IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re RENO, On Habeas Corpus.	**CAPITAL CASE** California Supreme Court Case No. S124660 Los Angeles County Superior Court Case No. A445665 Direct Appeal California Supreme Court Case No. S004770

PETITIONER'S SECOND SUPPLEMENT TO THE TRAVERSE TO RESPONDENT'S RETURN TO THE PETITION FOR WRIT OF HABEAS CORPUS AND SUPPORTING EXHIBIT

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TO THE HONORABLE CHIEF JUSTICE CANTIL-SAKAUYE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

I. INTRODUCTION.

On May 10, 2004, petitioner filed his second petition for writ of habeas corpus with this Court. See *In re Reno*, Case No. S124660. Of the one-hundred-forty-three (143) claims raised in the second petition, fifty-six (56) claims were previously raised before this Court on direct appeal or in the first petition for writ of habeas corpus ("repetitive claims").[1] Eighty-seven (87) claims had not been presented to this Court previously ("non-repetitive claims").[2] All the claims were timely submitted; state a *prima facie* case for relief; and allege violations of petitioner's fundamental state and federal constitutional rights individually and in the cumulative. *See generally* Traverse To Respondent's Return to This Court's Order to Show Cause ("traverse") (citing *In re Clark* (1993) 5 Cal.4th 770 and *In re Sanders* (1999) 21 Cal.4th 697).

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[1] Claims 1, 2, 3, 4, 5, 6, 8, 9, 10, 17, 19, 24, 27, 28, 29, 30, 31, 32, 33, 38, 39, 40, 41, 47, 48, 49, 56, 57, 58, 59, 60, 61, 62, 63, 65,66, 67, 68, 70, 73, 80, 81, 82, 112, 123, and 128, were raised as claims of error on direct appeal from petitioner's second trial. Claims 7, 15, 16, 18, 19, 20, 21, 25, 26, 121, and 122 were raised as claims of error in petitioner's prior state habeas proceeding. Claim 19 was raised in both direct appeal and in the first petition.

[2] Claims 11, 12, 13, 14, 22, 23, 34, 35, 36, 37, 42, 43, 44, 45, 46, 50, 51, 52, 53, 54, 55, 64, 69, 71, 72, 74, 75, 76, 77, 78, 79, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 113, 114, 115, 116, 117, 118, 119, 120, 124, 125, 126, 127, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, and 143 were raised for the first time in the second petition.

Over six years later, on September 15, 2010, this Court issued an Order to Show Cause in regards to petitioner's second petition. Traverse Exhibit B (September 15, 2010, Order to Show Cause). On September 16, 2010, this Court issued an Amended Order to Show Cause:

> The Secretary of the Department of Corrections and Rehabilitation is ordered to show cause before this court, when the matter is placed on calendar, whether the petition for writ of habeas corpus filed in this case should be considered an abuse of the writ, for the following reasons: (listing eight reasons).

Traverse Exhibit C (September 16, 2010, Order to Show Cause) (citations omitted).

On November 16, 2010, respondent filed its return to petitioner's petition for writ of habeas Corpus. On February 28, 2011, petitioner filed his traverse. On November 18, 2011, petitioner filed his first supplement to the traverse.

On March 19, 2012, the Attorney General raised arguments in Cox v. Chappelle, EDCA Case No. 2:04-cv-00065 MCE CKD regarding the exhaustion status of the petitioner's petition. By this filing, petitioner seeks to supplement his traverse in light of those arguments. Petitioner thus respectfully requests that this Court consider the matters raised in this supplement to the traverse and determine that petitioner did not abuse the writ by filing his petition.[3]

---

[3] Petitioner's supplement has been timely submitted in accordance with the California Rules of Court. See generally California Rules of Court, Rule 8.520(d)(1) and (2). The cited rules apply to direct appeals, however, petitioner has complied with the requirements nevertheless. This supplement only addresses matters that were not available in time to be included in his prior supplement. This supplement has been timely filed within ten days of oral argument in petitioner's case.

