

1 subclaims of that claim were exhausted. The parties were unable to resolve their
2 disagreement about the exhaustion status of Claim 11, and submitted briefing of
3 the exhaustion dispute. An order finding Claim 11 exhausted was issued
4 November 23, 2011. *See* Doc. 48.

5 The parties filed a Joint Statement regarding the exhaustion status of the
6 remaining claims, excluding Claim 11, in Beames' federal petition. There are no
7 claims that the parties agree are exhausted. The parties agree that 20 claims and
8 part of one more claim (of the 49 claims in the federal petition) are unexhausted.
9 The agreed unexhausted claims are: 1, 2, 6, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 23,
10 24, 25, 26, 27, 35D, 42 and 49. Beames asserts that these agreed unexhausted
11 claims are presently pending before the California Supreme Court. *See* California
12 Case No. S195127.

13 Incorporation Language Objections

14 The Warden filed his brief regarding the exhaustion status of the
15 remaining claims February 28, 2012. *See* Doc. 52. The Warden objects to the
16 incorporation language in each claim of the federal petition, which "incorporates
17 all facts, exhibits, declarations and claims of constitutional violation alleged
18 elsewhere in this petition," as including unexhausted claims and new exhibits
19 which have not been presented to the state. The Warden asserts that Beames has
20 not established why the incorporations of new claims and exhibits do not render
21 all his federal claims unexhausted. The Warden states that if the incorporation
22 language were eliminated, "it appears" 20 of Beames' claims and subclaims of
23 two other claims would be exhausted. These claims are: 3, 7, 19, 20, 21, 22, 28, 31,
24 32, 33, 34, 35A-C, 36, 38, 39, 40, 43A-L and N, 44, 45, 46, 47 and 48.¹ Although the
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26 ¹ In his reply brief, the Warden adds Claim 5 to this group.

1 Warden states these claims appear to be exhausted, he indicates the exhaustion
2 requirement is not waived for any federal claim, as it is possible that he has failed
3 to identify every unexhausted claim or subclaim.

4 Beames filed his responding brief on exhaustion March 30, 2012. *See* Doc.
5 54. Beames asserts that for otherwise exhausted claims, the incorporation
6 language has no effect on the exhaustion status, as the language does not change
7 the legal or factual basis of, or fundamentally alter, the claims. Beames asserts
8 the purpose of the incorporation language is to preserve his ability to refer in
9 future briefing and argument to any portion of the record in relation to any other
10 portion, within the bounds of relevance. Beames argues that because the
11 incorporation language does not alter the substance of these claims, they should
12 be found to be exhausted.

13 The Warden filed a reply April 30, 2012, arguing that Beames' assertion –
14 that the incorporation language does not purport to expand the legal or factual
15 basis of, or fundamentally alter, any claim – is contradictory to the plain language
16 in the federal petition. *See* Doc. 55. The Warden contends that since the federal
17 petition presents 49 claims with various subclaims and 165 exhibits, the general
18 incorporation language vastly expands his federal claims beyond the allegations
19 presented to the state court. The Warden argues the use of similar incorporation
20 language in Beames' state petition does not solve the problem, as several
21 arguments and exhibits are included in the federal petition which were not
22 presented to the state. Further, the Warden contends the general incorporation
23 language was not sufficient to alert the state court that particular exhibits or
24 declarations were to be considered with specific claims, and that Beames needed
25 to explicitly state which exhibits supported which claims.

26 The Warden's objection, that the language of incorporation in Beames'

1 petition incorporates all legal and factual bases in the entire petition into each
2 claim, is well taken. The actual language of the incorporation clause sweeps
3 more broadly than Beames asserts it does. In light of Beames' contention about
4 the purpose of the incorporation language in his federal petition, that language
5 will be interpreted to conform to Beames' interpretation - that it "does not change
6 the legal or factual basis of, or fundamentally alter, the claims" but only allows
7 Beames to argue, where relevant, any facts asserted in the petition. Under this
8 interpretation, the exhaustion status of these claims will not be defeated by the
9 inclusion of incorporation language in the claims. Consideration will only be
10 given to legal or factual bases for habeas relief which are specifically stated in
11 Beames' federal claims.

