY-ONE IS PROCEDURALLY DEFAULTED AND BARRED BY § 2254(D)

In Claim Twenty-One, Petitioner contends that the jury received inadequate and insufficient jury instructions at the penalty phase. (Pet. at 366-72.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 326-32 (Claim "R").) The California Supreme Court summarily rejected the claim on the merits in its order denying the petition. In that same order,

the California Supreme Court also rejected the claim on the ground that, to the extent it was not raised on direct appeal, and except insofar as it alleged ineffective assistance of counsel, it was barred by *In re Harris*, 5 Cal. 4th at 825 & n.3, 826-29 and *In re Dixon*, 41 Cal. 2d at 759. (NOL C7.) As explained below, the claim is procedurally defaulted. In addition, the claim is barred by § 2254(d).

A. The Claim is Procedurally Defaulted

The California Supreme Court found that the claim was barred by *Harris* and *Dixon* because it was not raised on appeal. As discussed above (Arg. III), the *Dixon* bar -- that habeas corpus cannot serve as a substitute for an appeal -- is both independent and adequate. Petitioner fails to show cause for the default and prejudice resulting from it, or a fundamental miscarriage of justice. In light of the *Dixon* bar, the claim is procedurally defaulted.

B. The Claim is Barred by § 2254(d)

Furthermore, the claim is barred by § 2254(d). Petitioner first contends that the penalty phase instructions were inadequate because they permitted the prosecutor to argue that only factors related to the crime could be mitigating. (Pet. at 367-69.) The California Supreme Court reasonably rejected the claim.

"The Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence offered by petitioner." *Boyde v. California*, 494 U.S. 370, 377-78, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990). This includes evidence that may not be related to the crime, such as the defendant's background and character. *See id*. at 381-82. Here, the jury was instructed on factors to consider in deciding which penalty to impose. Included in those factors was the following: "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, *whether or not related to the offense for which he is on trial*. You must disregard any jury instruction given to you in the guilt or

innocence phase of this trial which conflicts with this principle." (2CT at 411 (emphasis added).) This instruction expressly permitted the jury to consider evidence in mitigation that was unrelated to the crime.

Petitioner contends that the prosecutor misstated the law by telling the jury that mitigation had to be related to the crime. (Pet. at 367-69.) But the trial court instructed the jury that it "must accept and follow the law that I shall state to you." (2CT at 391.) Presumably, the jury followed the instruction that permitted it to consider evidence in mitigation that was unrelated to the crime. *See Weeks v. Angelone*, 528 U.S. at 234 ("A jury is presumed to follow its instructions"). Furthermore, the prosecutor never stated that mitigation had to be related to the crime. In fact, the prosecutor repeated the part of the instruction that permitted the jury to consider "any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death." (31RT at 4642.) Thus, it is not reasonably likely that the jury applied the penalty phase instructions in a way that prevented the consideration of constitutionally relevant evidence. *Boyde v. California*, 494 U.S. at 380.

Petitioner also contends that the penalty phase instructions were inadequate because they failed to prohibit consideration of mitigating factors as aggravating factors. (Pet. at 369-72.) The California Supreme Court reasonably rejected the claim.

The trial court instructed the jury that an aggravating factor "is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." It instructed the jury that a mitigating circumstance "is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." (2CT at 405.) The trial court also instructed the jury on factors to consider in determining

which penalty to impose, but it did not identify any factors as aggravating or mitigating. (2CT at 411-12.)

The California Supreme Court reasonably rejected Petitioner's claim that the instructions failed to prohibit consideration of mitigating factors as aggravating factors because the Supreme Court has never held that particular sentencing factors can only be mitigating or that a trial court must instruct the jury that particular sentencing factors can only be mitigating. Instead, the Supreme Court has held that a capital sentencer need not be instructed on how to weigh sentencing factors. *Tuilaepa v. California*, 512 U.S. 967, 979, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994) ("'discretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed' is not impermissible in the capital sentencing process"). Furthermore, some evidence can be a "two-edged sword" that can be both aggravating and mitigating. *See Pinholster*, 131 S. Ct. at 1410. Thus, the California Supreme Court reasonably rejected Petitioner's claim that the instructions were constitutionally deficient.

Therefore, Claim Twenty-One is barred by § 2254(d).