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II. PETITIONER HAS NOT COMMITTED AN ABUSE OF THE WRIT BY FILING A COMPREHENSIVE EXHAUSTION PETITION.

Petitioner's second state petition before this Court (*see* In re Reno, Case No. S124660) is identical to his Operative Amended Federal Petition before the United States District Court for the Central District of California. *See* Reno v. Chappelle, CDDC Case No. 2:96-cv-02768-CBM, Civil Docket ("Doc") #198. Petitioner had to file identical petitions in state and federal court to prevent the Attorney General from alleging that his federal cumulative error claims are unexhausted. *See Wooten v. Kirkland*, 540 F.3d 1019 (2008) (holding that a cumulative error claim must be separate and specifically exhausted for consideration). Additionally, petitioner did not alter the language or order of his claims so that the Attorney General could not argue that his claims, or portions thereof, were unexhausted. *See Vasquez v. Hillery*, 474 U.S. 254, 258 (1986).

In filing identical state and federal petitions, petitioner's counsel sought to avoid the situation that recently occurred in Cox v. Chappelle, EDCA Case No. 2:04-cv-00065 MCE CKD. There, the petitioner filed a federal petition that did not identically mirror his prior state habeas petition. The Attorney General argued that Cox's cumulative error claim is not exhausted because it was not presented with all his claims in a single state petition. See Exhibit S, at 39. Petitioner Cox's cumulative error claim was instead presented with his opening brief, supplemental petition for writ of habeas corpus, and traverse to an order to show cause. *Id.*, at 38.

The Attorney General also argued that Cox's claims are not

into a petition that satisfies federal pleading requirements. They must familiarize themselves with a lengthy and complex case, conduct investigation, conduct research, consult with experts, obtain files, and prepare a federal habeas corpus petition. Federal counsel have at most a year (often less) to resolve these issues.

Invariably, in the course of a thorough and diligent review of the record and the investigative leads it presents, federal counsel will discover additional claims that must be exhausted and additional facts relevant to claims that have been exhausted. For a variety of reasons - including inadequate state funding, state counsel's exhaustion of state funding for investigation and experts, inadequate state discovery, the omission of viable claims by state counsel, or the uncovering of new evidence or mitigation - the task of preparing a federal petition involves the development of claims in the petitioner's case. In fact, the development of new facts and new claims during federal habeas corpus investigation is a customary and accepted part of the California capital post-conviction litigation process. *See Ashmus v. Calderon* (N.D. Cal. 1998) 31 F.Supp.2d 1175, 1188-89 n. 26 (*affirmed* (9th Cir.) 202 F.3d 1160) (*cert. denied* (2000) 531 U.S. 916); and *In re Gallego* (1998) 18 Cal.4th 825, 834 ("Only if and when the petitioner thereafter acquires additional information offered in support of a *prima facie* claim, either after obtaining investigation funding from another source or by learning of the information in some other manner, does the time for promptly filing the claim commence.").

The development of new claims and evidence poses additional issues

for federal counsel.[4] Those claims and that evidence cannot be presented to the federal court without the petitioner first presenting them to this Court.[5] *O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 842 (exhaustion requires a petitioner to give the California state courts a "fair opportunity to act" on each of his claims before he presents new claims in a federal habeas petition). In presenting those claims to this Court, federal counsel must also decide whether to also present the claims that have already been raised in the case.[6] In the absence of clear guidance on how to proceed,

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[4] The United States Supreme Court's recent decision in *Cullen v. Pinholster* (2011) 563 U.S. ___, 131 S.Ct. 1388 has only added to federal counsel's confusion regarding exhaustion. *Pinholster* indicates that unexhausted facts cannot be considered in federal court. *Id.*, at 1390. As a result, conscientious federal counsel will include everything available in the exhaustion petition, lest by not doing so their client is exposed to an unanticipated default farther down the road. Nevertheless, and as demonstrated in petitioner's first supplement to the traverse, *Pinholster* supports the filing of all petitioner's claims in a single petition and the excusal of procedural bars to petitioner's claims.

