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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DARREN CORNELIUS STANLEY,  
  
Plaintiff,  
  
v.  
  
ROBERT AYERS, et al.,  
  
Defendants.

Case No. [07-cv-04727-EMC](#)

**DEATH PENALTY CASE**

**ORDER RE EXHAUSTION;  
PROPOSITION 66 STAY; MOTION  
FOR EQUITABLE RELIEF;  
ADMINISTRATIVE MOTION FOR  
LEAVE TO FILE SURREPLY; MOTION  
FOR SANCTIONS; AND REQUEST  
FOR HEARING RE EXCUSING  
EXHAUSTION REQUIREMENT**

Docket Nos. 226, 228, 260, 262, 274

**I. INTRODUCTION**

Petitioner Darren Cornelius Stanley filed a finalized Petition for Writ of Habeas Corpus on October 12, 2016. Docket No. 252. On December 12, 2016, Respondent Ron Davis filed a Joint Statement Regarding Exhaustion (“Joint Statement”) and a Motion to Dismiss the petition for failure to exhaust all claims (“Motion to Dismiss”). Docket Nos. 259-60. The Joint Statement informed the Court that the parties agreed Claims 5, 6, 16, 17A, 17B, 17C, 17F, 17G, and 17H were exhausted but disagreed as to the exhaustion status of all other claims. Docket No. 259 at 2-3.

On January 17, 2017, Petitioner filed an opposition to the Motion to Dismiss. Docket No. 261. Petitioner requested a stay until California’s Proposition 66 is certified and no longer stayed by the California Supreme Court, renewed his Motions for Equitable Relief and for Sanctions (Docket Nos. 226, 228), and requested that the Court grant a hearing on excusing the exhaustion requirement pursuant to 28 U.S.C. § 2254(e)(2)(A)(ii) & (b)(1)(B) (“section 2254”). Docket No.

1 261. Briefing on the various motions ensued. *See* Docket Nos. 263, 266, 267, and 269. A hearing  
2 was held on March 9, 2017. Petitioner subsequently filed an Administrative Motion for leave to  
3 file a surreply (“Administrative Motion”) in relation to his Motion for Sanctions. *See* Docket No.  
4 274. Respondent filed an opposition. *See* Docket No. 275.

5 For the foregoing reasons, the Court finds that Claims 1, 2, 7, 10, 11, 13, 14, and 19 are  
6 fully unexhausted and Claims 3, 4, 8, 9, 12, 15, 17 (including 17D and 17E), 18, and 20 are  
7 partially unexhausted. Respondent’s Motion to Dismiss is **DENIED WITHOUT PREJUDICE**.  
8 Respondent may renew the motion for the Court’s consideration following the filing of  
9 Petitioner’s motion to dismiss unexhausted claims or request for a stay pursuant to *Rhines v.*  
10 *Webber*, 544 U.S. 269, 277 (2005). Petitioner’s Administrative Motion for leave to file a surreply  
11 related to his Motion for Sanctions is **GRANTED**. Petitioner’s request for a stay until Proposition  
12 66 is certified and no longer stayed, request for a hearing on excusing the exhaustion requirement,  
13 and Motion for Equitable Relief (Docket No. 226) are **DENIED**. Petitioner’s Motion for  
14 Sanctions (Docket No. 228) is **DENIED WITHOUT PREJUDICE**.

## 15 **II. BACKGROUND**

16 Petitioner was sentenced to death by the Superior Court of California in the County of  
17 Alameda in 1991. The California Supreme Court affirmed Petitioner’s convictions and death  
18 judgment on direct appeal in 2006, *People v. Stanley*, 39 Cal. 4th 913 (2006), and summarily  
19 denied his petition for writ of habeas corpus in 2009, *In re Stanley on Habeas Corpus*, S106165.  
20 While his state habeas case was still being litigated, Petitioner initiated the present habeas action  
21 by asking the Court to appoint counsel and to stay his execution on September 13, 2007.  
22 Petitioner, acting *pro se*, filed a protective petition on July 8, 2010.

23 On November 28, 2011, the Court issued a stay of this matter in order to examine issues  
24 related to Petitioner’s competency under *Rohan v. Woodford*, 334 F.3d 803, 817 (9th Cir. 2003).  
25 Docket No. 39. On July 16, 2013, the stay was partially lifted in order to examine issues related to  
26 Petitioner’s competency under *Ford v. Wainwright*, 477 U.S. 399 (1986), and to refer the case for  
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1 settlement. Docket No. 106. After disposing of three previous motions<sup>1</sup> for equitable tolling, on  
2 March 10, 2016, the Court lifted its stay and granted Petitioner’s fourth Motion for Equitable  
3 Tolling. Docket No. 214.

4 **III. DISCUSSION**

5 A. Legal Standard

6 1. Exhaustion

7 A federal court may not grant habeas relief until the petitioner has exhausted available state  
8 remedies with respect to each claim. 28 U.S.C. § 2254(b); *Picard v. Connor*, 404 U.S. 270  
9 (1971). The exhaustion doctrine rests on principles of comity and federalism. *Rose v. Lundy*, 455  
10 U.S. 509, 515 (1982). Exhaustion is required to: (1) protect the state court’s role in the  
11 enforcement of federal law; (2) prevent disruption of state court proceedings; and (3) reduce  
12 piecemeal litigation. *Id.* at 518-20.

13 A federal constitutional claim is exhausted when it has been “fairly presented” to the  
14 highest state court and that court has had a meaningful opportunity to apply controlling legal  
15 principles to the facts underlying the claim. *Picard*, 404 U.S. at 276-77; *Anderson v. Harless*, 459  
16 U.S. 4, 7 (1982); *Middleton v. Cupp*, 768 F.2d 1083, 1086 (9th Cir. 1985), *cert. denied*, 478 U.S.  
17 1021 (1986). A claim has been “fairly presented” if the petitioner described in state court both the  
18 legal theories and the operative facts on which he bases the claim. *Picard*, 404 U.S. at 277-78.

19 To fairly present the legal theory of a claim, a petitioner must alert the state court that he is  
20 asserting a federal constitutional claim, either by citing the constitutional provision on which he  
21 relies or otherwise advising the court of the claim’s federal basis. *Duncan v. Henry*, 513 U.S. 364,  
22 365-66 (1995) (petitioner failed to fairly present Fourteenth Amendment due process claim when  
23 he alleged only that prejudice outweighed probative value of admitted evidence); *Johnson v.*  
24 *Zenon*, 88 F.3d 828, 830 (9th Cir. 1996) (petitioner did not fairly present Fourteenth Amendment  
25 due process claim by asserting that admission of prior act evidence “infringed on his right to  
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27 <sup>1</sup> The Court denied without prejudice Petitioner’s *pro se* Motion for Equitable Tolling (Docket No.  
28 10), granted in part and denied in part a second motion (Docket No. 26), and denied without  
prejudice a third motion (Docket No. 106).

1 present a defense and receive a fair trial”); *Picard*, 404 U.S. at 277-78 (petitioner must present  
2 state courts with same claim he urges upon the federal courts); *see Baldwin v. Reese*, 541 U.S. 27  
3 (2004) (petitioner did not fairly present ineffective assistance of appellate counsel claim when he  
4 did not explicitly include those words, cite the relevant federal constitutional provisions, or  
5 otherwise cite to cases showing he was making a federal claim); *Castillo v. McFadden*, 399 F.3d  
6 993, 1002 (9th Cir. 2004) (petitioner did not give state appellate court fair opportunity to rule on  
7 federal due process claim by concluding his brief with “scattershot citation of federal  
8 constitutional provisions” with no articulated federal legal theory).

9 The factual basis of a claim has been fairly presented as long as the facts subsequently  
10 alleged in federal court do not fundamentally alter the nature of the claim presented to the state  
11 court, *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986); *Chacon v. Wood*, 36 F.3d 1459, 1468 (9th  
12 Cir. 1994)), place the claim in a “significantly different and stronger evidentiary posture” than it  
13 was when the state courts considered it, or “substantially improve[] the evidentiary basis” of the  
14 claim. *Aiken v. Spalding*, 841 F.2d 881, 883 (9th Cir. 1988).

15 Generally, a petitioner may add factual materials supportive of those already in the record  
16 without fundamentally altering his claim and rendering it unexhausted. *See Vasquez*, 474 U.S. at  
17 260 (statistical analyses of facts already in record do not render claim unexhausted); *see also*  
18 *Chacon*, 36 F.3d at 1468 (factual basis of claim that interpreter mistranslated guilty plea  
19 proceedings was fairly presented where the state court understood accuracy of translation to be at  
20 issue). However, where the new facts substantially improve the claim by contradicting evidence  
21 the state court already considered, the new factual materials must be presented to the state court.  
22 *See Aiken*, 841 F.2d at 883-84 & n.3 (new evidence consisting of decibel level studies of tape of  
23 petitioner’s confession, which conflicted with evidence state court had considered, substantially  
24 improved evidentiary posture of claim and required exhaustion); *Dickens v. Ryan*, 740 F.3d 1302,  
25 1317 (9th Cir. 2014) (new allegations regarding petitioner’s fetal alcohol syndrome and organic  
26 brain damage in ineffective assistance of counsel claim substantially improved evidentiary posture  
27 of claim and require exhaustion).

28 Exhaustion may be excused where it would be futile. *See* 28 U.S.C. § 2254(b)(1);

1 *Edelbacher v. Calderon*, 160 F.3d 582, 585 (9th Cir. 1998) (requiring “extremely unusual  
2 circumstances”); *Sweet v. Cupp*, 640 F.2d 233, 236 (9th Cir. 1981) (exhaustion requirement may  
3 be avoided by showing that it would be futile in light of prevailing decisions of highest state  
4 court). Section 2254 provides two ways around the exhaustion requirement: “an absence of  
5 available State corrective process” or when “circumstances exist that render such process  
6 ineffective to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1)(A).

7 2. Analysis

8 As a threshold issue, Petitioner argues Respondent has the burden of proving  
9 nonexhaustion.<sup>2</sup> *See* Docket No. 161 at 3. Respondent disagrees, arguing Petitioner has the  
10 burden of showing exhaustion once Respondent raises the issue. Docket No. 263 at 1-2.

11 Although neither the Supreme Court nor the Ninth Circuit have explicitly ruled on the  
12 issue, federal habeas rules, such as Local Rule 2254-28, suggest that Petitioner is responsible for  
13 showing his claims are exhausted. H.R.L.R. 2254-28(b)(4) (petitioner’s finalized petition must  
14 identify where in the record each claim was exhausted). The circuits which have considered the  
15 issue have held a petitioner bears the burden of showing exhaustion after the state raises the issue  
16 in habeas corpus. *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir.1997), as amended (1998)  
17 (habeas petitioner carries burden of proving exhaustion of all available state remedies) (citation  
18 omitted), cert. denied, 532 U.S. 919, 121 S.Ct. 1353 (2001); *Matthews v. Evatt*, 105 F.3d 907, 911  
19 (4th Cir.) (burden of proving that claim has been exhausted lies with petitioner) (citation omitted),  
20 cert. denied, 522 U.S. 833 (1997); *Olson v. McKune*, 9 F.3d 95 (10th Cir.1993) (state prisoner  
21 bringing federal habeas corpus action bears burden of showing that he has exhausted available  
22 state remedies) (citation and quotation marks omitted).

23 The Court need not resolve the burden question, however, because even if Respondent  
24 carried the burden of showing Petitioner’s claims were unexhausted, Respondent would have met  
25 that burden here. Respondent identified each allegedly unexhausted claim, subclaim, and  
26 allegation and explained in detail the basis for his assertion that each item was unexhausted. *See*

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28 <sup>2</sup> Because the parties have stipulated that Claims 5, 6, 16, 17A, 17B, 17C, 17F, 17G, and 17H are  
exhausted, the Court will not include those claims here.

1 Docket No. 160. Accordingly, the Court concludes respondent sufficiently raised the defense of  
2 nonexhaustion and the Court may therefore rule on the exhaustion status of each of the disputed  
3 claims.

4 a. Claim 1

5 Petitioner argues the trial court violated his constitutional rights by failing to conduct a  
6 hearing on his competence to stand trial in violation of his Fifth, Eighth, and Fourteenth  
7 Amendment rights. *See* Docket No. 252, Petition for Writ of Habeas Corpus (“Fed. Pet.”) at 61.  
8 Respondent argues Claim 1 is fully unexhausted. Petitioner does not assert the claim has been  
9 presented. The Court has reviewed the record and concludes that Petitioner indeed did not present  
10 this claim to California Supreme Court; Claim 1 is therefore fully unexhausted.

11 b. Claim 2

12 Petitioner argues his constitutional rights were violated by the Court’s erroneous exclusion  
13 of various qualified jurors under *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968) and its  
14 progeny. *See* Fed. Pet. at 75. Respondent argues Claim 2 is fully unexhausted. Petitioner does  
15 not assert the claim has been presented before. The Court has reviewed the record and concludes  
16 Petitioner indeed did not present this claim to the California Supreme Court; Claim 2 is fully  
17 unexhausted.

18 c. Claim 3

19 Petitioner argues the prosecutor’s systematic exclusion of five black women from his jury  
20 violated *Batson v. Kentucky*, 476 U.S. 79 (1986). *See* Fed. Pet. at 98. Respondent argues Claim 3  
21 is unexhausted in part due to various subclaims containing new factual and legal allegations.  
22 Petitioner asserts the claim was fairly presented during his automatic appeal. *See* Docket No. 261  
23 at 11-14. The Court addresses each subclaim in turn.

- 24 ■ In his direct appeal, Petitioner argued that the trial court’s denial of his *Batson-Wheeler*  
25 motions violated his right to equal protection of the laws under the Fourteenth  
26 Amendment. *See* AG007941-89, AOB Vol. II at 140-87. Petitioner’s finalized petition  
27 now argues that the prosecutor engaged in gender discrimination by using peremptory  
28 challenges on five black women, citing *Batson* and *J.E.B. v. Alabama*, 511 U.S. 127, 128-

1 29 (1994). *See* Fed. Pet. at 98, 124, & 148. Respondent argues the subclaim is  
2 unexhausted. The Court has reviewed the record and concludes that Petitioner has not  
3 previously raised a claim of gender discrimination. His *Batson-Wheeler* motion was based  
4 on race only. Petitioner argues the subclaim is exhausted because “Black women” is a  
5 subset of “Black jurors,” and by rejecting his *Batson* claim, the California Supreme Court  
6 necessarily also found there was no discrimination on the basis of gender. *See* Docket No.  
7 261 at 14. The California Supreme Court made no such findings. *See People v. Stanley*,  
8 39 Cal.4th at 943-45 (analyzing whether prosecutor offered race-neutral explanations for  
9 peremptory challenges). In order to exhaust, the petition must fairly identify the specific  
10 claims. Race and gender discrimination, though they may occur in the conjunctive, are  
11 separate and distinct claims requiring distinct findings. *See Moormann v. Schriro*, 426  
12 F.3d 1044, 1056 (adding new instances of ineffective assistance of counsel to habeas claim  
13 constitute new legal theories and are therefore unexhausted); *see also Duncan v. Henry*,  
14 513 U.S. 364, 366 (1995) (“mere similarity of claims is insufficient to exhaust”); *see also*  
15 *Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 1051 (9th Cir. 1987) (in wrongful  
16 termination action, failure to explicitly argue age and sex discrimination in EEOC  
17 complaint in addition to allegation of national origin discrimination renders age and sex  
18 discrimination claims unexhausted). Evidence of discrimination on the basis of gender is  
19 likely to differ from that based on race – *e.g.*, any comparative juror analysis that looks to  
20 similarly situated comparators is likely to differ. As Petitioner never advanced a gender-  
21 based *Batson-Wheeler* claim in the state court, it was not fairly presented by the race-based  
22 challenge. The subclaim is unexhausted.

- 23 ■ In his direct appeal, Petitioner argued that the prosecutor’s assertion that Jurors, F., B., D,  
24 (*see* AG007979-81, AOB Vol. II at 177-79) and S (*see* AG007985-86, AOB Vol. II at 183-  
25 84) were sympathetic was a sham. Petitioner also argued that the prosecutor had been  
26 unable to provide any reason as to why he thought Juror S. had sympathy for the defendant  
27 before the trial court suggested “body language” as a reason; finally, Petitioner argued that  
28 the trial court’s comment to the prosecution that it “didn’t detect anything in [Juror S.’s]

1 answers that would lead [the trial court to believe] she was sympathetic [to Petitioner]”  
2 shows that the trial court was unable to verify the prosecutor’s rationale through its own  
3 personal observation. *See* AG007979-86, AOB Vol II, at 177-84. In his finalized Petition,  
4 Petitioner now argues that the prosecutor merely picked up on the trial court’s reasoning  
5 that “sympathy for the defendant” would be a legitimate reason to use peremptory  
6 challenges on Jurors F., B., and D., and that under Ninth Circuit law, the prosecution’s  
7 adoption of the Court’s proffered language prevents the Court from meaningfully assessing  
8 the veracity of the prosecutor’s reasons for exercising a challenge. *See* Fed. Pet. at 113-14.  
9 Respondent argues that Petitioner never argued that the prosecution adopted the trial  
10 court’s suggested rationale as to Jurors F., B., or D., and that the subclaim is therefore  
11 unexhausted. The Court has reviewed the record and concludes that Respondent is correct.  
12 Insofar as Petitioner now incorporates Jurors F., B., and D. into his argument that the trial  
13 court failed to scrutinize the veracity of the prosecutor’s proffered race-neutral reason for  
14 striking Juror S., Petitioner now presents new legal theories that have not been fairly  
15 presented to the California Supreme Court. *See Moormann v. Schriro*, 426 F.3d at 1056  
16 (adding new instances of ineffective assistance of counsel to habeas claim constitute new  
17 legal theories and are therefore unexhausted); *see also* AG007977-81, AOB Vol II, at 177-  
18 80. This argument, if accepted, would substantially strengthen the evidentiary basis of  
19 Petitioner’s *Batson* claim. The subclaim is unexhausted.