12 Objections to Specific Claims

13 The Warden asserts that even without the incorporation language, six
14 claims and one subclaim have not been established as exhausted. These claims
15 are: 4, 5, 29, 30, 37, 41 and 43M.

16 Claim 4 alleges the trial court violated Beames' rights by denying a
17 continuance prior to trial to assess the impact of pretrial publicity and to present
18 expert testimony regarding a jury survey, for the purposes of bringing a change
19 of venue motion. The Warden contends Claim 4 specifically incorporates Claims
20 8 and 9, both of which are unexhausted, and includes exhibits 76 through 91
21 (news articles regarding Cassie's death and the resulting criminals cases of
22 Beames and Cassie's mother). Beames attempted to present the news articles to
23 the state court during direct appeal by way of a motion for judicial notice, which
24 was denied. The Warden asserts the news articles substantially alter Claim 4
25 from the claim presented in state court, because they provide the factual
26 foundation for the claim.

1 Beames asserts Claim 4 is fully exhausted as the same issue was presented
2 to the state court as Issue I on direct appeal. *See* Appellant’s Opening Brief at 47 -
3 112. Beames contends the state court had the opportunity to pass on the question
4 of whether the United States Constitution was violated by the trial court’s denial
5 of a continuance. The Warden alleges the claim is rendered unexhausted by the
6 inclusion of Exhibits 76 through 91, newspaper articles regarding the case against
7 Beames and the trial of co-defendant Angelita McMains (Cassie’s mother).²
8 Beames observes that exhaustion only requires *presentation* to the state court, not
9 *consideration* by the state court. Beames argues the presentation requirement is
10 satisfied by the motion for judicial notice.

11 Beames contends that Claim 4 would be exhausted even without regard to
12 the motion for judicial notice, as the exhibits were summarized in his briefs and
13 individually described or quoted in the text. Because the substance of the
14 exhibits were before the California Supreme Court in the appellate briefs, Beames
15 asserts the submission of the articles as exhibits to the federal petition does not
16 render the claim unexhausted.

17 Beames argues even if the substance of the exhibits had not been presented
18 in state court, the presentation of supplemental evidence in federal court would
19 not defeat exhaustion, as the exhibits support, without expanding, the factual
20 basis presented to the state court. The claim on direct appeal asserted that local
21 media coverage was inflammatory. Beames contends that since the exhibits
22 provide direct support for these allegations without altering the basis of the
23 claim, they have no effect on exhaustion. Both Issue I on state direct appeal and
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25 ² The exhibits were presented on direct appeal with a motion for judicial
26 notice, which was denied. These exhibits also were presented to the state court in
support of the related claim of ineffective assistance of counsel for failure to bring
a change of venue motion. State Habeas Petition, Claim IX.

1 Claim 4 of the federal petition are explicitly based on the local newspaper
2 coverage. Beames contends the exhibits are not newly added to the claim.

3 Lastly, Beames asserts that the reference to Claims 8 and 9, which are
4 presently pending before the California Supreme Court, does not affect the
5 exhaustion status of Claim 4. The state court had the opportunity to pass on
6 whether the pretrial publicity required a continuance for preparation of a change
7 of venue motion, so a passing reference to unexhausted claims does not
8 fundamentally alter Claim 4.

9 The Warden disagrees that the properly denied motion for the state court
10 to take judicial notice of certain exhibits satisfies the presentation requirement for
11 exhaustion and disagrees with Beames' assertion that the description of or quotes
12 from the exhibits fairly presented the substance of the exhibits to the state court.
13 The Warden also disagrees with Beames' contention that the exhibits do not
14 fundamentally alter the claim, and asserts the exhibits substantially improve the
15 evidentiary basis of Claim 4, placing it in a stronger evidentiary posture.

16 Lastly, the Warden alleges the incorporation of Claims 8 and 9 (which are
17 acknowledged to be unexhausted), render Claim 4 unexhausted by incorporating
18 arguments and exhibits the state court has not yet considered.