[5] In filing an exhaustion petition, federal counsel are presented with several financial obstacles. In seeking exhaustion, federal counsel does not know whether he or she will be compensated for preparing, filing, or pursuing the state exhaustion petition. Federal courts ordinarily will not compensate counsel for preparing a state petition. If federal counsel does not seek appointment from this Court, this Court will not compensate counsel. If federal counsel does accept appointment from this Court, the compensation available to counsel may be dependent upon the compensation previously received by state counsel and may not be granted for several years.

[6] Whether federal courts will "look through" timeliness defaults of repetitive claims is an open legal question. However, under the rationale of *Cone v. Bell* (2009) 556 U.S. 449, 461, federal courts should hold that a claim previously found timely, then subsequently found untimely, is not precluded in federal court. In *Cone,* the Supreme Court found that "[w]hen

conscientious federal counsel would decide to include all the petitioner's claims, whether repetitive or non-repetitive, in the exhaustion petition to state and exhaust allegations of cumulative error and prejudice and avoid a situation as in Cox v. Chappelle, EDCA Case No. 2:04-cv-00065 MCE CKD.

Here, petitioner's counsel thus reasonably made the decision to file identical comprehensive petitions with this Court and the district court. Petitioner's approach ensures that all relevant claims are before the Court when it reviews his petition. Petitioner's approach ensures that this Court and the federal court reviews identical petitions. Petitioner's approach preserves his rights in federal court. Petitioner's approach does not abuse the writ.

Petitioner might have been able to reference his prior claims by a request for judicial notice, by incorporation by reference, or simply by asking this Court to consider new claims in conjunction with those it had previously rejected.[7] Petitioner, however, could not be sure that such

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a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review." *Ibid.* Logically then, a repetitive claim that was previously found timely and denied on the merits is not precluded in federal court simply because it was found untimely after having been presented again in a successive petition for the purpose of providing the state court with a single comprehensive petition and to fully demonstrate the cumulative error claim(s).

[7] This approach was recently taken by petitioners in In re Dennis, Case No. S201330; In re Hawthorne, Case No. S201319; In re Hillhouse, Case No. S201327; In re Jackson, Case No. S201322; and In re Proctor, Case No. S201346.

requests would be granted and that his claims would be reviewed for the purposes of the state record under 28 U.S.C. § 2254(d).

Additionally, petitioner was concerned that the Attorney General would identify claims, portions of claims, or specific facts that were purportedly not exhausted. The Attorney General's arguments would be potent because the inclusion of unexhausted matters in his petition could lead to its dismissal. See *Rose, supra,* 455 U.S. 509. While the Attorney General has the option to waive exhaustion (28 U.S.C. § 2254(b)(3)), thus permitting the matter to proceed expeditiously to federal litigation without burdening this Court with a successive petition, this is an option the Attorney General rarely *if ever* exercises. Indeed, as Cox v. Chappelle, EDCA Case No. 2:04-cv-00065 MCE CKD (Doc #113) demonstrates, even minor alterations in the order of allegations between state and federal court, or in the general or introductory characterization of facts, may result in the Attorney General's assertion of lack of exhaustion. In light of the risks facing petitioner, counsel decided that the only remedy to the Attorney General's exhaustion objections was to file identical petitions with this Court and the federal court raising all repetitive and non-repetitive claims in his case.