- 20 ■ During oral argument for his direct appeal, Petitioner’s counsel stated that Juror N.  
21 “express[ed] concern that serving as a juror in [Petitioner’s] trial would conflict with a  
22 convention in Palm Springs she planned on attending,” *see* Motion to Dismiss at 16. In the  
23 briefing for his direct appeal, Petitioner also argued that “the prosecutor’s Palm Springs  
24 convention rationale bears closer scrutiny. . . [If the prosecutor] was concerned that [Juror  
25 N.]’s time conflict would render her an inattentive juror, why did he not ask that she be  
26 excused for cause.” *See* AG007959, AG007971-72, AOB Vol. II at 169-70. In his  
27 finalized petition, Petitioner now asserts that Juror N. “never said during her voir dire she  
28 ‘didn’t want to be here because she had a convention in Palm Springs.’ ” *See* Fed. Pet. at

1 110. Respondent argues that this allegation is unexhausted because Petitioner allegedly  
2 conceded, during oral argument for his direct appeal, that Juror N. in fact did not want to  
3 serve on Petitioner’s jury as a result of the convention in Palm Springs. *See* Motion to  
4 Dismiss at 16. The Court has reviewed the record and concludes the allegation in the  
5 finalized petition was fairly presented to the California Supreme Court: Petitioner now  
6 relies on the same portion of the factual record pointed out to the California Supreme  
7 Court, and the purported concession by appellate counsel is consistent with and similar to  
8 Petitioner’s characterization of the evidence in his finalized petition. The allegation is  
9 fully exhausted.

- 10 ■ Respondent argues that Petitioner has not exhausted the following subclaims in his  
11 finalized petition: the California Supreme Court relied on false statements made by the  
12 prosecutor to the trial court, i.e., that the prosecutor wrote “sympathy for the defendant” in  
13 his voir dire notes for each of the contested jurors, and the Attorney General knowingly  
14 perpetuated those false statements before the California Supreme Court. *See* Fed. Pet. at  
15 99, 111-12, 110-223, 130. In this petition, Petitioner presented new allegations; *e.g.*, that  
16 there are notes in the prosecutor’s file pertaining to the black jurors in which the prosecutor  
17 wrote “Black,” “BLACK,” or “Dark” for each black juror. *See* Fed. Pet. at 119-123. The  
18 Court has reviewed the record and concludes that Petitioner has not presented these new  
19 and significant allegations to the California Supreme Court; these allegations substantially  
20 improve the evidentiary posture of Petitioner’s challenge to the credibility of the  
21 prosecutor in Claim 3.

22 Petitioner nevertheless argues that this subclaim is exhausted because the new  
23 evidence goes to whether the California Supreme Court made an unreasonable  
24 determination of the facts, and that under *McDaniels v. Kirkland*, 813 F.3d 770 (9th Cir.  
25 2015), this Court may consider the evidence despite the fact that it was not presented to the  
26 California Supreme Court.<sup>3</sup> *See* Docket No. 261 at 12-13. Petitioner’s reliance on

27  
28 <sup>3</sup> Petitioner makes various arguments as to Claim 3, including that he is entitled to equitable  
estoppel and the arguments related to his renewed Motion for Default Sanctions. *See* Docket Nos.

1 *McDaniels* is misplaced. *McDaniels* applied only in the context of comparative juror  
2 analysis, where the evidence at issue was part of the trial, appellate, or post-conviction  
3 record. *Id.* at 780-81. Here, Petitioner references documents that were part of the  
4 prosecutor’s file, but not the trial court record; the new facts have therefore not been  
5 presented to any state court. Moreover, even if the new factual allegations were intended  
6 to show whether the state court made an unreasonable determination of the facts, Petitioner  
7 must nevertheless exhaust them by presenting them to the state court because they  
8 significantly improve the evidentiary posture of his *Batson* claim. *See Aiken v. Spalding*,  
9 841 F.2d at 883; 28 U.S.C. § 2254(d)(2) (“[a]n application for a writ of habeas corpus . . .  
10 shall not be granted with respect to any claim that was adjudicated on the merits in State  
11 court proceedings unless the adjudication of the claim . . . resulted in a decision that was  
12 based on an unreasonable determination of the facts *in light of the evidence presented in*  
13 *the State court proceeding*”) (emphasis added); *Cullen v. Pinholster*, 131 S.Ct. at 1400, n.  
14 7 (recognizing that review under § 2254(d)(2) is “plainly limited to the state-court  
15 record”). These subclaims are therefore fully unexhausted.

- 16 ■ Respondent argues that Petitioner failed to exhaust the following subclaim in his finalized  
17 petition: comparative juror analysis (the comparison of the venirepersons struck and those  
18 empaneled) supports Petitioner’s *Batson* claim. *See* Fed. Pet. at 132-48. Petitioner  
19 concedes that he did not previously present this subclaim to the California Supreme Court,  
20 but argues this subclaim is exhausted because the “new” evidence was part of the trial  
21 court record. *McDaniels v. Kirkland*, 813 F.3d 770; *see* Docket No. 261 at 13. Petitioner  
22 is correct. The subclaim consists of analysis of evidence already in the trial court record  
23 and Petitioner’s *Batson* claim alerted the California Supreme Court that the disparate  
24 treatment of the prospective jurors was at issue. The subclaim is therefore fully exhausted.  
25 *See McDaniels*, 813 F.3d 770 (consideration of voir dire and juror questionnaires during  
26 federal habeas proceedings was proper even if those items were not presented to appellate  
27

28 261, 228, & 274. The Court will address each of Petitioner’s additional arguments in other  
sections of this order.

1 court because they were part of the state court record); *see also Vasquez*, 474 U.S. at 260  
2 (federal habeas petitioner may apply statistical analysis to facts or information contained in  
3 a state record without rendering a claim unexhausted).

- 4 ■ Respondent argues Petitioner failed to exhaust the following subclaim in his finalized  
5 petition: the prosecutor’s peremptory challenges violate the First, Fifth, Sixth, Eighth, an  
6 Fourteenth Amendments, the International Convention of the Elimination of All Forms of  
7 Racial discrimination, international customary law to equal protection, and general  
8 principles of fairness and due process.<sup>4</sup> *See* Fed. Pet. 98-99. The Court has reviewed the  
9 record and concludes that Petitioner did not previously cite to these legal theories, other  
10 than the Fourteenth Amendment’s equal protection clause, in his *Batson* claim on direct  
11 appeal (*see* AG007941-89, AOB Vol. II at 140-87). As Petitioner did not alert the  
12 California Supreme Court to these additional legal theories, the subclaim has not been  
13 fairly presented and is partially unexhausted. *See Picard*, 404 U.S. at 278 (claim that  
14 failure to use grand jury to indict defendant violated Fourteenth Amendment equal  
15 protection clause not exhausted when state habeas petition cited only Fifth Amendment  
16 due process as basis for federal violation); *id.* at 277-78 (petitioner must present state  
17 courts with same claim he urges upon the federal courts).
- 18 ■ Respondent argues that the following allegation is unexhausted: the Alameda County  
19 District Attorney’s Office, including the prosecutor in Petitioner’s case, had a pattern of  
20 excusing “black jurors, particularly black women” (Fed. Pet. at 132) at the time of  
21 Petitioner’s trial. The Court has reviewed the record and concludes Petitioner did not  
22 present this allegation to the California Supreme Court. Petitioner presented no evidence  
23

24 \_\_\_\_\_  
25 <sup>4</sup> Petitioner lists the following general principles of fairness: the rights “to be tried before a fair  
26 and impartial tribunal and a fair and impartial jury; to due process; to judicial proceedings free of  
27 racial, gender, religious, and ethnic animus; to confrontation of witnesses; to compulsory process;  
28 to notice of the evidence against him; ... to the presumption of innocence; and to fair, accurate and  
reliable guilt, death-eligibility, and penalty determinations free from unconstitutionally  
impermissible risk that consideration of race, gender, ethnicity, and religion, influenced the  
outcome of the prosecutor’s purposeful, invidious discrimination and racial, gender, ethnic, and  
religious animus in his use of peremptory challenges to remove... African American women from  
[Petitioner’s] jury.”

1 of a pattern of conduct by the District Attorney. Because the new allegation substantially  
2 improves the evidentiary posture of Petitioner’s *Batson* claim, this subclaim is fully  
3 unexhausted.

- 4 ■ Respondent argues that the following subclaim in Petitioner’s finalized petition is  
5 unexhausted: the California Supreme Court has systematically denied virtually every  
6 *Batson* claim it has ever addressed and regularly violates clearly established federal law  
7 and regularly makes an unreasonable determination of the facts in *Batson* claims. This  
8 subclaim was never presented to the California Supreme Court. The subclaim is therefore  
9 fully unexhausted.

10 Based on the aforementioned, Claim 3 is partially unexhausted.

11 d. Claim 4

12 Petitioner argues the prosecution violated his Fifth, Sixth, Eighth, and Fourteenth  
13 Amendment rights by failing to disclose various pieces of exculpatory and impeachment evidence  
14 and failing to correct false testimony. *See* Fed. Pet. at 149. Respondent argues Claim 4 is  
15 unexhausted in part due to various subclaims containing new factual and legal allegations;  
16 Petitioner asserts he exhausted the claim on direct appeal. The Court addresses each subclaim in  
17 turn.

- 18 ■ In his state habeas petition, Petitioner alleged that the prosecutor committed a *Brady*  
19 violation when he failed to turn over a CYA report. The CYA report, which was not  
20 turned over to Petitioner during trial, contained two arguably-favorable psychological  
21 reports diagnosing Petitioner with Cyclothymic Disorder. The state habeas petition also  
22 cites/included a portion of the trial transcript in which Petitioner’s counsel, Walter  
23 Cannady, tells the trial court that he received a certified letter from the CYA stating that  
24 they did not have a copy of Petitioner’s CYA report; the CYA. *See* AG009676-77, State  
25 Pet. at fn. 12, 97-98 (“Mr. Stanley’s trial attorney reminded the court that Mr. Landwich  
26 [prosecutor] had never produced defendant’s CYA records”); *see also* AG009993, State  
27 Pet. Exh. W (trial transcript excerpt containing Cannady’s conversation with the trial  
28 court). In his finalized petition, Petitioner now includes the CYA’s certified letter to trial

1 counsel as support for Petitioner’s claim that trial counsel tried, but was unable, to obtain a  
2 copy of the CYA report. *See* Fed. Pet. at 159. Respondent argues that Petitioner’s  
3 inclusion of the CYA letter addressed to Cannady constitutes new evidence and is  
4 therefore unexhausted. The Court has reviewed the record and concludes that Petitioner  
5 fairly presented this subclaim. Cannady referred to the letter and its contents in a colloquy  
6 with the trial court and Petitioner cited to the conversation with the court about the lack of  
7 CYA records in his state habeas petition. Because the contents of the actual letter were  
8 already in the record, the inclusion of a copy of the letter in the federal habeas petition does  
9 not significantly alter the claim presented to the California Supreme Court. The subclaim  
10 is fully exhausted.

- 11 ■ In his state habeas petition, Petitioner asked the California Supreme Court to take judicial  
12 notice of the record in a mandamus action<sup>5</sup> and introduced Landswick’s declaration stating  
13 that all *Brady* discovery had been turned over. *See, e.g.*, AG009593-94, State. Pet. at 14-  
14 15, AG009891-92, Exh. R (Decl. of Theodore T. Landswick) at 1-2. Petitioner also argued  
15 in his state habeas petition that Landswick’s declaration (referenced above) was “untrue”  
16 because the Alameda County District Attorney’s office had not turned over the CYA  
17 report. *See* AG009593, State Pet. at 14. In his finalized petition, Petitioner now alleges—  
18 in support of his *Brady* claim—that because Petitioner’s writ of mandamus sought all  
19 possible exculpatory evidence/all deals involving prosecution witnesses, and Landswick’s  
20 declaration stated that all *Brady* documents and discovery had already been turned over,  
21 the newly discovered evidence shows that Landswick’s declaration was false. The  
22 finalized petition also alleges that Petitioner was unable to pursue additional *Brady*  
23 discovery in state court after his mandamus claim was rejected (citing *Gonzalez v. Wong*,  
24 667 F.3d 965, 978 (9th Cir. 2001)). *See* Fed. Pet. at 151-52.

25 Respondent argues that Petitioner’s allegations related to the writ of mandamus,  
26 including Petitioner’s assertion that the denial of the writ made it impossible for Petitioner

27  
28 <sup>5</sup> Petitioner’s mandamus action sought to obtain various pieces of exculpatory evidence from the Alameda County District Attorney’s Office.

1 to pursue additional *Brady* discovery, are unexhausted because they constitute new factual  
2 allegations and legal bases for habeas relief. The Court has reviewed the record and  
3 concludes that Petitioner fairly presented the factual allegations regarding his mandamus  
4 case when he asked the California Supreme Court to take judicial notice of the record in  
5 the mandamus action and introduced Landswick’s declaration in asserting he was unable to  
6 obtain exculpatory records. As to the new legal citation, Petitioner cites *Gonzalez v. Wong*  
7 for the proposition that he was not able to pursue further state remedies after denial of his  
8 writ of mandate; but this does not introduce any other federal grounds for relief and  
9 therefore does not fundamentally alter or substantially improve the evidentiary posture of  
10 the claim presented before the California Supreme Court. *See Picard*, 404 U.S. at 277-78  
11 (petitioner must present state courts with same claim he urges upon federal courts). The  
12 subclaim is fully exhausted.

- 13 ■ In his state habeas petition, Petitioner argued that the prosecutor violated *Brady* when he  
14 described Petitioner as “a person who has no soul,” “no remorse,” and as “cold-blooded”  
15 were deceptive, improper, and unfair because the prosecution was aware that Petitioner had  
16 been diagnosed by Dr. Robinson (in the CYA report) with Cyclothymic Disorder and  
17 Petitioner’s criminal behavior was rooted in his mental illness. *See AG00009681-84*, State  
18 Pet., at 102-05. In his finalized petition, Petitioner now argues that the prosecutor violated  
19 *Brady* when he argued to the jury that CYA therapists found Petitioner lacked remorse and  
20 ignored CYA efforts for rehabilitation, an argument Petitioner states is “at odds” with the  
21 CYA report. *See Fed. Pet.* at 160. The Court has reviewed the record and concludes that  
22 Petitioner exhausted this allegation by raising it in a substantially similar fashion in his  
23 state habeas petition. The allegation is fully exhausted.
- 24 ■ In his state habeas petition, Petitioner argued, in the context of his *Brady* claim, that had  
25 Drs. Pierce and Benson been able to review the CYA report, they would have testified in a  
26 way that could have “supported a potentially successful defense that [P]etitioner was  
27 legally insane at the time of the homicide and the other charged offenses.” *See AG009677*,  
28 State Pet. at 98. Petitioner also argued in his state habeas petition that had they had the

1 CYA report, Drs. Pierce and Benson could have testified that Petitioner suffered from  
2 Bipolar Disorder, Manic Type, or Mood Disorder, making it probable that Petitioner would  
3 not have been sentenced to death. *Id.* In his finalized petition, Petitioner now argues that  
4 the CYA report could have provided the basis for a guilt phase defense of imperfect self-  
5 defense, as well as mitigation for the penalty phase under Penal Code section 190.3(a)  
6 (circumstances of crime), 190.3(d) (influence of extreme mental or emotional distress),  
7 190.3(h) (impaired capacity to appreciate or conform his conduct to the requirements of  
8 law due to mental disease or defect, or the effects of intoxication), and 190.3(k) (any other  
9 extenuating circumstance). *See* Fed. Pet. at 162.

10 Respondent argues that Petitioner’s subclaims are unexhausted because they  
11 constitute new legal theories that fundamentally alter the claim decided by the California  
12 Supreme Court. The Court has reviewed the record and concludes that although Petitioner  
13 never argued before the California Supreme Court that the prosecutor’s failure to turn over  
14 the CYA report prevented him from claiming imperfect self-defense or present mitigation  
15 under Penal Code section 190.3(a), Petitioner nevertheless fairly presented the claim by  
16 providing the operative facts and citing the applicable federal basis of his subclaim through  
17 his citations to *Brady* and by arguing that failure to provide the CYA report impaired his  
18 ability to mount a defense related to his mental illness at both the guilt and penalty phases  
19 of trial. *See* AG009675-77, State Pet. at 96-98 (citing *Brady* and the Fifth, Sixth, Eighth,  
20 and Fourteenth Amendments). This subclaim is fully exhausted. *See* AG009661 &  
21 AG009677, State Pet. at 82 & 98.