19 Beames properly presented this claim on direct appeal. The California
20 Supreme Court, in considering this claim, had before it the substance of the
21 exhibits, as the majority of the exhibits were part of the record, were included in
22 the motion for judicial notice, and/or were quoted in Beames' opening brief. The
23 incorporation of Claims 8 and 9 (trial counsel failed to peremptorily challenge
24 biased jurors and failed to adequately voir dire jurors for bias), are only asserted
25 in this claim as factors which exacerbated the trial court's allegedly inadequate
26 approach of preferring voir dire over jury surveys in assessing the extent of

1 media influence in the community, and the use of rehabilitation for jurors who
2 expressed doubts at their ability to be impartial. See Federal Petition at page 91.
3 The Warden's objections to the inclusion of news articles and to the incorporation
4 of unexhausted claims do not render this claim unexhausted. Claim 4 is
5 exhausted.

6 Claim 5 alleges trial counsel was ineffective by failing to move for a change
7 of venue. The Warden contends Claim 5 is unexhausted because it specifically
8 incorporates Claim 4, which is unexhausted for the reasons stated above.

9 Beames responds that since Claim 4 is exhausted, as stated above, Claim 5
10 also is exhausted. Beames asserts that Claim 5 is identical to Claim IX in his first
11 state habeas petition, with the exception of minor editing and the reference to the
12 interrelated nature of Claims 4 and 5. The text of state habeas Claim IX (and
13 federal Claim 5) repeats much of the factual basis from direct appeal Issue I (and
14 federal Claim 4). Beames argues the relationship between the two claims was
15 obvious to the state court, and merely noting that relationship in the federal
16 petition has no effect on exhaustion.

17 The Warden in his reply acknowledges that the exhaustion status of
18 Claim 4 is irrelevant to whether Claim 5 is exhausted, as the factual allegations
19 incorporated from Claim 4 were fully detailed in Beames' state habeas petition.
20 The Warden's only objection to Claim 5 remains due to the general incorporation
21 language discussed above.

22 Claim 5 is exhausted.

23 Claim 29 alleges the cumulative effect of errors and constitutional
24 violations at the guilt phase require reversal of the verdict and special
25 circumstance finding. The Warden contends Claim 29 is unexhausted because it
26 specifically incorporates Claims 4 and 5, which are unexhausted for the reasons

1 stated above.

2 Beames responds that Claims 4 and 5 are exhausted, as stated above, so
3 Claim 29 also is exhausted. Beames argues that the state court had an
4 opportunity to consider whether the cumulative effect of the alleged errors
5 invalidated his conviction. Further, Beames contends that even if any of the
6 claims are unexhausted, the cumulative error claim would not be rendered
7 unexhausted, it would mean only that the unreviewable claims would be
8 excluded from cumulation.

9 The Warden replies that Beames' contention is contrary to the exhaustion
10 requirement in federal habeas proceedings, and contends Beames has failed to
11 establish that Claim 29 is exhausted.

12 The inclusion of Claims 4 and 5, both of which are found to be exhausted
13 above, do not make this cumulative error claim unexhausted. Claim 29 is
14 exhausted.

15 Claim 30 alleges that trial counsel was prejudicially deficient for failing to
16 investigate and present mitigating evidence regarding Beames' family
17 background and socio-medical history, including evidence of child abuse and
18 neglect, and multiple other sources of emotional trauma. The Warden contends
19 that Beames has added key facts to Claim 30 which were not presented to the
20 state court. Specifically, a declaration by Gretchen White, Ph.D. (Ex. 160), which
21 states that the social history information presented in support of Beames' state
22 habeas petition was the kind of investigation conducted by competent counsel
23 and/or their experts in 1995, that the information was available at the time of trial,
24 that the information could have been presented to the jury during the penalty
25 phase, and that a reliable sentencing decision could not be made without such
26 information. The Warden observes that Dr. White's declaration attempts to

1 provide supporting evidence for the claim that trial counsel's performance was
2 deficient because he could have investigated and discovered this information in
3 1995. Without Dr. White's declaration, the state habeas claim was defective as it
4 relied on innuendo to establish the claim. Accordingly, the Warden asserts the
5 addition of Dr. White's declaration substantially alters this claim by placing it in a
6 significantly different and stronger evidentiary posture.