As demonstrated alone, the issues counsel face in preparing a federal petition and exhaustion petition demonstrates that petitioner has not committed an abuse of the writ before this Court. Counsel was required to file comprehensive and identical petitions with this Court and the district court after developing unexhausted claims. Petitioner did not file his

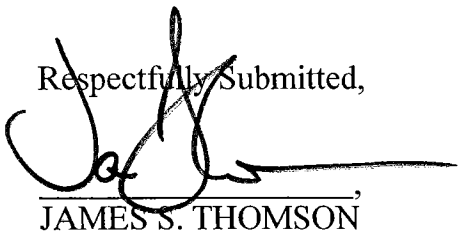
petition to "vex, harass, or delay" the Court (*Sanders v. United States* (1963) 373 U.S. 1, 18), or to conduct "abusive litigation practices." *In re Clark* (1993) 5 Cal.4th 770. Petitioner filed his petition to preserve his rights, and avoid a situation as presented in Cox v. Chappelle, EDCA Case No. 2:04-cv-00065 MCE CKD. Petitioner's petition should not be denied as an abuse of the writ. This Court should reach the merits of his claims.

III. CONCLUSION.

Petitioner accordingly moves to supplement his traverse with the foregoing legal principles and arguments. As set forth here and in the petition, informal reply, traverse, and supplement to the traverse, this Court should review all one-hundred-forty-three (143) of petitioner's potentially meritorious claims. There are no grounds by which to conclude that petitioner has abused the writ in any one of the eight manners listed in this Court's Order to Show Cause.

Dated: April 20, 2012.

Respectfully Submitted,



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Counsel for Petitioner
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CERTIFICATE OF COMPLIANCE
CAPITAL CASE

I certify that the attached PETITIONER'S SECOND SUPPLEMENT TO THE TRAVERSE TO RESPONDENT'S RETURN TO THE SECOND PETITION FOR WRIT OF HABEAS CORPUS uses a 13 point Times New Roman font and contains 2,529 words.

DATED: April 20, 2012.

Respectfully submitted,

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EXHIBIT S

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL A. COX, Petitioner, v. WARDEN of the California State Prison at San Quentin, Respondent.	Case No. 2:04-cv-00065 MCE CKD DEATH PENALTY CASE JOINT STATEMENT REGARDING CLAIM EXHAUSTION

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Pursuant to the Court's orders of January 18, 2012 (Doc. 110) and February 29, 2012 (Doc. 112), the parties submit this Joint Statement Regarding Claim Exhaustion.

I. BACKGROUND.

A. Petitioner's Position.

The Petition for Writ of Habeas Corpus in this matter was filed on June 28, 2005, raising 53 claims. Doc. 32. Proceedings were stayed during the pendency of a 2005 state court petition. In re Cox, California Supreme Court, No. S135128. The stay of proceedings was lifted by order dated July 28, 2010. Doc. 80. Respondent filed an Answer on July 1, 2011, and petitioner filed a Traverse on October 31, 2011. Doc. 96, Doc. 102.

In the Answer, Respondent raised objections based on a failure to exhaust all or part of the claim with regard to 21 claims: Claims 1, 2, 5, 8, 10, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 38, 39, and 49. Petitioner asserted in the Traverse that all claims were exhausted.

Pursuant to the Court's directive, the parties have exchanged e-mails regarding their viewpoints. Upon reconsideration, respondent withdraws any exhaustion-based objection to Claims 2, 5, 8, 10, 30, and 38 and concedes that those claims have been exhausted.

B. Respondent's Position.

Respondent, however, maintains that portions of claims 2, 5, 8, and 10 are procedurally defaulted. In addition, despite meeting and conferring, Respondent laments that Petitioner refused to make any concessions regarding their exhaustion positions.

C. Joint Statement of the Parties.

As to Claims 1, 22, 23, 24, 25, 26, 27, 28, 31, 32, 33, 34, 35, 39, and 49, however, the exhaustion question is disputed.

II. GENERAL DISCUSSION REGARDING EXHAUSTION PRINCIPLES

A. Petitioner's Position.

Under both statute (28 U.S.C. § 2254(b)) and case law, a habeas petitioner in federal court must have exhausted the remedies available in the state courts. This exhaustion doctrine

requires generally that each claim raised in a federal habeas petition be first presented to the state courts, if there is an available state remedy. Picard v. Connor, 404 U.S. 270, 275-278 (1971).