- 22 ■ Respondent argues that the following subclaim in Petitioner’s finalized petition is  
23 unexhausted: the trial court’s order requiring the Alameda County District Attorney’s  
24 Office and the Oakland Police Department to use “reasonable means” to preserve specified  
25 evidence offered at trial and reports/notes related to the case was inadequate and  
26 insufficient to preserve evidence related to Petitioner’s claims (such as information  
27 regarding cases built against Issac Stanley, who testified against Petitioner during trial)  
28 because it was limited to preservation of evidence in Petitioner’s case only. *See* Fed. Pet.

1 at 152. The Court has reviewed the record and concludes the subclaim was never  
2 presented to the California Supreme Court. Because the destruction of evidence resulting  
3 from an ineffective preservation order may substantially improve the evidentiary posture of  
4 Petitioner’s argument that he was prejudiced by the prosecutor’s alleged *Brady* claims, the  
5 allegation is fully unexhausted.

- 6 ■ Respondent argues that the following allegations are unexhausted: the prosecutor withheld  
7 the identity of the evaluators (Dr. Robinson and Dr. Nicholas) who created Petitioner’s  
8 CYA report; had Dr. Nicholas been called to testify at trial, he would have testified that  
9 Petitioner’s symptoms suggested mental illness, poor contact with reality, attention  
10 deficits, grandiose delusions, and thought disturbance. *See* Fed. Pet. at 160-61. The Court  
11 concludes that Petitioner did not present these allegations to the California Supreme Court.  
12 Although Petitioner’s allegation that the prosecutor withheld the identity of the evaluators  
13 itself does not fundamentally alter Petitioner’s claim on state habeas because it falls into  
14 Petitioner’s general claim that the prosecution failed to turn over the CYA report  
15 containing the evaluators’ names, Petitioner’s argument that Dr. Nicholas would have  
16 testified that Petitioner’s symptoms suggested mental illness, poor contact with reality,  
17 attention deficits, grandiose delusions, and thought disturbance had he been called to  
18 testify at Petitioner’s trial constitutes new evidence that would significantly bolster the  
19 evidentiary posture of Petitioner’s *Brady* claim; it is therefore partially unexhausted.<sup>6</sup>

- 20 ■ Respondent argues the following subclaims in Petitioner’s finalized petition are  
21 unexhausted: the prosecutor committed *Brady/Napue* violations when he failed to turn over  
22 exculpatory evidence related to Issac Stanley and criminalist Alan Keel. *See* Fed. Pet. at  
23 164-65. Specifically, Petitioner argues that the prosecution failed to disclose that  
24 Landwick dismissed five 1990 felony charges against Issac Stanley and offered  
25 misdemeanor pleas for time served in exchange for Issac Stanley’s testimony against  
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27 <sup>6</sup> The Court could not locate a filed copy of the cited declaration by Dr. Nicholas, but Petitioner’s  
28 counsel previously stated in a declaration that Dr. Nicholas did not retain any records or have any  
recollection of Petitioner. *See* Docket No. 87, Exh. 2 at 1.

1 Petitioner at trial. *See* Fed. Pet. at 166. Petitioner also argued that the prosecution failed to  
2 disclose that Keel was suspended from some of his regular duties at the Oakland Police  
3 Department crime lab during 1990 for making errors in his blood analysis. *See* Fed. Pet. at  
4 164.

5 As a threshold matter, the Court concludes that the allegations related to Issac  
6 Stanley and Alan Keel fundamentally alter Petitioner’s previous *Brady* claim because they  
7 would substantially improve the evidentiary posture of his argument that the state’s *Brady*  
8 violations deprived him of a fair trial. Petitioner does not dispute that he has not presented  
9 the allegations to the California Supreme Court, but argues, citing *Banks v. Dretke*, 540  
10 U.S. 668, 691 (2004), that the Court should excuse the exhaustion requirement due to the  
11 state’s failure to turn over the material evidence relating to Isaac Stanley and Alan Keel  
12 until *after* Petitioner initiated his federal habeas proceedings. *See* Docket No. 261 at 7.

13 *Banks* is inapposite. *Banks* was decided under the pre-AEDPA federal habeas  
14 scheme and nevertheless held that the petitioner, Banks, had already exhausted the legal  
15 basis for his claim in state court by arguing that the prosecution failed to turn over  
16 exculpatory evidence related to an informant named Farr. *Banks*, 540 U.S. at 690. Under  
17 the pre-AEDPA scheme, a petitioner could supplement the factual basis of a claim through  
18 an evidentiary hearing if he could show cause for his failure to develop the facts in state  
19 court and actual prejudice resulting from that failure.<sup>7</sup> *See Banks*, 540 U.S. at 690-91. The  
20 pre-AEDPA federal district court, which was not subject to section 2254(d)(2)’s directive  
21 that review of factual determinations must be based on the evidence presented in state  
22 court, could consider the new evidence in granting or denying the petition for writ of  
23 habeas corpus without requiring the petitioner to return to state court to present the new  
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25 <sup>7</sup> Some situations covered in the statute included: when a factual dispute was not resolved; when  
26 the state’s factual determination was not supported by the record; when the state’s fact-finding  
27 procedure was inadequate; when there was substantial new evidence; when the material facts were  
28 not developed at the state court hearing; or when, for any reason, it appeared that the state trier of  
fact did not afford the petitioner a full and fair hearing on a factual issue. *See Keaney v. Tamayo-Reyes*, 504 U.S. 1, 17 (1992) (O’Connor, J., dissenting) (citing *Townsend v. Sain*, 372 U.S. 293 (1963)).

1 facts. Accordingly, in *Banks*, when the petitioner showed cause and prejudice as a result of  
2 the prosecution’s suppression of impeaching evidence related to Farr, the Supreme Court  
3 was able to grant him relief without requiring additional exhaustion proceedings. *See id.* at  
4 703.

5 Under AEDPA, however, the Supreme Court has unequivocally stated that a  
6 district court is “plainly limited to [reviewing § 2254 claims based on] the state-court  
7 record,” and petitioners must therefore exhaust substantial new factual allegations unless  
8 they meet an exception under § 2254(b), such as when there is an absence of state  
9 corrective process or circumstances exist that render process ineffective. *Cullen v.*  
10 *Pinholster*, 131 S.Ct. at 1400, n. 7. The cause and prejudice analysis in *Banks* is simply  
11 not applicable to AEDPA cases in the context of exhaustion. Here, Petitioner does not  
12 dispute that AEDPA applies and concedes he has not previously presented the legal or  
13 factual basis for the Issac Stanley and Alan Keel *Brady* subclaims in state court.

14 Petitioner also argues that the Court should excuse the exhaustion requirement  
15 because he can show cause and prejudice for any procedural default. Petitioner appears to  
16 conflate the concepts of procedural default and exhaustion, which are related, but  
17 ultimately different, inquiries. On one hand, the exhaustion doctrine requires a petitioner  
18 to exhaust any available state remedies. 28 U.S.C. § 2254(b). On the other, procedural  
19 default places constraints the district court’s ability to consider the merits of a claim.  
20 *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992). Accordingly, a showing of cause and  
21 prejudice for procedural default has no direct bearing on exhaustion; it is relevant only to  
22 whether a federal court may reach the merits of a procedurally-defaulted claim. *See*  
23 *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992). Moreover, while procedural default  
24 sometimes overlaps with the exhaustion doctrine in that procedural default can effectively  
25 foreclose a petitioner’s access to state remedies, the overlap ends there; a district court will  
26 not excuse exhaustion if a petitioner still has a state remedy available. *See Coleman v.*  
27 *Thompson*, 501 U.S. at 731-32 (petitioner who has procedural defaulted his federal claims  
28 meets technical requirements for exhaustion when state remedies are no longer available to

1 him); *see also* 28 U.S.C. § 2254(c) (petitioner has not “exhausted the remedies available in  
2 the courts of the State . . . if he has a right under the law of the State to raise, by any  
3 available procedure, the question presented”).

4 Here, Petitioner has failed to show that his claim would be procedurally defaulted if  
5 sent back to state court for exhaustion proceedings or that exhaustion should be excused  
6 based on any of section 2254(b)’s provisions. On the contrary, Petitioner’s argument that  
7 the nonexhaustion was caused by the state’s suppression of evidence can presumably be  
8 made before the California Supreme Court to cure any procedural default. *See In re Clark*,  
9 5 Cal. 4th 750, 775 (1993) (“where the factual basis for a claim was unknown to the  
10 petitioner and he had no reason to believe that the claim might be made, or where the  
11 petitioner was unable to present his claim, the court will . . . consider the merits of the  
12 claim if it is asserted as promptly as reasonably possible).

13 Petitioner has failed to cite any relevant authority showing the exhaustion  
14 requirement should be excused for these subclaims. The subclaims are fully unexhausted.  
15 Based on the aforementioned, Claim 4 is partially unexhausted.

16 e. Claim 7

17 Petitioner argues that he was denied effective assistance of counsel because trial counsel  
18 failed to assert he was incompetent to stand trial. *See* Fed. Pet. at 238. Petitioner concedes that  
19 the claim is unexhausted. *See id.* at 239. Claim 7 was never presented to the California Supreme  
20 Court. It is therefore fully unexhausted.<sup>8</sup>

21 f. Claim 8

22 Petitioner argues that counsel was ineffective at the guilt phase of trial by failing to  
23 conduct an adequate investigation into Petitioner’s family/personal history and failing to enter an  
24 insanity plea. *See* Fed. Pet. at 245. Respondent argues that Claim 8 is unexhausted in part due to  
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26 <sup>8</sup> In his finalized petition, Petitioner alleges several pages of facts under the subheading “omnibus  
27 facts in support of ineffective assistance of counsel claims,” (“Omnibus Facts”) which are  
28 unexhausted. As Claim 7 is already fully unexhausted, the Court will consider the Omnibus Facts  
in the next section.

1 various subclaims containing new factual and legal allegations. Petitioner asserts the claim was  
2 exhausted in his state habeas proceedings. *See* Fed. Pet. at 245; Docket No. 261 at 15. The Court  
3 addresses each subclaim in turn.

- 4     ▪ In his finalized petition, Petitioner alleges several pages of Omnibus Facts, which are  
5       incorporated by reference in claims 7, 8, and 9 (*see ante*, fn. 8). Respondent argues that  
6       the Omnibus Facts are unexhausted because they include new allegations related to  
7       Petitioner’s trial counsel and trial team. In summary, the Omnibus Facts include:  
8       allegations regarding the appointment and succession line of Petitioner’s trial attorneys,  
9       including Lincoln Mintz, Walter Cannady, Richard Humphrey, and Richard Hove, as well  
10      as some of their funding requests, correspondence, and disciplinary history. The Omnibus  
11      Facts also include billing histories and other correspondence to/from defense investigator  
12      Brian Olivier and Drs. William Pierce and Samuel Benson; summaries of the testimonies  
13      of several defense witnesses; allegations regarding Petitioner’s mental illness and  
14      medical/mental health history both prior to and after his conviction; Petitioner’s family  
15      history; Petitioner’s criminal history; Petitioner’s CYA history; contents of the CYA  
16      report; reports of Petitioner’s drug use and personality; reports regarding various incidents  
17      Petitioner was involved in while incarcerated awaiting trial for this case; and a reference to  
18      an order by this Court holding that Petitioner. *See* Fed. Pet. at 180-237. The Court has  
19      reviewed the record and concludes that Petitioner failed to present many of the allegations  
20      in the Omnibus Facts to the California Supreme Court. For example, Petitioner has never  
21      presented his trial counsel’s billing histories showing the small number of hours they spent  
22      on investigation or negative disciplinary history showing Mintz was disbarred after a “long  
23      pattern” of incompetence and that Hove, co-counsel at Petitioner’s trial, was also disbarred  
24      in 2008. *See* Fed. Pet. at 182-88, 211. Petitioner did not present letters from attorney  
25      Humphrey (who left Petitioner’s defense team shortly before the start of trial), expressing  
26      concern that penalty phase defense work had yet to be started and seeking to take on the  
27      responsibility of conducting investigation on Petitioner’s drug dependency and  
28      psychological make-up. *See* Fed. Pet. at 191. Petitioner never introduced evidence that

1 Cannady and the rest of the defense team did not begin penalty phase investigation until a  
2 week after the guilt phase of trial began. *See* Fed. Pet. at 211. Petitioner also never  
3 presented evidence that Cannady misrepresented the amount of funds he intended to use  
4 for penalty phase investigation, causing him to run out of money before conducting the  
5 minimum amount of hours dedicated to penalty phase investigation recommended by Drs.  
6 Benson and Pierce, as well as Olivier, before trial. *See* Fed. Pet. at 191-213. If proven,  
7 these facts would support Petitioner’s ineffective assistance of counsel claims by showing  
8 that his defense team failed to do what was necessary to ensure that it investigated  
9 Petitioner’s mental health and overall background, and would certainly be relevant in  
10 determining whether any of these failures were due to incompetence or strategic in nature.  
11 *See Strickland v. Washington*, 466 U.S. 668 (defendant is entitled to effective assistance of  
12 counsel); *Wiggins v. Smith*, 539 U.S. 510 (2003) (counsel has duty to perform reasonable  
13 investigation); *Williams v. Taylor*, 529 U.S. 362 (2000) (counsel must conduct  
14 investigation into defendant’s background for penalty phase of trial). Accordingly, as  
15 Petitioner’s new factual allegations would substantially improve the evidentiary posture of  
16 Petitioner’s ineffective assistance of counsel claims, the new factual allegations in the  
17 Omnibus Facts must be exhausted.<sup>9</sup>

- 18 ■ In his state habeas petition, Petitioner argued that trial counsel’s failure to adequately  
19 investigate Petitioner’s family/personal history, and failure to provide psychiatric experts  
20 and jurors with critical information about Petitioner’s mental illness, violated Petitioner’s  
21 rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the federal  
22 constitution, including his right to effective assistance of counsel. *See* AG009650-63,  
23 State Pet. Vol. I at 71-84. In his finalized petition, Petitioner now argues that his  
24 confinement and sentence are illegal, unconstitutional, and void under the Fifth, Sixth, and  
25 Fourteenth Amendments to the U.S. Constitution, his rights to due process, equal  
26 protection, assistance of counsel, a fair trial, and a reliable determination of guilt, because

27  
28 <sup>9</sup> Insofar as the Omnibus Facts are incorporated by reference into Claims 7 and 9, they are also  
unexhausted as to those claims.

1 defense counsel failed to adequately investigate, prepare, and present a defense (citing  
2 *Strickland v. Washington*, 466 U.S. 668). *See* Fed. Pet. at 245. Respondent argues that the  
3 subclaim is partially unexhausted because Petitioner never argued his right to equal  
4 protection under any constitutional amendment was violated by ineffective assistance of  
5 counsel at the guilt phase. The Court has reviewed the record and concludes Respondent is  
6 correct. Petitioner now presents a new federal legal ground for relief; the subclaim is  
7 unexhausted. *See Picard*, 404 U.S. at 278 (claim that failure to use grand jury to indict  
8 defendant violated Fourteenth Amendment equal protection clause not exhausted when  
9 state habeas petition cited only Fifth Amendment due process as basis for federal  
10 violation); *id.* at 277-78 (petitioner must present state courts with same claim he urges  
11 upon the federal courts).

- 12 ■ In his finalized petition, Petitioner alleges that his counsel, “collectively and singularly,”  
13 provided assistance that was constitutionally deficient and that counsel’s deficient  
14 representation severely prejudiced Petitioner and “collectively and singularly” failed to  
15 adequately investigate and present an insanity defense at the guilt phase of trial. Petitioner  
16 also argues that counsel’s failure to provide constitutionally adequate representation  
17 deprived him of the presentation of a defense that would have resulted in a verdict of not  
18 guilty by reason of insanity. *See* Fed. Pet. at 246. The Court has reviewed the record and  
19 concludes that Petitioner’s argument is essentially an assertion of cumulative error.  
20 Petitioner had not previously made any allegations regarding appointed counsel other than  
21 Cannady; accordingly, insofar as the claim of cumulative error relies on Petitioner’s  
22 unexhausted Omnibus Facts (*see ante*, at 20-21), the subclaim is unexhausted.
- 23 ■ In his state habeas petition, Petitioner argued that trial counsel was ineffective in failing to  
24 be aware of and raise a potentially successful insanity defense on Petitioner’s behalf. *See*  
25 AG0099724, State Pet. at 145. In his finalized petition, Petitioner now argues that trial  
26 counsel could have argued that Petitioner was not the person who stabbed Rubaclava, as he  
27 did so in trial, and then also present a defense that Petitioner was insane without prejudice  
28 to Petitioner’s case if the jury rejected the first defense. Petitioner also argues that counsel

1 knew the jury would reject the defense that Petitioner was not the person who stabbed  
2 Rubaclava. *See* Fed. Pet. at 247.

3 Respondent argues that the subclaim is unexhausted because it includes new facts  
4 and legal arguments. The Court has reviewed the record and concludes that Petitioner  
5 never alleged that California law allowed Petitioner to present both the identification and  
6 insanity defenses, nor did he allege that Cannady knew the jury would reject the  
7 identification defense. However, the new allegations do not raise any alternate federal  
8 grounds for relief or fundamentally alter Petitioner’s claim that counsel was ineffective in  
9 failing to raise an insanity defense. *Vasquez*, 474 U.S. at 260 (factual basis of a claim  
10 fairly presented as long as facts subsequently alleged in federal court do not fundamentally  
11 alter nature of the claim presented to the state court). The subclaim is therefore exhausted.

