

1 The Warden filed an answer as to Claim 11 as ordered, on August 29, 2011.
2 The Warden states no procedural bar is applicable to Claim 11, that all but one
3 subclaim have been exhausted, and that the AEDPA controls the disposition of
4 this case. Claim 11 asserts that trial counsel was constitutionally deficient for
5 failing to: (1) retain and present his own pediatric forensic pathologist with
6 respect to Cassie's cause of death; (2) adequately cross-examine the prosecution's
7 medical experts on this subject; (3) request lesser included instructions; and (4)
8 conduct a reasonable investigation with respect to Cassie's cause of death, all of
9 which resulted in prejudice. The Warden asserts the fourth subclaim, failure to
10 conduct a reasonable investigation into the cause of Cassie's death, was not
11 presented to the state court and is not exhausted.

12 The Warden denies that Beames is entitled to federal habeas relief on
13 Claim 11, including the unexhausted subclaim. Specifically, the Warden asserts
14 that Beames has not demonstrated the state court's rejection of these subclaims
15 was contrary to, or involved an unreasonable application of, clearly established
16 federal law as determined by the United States Supreme Court (*see* 28 U.S.C.
17 § 2254 (d)(1)), or that the rejection was based on an unreasonable determination
18 of the facts in light of the evidence presented in the state court proceedings (*see*
19 § 2254 (d)(2)).

20 Beames responded, asserting the Warden's theory of non-exhaustion is
21 fundamentally flawed and Claim 11 is fully exhausted. Beames contends his
22 state petition identified the constitutional guarantee on which the claim was
23 based and discussed the governing federal law, as well as presented the factual
24 basis of the claim. Beames states that in both the federal and state petitions he
25 faulted trial counsel for failing to retain a defense expert to review the autopsy
26 report and provide an alternate and exculpatory opinion, and for failing to

1 expose the errors and incompetence of the prosecution experts. Beames argues
2 that the supporting evidence, with one exception¹, was presented to the state
3 court, and that the text of Claim 11 is nearly identical to the claim in the state
4 petition.

5 Beames observes that first, in the Answer, the Warden challenged as
6 unexhausted the claim of counsel failed to conduct a reasonable investigation
7 with respect to Cassie’s death, and second, in the Brief Regarding Exhaustion,
8 challenged as unexhausted the claim that counsel failed to adequately investigate
9 the prosecution’s experts. Beames contends the first assertion, trial counsel’s
10 failure to investigate the true cause of Cassie’s death, goes to the very core of the
11 claim, which was repeated throughout the state petition, along with allegations
12 that this failure violated the Sixth Amendment. Beames further contends the
13 second assertion was repeatedly alleged in the state petition, and the change
14 from trial counsel’s failure to “adequately cross-examine” the state’s experts, to
15 “adequately investigate and cross-examine” is a minor change that does not
16 create a new claim. Beames asserts that the state petition repeatedly alleges the
17 inaccuracies of the state’s experts regarding Cassie’s injuries, and presents the
18 theory that trial counsel was deficient for failing to effectively cross-examine
19 them and expose their errors.

20 The Warden replies that the difference in language of the Answer and the
21 brief regarding exhaustion is due to vagueness in Beames’ petition, and asserts
22 that the subclaim pertaining to trial counsel’s alleged inadequate investigation as
23 set forth in Claim 11 is unexhausted. The Warden asserts that isolated sentences

24
25 ¹ Beames acknowledges the declaration of Allen Bloom submitted in support
26 of the federal petition, Exhibit 158, was not presented to the state court, and that
while it may not be considered for purposes of analysis under 28 U.S.C. § 2254(d),
it may be considered for other purposes.

1 scattered throughout Beames' state petition do not allege a substantive claim
2 that trial counsel was ineffective for failing to investigate. Rather, the Warden
3 asserts that these scattered sentences are no more than supporting argument for
4 the other subclaims, specifically, the failure to retain and present defense experts,
5 and the failure to adequately cross-examine the prosecution's experts. The
6 Warden asserts the addition of "adequately investigate" to those subclaims
7 creates a new subclaim. The Warden argues that Beames presented the claim of
8 inadequate investigation of the prosecution's experts in his exhaustion petition,
9 which is a sign that the subclaim of inadequate investigation in Claim 11 is
10 unexhausted.

11 The addition of "adequately investigate" does not create a new subclaim,
12 as it is implicit in the subclaims presented in the state petition. In order to
13 adequately cross-examine the prosecution's experts, trial counsel would have
14 had to investigate those experts' opinions, and in order to retain and present
15 defense experts, trial counsel would have had to investigate the evidence upon
16 which they would opine.

17 The Warden further argues that Claim 11 presents a new legal theory of
18 ineffective assistance of counsel pertaining to failure to conduct an adequate
19 investigation. However, the Warden does not indicate what new legal theory is
20 presented in the federal petition, and Beames' citations to the relevant United
21 States Supreme Court cases, *Strickland*, *Williams*, *Rompilla*, and *Wiggins*, are all
22 cited in his state petition.

23 Although Claim 11 has been slightly reorganized in the federal petition, it
24 does not present new facts or a new legal theory from the claim which was
25 previously presented to the state court. That current counsel included a portion
26 of this claim in Beames' state exhaustion does not render this claim unexhausted,

1 as capital counsel often, out of an abundance of caution, re-present claims to the
2 state court. Claim 11 is exhausted.

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IT IS SO ORDERED.

Dated: November 23, 2011


CHIEF UNITED STATES DISTRICT JUDGE