In order to exhaust a claim, the petitioner has to present the "substance" of the claim to the state court so that the state court has a "fair opportunity" to rule on the merits of the claim. Duncan v. Henry, 513 U.S. 364, 365-366 (1995); Chacon v. Wood, 36 F.3d 1459, 1467-1468 (9th Cir. 1994.) The language of the claim presented to the state court and the claim before the federal court need not be the same, as long as the "substantial equivalent" of the claim has been presented in state court. Picard v. Connor, 404 U.S. at 278. A federal claim is fairly presented, then, if the operative facts and the basis for the legal theory are described in the state pleadings. Bland v. California Department of Corrections, 20 F.3d 1469, 1472-1473 (9th Cir. 1994); see Smith v. Goguen, 415 U.S. 566, 576-577 (1974); Peterson v. Lampert, 319 F.3d 1153, 1155-1156 (9th Cir. en banc 2003).

Obviously, a petitioner might present a claim in state court in a different manner than he might in federal court. For example, there might be a parallel state law claim, statute, or authority that is emphasized in the state court proceedings. Or a petitioner might choose to emphasize different factual or legal aspects of a claim in different courts. As long as the state court is made aware of the federal claim, the issue has been exhausted. Indeed, even an explicit reference to a particular federal constitutional provision is not necessary if the state court presentation "cite[s] either federal or state case law that engages in a federal constitutional analysis." Fields v. Waddington, 401 F.3d 1018, 1021 (9th Cir. 2005); see Davis v. Silva, 511 F.3d 1005, 1011 (9th Cir. 2008)["a legal theory is fairly presented when a citation is provided to the relevant case law"]; Tamapua v. Shimoda, 796 F.2d 261, 262 (9th Cir. 1986) ["A habeas petitioner may . . . reformulate somewhat the claims made in state court; exhaustion requires only that the substance of the federal claim be fairly presented."].

In reviewing respondent's assertions in the Answer, petitioner notes that respondent appears to be asserting a hyper-technical and incorrect view of the exhaustion doctrine. As noted, there is no need to use the language in the federal petition in the state court presentation.

There is no need for a magic word or ritualistic incantation. If the factual basis and the legal theory underlying the claim are presented to the state court, it is enough.

B. Respondent's Position.

The requirement of fair presentation to the state's highest court is self-executing. The language of 28 U.S.C. § 2254(b)(1), codifying the requirement of exhaustion, bars relief on any federal-petition-asserted theory of relief unless and until the Respondent expressly waives that protection. 28 U.S.C. § 2254(b)(2).

Petitioners bear the burden of establishing that their federal claims were exhausted by fair presentation to the state high court in a procedurally appropriate manner. Darr v. Buford, 339 U.S. 200, 218-19 (1950); O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999); Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir. 1981); Williams v. Craven, 460 F.2d 1253, 1254 (9th Cir. 1972) (citing Schiers v. California, 333 F.2d 173 (9th Cir. 1964)); 28 U.S.C. § 2254(b)(1), (b)(1)(A).

> Exhaustion requires the petitioner to "fairly present" his claims to the highest court of the state ... In order to fairly present a claim, the petitioner must clearly state the *federal basis and the federal nature* of the claim along with relevant facts....

Cooper v. Neven, 641 F.3d 322, 326-27 (9th Cir. 2011) (emphasis added).

"Mere 'general appeals to broad constitutional principles, such as due process, equal protection, and the right to a fair trial,' do not establish exhaustion." Castillo v. McFadden, 399 F.3d 993, 999 (9th Cir. 2005) (quoting Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999)); see also Fields v. Waddington, 401 F.3d 1018, 1021 (9th Cir. 2005) (A federal claim is not exhausted "by a petitioner's mention, in passing, of a broad constitutional concept, such as due process."). The United States Court of Appeals for the Ninth Circuit (Ninth Circuit) has specifically held that a petitioner's "conclusory, scattershot citation of federal constitutional provisions, divorced from any articulated federal legal theory..." failed to satisfy the fair presentation requirement. Castillo v. McFadden, 399 F.3d at 1003 ("Exhaustion demands more than drive-by citation, detached from any articulation of an underlying federal legal theory.").