- 12 ■ In his finalized petition, Petitioner makes several factual allegations related to his jail  
13 medical records in support of his claim that trial counsel was ineffective in failing to  
14 investigate his background and raise an insanity defense. Respondent argues that  
15 Petitioner failed to exhaust the factual allegations. Petitioner’s factual allegations for his  
16 current proceedings, as well as his allegations during his state habeas, are as follow:

17 *Finalized Petition*

*State Habeas Petition*

18 Medical staff at the county jail holding  
19 Petitioner began medicating Petitioner with  
20 Mellaril/Thioridazine, an anti-psychotic  
21 medication used in the treatment of  
22 schizophrenia. During his incarceration, he  
23 was described as agitated, hostile, tired,  
24 drowsy, and sleeping more than 8 hours a  
25 day. Petitioner reported seeing bugs and  
26 was described as hallucinating.

27 Dr. Robinson made a provisional diagnosis  
28 of bipolar disorder, manic type, and several

Had counsel conducted a competent  
investigation, counsel would have  
discovered the CYA report, which included  
psychiatric evaluation by Dr. Robinson.  
Dr. Robinson made a provisional diagnosis  
of Petitioner as suffering from bipolar  
disorder, manic type,” then revised the  
diagnosis to cyclothymic disorder. She  
recommended lithium for mood  
stabilization. Had counsel obtained the  
CYA report, he would have been made

1 other diagnoses in the CYA report. Had  
2 Mintz obtained any of Petitioner’s jail,  
3 medical, or CYA records, he would have  
4 recognized Petitioner was exhibiting  
5 distinctive mood cycling and other signs of  
6 a major affective disorder shortly after his  
7 arrest; he would have discovered that a  
8 meritorious insanity defense could and  
9 should have been presented at trial. *See*  
10 Fed. Pet. at 248-249.

aware of Drs. Robinson and Nicholas’  
reports indicating Petitioner exhibited mood  
cycling and Cyclothymic disorder. The  
information would have allowed Drs.  
Benson and Pierce to testify in a way  
supporting an insanity defense and would  
have constituted powerful mitigating  
evidence. Dr. Benson would have also  
testified that there was a continuum in  
Petitioner’s juvenile criminal behavior and  
his adult crimes. *See* AG009654-56,  
AG009660-61, State Pet. at 75-77;  
AG009757-58, State Pet., Exh. A at 2-3  
(stating that jail medical records indicate  
that Petitioner was prescribed Mellaril, a  
tranquilizer used to treat psychosis).

17 The Court has reviewed the record and concludes that Petitioner presented allegations  
18 regarding the jail records and the CDC’s prescription of Mellaril to the California Supreme  
19 Court during his state habeas review by citing Dr. Benson’s declaration (*see* AG009757-  
20 58, State Pet., Exh. A at 2-3) in his ineffective assistance of counsel claim. Moreover,  
21 Petitioner previously alleged that reasonably competent counsel would have “conducted an  
22 investigation into [P]etitioner’s mental health history and . . . past experiences with the  
23 criminal/justice system.” *See* AG009655, State Pet. at 76. To the extent the subclaim  
24 raises more details about the contents of the jail medical records, including that Petitioner  
25 was described as agitated, hostile, tired, drowsy, was sleeping more than 8 hours a day,  
26 reported seeing bugs, and was described as hallucinating, the details do not fundamentally  
27 alter Petitioner’s state habeas claim. Petitioner presented substantial operative facts to the  
28 state court, i.e., that Petitioner showed signs of mental illness, which was evidenced by his

1 CYA report, CDC file, family history, and family/friends' accounts of Petitioner's  
2 behavior. Petitioner also presented to the state court the relevant legal theory, i.e., that  
3 counsel was ineffective in failing to investigate and obtain the jail, medical, or CYA  
4 records and use them to mount an insanity defense or as mitigation evidence. This  
5 subclaim is therefore exhausted.

6 ■ Respondent argues that the following allegation is unexhausted: Cannady would have  
7 discovered Petitioner's history of mental illness had he entered an insanity plea on his  
8 behalf. *See* Fed. Pet. at 247. The Court has reviewed the record and concludes the  
9 allegation is substantially similar to Petitioner's state habeas claim that counsel was  
10 ineffective in failing to raise a defense of insanity. *See* AG009724-27, State Pet. at 145.  
11 The subclaim is exhausted.

12 ■ Respondent argues that the following subclaim in Petitioner's finalized petition is  
13 unexhausted: Petitioner's first appointed counsel, Mintz, incompetently represented  
14 Petitioner after he was appointed in February 1989 and failed to hire an investigator or  
15 mental health expert or speak to Petitioner's family; failed to obtain any of Stanley's  
16 records, including school, jail, juvenile, or CYA records containing crucial information  
17 about Petitioner's mental and medical health; and then billed Alameda County for a total  
18 of 24.3 hours over the course of ten months. *See* Fed. Pet. at 248-49. The Court has  
19 reviewed the record and concludes that Petitioner has not previously presented these  
20 allegations to the California Supreme Court. While Mintz played only a pretrial role in  
21 Petitioner's trial representation, the allegations, if proven, would substantially improve the  
22 evidentiary posture of Petitioner's argument that his appointed attorneys' cumulative  
23 failures, including the failure to conduct adequate pretrial investigation or enter an insanity  
24 plea on Petitioner's behalf, amounted in ineffective assistance of counsel. *See Wiggins*,  
25 539 U.S. at 535 (failure to investigate may constitute ineffective assistance of counsel).  
26 The subclaim is unexhausted.

27 ■ Respondent argues that the following allegations are unexhausted: Cannady and his co-  
28 counsel Humphrey failed to obtain relevant documents and records, including Petitioner's

1 CYA records and his medical/psychiatric records from the county jail, and Humphrey  
2 abandoned Petitioner two months prior to the start of his trial. *See Fed. Pet. at 250.* The  
3 Court has reviewed the record and concludes that Petitioner has not previously presented  
4 evidence regarding Humphrey's behavior as appointed counsel; while Humphrey played  
5 only a pretrial role in Petitioner's trial representation, the allegations regarding  
6 Humphrey's failure to obtain relevant documents pertaining to Petitioner's mental illness,  
7 as well as his abandonment shortly before trial, would substantially improve the  
8 evidentiary posture of Petitioner's claim that his appointed attorneys' cumulative failures,  
9 including the failure to conduct adequate pretrial investigation or enter an insanity plea on  
10 Petitioner's behalf, amounted to ineffective assistance of counsel. *See Wiggins, 539 U.S.*  
11 *at 535* (failure to investigate may constitute ineffective assistance of counsel). The  
12 subclaim is therefore unexhausted.

- 13 ■ Respondent argues that the following subclaim in Petitioner's finalized petition is  
14 unexhausted: Cannady's representation was inadequate when he chose not to enter an  
15 insanity plea even after being presented with a number of reports from Drs. Benson and  
16 Pierce stating Petitioner had grandiose delusions, poor reality contact, thought disturbance,  
17 and loss of memory. Petitioner also told his investigator, Olivier, that he was born in New  
18 York and lived there until he entered the sixth grade, which was not true. *See Fed. Pet. at*  
19 *250.* The Court has reviewed the record and concludes Petitioner never presented  
20 allegations related to Olivier in the California Supreme Court; however, the allegation that  
21 Petitioner said he lived in New York does not substantially alter the claim that counsel was  
22 ineffective in failing to raise an insanity defense given Petitioner's signs of mental illness.  
23 *See Seidel v. Merkle, 146 F.3d 750, 755 (9th Cir. 1998)* (counsel cannot ignore abundant  
24 signs of mental illness); *Daniels v. Woodford, 428 F.3d 1181, 1203-04 (9th Cir. 2005)*  
25 (counsel may not rest on a preliminary examination in deciding to abandon mental health  
26 defense). The subclaim is exhausted.
- 27 ■ Respondent argues that the following subclaim in Petitioner's finalized petition is  
28 unexhausted because it includes new factual and legal allegations: Petitioner incorporates

1 by reference “all previous and subsequent claims and facts alleged in” his federal petition  
2 (Fed. Pet. at 246). Respondent is correct. To the extent Claim 8 incorporates legal  
3 arguments and facts from his unexhausted claims, Claim 8 is unexhausted.

4 Based on the aforementioned, Claim 8 is partially unexhausted.

5 g. Claim 9

6 Petitioner argues that he was denied effective assistance of counsel at the penalty phase of  
7 trial by failing to investigate, prepare, and present readily available mitigating evidence on  
8 Petitioner’s behalf. *See* Fed. Pet. at 251. Respondent argues Claim 9 is unexhausted in part due to  
9 various subclaims containing new factual and legal allegations. Petitioner asserts the claim was  
10 exhausted in his state habeas proceedings. *See* Fed. Pet. at 251. The Court addresses each  
11 subclaim in turn.

- 12 ■ In his state habeas petition, trial counsel’s failure to adequately investigate Petitioner’s  
13 family/personal history, including Petitioner’s CYA records, and failure to provide  
14 psychiatric experts and jurors with critical information about Petitioner’s mental illness  
15 violated Petitioner’s rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of  
16 the federal constitution. *See* AG009650-63, State Pet. Vol. I at 71-84. In his finalized  
17 petition, Petitioner now argues he was denied the effective assistance of counsel at the  
18 penalty phase of trial; and that his confinement and sentence are illegal, unconstitutional,  
19 and void pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S.  
20 Constitution, his rights to due process, equal protection, assistance of counsel, a fair trial,  
21 and a reliable determination of guilt (citing *Strickland v. Washington*). *See* Fed. Pet. at  
22 251. Respondent argues that the subclaim is unexhausted because it includes a new legal  
23 theory. The Court has reviewed the record and concludes that Petitioner did not cite the  
24 Fourteenth Amendment’s equal protection clause or otherwise provide notice to the  
25 California Supreme Court that his right to equal protection under any constitutional  
26 amendment was violated by ineffective assistance of counsel at the penalty phase of trial.  
27 As Petitioner’s new constitutional argument was never fairly presented in state court, the  
28 subclaim is partially unexhausted. *See Picard*, 404 U.S. at 277-78 (petitioner must present

1 state courts with same claim he urges upon the federal courts); *see also Castillo v.*  
2 *McFadden*, 399 F.3d at 1002 (petitioner did not give state appellate court fair opportunity  
3 to rule on federal due process claim by concluding his brief with “scattershot citation of  
4 federal constitutional provisions” with no articulated federal legal theory).

5 ■ In his finalized petition, Petitioner cites various cases in support of his claim that trial  
6 counsel had a duty to investigate Petitioner’s background. Respondent argues that  
7 Petitioner has not exhausted the subclaim because Petitioner’s citations introduce new  
8 legal theories fundamentally altering the claim presented to the California Supreme Court.  
9 Petitioner’s federal and state habeas petition subclaims are set forth below:

10 Federal Petition

11 Petitioner cites the following cases to  
12 support his allegations of ineffective  
13 assistance of counsel: *Wiggins v. Smith*, 539  
14 U.S. 510, 522 (2003) (counsel must  
15 investigate defendant’s background); *Caro*  
16 *v. Calderon*, 165 F.3d 1223, 126-27 (all  
17 relevant mitigation must be unearthed for  
18 penalty phase of capital case; failure to  
19 investigate defendant’s organic brain  
20 damage may be ineffective assistance of  
21 counsel; counsel must inquire into social  
22 background, family abuse, substance abuse,  
23 and medical history, and must obtain  
24 health/school/criminal records); *Bemore v.*  
25 *Chappell*, 788 F.3d 1151, 1171 (9th Cir.  
26 2015) (counsel’s duty to follow up on  
27 indicia of mental illness much broader  
28 during penalty phase of capital case). *See*

State Habeas Petition

Petitioner cited the following cases to  
support his allegations of ineffective  
assistance of counsel: *Strickland v.*  
*Washington*, 266 U.S. at 668-89; *Williams*  
*v. Taylor*, 529 U.S. 362, 393-99 (2000)  
(counsel must conduct adequate  
investigation into defendant’s life for  
penalty phase of capital case); *Wallace v.*  
*Stewart*, 184 F.3d 1112, 1115-18 (9th Cir.  
1999) (counsel was ineffective by failing to  
seek out mental health evidence and bring  
it to attention of defense experts; citing  
*Caro v. Calderon*, 165 F.3d 1223); *Bloom*  
*v. Calderon*, 132 F.3d 1267, 1277-78 (9th  
Cir. 1997) (counsel has duty to acquire  
sufficient background material for mental  
health expert when the expert requests such  
information). *See* AG009657, State Pet. at

1 Fed. Pet. at 252.

78.

2 Respondent argues that Petitioner’s citations render his claim unexhausted because the  
3 citations constitute new legal theories that fundamentally alter the theory presented to the  
4 California Supreme Court. The Court has reviewed the record and concludes the new  
5 citations do not alter Petitioner’s state habeas legal theory that his counsel was ineffective  
6 in failing to investigate, discover, and provide his mental health experts with evidence of  
7 Petitioner’s mental illness during both phases of Petitioner’s trial. *Compare* AG009648-  
8 63, State Pet. at 69-84 *with* Fed. Pet. at 252. Although the federal petition contains new  
9 citations, the legal theory is essentially the same. The subclaim is exhausted.

- 10 ■ In his finalized petition, Petitioner argues that his counsel, “collectively and singularly”  
11 provided assistance that was constitutionally deficient, that counsel’s deficient  
12 representation severely prejudiced him, and that counsel “collectively and singularly”  
13 failed to adequately investigate and present an insanity defense at the penalty phase of trial.  
14 Petitioner also argues that had counsel presented such mitigating evidence, the jury would  
15 not have returned a sentence of death. The Court has reviewed the record and concludes  
16 that Petitioner’s argument is essentially an assertion of cumulative error. Petitioner had  
17 not previously made any allegations regarding appointed counsel other than Cannady;  
18 accordingly, insofar as the claim of cumulative error relies on Petitioner’s unexhausted  
19 Omnibus Facts (*see ante*, at 20-21), the subclaim is unexhausted.
- 20 ■ Respondent argues that the following factual allegations in the instant federal petition are  
21 unexhausted: approximately ten pages of factual allegations concerning Petitioner’s  
22 defense team during trial (Mintz, Humphrey, Cannady, Olivier, Dr. Benson, Dr. Pierce),  
23 including allegations that Mintz failed to conduct any investigation or represent Petitioner  
24 during his time as Petitioner’s lawyer; that Cannady failed to subpoena any of the  
25 documents on investigator Olivier’s list of important documents for penalty phase  
26 investigation (prison, school, CYA, parole, or child custody records); that, after Cannady  
27 took over, the defense team had no person in charge of penalty phase investigation and  
28 preparation; that Humphrey tried to divide each attorney’s responsibility for the guilt and

1 penalty phases, but was turned down by Cannady; that Olivier conducted only a single  
2 interview for his penalty phase investigation; that Cannady had not obtained funding for  
3 penalty phase investigation until September 1990; that penalty phase investigation did not  
4 begin until May 23, 1991, or six days before the prosecution rested its case in the guilt  
5 phase of Petitioner’s trial; that Olivier failed to obtain various medical/mental health  
6 records requested by Dr. Pierce; that Dr. Pierce’s notes and testimony contained several  
7 factual errors; and various allegations regarding mental health findings resulting from  
8 competency proceedings conducted in this Court. *See* Fed. Pet. at 253-62. The Court has  
9 reviewed the record and concludes that Petitioner has not presented any allegations  
10 regarding Mintz, Humphrey, or Olivier, or any of the mental health allegations resulting  
11 from proceedings in this Court, to the California Supreme Court. As these allegations  
12 would, if proven, support Petitioner’s argument that his defense team’s lack of  
13 investigation/presentation of mitigating evidence at the penalty phase was a result of a  
14 failure of his defense team rather than a strategic decision by counsel, the Court concludes  
15 the new allegations would substantially improve the evidentiary posture of Petitioner’s  
16 claim. *See Strickland v. Washington*, 466 U.S. 668 (defendant is entitled to effective  
17 assistance of counsel); *Wiggins v. Smith*, 539 U.S. 510 (2003) (counsel has duty to perform  
18 reasonable investigation); *Williams v. Taylor*, 529 U.S. 362 (2000) (counsel must conduct  
19 investigation into defendant’s background for penalty phase of trial). Accordingly, the  
20 new factual allegations are unexhausted.

- 21 ■ Respondent argues that the following subclaim in Petitioner’s finalized petition is  
22 unexhausted because it includes facts and arguments from unexhausted claims: Petitioner  
23 incorporates by reference “all previous and subsequent claims and facts alleged in” his  
24 federal petition (*see* Fed. Pet. at 253). Respondent is correct. To the extent Claim 9  
25 incorporates legal arguments and facts from his unexhausted claims, Claim 9 is  
26 unexhausted.