XXII. CLAIM TWENTY-TWO IS BARRED BY § 2254(D)

In Claim Twenty-Two, Petitioner contends that his death sentence is unconstitutional because the jurors were not instructed that they were required to unanimously agree on the circumstances in aggravation that supported their penalty phase verdict, and were not instructed that the reasonable doubt standard applied to their determinations as to which factors were aggravating, whether aggravating factors outweighed mitigating factors, and whether death was the appropriate penalty. (Pet. at 372-81.) Petitioner raised the claim concerning the lack of an instruction concerning unanimous agreement on circumstances in aggravation in his opening brief on appeal in the California Supreme Court. (NOL B1 at 221-23.) The California Supreme Court rejected the claim in its reasoned opinion on appeal. (NOL B4; *People v. Jones*, 29 Cal. 4th at 1267.) Petitioner raised the claim

concerning the lack of an instruction concerning the reasonable doubt standard in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 333-46.) The California Supreme Court summarily rejected the claim on the merits in its order denying the first habeas corpus petition. (NOL C7.)

The California Supreme Court reasonably rejected Petitioner's claims because the Supreme Court has never held that penalty phase jurors must: (1) unanimously agree on circumstances in aggravation; (2) be convinced beyond a reasonable doubt as to the existence of aggravating factors; (3) be convinced beyond a reasonable doubt that aggravating factors outweigh mitigating factors; or (4) be convinced beyond a reasonable doubt that death is the appropriate penalty. Therefore, Claim Twenty-Two is barred by § 2254(d).

XXIII. CLAIM TWENTY-THREE IS PREMATURE AND BARRED BY § 2254(D)

In Claim Twenty-Three, Petitioner contends his death sentence amounts to cruel and unusual punishment in violation of the Eighth Amendment because of his mental disabilities and impairments. (Pet. at 382-93; Pet. § 2254(d) Br. at 121-29.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 347-70.) The California Supreme Court summarily rejected the claim on the merits in its order denying the first habeas corpus petition. (NOL C7.)

First, this claim is premature. Petitioner's execution has been stayed by this Court pending the resolution of the claims currently before it, so Petitioner's execution is hardly imminent. Execution must be imminent for a claim of sanity/competence to be executed to be ripe for judicial review. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45, 118 S. Ct. 1618, 140 L. Ed. 849 (1998). Furthermore, the California Penal Code sets forth a strict procedure to be complied with in order to determine whether an inmate is competent to be executed. *See* Cal. Penal Code § 3700, et. seq. Those procedures, which are designed to ensure

incompetent persons are not executed, are automatically initiated upon the court entering "an order appointing a day upon which a judgment of death shall be executed upon a defendant . . . ." Cal. Penal Code § 3700.5. As Petitioner's execution has been stayed, and there is no date set for his execution to take place, the instant claim must be denied as premature.

In any event, Petitioner's claim is barred by § 2254(d). For reasons previously discussed, there is no credible evidence that Petitioner has any significant mental impairments so severe that he is incompetent to be executed. Thus, the California Supreme Court had a reasonable basis for denying relief on this claim and, accordingly, federal habeas relief is barred.

XXIV. CLAIM TWENTY-FOUR IS BARRED BY § 2254(D)

In Claim Twenty-Four, Petitioner contends that California's death penalty statute is unconstitutional because it fails to narrow the class of offenders eligible for the death penalty. (Pet. at 394-401.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 383-408.) The California Supreme Court summarily rejected the claim on the merits in its order denying the first habeas corpus petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

Under the Eighth Amendment, a sentence of death cannot be imposed arbitrarily. In order for a capital sentencing scheme to pass constitutional muster, it must perform a narrowing function with respect to the class of persons eligible for the death penalty. *Jones v. United States*, 527 U.S. 373, 381, 119 S. Ct. 2090, 144 L. Ed. 2d 370 (1999). California's death penalty statute limits eligibility for the death penalty to persons who commit first degree murder under certain enumerated special circumstances. Cal. Penal Code § 190.3. Petitioner contends that the statute fails to properly perform a narrowing function given the number and scope of special circumstances that permit application of the death penalty. The Supreme Court, however, has never held that there is a constitutional limit on the number and

scope of special circumstances that can be included in a death penalty statute. Therefore, the California Supreme Court reasonably rejected Petitioner's claim that California's death penalty statute is insufficiently narrow. *See Mayfield v. Woodford*, 270 F.3d 915, 914 (9th Cir. 2001) (declining to grant certificate of appealability on claim that California's death penalty scheme does not adequately narrow class of offenders eligible for death penalty because the issue was not debatable among reasonable jurists).