7 Beames responds that although Dr. White's declaration was not presented
8 to the state court, it has no effect on exhaustion as it supplements the claim
9 without altering the allegations or evidence presented in state court.³ Beames
10 contends that Dr. White's declaration does not refer to a single fact about his life
11 or background which was not alleged in the state petition. The allegations of
12 Beames social history narrative are based on lay witness declarations and other
13 exhibits which were presented to the state court. Dr. White's declaration
14 provides an expert opinion that the mitigation evidence presented in the state
15 and federal petitions is the type developed and used by competent capital
16 defense counsel at the time of Beames' trial. Beames asserts that Dr. White's
17 declaration merely supplements the fully-exhausted allegation that his trial
18 counsel's performance violated prevailing professional norms.

19 Further, the Warden asserts Claim 30 is unexhausted because it
20 incorporates Claims 21 and 31, which include three new exhibits not presented to
21 the state court. A declaration by Natasha Kazanov, Ph.D., (Ex. 38), which states
22 that Beames has significant organic brain damage, most certainly present prior to
23 his arrest in 1994. A declaration by Mohamed Abou-Dona, Ph.D., (Ex. 151),

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25 ³ Beames notes he understands Dr. White's declaration will be disregarded
26 when this Court reviews the state court's adjudication of this claim for
reasonableness under 28 U.S.C. § 2254(d), pursuant to *Cullen v. Pinholster*, 563 U.S.
_____, 131 S. Ct. 1388 (2011).

1 which states Beames' exposure to powerful neurotoxins lead to his brain
2 impairment and neurological dysfunction. A report by Richard Blak, Ph.D., (Ex.
3 149), which states Beames may have been suffering from psychotic process
4 during the episode of Cassie's death and while incarcerated after.⁴

5 Beames responds that these exhibits were submitted to the state court in
6 support of claims other than Claim 30. Beames asserts that reference to exhibits
7 that were before the state court cannot render Claim 30 unexhausted. Beames
8 argues that the title of the corresponding state habeas claim, Claim XI, references
9 the subjects addressed by the three exhibits: his family and socio-medical history,
10 his exposure to toxins, his addiction to methamphetamine, and his psychological
11 impairments. Further, Beames contends the text of Claim XI includes allegations
12 of his exposure to agricultural neurotoxins. The related Claim IV, involving
13 neurotoxin exposure and its implications for Beames' neuropsychological
14 functioning, presented the opportunity for the state court to consider the
15 interrelationship of these claims. Beames concludes that he has only made
16 explicit in the federal petition what was implicit in the state petition: the
17 relevance of related mitigation facts and evidence detailed elsewhere in the
18 petition to the ineffective assistance of counsel claim. Beames contends the state
19 court had the opportunity to consider whether counsel's failure to present the
20 mitigation case set forth in the state (and federal) petition violated his Sixth
21 Amendment rights, rendering Claim 30 exhausted.

22 The Warden replies that Beames has presented key facts in his federal
23 petition which were not presented to the state court, most notably, the

24 ⁴ The Warden includes the exhibits supporting Claims 21 and 31 as
25 contributing to the exhaustion problem for Claim 30 (although Dr. White's
26 declaration appears the primary source of the objection), but these exhibits are not
mentioned as rendering Claims 21 and 31 unexhausted. In fact, the only objection
by the Warden in Claims 21 and 31 is to the general incorporation language.

1 declaration by Dr. White. The Warden argues that, contrary to Beames'
2 assertion, Dr. White's declaration does more than supplement the allegations and
3 evidence presented to the state court, as it provides the only evidence in support
4 of his contention that counsel's performance fell below the standard prevailing in
5 1995. The Warden contends that without Dr. White's declaration, Beames had no
6 evidentiary support for his allegations, so the addition of Dr. White's declaration
7 alters Claim 30 by placing it in a significantly different and stronger evidentiary
8 posture than when it was considered by the state court.