27 For the aforementioned reasons, Claim 9 is partially unexhausted.

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1                   h.       Claim 10

2                   Petitioner argues that his death sentence was unconstitutionally imposed due to the bailiff  
3 tampering with the jury in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights.  
4       *See* Fed. Pet. at 263. Respondent argues Petitioner never presented Claim 10 to the California  
5 Supreme Court, and Petitioner concedes that the claim was not presented in any earlier state  
6 proceeding. *See* Fed. Pet. at 268. Instead, citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986),  
7 Petitioner argues that the Court should excuse the exhaustion requirement because he did not  
8 exhaust Claim 10 due to the bailiff’s failure to inform the trial court and/or counsel that he spoke  
9 to the jury. *See* Docket No. 261 at 8. *Murray*, however, does not aid Petitioner. There, the  
10 Supreme Court held that although ineffective assistance of counsel could constitute cause for  
11 procedural default, the claim of ineffective assistance of counsel should generally be exhausted in  
12 state court. *Murray*, 477 U.S. at 488. However, Petitioner does not currently argue that his claim  
13 is procedurally defaulted and that such default should not bar his claim; rather, the Court’s inquiry  
14 here is limited to whether Petitioner has exhausted Claim 10.

15                   As previously discussed in this Order, *see ante* at 18-19, Petitioner appears to conflate the  
16 doctrines of procedural default and exhaustion. *See Cooper v. Neven*, 641 F.3d at 327. While  
17 procedural default sometimes overlaps with the exhaustion doctrine in that procedural default can  
18 effectively foreclose a petitioner’s access to state remedies, the overlap ends there; a district court  
19 will not excuse exhaustion if a petitioner still has a state remedy available. *See Coleman v.*  
20 *Thompson*, 501 U.S. at 731-32 (petitioner who has procedurally defaulted his federal claims meets  
21 technical requirements for exhaustion when state remedies are no longer available to him); *see*  
22 *also* 28 U.S.C. 2254(c) (claim is not exhausted if petitioner “has the right under the law of the  
23 State to raise, by any available procedure, the question presented”). Accordingly, even if  
24 Petitioner was arguing that his claim is procedurally defaulted, Petitioner’s argument that he was  
25 unable to present Claim 10 earlier due to the state’s suppression of the evidence can presumably  
26 be made before the California Supreme Court to excuse any procedural default there. *See In re*  
27 *Clark*, 5 Cal. 4th at 775 (“where the factual basis for a claim was unknown to the petitioner and he  
28 had no reason to believe that the claim might be made, or where the petitioner was unable to

1 present his claim, the court will . . . consider the merits of the claim if it is asserted as promptly as  
2 reasonably possible). Petitioner must exhaust his claim in state court.

3 Claim 10 is fully unexhausted.

4 i. Claim 11

5 In his state habeas petition, Petitioner argued that defense counsel was ineffective in  
6 questioning Officer Burnham regarding the contents of a paper Petitioner had displayed  
7 concerning “Black History” (containing writing that the white man is the enemy), opening the  
8 door to testimony regarding Petitioner’s racial views (citing Fifth, Sixth, Eighth, and Fourteenth  
9 Amendments). *See* AG009685-88, State Pet. 106-109. In his finalized petition, Petitioner now  
10 argues that the trial court admitted evidence of his political speech, i.e., Petitioner’s “Police Pig of  
11 the Year” list and “the white man is your enemy” writing, in violation of his First, Fifth, Eighth,  
12 and Fourteenth Amendment rights. *See* Fed. Pet. at 269.

13 Respondent argues that Petitioner has not presented Claim 11 to the California Supreme  
14 Court, and Petitioner does not otherwise argue the claim was exhausted. The Court has reviewed  
15 the record and concludes that Claim 11 is fundamentally different from Petitioner’s state court  
16 claim. In state court, Petitioner characterized the admission of evidence as ineffective assistance  
17 of counsel; Claim 11 here states its admission violated the First Amendment. Although the  
18 underlying operative facts are similar, Claim 11 posits a significantly different legal theory. Thus,  
19 Petitioner has not fairly presented the claim to the California Supreme Court. *See Picard*, 404  
20 U.S. at 278 (claim that failure to use grand jury to indict defendant violated Fourteenth  
21 Amendment equal protection clause not exhausted when state habeas petition cited only Fifth  
22 Amendment due process as basis for federal violation); *id.* at 277-78 (petitioner must present state  
23 courts with same claim he urges upon the federal courts). Claim 11 is fully unexhausted.

24 j. Claim 12

25 Petitioner argues that he was denied his right to be present at his penalty phase trial and  
26 that any alleged waiver of his right was invalid. *See* Fed. Pet. at 273. Respondent argues Claim  
27 12 is unexhausted in part due to various subclaims containing new factual and legal allegations.  
28 Petitioner contends the claim was exhausted on direct appeal. *See* Fed. Pet. at 273. The Court

1 addresses each subclaim in turn.

- 2       ▪ During his direct appeal, Petitioner argued that the trial court’s permitting Petitioner to  
3 absent himself from the courtroom during Issac Stanley’s guilt phase testimony deprived  
4 Petitioner of his rights to due process, confrontation, an impartial jury, and a reliable  
5 determination of his guilt and sentence (citing the Fifth, Sixth, Eighth, and Fourteenth  
6 Amendments). *See* AG008120, AOB Vol. II at 318. In his finalized petition, Petitioner  
7 now argues that he was denied his right to be present at his penalty phase trial, that any  
8 alleged waiver of his right was invalid, and that his confinement and sentence are illegal,  
9 unconstitutional, and void pursuant to the Fifth, Sixth, Eighth, and Fourteenth  
10 Amendments to the U.S. Constitution, his rights to due process, equal protection,  
11 assistance of counsel, a fair trial, and a reliable determination of guilt because Petitioner  
12 did not validly waive his right to be present at trial. *See* Fed. Pet. at 273. The Court has  
13 reviewed the record and concludes that Petitioner did not cite the Fourteenth Amendment’s  
14 equal protection clause or otherwise provide notice to the California Supreme Court that  
15 his right to equal protection under any constitutional amendment was violated by  
16 ineffective assistance of counsel at the penalty phase of trial. As Petitioner’s new  
17 constitutional argument was never fairly presented in state court, the subclaim is partially  
18 unexhausted. *See Picard*, 404 U.S. at 277-78 (petitioner must present state courts with  
19 same claim he urges upon the federal courts); *see also Castillo v. McFadden*, 399 F.3d at  
20 1002 (petitioner did not give state appellate court fair opportunity to rule on federal due  
21 process claim by concluding his brief with “scattershot citation of federal constitutional  
22 provisions” with no articulated federal legal theory). This subclaim is partially  
23 unexhausted.
- 24       ▪ In his finalized petition, Petitioner argues that a trial record needs evidence that a  
25 defendant who waives his presence understands the right and the consequences of waiving  
26 the right to be present, citing *People v. Davis*, 36 Cal.4th 510, 532 (2005). Respondent  
27 argues that Petitioner’s citation to *People v. Davis* fundamentally alters the claim presented  
28 to the California Supreme Court. Petitioner’s federal habeas claim and direct appeal claim

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are set forth below:

Federal Petition

Petitioner’s citation to *People v. Davis*, 36 Cal.4th 510, 532 (2005) to argue that there must be evidence that a defendant understood the right he was waiving and the consequence of doing so when waiving his presence at trial; where there is scant evidence of consent or that the defendant understood the right he was waiving due to defense counsel’s waiver for defendant, a court cannot conclude defendant knowingly waived his right to presence at the hearing. *See Fed. Pet. at 276-77.*

Direct Appeal (State)

Even if a capital defendant could voluntarily waive his right to be present during trial testimony, the waiver in the present case would still be defective for lack of appellant’s personal on-the-record waiver. In the absence of a personal on-the-record waiver, it is difficult, if not impossible, to determine whether the defendant has knowingly and intelligently relinquished a known right (citing *United States v. Gordon*, 829 F.2d 119, 126 (D.C. Cir. 1987). AG008123-24, AOB Vol. II at 321-22.

The Court has reviewed the record and concludes that Petitioner’s citation and argument related to *Davis* is substantially similar to Petitioner’s argument on direct appeal and does not significantly alter Petitioner’s claim that the trial court erred by not requiring Petitioner’s personal knowing/intelligent waiver (as opposed to waiver through counsel) on the record. The subclaim is exhausted.

- In his finalized petition, Petitioner argues that Respondent argues that he need not establish prejudice from the denial of his right to be present during trial. Respondent argues that Petitioner’s subclaim is unexhausted because Petitioner now presents a new legal theory, fundamentally altering the claim presented to the California Supreme Court. Petitioner’s federal habeas claim and direct appeal claim are set forth below:

Federal Petition

Petitioner need not establish prejudice from the denial of his right to be present

Direct Appeal (State)

The right of a defendant to be present at all stages of a criminal trial is rooted in the

1 during trial; the right to be present is  
2 fundamental and one of the most basic  
3 rights guaranteed by the Confrontation  
4 Clause (citing *Brewer v. Raines*, 670 F.2d  
5 117, 118-19 (9th Cir. 1982). All that need  
6 be shown is that the absence occurred  
7 during a critical proceeding; the penalty  
8 phase of a capital trial is a critical  
9 proceeding. *See* Fed. Pet. at 277-78.

confrontation and due process clauses of the  
federal and state constitutions (citing Sixth  
and Fourteenth Amendments, *Illinois v. Allen*,  
397 U.S. 337, 338 (1970)). The California  
Supreme Court wrongfully rejected the  
argument that a capital defendant's absence  
from the courtroom during trial testimony  
violates the federal constitution in *People v.*  
*Jackson*, 13 Cal.4th 1164 (1996). *See*  
AG008120, AOB Vol. II at 318. In situations  
where a waiver might have been permissible  
but defective for failure to comply with  
statutory requisites, reversal is required unless  
the error can be shown beyond a reasonable  
doubt to have had no effect on the outcome.  
In a situation where no waiver may be taken,  
the standard must be even more stringent.  
AG008123-24, AOB Vol. II at 322-23.

19 The Court has reviewed the record and concludes that Petitioner has not fairly presented  
20 this subclaim to the California Supreme Court. By arguing that no prejudice need be  
21 shown from Petitioner's absence, Petitioner essentially argues that his absence constituted  
22 a structural defect. *See Campbell v. Rice*, 408 F.3d 1166, 1171 (“[a]utomatic reversal due  
23 to a constitutional error is required only if this error was a ‘structural defect’ that  
24 permeated ‘t[t]he entire conduct of the trial from the beginning to end’ or ‘affec[ed] the  
25 framework within which the trial proceeds”). Petitioner made no such argument in state  
26 court. *Illinois v. Allen* and *People v. Jackson*, cited by Petitioner during his direct appeal,  
27 do not consider whether a defendant's absence during testimony is a structural error, but  
28 rather focus on whether a defendant can ever waive the constitutional right to be present

1 during testimony. Accordingly, the subclaim is unexhausted.

2 For the aforementioned reasons, Claim 12 is partially unexhausted.

3 k. Claim 13

4 Petitioner argues that he will not have a meaningful opportunity to present his federal  
5 constitutional claims to this court as a result of dysfunctional and inadequate state court  
6 proceedings in violation of the U.S. Constitution’s Suspension Clause. *See* Fed. Pet. at 279.  
7 Respondent argues Petitioner has not presented Claim 13 to the California Supreme Court, and  
8 Petitioner concedes as much. *See id.* Petitioner argues, however, that there is no use in further  
9 delaying this Court’s consideration of the claim and that exhaustion should be excused, citing  
10 *Jones v. Davis*, 806 F.3d 538, 545 (9th Cir. 2015). Docket No. 261 at 16.

11 *Jones v. Davis* is inapposite in this context. There, a habeas petitioner raised a  
12 *Furman/Lackey* claim. The state argued that the claim was unexhausted and barred by *Teague*,  
13 but the district court nevertheless granted the petitioner’s petition based on the *Furman/Lackey*  
14 claim, holding that exhaustion was excused based on the “systemic delay and dysfunction” of  
15 California’s post-conviction review process. *Id.* at 542. The Ninth Circuit reversed. After finding  
16 that nothing in § 2254(b)(1) requires that a court demand or analyze exhaustion if it *denies* the  
17 writ, the Ninth Circuit held that the claim was procedurally barred by *Teague* and denied the writ  
18 altogether.<sup>10</sup> *Jones v. Davis*, at 545. Accordingly, *Jones* did not excuse exhaustion where the  
19 substantive claim has possible merit. Petitioner does not argue Claim 13 is barred by *Teague* or  
20 otherwise argue that his own habeas claim is unmeritorious;<sup>11</sup> *Jones v. Davis* is therefore not  
21 helpful to Petitioner.

22 Moreover, while the Court understands that Petitioner’s case has already gone through  
23 lengthy litigation, Petitioner has not shown that the California Supreme Court would be ineffective  
24 should he file an exhaustion petition in the future. As Petitioner recognized during hearing,

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26 <sup>10</sup> Although the majority did not decide whether Jones’ claim was exhausted or excused from the  
27 exhaustion requirement, the Hon. Paul Watford in concurrence opined that it was not exhausted.  
*Jones v. Davis*, 806 F.3d at 553.

28 <sup>11</sup> The Court does not make any rulings as to the merit of Claim 13 at this time. *See Rose v.*  
*Lundy*, 455 U.S. 509 (total exhaustion of petition required).

1 federal habeas petitions are routinely sent back to the California Supreme Court for exhaustion  
2 procedures, even if many of them are ultimately unsuccessful. *See* Docket No. 274-1. And, while  
3 undue delay during state court proceedings may sometimes call for excuse of the exhaustion  
4 requirement, those cases often involve situations in which direct appeals or state habeas petitions  
5 have already been filed but are still pending after years of delay. *See Coe v. Thurman*, 922 F.2d  
6 528, 530-32 (9th Cir. 1990) (in pre-AEDPA case, direct appeal pending in state court for nearly  
7 four years); *see also Hayes v. Ayers*, 632 F.3d 500 (9th Cir. 2011) (rejecting due process claim in  
8 case where direct appeal was pending for 11 years). Petitioner’s case does not fall within this  
9 category of cases.

10 In sum, Petitioner has failed to cite controlling authority or properly establish that he  
11 should be excused from the exhaustion requirement. Claim 13 is therefore unexhausted.

12 1. Claim 14

13 Petitioner argues the California death penalty system is unconstitutional because lengthy  
14 and unpredictable delays in the implementation of death sentences have resulted in an arbitrary  
15 and unfair capital punishment system in violation of the Eighth Amendment prohibition of cruel,  
16 torturous, and unusual punishment, and that application of this system to Petitioner violates his  
17 Fifth, Sixth, Eighth, and Fourteenth Amendment rights and international law. *See* Fed. Pet. at 293.  
18 Respondent argues Claim 14 is unexhausted in part due to various subclaims containing new  
19 factual and legal allegations. Petitioner asserts the claim was exhausted during his state habeas  
20 proceedings (Fed. Pet. at 293). The Court has reviewed the record and concludes Claim 14, which  
21 asserts the California death penalty scheme’s delays create a risk that the death penalty will be  
22 inflicted in an arbitrary and capricious manner, is significantly different from Petitioner’s claim  
23 before the California Supreme Court that the physical, mental, and emotional suffering caused by  
24 a prolonged delay was cruel and unusual. *See* AG009704-07, State Pet. at 125-28.

25 Petitioner argues, however, that there is no use in further delaying this Court’s  
26 consideration of the claim and that exhaustion should be excused, citing *Jones v. Davis*, 806 F.3d  
27 538, 545 (9th Cir. 2015). Docket No. 261 at 16. For the reasons cited in response to this  
28 argument as to Claim 13 above, the Court is not persuaded by Petitioner. Petitioner has failed to

1 cite controlling authority or properly establish that he should be excused from the exhaustion  
2 requirement. Claim 14 is therefore unexhausted.

3 m. Claim 15

4 Petitioner argues that his execution following lengthy confinement under a death sentence  
5 would constitute cruel and unusual punishment in violation of Petitioner’s federal constitutional  
6 rights and international law. *See* Fed. Pet. at 297. Respondent argues Claim 15 is unexhausted in  
7 part due to various subclaims containing new factual and legal allegations. Petitioner asserts the  
8 claim was exhausted during his state habeas proceedings, *id.*, and, alternatively, that exhaustion  
9 should be excused (Docket No. 261 at 16). *Id.* The Court addresses each subclaim in turn.

- 10 ■ In his state habeas petition, Petitioner argued that the international community is  
11 increasingly realizing that, without regard for the question of the appropriateness or  
12 inappropriateness of the death penalty itself, prolonged confinement under a death sentence  
13 is cruel and degrading and violates international human rights law, citing *Pratt v. Attorney*  
14 *General for Jamaica*, 4 All.E.R. 769 (1993); *Soerig v. United Kingdom*, 11 E.H.R.R. 439  
15 (1989). *See* AG009705-06, State Pet. at 126-27.

16 In his finalized petition, Petitioner now asserts that his execution following his  
17 lengthy confinement under sentence of death would constitute cruel and unusual  
18 punishment in violation of international law, covenants, treaties and norms. *See* Fed. Pet.  
19 at 297. Petitioner argues that his sentence violates the United Nations Convention Against  
20 Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. GAOR,  
21 29th Sess., Agenda Item 99, U.N. Doc. A/Res/39/46 (1984), and specifically alleges that  
22 his convictions and death sentence were obtained in violation of Article I, which defines  
23 torture in part as any act by which severe pain or suffering is intentionally inflicted on a  
24 person by a public official. *See* Fed. Pet. at 300. Petitioner also asserts that a death  
25 sentence is degrading and devastating, citing *Reflections on the Guillotine, in Resistance,*  
26 *Rebellion and Death* by Camus. *See* Fed. Pet. at 301.