But that is not all. The Supreme Court is explicit that for presentation to a state court to

be "fair," it must be under circumstances which normally would allow the state court to reach the merits under the state court's own rules. Castille v. Peoples, 489 U.S. 346, 350-51 (1989). Petitioners must merely point to precisely where in the California Supreme Court pleadings they clearly identified the very same theory they are advancing in federal court.

Nor will it suffice for a petitioner to claim it is too late to fairly present a given theory – such as for the reason he or she has waited too long, and that therefore the claim based on that theory is technically exhausted, even though not *properly* exhausted. The federal bar for lack of proper exhaustion applies not only when there remains a state remedy, but also – via the "inseparab[le]" procedural default rule – when a state remedy is no longer available due to delay:

> We recognized the inseparability of the exhaustion rule and the procedural-default doctrine in [Coleman v. Thompson, 501 U.S. 722 (1991)]: "In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases." 501 U.S., at 732 []. We again considered the interplay between exhaustion and procedural default last Term in O'Sullivan v. Boerckel, 526 U.S. 838 [] (1999), concluding that the latter doctrine was necessary to "'protect the integrity' of the federal exhaustion rule." Id., at 848 [] (quoting id., at 853 [] (STEVENS, J., dissenting)). The purposes of the exhaustion requirement, we said, would be utterly defeated if the prisoner were able to obtain federal habeas review simply by "'letting the time run'" so that state remedies were no longer available. Id., at 848 []. Those purposes would be no less frustrated were we to allow federal review to a prisoner who had presented his claim to the state court, but in such a manner that the state court could not, consistent with its own procedural rules, have entertained it. In such circumstances, though the prisoner would have "concededly exhausted his state remedies," it could hardly be said that, as comity and federalism require, the State had been given a "*fair* 'opportunity to pass upon [his claims].'" Id., at 854 [] (STEVENS, J., dissenting) (emphasis added) (quoting Darr v. Burford, 339 U.S. 200, 204 [] (1950)).

Carpenter v. Edwards, 529 U.S. 446, 452-53 (2000)

Thus, even when a petitioner proves (as part of his affirmative burden to show exhaustion) that there is no state court remedy available because he now would face a procedural bar which would deny him a state court ruling on the merits, the claim will be barred on federal habeas because of that facially independent bar. See Walker v. Martin, __ U. S. __, 131 S.Ct. 1120, 1126, 1128-29 (2011) (state law procedural bar cannot be deemed invalid because a state court has discretion to forego bar in favor of reaching merits); id. at 1130 (placing affirmative

burden of "showing" invalidity on prisoner challenging state procedural bar, and rejecting "seeming inconsistencies" as basis to invalidate bar).

Respondent's position is that Petitioner is trying to expand this case in every conceivable way and at every turn. Now is the time to pare this matter down. Going forward, Respondent must have a merits decision in order to obtain deference in this Court, and if there is no merits decision below, the claim is either unexhausted or procedurally defaulted.

III. DISCUSSION OF CLAIMS.

CLAIM 1

A. Petitioner's Position.

Claim 1 involves the allegation that petitioner's trial counsel labored under a conflict of interest in violation of the Constitution. Petition, 41-47. As noted in the Traverse, the claim was presented to the California Supreme Court in the Appellant's Opening Brief ("AOB"), filed August 5, 1987, pages 28-42, the Appellant's Reply Brief ("ARB"), filed March 1, 1988, pages 2-9, and the supplemental letter brief of March 7, 2002, pages 2-4. The factual presentation included testimony at the state habeas hearing in state court. See, e.g., HRT 6879-6900. Traverse, 6-7.