9 The Warden alleges that broad incorporation language is not sufficient to
10 alert the state court that particular exhibits are to be considered with a specific
11 claim, and that Beames had an obligation before the state court to plead factual
12 allegations with particularity. Thus, the Warden asserts because the declarations
13 of Doctors Khazanov, Abou-Donia and Blak were not specifically cited in support
14 of this claim in state court, they, along with the declaration of Dr. White,
15 substantially alter Claim 30 from the facts which were presented to the state.

16 The addition of expert declarations from Drs. White, Khazanov, Abou-
17 Donia, and Blak, do not change the factual or legal foundation for this claim.
18 Beames' state habeas petition contained over 130 pages of factual allegations of
19 his social history, including allegations of neglect, abuse, cognitive impairments,
20 neuro-toxin exposure, and drug use which impacted Beames; numerous
21 declarations from family and friends, as well as other supporting documents; and
22 the allegation that trial counsel's failure to investigate and present this evidence
23 was below the standard of care for capital counsel. The declaration of Dr. White
24 does not fundamentally change this claim. Claim 30 is exhausted.

25 Claim 37 alleges the trial court gave an improper instruction regarding the
26 Governors' commutation power that violated Beames' rights to due process, a

1 fair penalty trial, to present a penalty-phase defense, to freedom from cruel
2 and/or unusual punishment, and to a reliable, accurate, non-arbitrary sentence.
3 The Warden asserts the contention that this instruction denied Beames his right
4 to present a penalty-phase defense was not presented to the state court.

5 Beames responds that neither the factual nor legal basis of Claim 37 has
6 changed, and the right to present a penalty phase defense is an aspect of the Sixth
7 Amendment and due process rights to a fair penalty trial. Beames argues the
8 insertion of a clarifying phrase in the federal petition articulating a legal principle
9 subsumed within the broader principles presented in state court has no effect on
10 the scope of the claim. Beames asserts his elaboration of the constitutional
11 implications of the violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (a
12 capital sentencing jury may not be led to believe that responsibility for the death
13 verdict and execution lies elsewhere due to an instruction of the governor's
14 commutation power), does not change the basis of the claim for relief, and that
15 Claim 37 is exhausted.

16 The Warden replies that the broad mention of due process and the right to
17 a fair trial in state pleadings is insufficient to exhaust all Sixth Amendment errors
18 at trial. The Warden contends that if this is so, then many new Sixth Amendment
19 claims could be asserted on federal habeas even if not previously raised in the
20 state, as long as they were based on facts alleged in state court. The Warden
21 asserts this is not the law, but that a petitioner is required to present the same
22 claim to the state that is presented in federal court.

23 On direct appeal, Beames argued that the trial court's denial of his
24 requested inclusion to the commutation instruction, of a statement that the
25 commutation power had not been exercised in a capital case since the
26 reinstatement of the death penalty in 1977, *see* Beames' opening brief at pages

1 145-146, denied him the opportunity to deny or explain evidence against him,
2 which violated due process. *Id.*, at 163-166. This allegation is sufficient to have
3 presented to the state court the claim that Beames, as it regards the commutation
4 instruction, was denied the opportunity to present a defense. Claim 37 is
5 exhausted.

6 Claim 41 alleges the cumulative effect of errors and constitutional
7 violations of Claims 3 - 5, 7, 11, 19 - 22, 28 - 34, 35A-C, 36 - 41, and 43 - 38 require
8 reversal of the guilt and penalty verdicts. The Warden contends Claim 41 is
9 unexhausted because it specifically incorporates Claims 4, 5, 29, 30, 37 and 43,
10 which are unexhausted for the reasons stated above.

11 Beames responds that Claims 4, 5, 29, 30, 37, and 43 are exhausted, so
12 Claim 41 also is exhausted. Beames argues that the state court had an
13 opportunity to consider whether the cumulative effect of the alleged errors
14 invalidated his sentence. Further, Beames contends that even if any of the claims
15 are unexhausted, the cumulative error claim would not be rendered
16 unexhausted, it would mean only that the unreviewable claims would be
17 excluded from cumulation.

18 The Warden replies that Beames' contention is contrary to the exhaustion
19 requirement in federal habeas proceedings, and contends Beames has failed to
20 establish that Claim 41 is exhausted.