27 The Court has reviewed the record and concludes that Petitioner fairly presented  
28 most of the subclaim to the California Supreme Court when he presented the operative

1 facts and argued, as he does so here, that execution after lengthy confinement would  
2 constitute “cruel and degrading” punishment and would violate “international human rights  
3 law.” Petitioner’s citation to the U.N. Convention Against Torture’s Article 1, however,  
4 was not fairly presented because Petitioner never argued before the California Supreme  
5 Court that he believed his sentence, and the way it was imposed, violated the treaty or  
6 otherwise cite to cases discussing the treaty. Although Petitioner cited “international law”  
7 and various international cases in relation to his claim that prolonged confinement under a  
8 death sentence was cruel and unusual punishment, none of the cases discussed Article 1 of  
9 the U.N. Convention. *See* AG009705-06, State Pet. at 126-27; *see also* AG009722-24,  
10 State Pet. at 143-45 (citing the Universal Declaration of Human Rights, the International  
11 Covenant on Civil and Political Rights, the American Declaration of Rights and Duties of  
12 Man, and the International Convention Against All Forms of Racial Discrimination). The  
13 Court therefore concludes that Petitioner’s cite was insufficient to give the California  
14 Supreme Court a chance to rule on the subclaim. *See Picard*, 404 U.S. at 277-78  
15 (petitioner must present state courts with same claim he urges upon the federal courts); *id.*  
16 at 278 (claim that failure to use grand jury to indict defendant violated Fourteenth  
17 Amendment equal protection clause not exhausted when state habeas petition cited only  
18 Fifth Amendment due process as basis for federal violation); *see also Castillo v.*  
19 *McFadden*, 399 F.3d at 1002 (petitioner did not give state appellate court fair opportunity  
20 to rule on federal due process claim by concluding his brief with “scattershot citation of  
21 federal constitutional provisions” with no articulated federal legal theory). The subclaim is  
22 unexhausted.

- 23 ■ In his finalized petition, Petitioner argues that he is not responsible for the delay in his  
24 proceedings and that full, fair, and meaningful review of trial court proceedings requires a  
25 complete record and effective appellate representation. Respondent argues that  
26 Petitioner’s subclaim is unexhausted because it introduces a new legal theory that  
27 fundamentally alters the claim he presented to the California Supreme Court. Petitioner’s  
28 federal and state habeas subclaims are set forth below:

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Federal Petition

Petitioner is not responsible for the delay between his initial sentence and the day upon which it will be carried out. The extended period of his automatic appeal and state habeas proceeding was not his fault. Petitioner may not waive his automatic appeal. Full, fair, and meaningful review of trial court proceedings requires a complete record (citing *Chessman v. Teets*, 354 U.S. 156 (1957)) and effective appellate representation. The delays which occurred in Petitioner’s appeal were caused by factors over which he exercised no discretion or control, and where overwhelmingly attributable to the system in place, established by state and federal law. The delay at issue was caused by the negligence or deliberate action by the state (citing *Lackey v. Texas*, 514 U.S. 1045 (1995)). See Fed. Pet. at 297-98.

The Court has reviewed the record and concludes that in his state habeas petition, Petitioner alleged that the delay in his case is not attributable to him but instead, caused by the state (see AG009705, State Pet. at 126); cited to *Lackey v. Texas*, 514 U.S. 1045 (1995) (discussing the need to account for “negligence or deliberate action by the state” in considering delay between death sentence and actual execution date). Insofar as Petitioner now states that a complete record and effective appellate representation are necessary for full, fair, and meaningful review, the Court concludes that those allegations are subsumed

State Habeas Petition

Execution of Petitioner following his confinement for such a long time under sentence of death would constitute cruel and unusual punishment in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments (citing *Lackey v. Texas*). Petitioner’s confinement on death row, in part, has been directly attributable to the California Supreme Court’s delay in appointing counsel and deciding his appeal and habeas corpus. The appeal from a judgment of death is automatic; Petitioner cannot waive the automatic appeal. See AG009705, State Pet. at 126.

1 to Petitioner's *Lackey* claim and do not fundamentally alter Petitioner's *Lackey* claim  
2 because they do not raise additional federal claims, but rather state general principles of  
3 fairness. The subclaim is exhausted.

- 4 ■ Respondent argues that the following allegations in the finalized petition are unexhausted:  
5 Petitioner was not responsible for the delay between his initial sentence and the day it will  
6 be carried out (citing *People v. Sheldon*, 7 Cal.4th 1136, 1139 (1994); *In re Medley*, 134  
7 U.S. 160, 172 (1890)), allegations about the size of Petitioner's cell, Petitioner's constant  
8 surveillance, Petitioner's ability to leave his cell, and Petitioner's extreme isolation, pain  
9 and suffering as a death row inmate, and subjection to handcuffing any time he is  
10 transported anywhere. *See* Fed. Pet. at 297-98, 301. The Court has reviewed the record  
11 and concludes that Petitioner did not present any evidence regarding his own conditions of  
12 confinement as a result of being confined to San Quentin's death row (*see* Fed. Pet. at 298)  
13 to the California Supreme Court. Because the new allegations could substantially improve  
14 the evidentiary posture of his claim that execution following his lengthy confinement on  
15 death row would constitute cruel and unusual punishment, Petitioner's new allegations are  
16 unexhausted. *Compare* AG009704-07, State Pet. at 125-28 *with* Fed. Pet. at 297-98, 301.  
17 *See Allen v. Ornoski*, 435 F.3d 946, 955 (9th Cir. 2006).
- 18 ■ Respondent argues that the following subclaim in Petitioner's finalized petition is  
19 unexhausted: execution after prolonged confinement would not advance the penological  
20 goals of deterrence and retribution. *See* Fed. Pet. at 298-99. The Court has reviewed the  
21 record and concludes Petitioner gave the court sufficient notice of the legal doctrine that  
22 Petitioner was, and is now, invoking when he cited *Lackey*, 514 U.S. 1045, which  
23 discusses the penological goals of execution, in his state habeas claim. *See* AG009705,  
24 State Pet. at 126. The subclaim is therefore exhausted.
- 25 ■ Respondent argues that the following subclaim in Petitioner's finalized petition is  
26 unexhausted: execution after prolonged confinement is unusual in the historic context.  
27 *See* Fed. Pet. at 299. Petitioner alleges that the average wait on death row was 51 months  
28 after *Furman*, but as of 2011, waiting time was almost 15 years (citing *Valle v. Florida*,

1 564 U.S. 1067 (2011) (Breyer, J., dissenting from denial of stay). The Court has reviewed  
2 the record and concludes that although Petitioner did not present these figures to the  
3 California Supreme Court, this specific fact does not fundamentally alter his claim that  
4 execution after a prolonged delay violates the Eighth Amendment’s guarantee against cruel  
5 and unusual punishment.

- 6 ■ Respondent argues that the following allegation is unexhausted: execution after prolonged  
7 confinement would be cruel and unusual in his case due to his mental illness. *See* Fed. Pet.  
8 at 301. The Court has reviewed the record and concludes that Petitioner had not  
9 previously made this argument to the California Supreme Court. Petitioner’s new legal  
10 theory, especially paired with Petitioner’s new evidence of mental illness, would  
11 significantly improve the evidentiary standing of his *Lackey* claim as it relates to whether  
12 the penological goals of the death penalty would be served by his execution. *See Atkins v.*  
13 *Virginia*, 536 U.S. 304, 317 (2002). The subclaim is therefore unexhausted.
- 14 ■ Respondent argues that the following subclaim in Petitioner’s finalized petition is  
15 unexhausted: the method of execution will result in torture and severe pain and suffering,  
16 violating federal and state constitutions and international law. *See* Fed. Pet. at 301. The  
17 Court has reviewed the record and concludes that Petitioner did not allege a violation of  
18 international law in reference to his method of execution claim in the California Supreme  
19 Court. *Compare* AG009715-22, State Pet. at 136-43 *with* Fed. Pet. at 301. Because  
20 Petitioner did not give the California Supreme Court notice that he was invoking  
21 international law as to his method of execution argument, the subclaim is partially  
22 unexhausted.

23 Petitioner argues, however, that there is no use in further delaying this Court’s  
24 consideration of the claim and that exhaustion should be excused, citing *Jones v. Davis*, 806 F.3d  
25 538, 545 (9th Cir. 2015). Docket No. 261 at 16. For the reasons cited in response to this  
26 argument as to Claim 13, *see ante* at 37-38, the Court is not persuaded by Petitioner. Petitioner  
27 has failed to cite controlling authority or properly establish that he should be excused from the  
28 exhaustion requirement. Accordingly, Claim 15 is partially unexhausted.

1 n. Claim 17

2 Petitioner argues that the California death penalty statute is unconstitutional and its  
3 application to Petitioner’s sentence violated his Fifth and Fourteenth Amendment rights. *See Fed.*  
4 *Pet.* at 305. Respondent argues that subclaims 17D, 17E, and an unenumerated subclaim are  
5 unexhausted. Petitioner asserts the whole claim was exhausted on direct appeal. *See Fed. Pet.*  
6 307. The Court will address each subclaim in turn.

- 7 ■ Respondent argues that the following subclaim in Petitioner’s finalized petition is  
8 unexhausted: 17D, i.e., that the California death penalty statute failed to provide an  
9 instruction on the standard of proof for mitigating circumstances and failed to inform the  
10 jury that it did not need unanimity concerning the existence of mitigating circumstances.  
11 *See Fed. Pet.* at 310. The Court has reviewed the record and concludes that Petitioner has  
12 not previously made this argument in the California Supreme Court. Because the  
13 California Supreme Court has not ruled on the subclaim; subclaim 17D is fully  
14 unexhausted.
- 15 ■ Respondent argues that the following subclaim in Petitioner’s finalized petition is  
16 unexhausted: 17E, i.e., that the wording of several of the factors set forth in the Penal  
17 Code prevents full consideration of mitigation.<sup>12</sup> *See Fed. Pet.* at 311. The Court has  
18 reviewed the record and concludes Petitioner did not previously challenge the wording of  
19 Penal Code section 190(f) and (g) or otherwise argue that the words “reasonably believed”  
20 and “extreme” in each respective section led the jury to believe they could not consider as  
21 mitigation lesser degrees of mental/emotional disturbance or an unreasonable belief of  
22 moral justification. Petitioner also did not previously argue that the word “impaired” in  
23

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24 <sup>12</sup> In relevant part, Petitioner challenges the wording for the following factors: Cal. Pen. Code  
25 § 190(f), which states that the jury may consider “whether or not the offense was committed under  
26 circumstances which the defendant *reasonably believed* to be a moral justification or extenuation  
27 for his conduct” (emphasis added); Cal. Pen. Code § 190(g), which states that the jury may  
28 consider “whether or not the defendant acted under *extreme* duress or under the substantial  
domination of another person” (emphasis added); and Cal. Pen. Code § 190(h), which states that a  
jury may consider “whether or not at the time of the offense the capacity of the defendant to  
appreciate the criminality of his conduct or to conform his conduct to the requirements of the law  
was *impaired* as a result of” mental disease or intoxication (emphasis added).

1 section 190.3(h) led jurors to believe they could only consider impairment as a mitigating  
2 factor if Petitioner’s mental illness what was caused the crime (Petitioner argues such a  
3 limitation would be contrary to the California Supreme Court’s holding in *People v.*  
4 *Lucero*, 44 Cal.3d 1006, 1029-31 (1988) that a defendant is entitled to have the jury  
5 consider his psychological disorder as a mitigating factor even if the mental condition did  
6 not cause him to commit the crimes or was not otherwise operative at the time of the  
7 offense). Finally, Petitioner did not previously present evidence of an Illinois survey  
8 conducted by Professor Hans Zeisel in which he concluded that between 38.9 and 67.7%  
9 of respondents believed they were not allowed to rely on unlisted mitigating factors in  
10 deciding whether to vote for a sentence less than death. *See Fed. Pet.* at 311-13. Because  
11 Petitioner’s new legal theories were never presented to the California Supreme Court and  
12 Professor Zeisel’s survey results would significantly improve the evidentiary posture of his  
13 subclaim that the wording in the factors was confusing or misleading, Subclaim 17E is  
14 unexhausted.

15 ■ Respondent argues that the following unlabeled subclaim in Petitioner’s finalized petition  
16 is unexhausted: standing alone or taken together, the errors require reversal of the sentence  
17 imposed. *See Fed. Pet.* at 315. The Court has reviewed the record and concludes  
18 Petitioner did not previously raise a claim as to cumulative effect of the various alleged  
19 instructional errors, and even if Petitioner had previously raised the cumulative error claim,  
20 the new factual allegations and legal theories discussed above would necessarily render it  
21 fundamentally altered. *See Wooten v. Kirkland*, 540 F.3d 1019 (9th Cir. 2008) (cumulative  
22 error claim must either be sufficiently intertwined with an exhausted claim, in that raising  
23 one claim necessarily raises the cumulative error claim, or otherwise be explicitly raised in  
24 state court). Accordingly, the subclaim is fully unexhausted.

25 For the foregoing reasons, Claim 17 (including subclaims 17D, 17E, and the unlabeled  
26 cumulative error subclaim) is partially unexhausted.

27 o. Claim 18

28 Petitioner argues that he cannot be lawfully executed because the method of execution in

1 California violates federal constitutional and international law. *See* Fed. Pet. at 316. Respondent  
2 argues Claim 18 is unexhausted in part due to various subclaims containing new factual and legal  
3 allegations. Petitioner asserts the claim was exhausted during his state habeas proceedings. *See*  
4 Fed. Pet. at 316. The Court addresses each subclaim in turn.

5       ▪ Respondent argues that the following subclaim is unexhausted because it presents a new  
6 legal theory:

7       *Federal Petition*

8       The California Department of Corrections  
9 and Rehabilitation’s (“CDCR”) failed to  
10 develop and promulgate a valid lethal  
11 injection protocol under the Administrative  
12 Procedures Act (“APA”) and the method of  
13 execution must adhere to standards  
14 established under the direction of the CDCR  
15 pursuant to California Penal Code  
16 § 3604(a). *See* Fed. Pet. at 317. California  
17 does not have a valid protocol for  
18 implementing execution by lethal gas under  
19 the APA.

7       *State Habeas Petition*

8       California’s execution procedures (gas and  
9 lethal injection) violate the federal  
10 constitution in two respects: first, the state  
11 failed to comply with the statutory  
12 requirement that standards be established by  
13 the Department of Corrections (citing Penal  
14 Code § 3604(a)). Second, both statutory  
15 methods of execution constitute cruel and  
16 unusual punishment under the Eighth  
17 Amendment. *See* AG009707-09, State Pet.  
18 at 128-30. California did not comply with  
19 APA requirements in developing its lethal  
20 injection protocol. *See* AG009710, State  
21 Pet. at 131.

22       The Court has reviewed the record and concludes that Petitioner fairly presented this  
23 subclaim when he presented an almost identical argument during his state habeas  
24 proceedings. The subclaim is exhausted.

25       ▪ Respondent argues that the following subclaim in Petitioner’s finalized petition is  
26 unexhausted: Petitioner’s citation, over the course of four pages, to various prolonged or  
27 botched executions. *See* Fed. Pet. at 318-322. The Court has reviewed the record and  
28 concludes Petitioner also listed various examples of prolonged or botched executions in his

1 state habeas petition, including various examples he repeats in his federal petition. Insofar  
2 as Petitioner includes new recent examples of prolonged or botched executions, the  
3 examples do not fundamentally alter the claim considered by the California Supreme Court  
4 because they are substantially similar to the previous examples already provided.

5 *Compare* AG009717-21, State Pet. at 138-42 (examples of botched executions either  
6 because no suitable veins were found or because of an unexpected reaction with the drugs)  
7 *with* Fed. Pet. at 318-22 (same). The subclaim is exhausted

- 8 ■ Respondent argues that the following subclaim in Petitioner’s finalized petition is  
9 unexhausted: the method of execution results in violations of the Fifth and Sixth  
10 Amendments and “international law, covenants, treaties and norms.” *See* Fed. Pet. at 316.  
11 The Court has reviewed the record and concludes Petitioner never alleged the method of  
12 execution violated the Fifth or Sixth Amendments or international law (he only asserted  
13 Eighth and Fourteenth Amendment claims); as the California Supreme Court did not have  
14 notice Petitioner was challenging the method of execution on these additional federal  
15 grounds, the subclaim is fully unexhausted.
- 16 ■ In his state habeas petition, Petitioner argued that California’s method of execution  
17 violated the Eighth Amendment because its use of lethal injection in the administration of  
18 the death penalty fails to protect condemned prisoners from unnecessary pain and suffering  
19 and that the risk of inflicting such cruel and unusual pain is enhanced with the lack of  
20 established/comprehensive protocols. *See* AG009722, State Pet. at 143. In his finalized  
21 petition, Petitioner now argues, citing *Morales v. Tilton*, 465 F.Supp. 2d 972, 981 (N.D.  
22 Cal. 2006), that California’s actions/failures to act with respect to implementation of its  
23 lethal injection protocol resulted in an intolerable risk of violation of the Eighth  
24 Amendment. *See* Fed. Pet. at 317. The Court has reviewed the record and concludes  
25 Petitioner fairly presented the operative facts and constitutional/legal theories to the  
26 California Supreme Court during his state habeas petition. The subclaim is exhausted.
- 27 ■ Respondent argues that the following subclaim in Petitioner’s finalized petition is  
28 unexhausted: Petitioner’s allegation that the risk of prolonged or botched administration of

1 an execution violates international law and that “[a]waiting death is a form of  
2 psychological torture evidence by the fact that mock executions . . . are a common torture  
3 tactic.” *See* Fed. Pet. at 322. The Court has reviewed the record and concludes Petitioner  
4 did not make the international law argument during his proceedings in the California  
5 Supreme Court. Because Petitioner did not previously give notice to the California  
6 Supreme Court that he was arguing that the administration of the lethal injection violated  
7 international law, this subclaim is unexhausted.