The respondent asserts that "portions of this claim are unexhausted and must be dismissed, including but not limited to claims involving the Eighth and Fourteenth Amendments." Answer, 10. Respondent admits that the conflict of interest "claims" were raised in the direct appeal. Answer, 59. Indeed, respondent asserts that the California Supreme Court rejected the claims in a reasoned opinion and quotes extensively from that opinion. Answer, 59-61. But respondent also asserts that "Petitioner failed to argue that any conflict of interest violated either the Eighth or Fourteenth Amendments. As such, these new theories have not been exhausted and must be deleted . . ." Answer, 59.

In responding to the respondent's hyper-technical view, it should be noted that the claim in the petition alleges that the "convictions and sentence are unlawfully and unconstitutionally imposed, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States

Constitution, because petitioner's counsel had a potential or actual conflict of interest that affected the trial, and the trial judge failed in his duty to inquire into the circumstances and ramifications of the conflict." Petition, 41. The petition goes on to allege that a potential or actual conflict of interest existed with regard to defense counsel and four prosecution witnesses: Shirley Winn, Lisa Delashaw, James Carter, and Darin McArthur, and details the factual background of these potential or actual conflicts. Petition, 41-47. The petition also asserts that the trial court, having been alerted as to the potential or actual conflicts, failed to inquire adequately into the nature and effect of the conflict of interest. Petition, 41, 47. Respondent seems to believe that petitioner has raised three (or more?) separate claims. Not so. Rather this is a claim with several constitutional underpinnings.

In the state court briefing, state appellate counsel raised these conflicts primarily as a claim involving the right to full and effective counsel under the Sixth Amendment and the California Constitution. Such is the logical foundation of the right to conflict-free counsel. But the claim also contains Fourteenth and Eighth Amendment aspects.

First, as a fundamental premise of Constitutional doctrine, any challenge based on the Sixth Amendment raised in a state court proceeding incorporates, by its very nature, the due process clause of the Fourteenth Amendment. That is: the only reason the Sixth Amendment is applicable in state court proceedings in the first place is because the right to counsel is a fundamental right implicit in the concept of ordered liberty and consequently applicable to state courts as part of due process. Malloy v. Hogan, 378 U.S. 1, 6 (1964); Gideon v. Wainwright, 372 U.S. 335, 343-344 (1963).[1] In addition, state counsel specifically cited Powell v. Alabama, 287 U.S. 45 (1932) (see AOB, page 29) which holds that the denial of counsel in a capital case is a violation of the Fourteenth Amendment, and Wood v. Georgia, 450 U.S. 261 (1981) (see AOB page 30, 35; ARB pages 8-9), which holds that a conflict of interest caused by a single attorney

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[1] The Bill of Rights originally was only applicable to the federal government. See Adamson v. California, 332 U.S. 46, 51 (1947). Only after the Fourteenth Amendment, and only via the incorporation doctrine, did the vast majority of Bill of Rights provisions become applicable to the states. See Twining v. New Jersey, 211 U.S. 78, 89-100, 106-107 (1908).

representing more than one defendant in a criminal proceeding may violate the due process clause of the Fourteenth Amendment.

The need for extra reliability in a capital prosecution -- the Eighth Amendment aspect -- was raised in the discussion of Lockett v. Ohio, 438 U.S. 586, 605 (1978) (AOB, page 30). Lockett stands for, among other things, the concept that extra reliability is required in assessing the penalty in a capital case. Proceedings should minimize the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." 438 U.S. at 605.

Obviously, the California Supreme Court was aware that this was a capital case. Petitioner's state counsel raised the federal constitutional aspects of the claim through specific citations to the federal Constitution and specific citations of federal opinions. The state court had a fair opportunity to act on the claim. Davis v. Silva, 511 F.3d at 1009. The claim is exhausted.