21 Claims 4, 5, 29, 30, 37, and 43 have been found exhausted, so Claim 41 also
22 is exhausted.

23 Claim 43M contends that California's death penalty statute, as interpreted
24 by the California Supreme Court and applied to Beames, deprived him of due
25 process, a fair jury trial, and a reliable penalty determination. Specifically,
26 Beames contends that his right to equal protection is violated by California's

1 failure to require inter-case proportionality review; any burden of proof at
2 penalty; unanimity of aggravating factors; and written findings by the jury of the
3 factors supporting death, and that these protections, which result in reliable and
4 accurate fact-finding, are required under *Ring v. Arizona*, 536 U.S. 584 (2002)⁵.
5 (Subclaim 43D also asserts California’s statute is unconstitutional under *Ring* for
6 failing to require penalty phase findings beyond a reasonable doubt.)

7 The Warden contends that subclaim M was not presented to the state
8 court. Subclaim M specifically contends the state’s refusal to accept the
9 applicability of *Ring v. Arizona*, to any part of California’s penalty phase, denied
10 him the safeguards provided to capital defendants and violates equal protection
11 and the Sixth, Eighth and Fourteenth Amendments.

12 Beames responds that Claim 43M is substantially the same as Issue VI.N on
13 appeal, and the text has been edited to clarify the allegations and legal arguments
14 without altering their bases. Beames contends that the prior sections of this claim
15 identify aspects of the California statute that are alleged to violate due process
16 and the Sixth and Eighth Amendments. Because the previously identified
17 problems with the statute include allegations of *Ring* violations, the addition of
18 the citation to *Ring* has no effect on the scope of the claim. Beames concludes that
19 no constitutional violation is presented in the federal petition which was not
20 before the state court, so Claim 43M is exhausted.

21 The Warden replies that although Beames cited and/or argued *Ring* in the
22 context of other subclaims presented to the state court, none of those references
23 raise the broad and sweeping claim raised in subclaim M.

24 ⁵ *Ring* held that the Sixth Amendment right to jury trial is violated where,
25 following a jury adjudication of a defendant’s guilt of first-degree murder, a trial
26 judge (instead of the jury) determines the presence or absence of aggravating factors
required for imposition of the death penalty.

1 Subclaims D, E, F, G, H and I of Claim 43, which are all exhausted,
2 presented to the state court challenges to California's death penalty statute based
3 on (1) failure to require proof of beyond a reasonable doubt of sentencing factors;
4 (2) failure to require unanimity and written findings of aggravating factors; and
5 (3) failure to conduct inter-case proportionality review.⁶ The argument that *Ring*
6 required these types of findings and review was made in these others subclaims,
7 and the allegation in subclaim M does not substantially differ from the claims
8 presented to the state court. Claim 43M is exhausted.

9 Order

- 10 1. Claims 4, 5, 29, 30, 37, 41 and 43M are exhausted. The incorporation
11 language in Beames' federal petition will be interpreted to conform to
12 Beames' interpretation, that it "does not change the legal or factual basis of,
13 or fundamentally alter, the claims," but only allows Beames to argue,
14 where relevant, any facts asserted in the petition. Consideration will only
15 be given to legal or factual bases for habeas relief which are specifically
16 stated in Beames' federal claims.
- 17 2. Beames' Opening Brief on the merits of Claim 11, including points and
18 authorities in support of the claim, and discussion of 28 U.S.C. § 2254(d),
19 shall be filed within 90 days of the date of this order.
- 20 3. The Warden shall file his Answering Brief on the merits of Claim 11,
21 including points and authorities in support of the claim, and discussion of
22 28 U.S.C. § 2254(d), shall be filed within 60 days thereafter.
- 23 4. Beames' Reply shall be filed within 30 days after the filing of the Warden's
24 Answering Brief.

25 ⁶ Claim 44, which also is exhausted, presents allegations of error regarding the
26 lack of inter-case proportionality review in California' statute.

1 5. A status conference shall be scheduled upon conclusion of the briefing
2 ordered above to discuss further proceedings regarding Claim 11.
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4 IT IS SO ORDERED.

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6 DATED: May 17, 2012

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/s/ Anthony W. Ishii

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Chief United States District Judge

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