8 For the aforementioned reasons, Claim 18 is partially unexhausted.

9 p. Claim 19

10 Petitioner argues that he is permanently incompetent and may not be executed under *Ford*.  
11 *See* Fed. Pet. at 324. Respondent argues that Petitioner has not presented this claim to the  
12 California Supreme Court, and Petitioner concedes as much. *See* Fed. Pet. at 330. Petitioner  
13 argues, however, that Claim 19 does not require exhaustion because it does not challenge or attack  
14 the judgment made by the state and is therefore not a “claim” in the traditional sense of federal  
15 habeas. Alternatively, Petitioner argues exhaustion should be excused for futility. *See* Fed. Pet. at  
16 330; Docket No. 261 at 19.

17 In support of his first contention, Petitioner cites to Justice Thomas’s dissent in *Stewart v.*  
18 *Martinez-Villareal*, 523 U.S. 637, 652, fn. 3 (1998). There, the Supreme Court held that filing a  
19 second habeas petition alleging only *Ford* incompetency is not barred as a successive petition  
20 when the facts supporting the *Ford* claim arise after the petitioner’s initial federal petition has  
21 been decided. *Id.* at 639. In the portion of Justice Thomas’ dissent cited by Petitioner, Justice  
22 Thomas argued that *Ford* claims should not be cognizable in federal habeas at all, reasoning that  
23 *Ford* claims fall outside the writ’s original purpose and outside of section 2254 by challenging  
24 when or whether a sentence can be carried out, not whether a petitioner is “ ‘in custody in  
25 violation of the Constitution or laws or treaties of the United States.’ ” *Id.* at 652 & fn. 3 (internal  
26 citation omitted). Petitioner’s citation to the dissent is misplaced. Although Justice Thomas  
27 indeed argues in *Martinez-Villareal* that *Ford* claims are not cognizable in federal habeas law, the  
28 Supreme Court in numerous cases appear to assume *Ford* claims are in fact cognizable in a habeas

1 proceeding. *See, e.g., Ford*, 477 U.S. at 404 (claim considered after unsuccessful challenge to  
2 competency before Florida Supreme Court); *Pannetti*, 551 U.S. 930 (*Ford* claim considered on  
3 habeas). Petitioner has cited no cases holding otherwise. In any event, Petitioner brings Claim 19  
4 as a federal habeas claim; as such, it is in the first instance subject to the exhaustion requirement  
5 as any other habeas claim. *See* 28 U.S.C. § 2254(b).<sup>13</sup>

6 Petitioner also argues, however, that no adequate remedy exists for him to exhaust, thus  
7 excusing exhaustion. Under section 2254(b), exhaustion may be excused where there is no state  
8 corrective process or the process is ineffective to protect the inmate’s rights. 28 U.S.C.  
9 § 2254(b)(1). Section 2254(c) states that “an applicant shall not be deemed to have exhausted the  
10 remedies available in the courts of the State . . . if he has the right under the law of the state to  
11 raise, by any available procedure, the question presented.” (Emphasis added.)

12 In arguing that California lacks an adequate remedy for *Ford* claims, Petitioner focuses on  
13 California Penal Code section 3700 et seq., the statutory scheme for determination of competency  
14 for execution. *See* Docket No. 261 at 8-9 (citing arguments discussed in Docket No. 164 at 4-8).  
15 Penal Code section 3700 states that “[n]o judge, court, or officer, other than the Governor, can  
16 suspend the execution of a judgment of death, except the warden of the State prison to whom he is  
17 delivered for execution, as provided in the six succeeding sections, unless an appeal is taken.” In  
18 relevant part, Penal Code section 3701 states that a warden must initiate proceedings to determine  
19 a petitioner’s competency if “there is good reason to believe that a defendant, under a judgment of  
20 death, has become insane.” The process requires that the warden contact the district attorney in  
21 the county of the inmate’s confinement, and the district attorney will then file a petition in state  
22 court, empanel a jury, and conduct grand jury-like proceedings to determine whether the inmate is  
23 in fact insane. Cal. Pen. Code §§3701-03. Petitioner correctly points out that the Penal Code  
24 section 3700 et seq. procedure, which is triggered after an execution date is set, vests discretion of  
25 commencing competency proceedings solely in the hands of the condemned prisoner’s warden,  
26 and neither the condemned nor the courts may order a warden to initiate those proceedings. *See*

27 \_\_\_\_\_  
28 <sup>13</sup> The Court does not at this juncture determine whether a *Ford* claim is cognizable exclusively  
through habeas or whether it may also be brought pursuant to 42 U.S.C. § 1983.

1 *Caritativo v. Teets*, 47 Cal.2d 304 (1956) (court may not issue writ of mandamus compelling  
2 warden to initiate competency proceedings). Hence there is a strong argument that Penal Code  
3 section 3700 does not provide a remedy in the courts of California to address the *Ford* claim.

4 On the other hand, Respondent relies on California Penal Code section 1473 to argue there  
5 is a state judicial remedy. Penal Code section 1473 states that a person “unlawfully imprisoned or  
6 restrained of his or her liberty, under any pretense, may prosecute a writ of habeas corpus. . . .”  
7 Cal. Pen. Code § 1473(a). An inmate may also bring claims that a sentence constitutes cruel and  
8 unusual punishment pursuant to Penal Code section 1473. See *People v. Reece*, 66 Cal.App.3d 96,  
9 98 (“habeas is the proper means of challenging a sentence which, as applied, is cruel or unusual”)  
10 (citing *People v. Wingo*, 14 Cal.3d 169, 183 (1975); see also Cal. Pen. Code § 1473(d) (statute  
11 does not limit the grounds for which a writ of habeas corpus may be prosecution).

12 The issue whether Penal Code section 1473 provides a means of addressing a *Ford* claim is  
13 currently before the California Supreme Court in *McPeters (Ronald Avery) on Habeas Corpus*,  
14 S226918. In *McPeters*, the parties agree that the petitioner (McPeters) is permanently  
15 incompetent for execution. However, McPeters argues that Penal Code § 3700 et seq. is  
16 inadequate to secure his rights, rendering California’s death penalty scheme unconstitutional. See  
17 *McPeters (Ronald Avery) on Habeas Corpus*, S226918, Pet. at 16-26. The respondent in  
18 *McPeters* argues, as Respondent argues here, that *Ford* claims are indeed cognizable on state  
19 habeas and urges the California Supreme Court to issue an order to show case on the *Ford* claim.  
20 Until the California Supreme Court decides *McPeters*, the Court will not excuse exhaustion based  
21 on futility. The Court therefore will require exhaustion of the *Ford* claim, but without prejudice to  
22 reconsideration if warranted by the California Supreme Court’s ensuing ruling in *McPeters*.

23 As Petitioner has not yet shown that the state process would be inadequate to secure his  
24 remedy as to this claim, Claim 19 is fully unexhausted.

25 q. Claim 20

26 Respondent argues Petitioner’s claim that the cumulative effect of errors and constitutional  
27 violations alleged in the petition require that Petitioner’s conviction and death sentence be vacated  
28 is unexhausted because it is based on Petitioner’s finalized petition, which contains various

1 unexhausted claims and subclaims. *See* Fed. Pet. at 332. To the extent that Claim 20 incorporates  
2 unexhausted claims identified in this Order, it is partially unexhausted.

3 3. Conclusion

4 Claims 3, 4, 8, 9, 12, 15, 17 (including 17D, 17E, and the unlabeled cumulative error  
5 subclaim), 18, and 20 are partially unexhausted. Claims 1, 2, 7, 10, 11, 13, 14, and 19 are fully  
6 unexhausted.

7 **IV. EQUITABLE ESTOPPEL, RENEWED MOTIONS, ADMINISTRATIVE MOTION,**  
8 **REQUEST FOR HEARING, AND PROPOSITION 66 STAY**

9 In his Opposition to Respondent’s Motion to Dismiss, Petitioner argued that the Court  
10 should estop Respondent from raising the defense of nonexhaustion “as to all of the disputed  
11 claims, facts, and ‘legal bas[e]s’ which Respondent contends require exhaustion.” *Id.* Petitioner  
12 also (1) renewed his Motion for Equitable Relief (Docket No. 226), (2) renewed his Motion for  
13 Sanctions (Docket No. 228), (3) filed a Motion for Administrative Relief for leave to file a  
14 surreply related to his Motion for Sanctions (Docket No. 274); (4) requested that the Court grant a  
15 hearing to determine whether exhaustion should be excused based on section 2254(e)(2)(A)(ii) &  
16 (b)(1)(B); and (5) requested that the Court dismiss Respondent’s Motion to Dismiss without  
17 prejudice and stay proceedings until Proposition 66 was no longer stayed by the California  
18 Supreme Court. *See* Docket No. 261 at 3, 4, 6, & 17. The Court addresses each item in turn.

19 A. Equitable Estoppel

20 Petitioner argues that he is entitled to equitable estoppel against Respondent’s assertions of  
21 nonexhaustion for all claims based on the doctrine of unclean hands. *See* Docket No. 261 at 3.<sup>14</sup>  
22 Respondent argues that estoppel cannot be asserted in the context of exhaustion of federal habeas  
23 claims. Respondent also argues that in any event, Petitioner is not entitled to estoppel. *See*  
24 Docket No. 263 at 11-14.

25 In support of his estoppel argument, Petitioner cites *Ziembra v. Wezner*, 366 F.3d 161, 163  
26

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27 <sup>14</sup> Although Petitioner makes the argument as to all claims, he also specifically points to Claims 1,  
28 2, 3, 4, 7, 8, and 9 in relation to his equitable estoppel arguments. *See* Docket No. 261 at 3-7. The  
Court will consider them collectively.

1 (2d Cir. 2004) and *Ruggiero v. County of Orange*, 467 F.3d 170, 178 (2d Cir. 2006), in which the  
2 Second Circuit Court of Appeals held that the failure to exhaust claims under the Prison Litigation  
3 Reform Act (“PLRA”) is an affirmative defense which may be subject to estoppel. However,  
4 section 2254(b)(3) governing habeas proceedings (as distinct from PLRA suits) explicitly  
5 precludes the Court from estopping the state from asserting nonexhaustion. It stated in relevant  
6 part: “[a] State shall not be deemed to have waived the exhaustion requirement *or be estopped*  
7 *from reliance upon the requirement* unless the State, through counsel, expressly waives the  
8 requirement.” (Emphasis added). The PLRA has no such provision. *Ziembra* and *Ruggiero* are  
9 therefore inapposite.

10 Petitioner also argues that the Court has inherent power to estop Respondent from asserting  
11 nonexhaustion. *See* Docket No. 261 at 5. But applying any such inherent power would  
12 contravene the plain language of section 2254(b)(3). *See Banks*, 540 U.S. at 705 (“AEDPA  
13 forbids a finding that exhaustion has been waived unless the State expressly waives the  
14 requirement [under] 28 U.S.C. § 2254(b)(3)”); *United States v. Texas*, 507 U.S. 529, 534 (1993)  
15 (statute abrogates common-law principle when it “speak[s] directly” to that principle); *cf. Whaley*  
16 *v. Belleque*, 520 F.3d 997 (9th Cir. 2008) (estopping state from asserting *procedural default* for  
17 failure to pursue remedies).

18 Petitioner additionally argues that the Court has power to estop Respondent from asserting  
19 nonexhaustion based on Federal Rule of Civil Procedure 37 (“Rule 37”). Docket No. 261 at 6.  
20 Rule 37 allows a court to impose appropriate sanctions on a party for, among other reasons, failure  
21 to comply with that court’s order. Fed. R. Civ. Pro. 37(b)-(c). Here, Petitioner does not argue that  
22 Respondent failed to comply with any of this Court’s orders for discovery; in fact, the basis of  
23 some of Petitioner’s new claims and subclaims arose out of evidence that was turned over during  
24 federal discovery, revealing possible suppression in the state courts. Hence, there is no violation  
25 warranting sanctions under Rule 37. In any event, Petitioner cites no authority suggesting that  
26 Rule 37 can be applied in contravention of section 2254(b)(3) given that the Federal Rules of Civil  
27 Procedure apply to federal habeas proceedings only “to the extent that they are not inconsistent  
28 with any statutory provisions.” Rules Governing Section 2254 Cases, rule 12.

1 Section 2254(b)(3)'s explicit limit on the Court's power to estop Respondent from asserting  
2 nonexhaustion prevails over Rule 37.

3 Petitioner's request that the Court equitably estop Respondent from asserting  
4 nonexhaustion as to all claims, including Claims 1, 2, 3, 4, 7, 8, and 9, is therefore **DENIED**.

5 B. Motion for Equitable Relief

6 Petitioner argues that the Court should grant Petitioner an indefinite stay of proceedings  
7 because the state court delays, the inadequacy of the proceedings, and his permanent  
8 incompetence have made his claims of ineffective assistance of counsel unreviewable by this or  
9 any other court. *See* Docket No. 226 at 45. Respondent argues that an indefinite stay is  
10 inappropriate. *See* Docket No. 266 at 2.

11 This Court previously considered whether it may issue a permanent stay in the context of  
12 Petitioner's permanent incompetence in its Order of July 16, 2013.<sup>15</sup> *See* Docket No. 106 at 2-4.  
13 Shortly before the Court issued that Order, the Supreme Court decided *Ryan v. Gonzales*, 133  
14 S.Ct. 696 (2013). In *Ryan*, the Supreme Court held that while the decision to grant a temporary  
15 competency stay is within the discretion of the district court, an indefinite stay is not appropriate if  
16 there is no reasonable hope the petitioner will regain competence in the foreseeable future. *Id.* at  
17 706-09. The Court explained that permanently staying a federal habeas petition would frustrate  
18 AEDPA's objective of encouraging finality by allowing a petitioner to delay the resolution of  
19 federal proceedings. The Supreme Court also noted that "[i]f a district court concludes that [a  
20 specific claim] could substantially benefit from the petitioner's assistance, [the court] should take  
21 into account the likelihood that the petitioner will regain competence in the foreseeable future.  
22 Where there is no reasonable hope of competence, a stay is inappropriate and merely frustrates the  
23 State's attempts to defend its presumptively valid judgment." *Id.* at 709.

24 As Respondent points out, other district courts in our circuit have since interpreted *Ryan* as  
25 barring indefinite competency stays when a petitioner is permanently incompetent. *See Huggins v.*  
26 *Chappell*, 06-cv-07254-YGR, 2013 WL 843296 (N.D. Cal. 2013) ("The [Supreme Court in *Ryan*]

27 \_\_\_\_\_  
28 <sup>15</sup> In that Order, the Court lifted its stay of the case, deferred the case for potential settlement, and  
ordered the parties to set a schedule for competency proceedings.

1 held that . . . an indefinite stay is inappropriate if there is no reasonable hope the petitioner will  
2 regain competence in the foreseeable future”); *Gates v. Davis*, 88-cv-2779-WHA, 2016 WL  
3 1598748 at \*2 (N.D. Cal. 2016) (same); *Mulder v. Baker*, 09-cv-00610-PMP-WGC, 2013 WL  
4 5758061 (D. Nev. 2013) (“even if [the petitioner’s] petition contains claims that could  
5 substantially benefit from his assistance, he is eligible for a stay only if there is at least a  
6 reasonable hope that he will regain competence in the foreseeable future”).<sup>16</sup> While the Court  
7 previously declined to follow *Ryan* based on its interpretation that the disputed language was  
8 *dicta*, the Court now joins the other district courts, all of which have concluded otherwise. Insofar  
9 as Petitioner argues he is entitled to an indefinite stay based on his alleged permanent  
10 incompetence, the Court denies the stay on that ground.<sup>17</sup>

11 Petitioner also argues that the delays and inadequacies in his state court proceedings, the  
12 time elapsed since his conviction, and his permanent incompetence have prejudiced him by  
13 rendering certain claims, including his ineffective assistance of counsel claims, unreviewable in  
14 any meaningful way. As a result, Petitioner argues he is nevertheless entitled to a permanent stay.  
15 *See* Docket No. 226 at 45. In support, Petitioner asserts that federal habeas law allows for flexible  
16 remedies responsive to the petitioner’s specific circumstances, citing *Lujan v. Garcia*, 734 F.3d  
17 917, 933 (9th Cir. 2013). In *Lujan*, the district court granted a petitioner’s habeas claim and  
18 allowed the state to modify the petitioner’s convictions, originally for first-degree murder, to  
19 second-degree murder in lieu of releasing or retrying him. *Id.* at 933. The Ninth Circuit explained  
20 that district courts have wide discretion in fashioning a remedy as long as it is “tailored to the  
21 injury suffered from the constitutional violation and [does] not unnecessarily infringe on  
22 competing interests.” *Id.* The Ninth Circuit then vacated the trial court’s remedy on other  
23 grounds. *Id.* at 935. *Lujan* is inapposite in this context. This Court has not granted Petitioner’s

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25 <sup>16</sup> The Ninth Circuit recognized that “the [Supreme] Court’s conclusion that ‘[w]here there is no  
26 reasonable hope for competence, a stay is inappropriate’ ” was applicable to post-AEDPA  
27 petitions in *Medina v. Chappell*, 781 F.3d 1076, 1089-91 (9th Cir.), vacated and remanded, 782  
28 F.3d 1115 (9th Cir. 2015), which was vacated as moot upon the petitioner’s death shortly after it  
issued its decision. While the opinion has no precedential value, it is instructive.