Accordingly, Claim Twenty-Four is barred by § 2254(d).

XXV. CLAIM TWENTY-FIVE IS PROCEDURALLY DEFAULTED AND BARRED BY § 2254(D)

In Claim Twenty-Five, Petitioner contends that his death sentence is unconstitutional because it was imposed in a discriminatory manner based on his race and gender. (Pet. at 401-06.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 409-15 (Claim "Y").) The California Supreme Court summarily rejected the claim on the merits in its order denying the first habeas corpus petition. In that same order, the California Supreme Court also rejected the claim on the ground that, with the exception that it alleged ineffective assistance of trial counsel, Petitioner failed to raise it in the trial court, citing *In re Seaton*, 34 Cal. 4th 193. (NOL C7.) As explained below, the claim is procedurally defaulted. In addition, the claim is barred by § 2254(d).

A. The Claim is Procedurally Defaulted

The claim is procedurally defaulted. At trial, Petitioner never objected that his death sentence was imposed in a discriminatory manner based on his race and gender. The California Supreme Court denied Petitioner's claim because he failed to raise it in the trial court, citing *In re Seaton*. As discussed above (Arg. X), the denial of a claim based on the failure to object at trial is a state procedural ground that is both independent and adequate and consistently applied by California courts. Petitioner fails to show cause for the default and prejudice resulting from it, or a

fundamental miscarriage of justice.[48] Therefore, the claim is procedurally defaulted.

B. The Claim is Barred by § 2254(d)

Furthermore, the claim is barred by § 2254(d). The Supreme Court has made clear that "[d]iscrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979). However, "to prevail under the Equal Protection Clause, [a petitioner] must prove that the decisionmakers in *his* case acted with discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 292, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987) (emphasis in original). The Supreme Court in *McCleskey* established a demanding evidentiary standard for finding prosecutorial abuse of discretion in seeking the death penalty: "[b]ecause discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused." *Id*. at 297.

Here, Petitioner alleges that there was a pattern of racial discrimination in the Los Angeles County District Attorney's Office during the time period in which charges were brought against him, but he does not identify *any* evidence that there was discrimination in *his* case. *See McCleskey v. Kemp*, 481 U.S. 297 (statistical study was "clearly insufficient to support an inference that any of the decisionmakers in [petitioner's] case acted with discriminatory purpose"). Therefore, the California Supreme Court reasonably could have determined that Petitioner failed to show that the death sentence in his case was imposed in a discriminatory manner.

As for Petitioner's claim that trial counsel rendered ineffective assistance for failing to allege discrimination in the charging decision (Pet. at 406), the California

[48] To the extent Petitioner contends that trial counsel rendered ineffective assistance for failing to allege discrimination (Pet. at 406), the claims fails for the reasons discussed below in this Argument. Thus, it does not establish cause for the procedural default.

Supreme Court reasonably could have rejected Petitioner's claim as conclusory and unsupported since none of counsel's declarations explains why he did not allege discrimination in the charging decision. *See People v. Duvall*, 9 Cal. 4th at 474. Furthermore, since Petitioner does not identify any evidence that there was discrimination in the charging decision, the California Supreme Court reasonably could have determined that counsel did not render ineffective assistance for failing to allege such discrimination.

Accordingly, Claim Twenty-Five is barred by § 2254(d).

XXVI. CLAIM TWENTY-SIX IS BARRED BY § 2254(D)

In Claim Twenty-Six, Petitioner contends that his death sentence is unlawful because customary international law bars execution of mentally disordered offenders. (Pet. at 406-14.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 416-24.) The California Supreme Court summarily rejected the claim on the merits in its order denying the first habeas corpus petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

Under § 2254(a), habeas corpus relief is available only if the person is in custody "in violation of the Constitution or laws or treaties of the United States." Accordingly, Petitioner's claim that his death sentence violates international law is not cognizable in these proceedings. *Rowland v. Chappell*, No. C 94-3037 WHA, 2012 WL 4715262, at *34 (N.D. Cal. Oct. 2, 2012) (claim of violation of international law is not cognizable on federal habeas review). Furthermore, under § 2254(d)(1), Petitioner must show that the state court adjudication of his claim resulted in a decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." There is no clearly established Supreme Court law holding that execution of mentally disordered offenders violates international law.