<sup>17</sup> The Court will not decide at this time whether Petitioner is incompetent for purposes of  
execution.

1 habeas petition and is not fashioning a remedy based on Petitioner’s showing that a constitutional  
2 violation has occurred as in *Lujan*. Accordingly, *Lujan* lends no support to Petitioner’s contention  
3 that he is entitled to an indefinite stay at this point in his litigation, and certainly does not support  
4 Petitioner’s argument that the Court has the power to grant such a stay in this context.

5 In any event, Petitioner’s argument lacks factual merit. Petitioner argues that the various  
6 issues related to funding, passage of time, ineffective assistance of counsel, and concealment of  
7 evidence by the State renders Petitioner’s ability to exhaust his claims futile. The Court rejects  
8 that argument. First, Petitioner has not explained how the alleged paucity of funding for his  
9 representation in state court during his past habeas proceedings would render his exhaustion  
10 petition ineffective in light of the fact that Petitioner has *already* obtained a significant amount of  
11 new evidence through discovery and competency proceedings in this Court, including evidence  
12 regarding Petitioner’s incompetence, *Batson* issues, alleged ineffective assistance of counsel, and  
13 various other documents related to his claims that could ultimately entitle him to relief in state  
14 court. Moreover, Petitioner has not shown that circumstances will render the process ineffective;  
15 on the contrary, many of Petitioner’s arguments before this Court regarding why the Court should  
16 estop Respondent from asserting nonexhaustion – including the alleged suppression of evidence  
17 by the state and ineffective assistance of counsel – may be made before the California Supreme  
18 Court to cure any procedural default. *See In re Clark*, 5 Cal. 4th 750, 775 (1993) (“where the  
19 factual basis for a claim was unknown to the petitioner and he had no reason to believe that the  
20 claim might be made, or where the petitioner was unable to present his claim, the court will ...  
21 consider the merits of the claim if it is asserted as promptly as reasonably possible”); *see also In re*  
22 *Reno*, 55 Cal.4th 428, 463 (2012) (court may, in some circumstances, consider the merits of a  
23 claim not previously presented by incompetent habeas counsel).

24 Accordingly, Petitioner’s Motion for Equitable Relief is **DENIED**.

25 C. Motion for Sanctions & Administrative Motion

26 Petitioner argued in his Motion for Sanctions that the Court should enter a default  
27 judgment in his favor on Claim 3, his *Batson* claim, based on the State’s purported concealment of  
28 evidence supporting the claim. *See* Docket No. 228 at 8. However, following a hearing on the

1 motion, in which the Court indicated that relief for Petitioner was dubious,<sup>18</sup> Petitioner filed an  
2 Administrative Motion in which the attached Proposed Surreply introduced new citations and  
3 sought to narrow Petitioner’s proposed remedy for his Motion for Sanctions. *See* Docket No. 274  
4 at 2 & No. 247-2 at 2-3.

5 As a threshold matter, the Court considers Petitioner’s Administrative Motion. In support  
6 of his Administrative Motion, Petitioner argues that the allegations and legal authorities in the  
7 Proposed Surreply (Docket No. 247-2) were not presented before due to the exhaustion of his  
8 attorneys’ Phase 2 CJA budget, and that the attorneys “could not have presented these facts and  
9 law through the exercise of reasonable diligence before the Court raised its questions at the March  
10 9, 2017 hearing.” Docket No. 274 at 2; *see* No. 274-2 at 1. Additionally, Petitioner narrows the  
11 proposed remedy for his Motion for Sanctions: rather than seeking a default judgment on Claim 3,  
12 Petitioner now seeks that the Court grant him *de novo* review on Claim 3 following the conclusion  
13 of his exhaustion proceedings. *See* Docket No. 247-2 at 2-3. In his opposition, Respondent  
14 argues that the allegations and legal authorities in the Proposed Surreply should have been  
15 included in Petitioner’s prior briefs because they are simply additional authorities in support of  
16 Petitioner’s original arguments and that Petitioner has not shown good cause for filing them after  
17 the hearing. *See* Docket No. 275 at 3. Respondent’s opposition does not reference or  
18 acknowledge the new proposed sanctions remedy in Petitioner’s Proposed Surreply.

19 Having considered both parties’ arguments, the Court finds that although Petitioner could  
20 have arguably presented the allegations and legal authorities on his own in a previous filing, the  
21 authorities contained in the Proposed Surreply were responsive to specific questions posed by the  
22 Court at the March 9, 2017 hearing, especially as they related to the futility of California  
23 exhaustion procedures and the Court’s power to grant the sanction sought by Petitioner.  
24 Petitioner’s Administrative Motion is therefore **GRANTED**.

25 However, the Court concludes it would be inappropriate to consider the additional

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27 <sup>18</sup> Specifically, the Court expressed skepticism that it had the power to grant Petitioner a default  
28 judgment on an unexhausted claim based on section 2254(b)’s explicit prohibition against waiving  
or otherwise preventing the State’s ability to require exhaustion of state remedies. The Court also  
questioned whether there was any basis for a Rule 37 remedy in this case.

1 allegations and legal authorities at this time because Petitioner’s new proposed remedy, i.e., that  
2 the Court consider Claim 3 *de novo* following Petitioner’s exhaustion proceedings, renders the  
3 Motion for Sanctions premature. *See* Docket No. 247-2 at 2-3. First, the Court has not yet  
4 granted any request for a *Rhines*<sup>19</sup> stay while Petitioner exhausts his claims in state court.  
5 Moreover, Petitioner’s requested remedy presupposes that should Petitioner return to the  
6 California Supreme Court for exhaustion proceedings, the court will deny his *Batson* claim.  
7 However, denial of Petitioner’s *Batson* claim is not certain. Petitioner’s claim contains significant  
8 new evidence that could very well excuse any procedural default and potentially prove meritorious  
9 in state court. *See In re Clark*, 5 Cal. 4th 750, 775 (1993) (“where the factual basis for a claim  
10 was unknown to the petitioner and he had no reason to believe that the claim might be made, or  
11 where the petitioner was unable to present his claim, the court will . . . consider the merits of the  
12 claim if it is asserted as promptly as reasonably possible”); *see Foster v. Chatman*, 136 S.Ct. 1737  
13 (2016) (using prosecutor’s file to find discriminatory intent in prosecutor’s peremptory  
14 challenges).

15 Accordingly, Petitioner’s Motion for Sanctions (Docket No. 228) is **DENIED WITHOUT**  
16 **PREJUDICE**. Petitioner may re-file a sanctions motion seeking his new proposed remedy  
17 following the conclusion of any exhaustion procedures should it still be necessary at that time.

18 D. Request for Hearing Pursuant to 28 U.S.C. § 2254(e)(2)(A)(ii) & (b)(1)(B)

19 Petitioner asserts he is entitled to waiver of the exhaustion requirement and is entitled to a  
20 hearing to resolve factual issues related to his argument that he should be excused from the  
21 exhaustion requirement as to all claims. *See* Docket No. 261 at 9.

22 The Court first notes that section 2254(e)(2)(A)(ii) does not establish an exception to the  
23 exhaustion requirement, but rather addresses the circumstances under which the Court may hold  
24 an evidentiary hearing on a claim that lacked factual development in state court. 28 U.S.C.  
25 § 2254(e)(2) (“If the applicant has failed to develop the factual basis of a claim in State court  
26 proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant  
27

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28 <sup>19</sup> *Rhines v. Webber*, 544 U.S. 269, 277 (2005).

1 shows that (A) the claim relies on— . . . (ii) a factual predicate that could not have been previously  
2 discovered through the exercise of due diligence; and (B) the facts underlying the claim would be  
3 sufficient to establish by clear and convincing evidence that but for constitutional error, no  
4 reasonable factfinder would have found the applicant guilty of the underlying offense”). Nothing  
5 in section 2254(e)(2)(A)(ii) relieves the exhaustion requirement; it addresses a different and  
6 distinct issue of when an evidentiary hearing on the merits may be held. Moreover, Petitioner has  
7 not shown that further factual development is necessary to address his arguments that he should be  
8 excused from the exhaustion requirement.

9 Petitioner has failed to cite any relevant authority showing he is entitled to a hearing on  
10 these grounds; Petitioner’s request for a hearing for “resol[ution of] factual issues” related to his  
11 failure to exhaust is therefore **DENIED**.

12 E. Request for Stay Re Proposition 66

13 Petitioner argues that the Court should stay proceedings pending resolution of *Briggs v.*  
14 *Brown* (S238309), wherein the California Supreme Court is considering a challenge to Proposition  
15 66. Docket No. 261 at 3.

16 Proposition 66, approved by California voters on November 8, 2016, makes several  
17 changes to California’s death penalty implementation and collateral review scheme. Petitioner  
18 points to one portion of Proposition 66, California Penal Code section 1509(d), in arguing that he  
19 is entitled to a stay. Section 1509(d) states in relevant part: “An initial petition which is untimely  
20 under subdivision (c) or a successive petition whenever filed shall be dismissed unless the court  
21 finds, by the preponderance of all available evidence, . . . that defendant is actually innocent of the  
22 crime of which he or she was convicted.” Petitioner argues that if this provision is upheld, it will  
23 render futile further efforts of exhaustion in the California state courts.

24 In *Briggs*, the petitioners are challenging the implementation of Penal Code section  
25 1509(d), arguing that it “abandons regard for fundamental fairness and integrity in the capital trial  
26 and post-conviction process, purely to rush capital defendants to the execution chamber and  
27 prevent courts from addressing wrongs. The new procedural bars turn on its head the rationale the  
28 California Supreme Court provided in [*In re Clark*, 5 Cal.4th 750, 776-87 (1993)] for excepting

1 claims from procedural default when there is a ‘fundamental miscarriage of justice.’<sup>20</sup>

2 As noted, Petitioner contends that requiring that he exhaust his claims during the pendency  
3 of *Briggs* would be “unfair” because Proposition 66, once enacted, would render his exhaustion  
4 petition futile. *Id.* at 3; Docket No. 269 at 6. As *Briggs* challenges the implementation of  
5 Proposition 66, including Penal Code section 1509(d), Petitioner seeks a stay pending *Briggs*.

6 “[T]he power to stay proceedings is incidental to the power inherent in every court to  
7 control the disposition of the causes on its docket with economy of time and effort for itself, for  
8 counsel, and for litigants.” *Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *Dependable*  
9 *Highway Express v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007). Whether to stay  
10 proceedings is entrusted to the discretion of the district court. *Landis*, 299 U.S. at 254. In  
11 determining whether a stay is appropriate pending the resolution of another case, a district court  
12 must consider various competing interests, including the possible damage which may result from  
13 the granting of a stay; the hardship to the parties if the suit is allowed to go forward; and the  
14 orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and  
15 questions of law which could be expected to result from a stay. *Lockyer v. Mirant Corp.*, 398 F.3d  
16 1098, 1109–10 (9th Cir.2005); *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir.1962).  
17 Additionally, a district court must consider whether a stay pending resolution of another case is  
18 likely to be resolved in a reasonable amount of time because of our duty to adjudicate habeas  
19 petitions in a reasonable time frame. *Yong v. INS*, 208 F.3d 1116, 1119–20 (9th Cir. 2000). The  
20 burden is on the movant to show that a stay is appropriate. *See Clinton v. Jones*, 520 U.S. 681,  
21 708 (1997).

22 Petitioner has failed to carry his burden. As to the potential length of a stay pending the  
23 resolution of *Briggs*, Petitioner points only to *Briggs*’s briefing schedule.<sup>21</sup> While oral argument

24 \_\_\_\_\_  
25 <sup>20</sup> *See Briggs* (S238309), Petition for Writ of Mandate at 35 (accessed on February 1, 2017 at  
<https://www.dropbox.com/sh/wisbubhyoi2maz7/AAATRdd0FTZms0h-h0zKjpy8a?dl=0>).

26 <sup>21</sup> Petitioner contended that the briefing was due by March 20; the Court, however, has determined  
27 that the California Supreme Court entertained replies to amicus briefs until April 6, 2017. The  
28 order was accessed on April 16, 2017 at  
[http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc\\_id=2169445&doc\\_no=S238309](http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2169445&doc_no=S238309).

1 has been set, neither the parties nor the Court can forecast when the California Supreme Court will  
2 ultimately issue a decision on the matter or whether further litigation related to *Briggs* will ensue.  
3 The stay could be lengthy. Petitioner also alleges potential hardship by arguing that the California  
4 Supreme Court will “rubber stamp” Penal Code section 1509(d), which would in turn moot his  
5 exhaustion petition. *See* Docket No. 261 at 4. However, this assertion is speculative. Petitioner  
6 also fails to offer support for his assumption that Penal Code section 1509(d)’s ban on successive  
7 petitions will be upheld without alternative equitable grounds such as those discussed in *In re*  
8 *Clark*, 5 Cal.4th at 776-87. Accordingly, Petitioner’s arguments for a stay are unpersuasive.<sup>22</sup>

9 On the other hand, should this Court stay the case until *Briggs* is decided, and then a ruling  
10 is issued in *Briggs* that does not render exhaustion futile, valuable time would have been wasted.  
11 Moreover, given the work completed in finalizing the federal petition, it would not take an  
12 inordinate amount of work by Plaintiff to commence the exhaustion process in state court. Should  
13 Proposition 66 be fully upheld, potentially rendering Petitioner’s exhaustion petition futile,  
14 Petitioner would be able to return to this Court to present his claims and make his argument that  
15 Proposition 66 effectively renders the California habeas scheme defective for purposes of  
16 exhaustion. In the meantime, Petitioner will have an opportunity to fully present, and perhaps  
17 obtain relief on, his claims in state court.

18 The Court finds that a stay is not warranted under these circumstances; Petitioner’ request  
19 is **DENIED**.

## 20 V. CONCLUSION

21 The Petition for Writ of Habeas Corpus is partially unexhausted:

22 Claims 5, 6, 16, 17A, 17B, 17C, 17F, and 17H are fully exhausted.

23  
24  
25 <sup>22</sup> Petitioner alternatively argues this Court should stay proceedings to ensure that the Court has  
26 the opportunity to rule on whether Proposition 66 renders California’s state habeas proceedings  
27 defective under section 2254(b)(1)(B). *See* Docket No. 261 at 3 & No. 269 at 5. In support,  
28 Petitioner cites *Federal Election Commission v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 462  
(2007), which discusses whether the federal courts had Article III jurisdiction to hear a nonprofit  
agency’s challenge to a piece of legislation despite the fact that the nonprofit’s challenge was  
effectively mooted prior to the conclusion of litigation. However, this Court is considering  
whether to grant Petitioner a stay, not whether it has Article III jurisdiction to entertain a  
constitutional challenge to Proposition 66. *Federal Election Commission* is therefore inapposite.

1 Claims 3, 4, 8, 9, 12, 15, 17 (including 17D, 17E, and the unlabeled cumulative claim), 18,  
2 and 20 are partially unexhausted.

3 Claims 1, 2, 7, 10, 11, 13, 14, and 19 are fully unexhausted.

4 Respondent's Motion to Dismiss is **DENIED WITHOUT PREJUDICE** and may be  
5 renewed following the filing of Petitioner's motion to dismiss unexhausted claims or request for a  
6 *Rhines* stay.

7 Petitioner's Motion for Equitable Relief is **DENIED**.

8 Petitioner's Administrative Motion is **GRANTED**.

9 Petitioner's Motion for Sanctions is **DENIED WITHOUT PREJUDICE**.

10 Petitioner's request for an evidentiary hearing on the waiver of exhaustion requirements  
11 pursuant to 28 U.S.C. § 2254(e)(2)(A)(ii) & (b)(1)(B) is **DENIED**.

12 Petitioner's request for a stay until Proposition 66 is certified and no longer stayed is  
13 **DENIED**, but may be subject to review after the California Supreme Court rules on the legality of  
14 Proposition 66.

15 Petitioner shall file any motion to dismiss unexhausted claims or request for a *Rhines* stay  
16 within thirty (30) days of this order. Respondent's opposition will be due fourteen (14) days  
17 following service of Petitioner's motion or request, and Petitioner must file any reply within seven  
18 (7) days following service of Respondent's opposition.

19 This order disposes of Docket Nos. 226, 228, 260, 262, and 274.

21 **IT IS SO ORDERED.**

23 Dated: May 22, 2017

24   
25 \_\_\_\_\_  
26 EDWARD M. CHEN  
27 United States District Judge  
28