Therefore, Claim Twenty-Six is barred by § 2254(d).

XXVII. CLAIM TWENTY-SEVEN IS *TEAGUE* BARRED AND BARRED BY § 2254(D)

In Claim Twenty-Seven, Petitioner contends that execution following a long period of confinement under a sentence of death constitutes cruel and unusual punishment. (Pet. at 414-18.) Petitioner raised this claim in his opening brief on appeal in the California Supreme Court. (NOL B1 at 229-43.) The California Supreme Court rejected the claim on the merits in its reasoned published opinion on appeal. (NOL B4; *People v. Jones*, 29 Cal. 4th at 1267.) As explained below, the claim is barred by *Teague v. Lane*, 489 U.S. 288. The claim is also barred by § 2254(d).

A. The Claim is Barred by *Teague*

Petitioner's *Lackey*[49] claim is barred by *Teague v. Lane*, 489 U.S. 288. Granting relief on this claim would require that a new rule of constitutional law be announced, i.e., that execution following a long period of confinement under a sentence of death constitutes cruel and unusual punishment. This rule was not compelled by existing precedent at the time Petitioner's conviction became final. *See Smith v. Mahoney,* 611 F.3d 978, 998-99 (9th Cir. 2010) (finding *Lackey* claim *Teague* barred); *White v. Johnson*, 79 F.3d 432, 437-39 (5th Cir. 1996) (same, observing that no federal court had recognized such a theory of cruel and unusual punishment). Furthermore, neither of *Teague*'s exceptions applies, as the rule does not place a class of private conduct beyond the power of the state to proscribe and is not a watershed rule of criminal procedure. *See White v. Johnson*, 79 F.3d at 438 (finding that *Lackey* claim does not fall within either of *Teague*'s exceptions). Thus, Petitioner's claim is *Teague* barred.

[49] Petitioner's claim is termed a "*Lackey*" claim. In a memorandum opinion respecting the denial of certiorari in *Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct. 1421, 131 L. Ed. 2d 304 (1995), Justice Stevens questioned whether executing a prisoner who has spent many years on death row constitutes cruel and unusual punishment prohibited by the Eighth Amendment. The Supreme Court, however, has never addressed the issue.

B. The Claim is Barred by § 2254(d)

Furthermore, the claim is barred by § 2254(d). The Supreme Court has never held that execution following a long period of confinement under a sentence of death constitutes cruel and unusual punishment. Therefore, the California Supreme Court reasonably rejected the claim. *See Allen v. Ornoski*, 435 F.3d 946, 958 (9th Cir. 2006) (denial of habeas relief proper because Supreme Court has never held that execution after long tenure on death row constitutes cruel and unusual punishment).

Therefore, Claim Twenty-Seven is barred by § 2254(d).

XXVIII. CLAIM TWENTY-EIGHT IS BARRED BY § 2254(D)

In Claim Twenty-Eight, Petitioner contends that his state appellate attorneys rendered ineffective assistance. (Pet. at 418-21.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 375-77.) The California Supreme Court summarily rejected the claim on the merits in its order denying the first habeas corpus petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

The *Strickland* standard applies when considering claims regarding the effective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000). Under that standard, appellate counsel have no duty to raise every nonfrivolous issue requested by a defendant. *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). In many instances, appellate counsel will choose not to raise an issue because counsel foresees little or no likelihood of success on the issue. *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that "the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy"). Furthermore, appellate counsel's failure to raise issues on direct appeal does not constitute ineffective assistance when the appeal would not have provided grounds for reversal. *Wildman v. Johnson*, 261 F.3d 832, 840 (9th Cir. 2001).

Petitioner contends that his state appellate attorneys rendered ineffective assistance because they did not raise numerous claims that Petitioner raised in the state habeas proceedings and in the instant proceedings. The California Supreme Court reasonably rejected the claim. Petitioner does not discuss how appellate counsel's performance was deficient for failing to raise the claims or how he was prejudiced by counsel's alleged deficient performance. In addition, in the state habeas proceedings, Petitioner failed to provide any declaration from his appellate attorneys explaining why they did not raise certain claims on appeal. Thus, the California Supreme Court reasonably could have rejected Petitioner's claim of ineffective assistance as conclusory and unsupported. *See People v. Duvall*, 9 Cal. 4th at 474; *People v. Karis*, 46 Cal. 3d at 656; *James v. Borg*, 24 F.3d at 26.

In addition, the California Supreme Court reasonably could have determined that appellate counsel did not render ineffective assistance for failing to raise the claims. Each of the claims that Petitioner contends appellate counsel should have raised on appeal was raised by Petitioner on habeas corpus in the California Supreme Court. In its order denying Petitioner habeas corpus relief, the California Supreme Court rejected each of the claims on the merits. (NOL C7.) Since the California Supreme Court determined that the claims lacked merit, it reasonably could have determined that counsel was not ineffective for failing to raise them. *See Turner v. Calderon*, 281 F.3d 851, 872 (9th Cir. 2002) (failure to raise untenable claims does not fall below the *Strickland* standard). For the same reason, the California Supreme Court reasonably could have determined that the failure to raise the unmeritorious claims was not prejudicial.

Therefore, Claim Twenty-Eight is barred by § 2254(d).

XXIX. CLAIM TWENTY-NINE IS BARRED BY § 2254(D)

In Claim Twenty-Nine, Petitioner contends that the appellate record of his trial proceedings was inaccurate and incomplete. (Pet. at 421-28.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1

at 11-19.) The California Supreme Court summarily rejected the claim on the merits in its order denying the first habeas corpus petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

To satisfy the constitutional guaranties of due process and equal protection, the state must provide a defendant with a "'record of sufficient completeness' to permit proper consideration of (his) claims" on appeal. *Mayer v. City of Chicago*, 404 U.S. 189, 193-94, 92 S. Ct. 410, 30 L. Ed. 2d 372 (1971); *Britt v. North Carolina*, 404 U.S. 226, 227, 92 S. Ct. 431, 30 L. Ed. 2d 400 (1971) ("there can be no doubt that the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal"). Here, Petitioner alleges that the record of the trial proceedings in his case was incomplete, identifying numerous materials that he claims should have been included in the record on appeal. (Pet. at 422-25.) Petitioner, however, fails to explain how the omission of any of the materials from the record prevented proper consideration of his claims on appeal. Therefore, the California Supreme Court reasonably rejected Petitioner's claim that the record on appeal was constitutionally deficient.

Petitioner also contends that his appellate attorneys rendered ineffective assistance for failing to ensure that there was an accurate and complete record on appeal. (Pet. at 426-27.) Petitioner, however, provides no declaration from his appellate attorneys in which they explain the reason they did not seek to have additional materials included in the record on appeal. Thus, the California Supreme Court reasonably could have rejected Petitioner's claim as conclusory and unsupported. *See People v. Duvall*, 9 Cal. 4th at 474. Furthermore, since Petitioner does not explain how any materials not included in the record were needed for the proper consideration of his claims on appeal, the California Supreme Court reasonably could have found that appellate counsel did not perform deficiently in

relying on the existing record and that Petitioner was not prejudiced by counsel's alleged deficient performance.

Therefore, Claim Twenty-Nine is barred by § 2254(d).

XXX. CLAIM THIRTY IS BARRED BY § 2254(D)

In Claim Thirty, Petitioner contends that the multiple constitutional violations that he alleges in the Petition cumulatively rendered his trial unfair. (Pet. at 428-29.) Petitioner raised this claim in his first habeas corpus petition in the California Supreme Court. (NOL C1 at 425-26.) The California Supreme Court summarily rejected the claim on the merits in its order denying the first habeas corpus petition. (NOL C7.) As explained below, the claim is barred by § 2254(d).

"While the combined effect of multiple errors may violate due process even when no single error amounts to a constitutional violation or requires reversal, habeas relief is warranted only where the errors infect a trial with unfairness." *Payton v. Cullen*, 658 F.3d 890, 896-97 (9th Cir. 2011), citing *Chambers v. Mississippi*, 410 U.S. 284, 298, 302-03, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). The California Supreme Court reasonably rejected Petitioner's cumulative error claim because it reasonably could have determined that, to the extent there were any errors at Petitioner's trial, they were not prejudicial, either individually or cumulatively, given the overwhelming evidence of Petitioner's guilt and the overwhelming aggravating evidence introduced at the trial.

Therefore, Claim Thirty is barred by § 2254(d).

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CONCLUSION

For the reasons discussed above, some of the claims in the Petition are procedurally defaulted and some of the claims are barred by *Teague v. Lane*, 489 U.S. 288. In addition, all of the claims are barred by 28 U.S.C. § 2254(d).

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Respectfully submitted,

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