B. Respondent's Position - Attorney conflict of interest claim.

Petitioner raised Sixth Amendment attorney conflict of interest claims in his direct appeal opening brief (AOB) before the California Supreme Court on August 5, 1987, at pages 28-42. However, Petitioner failed to argue that any conflict of interest violated either the Eighth or Fourteenth Amendments. As such, these new theories have not been exhausted and must be deleted, lest the entire petition should be dismissed. Jefferson v. Budge, 419 F.3d 1013, 1016 (9th Cir. 2005); Carriger v. Lewis, 971 F.2d 329, 333-34 (9th Cir. 1992); Pappageorge v. Sumner, 688 F.2d 1294, 1294-95 (9th Cir. 1982).

During the meet and confer process, Petitioner argued that: the Fourteenth Amendment elements of the conflict claim were raised in state court, via the discussion of Powell v. Alabama, 287 U.S. 45 (1932) in Petitioner's AOB at page 29, and Wood v. Georgia, 450 U.S. 261, 271 (1981) at AOB page 30. Petitioner also averred that the Eighth Amendment aspect was raised through his citation to Lockett v. Ohio, 438 U.S. 586, 605 (1978) at AOB page 30.

The passing references to Powell v. Alabama (not a conflict case), without any point page

citation, Wood v. Georgia, and Lockett v. Ohio, failed to fairly present either the Fourteenth or Eighth Amendment nature of the claim. It is simply not fair presentation to fail to mention either amendment in the state pleading and expect the state high court to search through the myriad of case citations and speculate that Petitioner meant to assert matters not stated plainly by heading or within the body of the pleading. In addition, these case citations follow specific reference to the Sixth Amendment (AOB 29), and the California Supreme Court interpreted Petitioner's claim as based solely upon the Sixth Amendment. People v. Cox, 30 Cal.4th 916, 947-51 (2003). These added references were simply not fairly presented and remain unexhausted here. Fields v. Waddington, 401 F.3d at 1021; Castillo v. McFadden, 399 F.3d at 999, 1003; Hiivala v. Wood, 195 F.3d at 1106.

CLAIM 22

A. Petitioner's Position.

Claim 22 involves the prosecutor's misconduct in deliberately referring to a polygraph examination during the direct examination of Joanna Napoletano. The claim was asserted in pleadings during the state court appeal: AOB at pages 43-85, 179-182, the ARB at pages 10-15, and Appellant's Letter Brief, filed March 7, 2002, at page 7. See Traverse, 43.

Nonetheless, respondent complains that petitioner "has not exhausted portions of this claim" and did not sufficiently "federalize the claims beyond his prosecutorial misconduct claim and confrontation claim and fairly place the state court on notice that the additional assertions he was raising were anything but state law based assertions." Answer, 16, 155.

Respondent's argument is contradicted by the record. On page 79 of the AOB, petitioner's counsel specifically cites the Sixth and Fourteenth Amendments, Chapman v. California, 386 U.S. 18 (1967), and Fahy v. Connecticut, 375 U.S. 85 (1963). In addition, petitioner's counsel devoted a special section of the AOB to the federalization of a number of claims, including this one, citing the Fifth Amendment and the Fourteenth Amendment as well as Moore v. Illinois, 408 U.S. 786 (1972). AOB, 179. At page 180 of the AOB, the brief specifically states that "the prosecutor's suggestion that Napoletano had taken a polygraph

examination constituted a federal constitutional violation . . ." Surely this is enough to make the state court aware that the petitioner is raising a federal constitutional violation. State court counsel went further in a letter brief filed on March 7, 2002, asserting that: "federal courts have acknowledged that a reference to the taking of a polygraph examination is the type of error which can make a trial fundamentally unfair pursuant to the due process claims, and thus is cognizable on federal habeas corpus," citing a Ninth Circuit opinion and a Seventh Circuit opinion. Appellant's Letter Brief, filed March 7, 2002, at page 7. In light of these references, it is difficult to understand the respondent's complaint.

As noted, a federal petition "may . . . reformulate somewhat the claims made in state court; exhaustion requires only that the substance of the federal claim be fairly presented." Tamapua v. Shimoda, 796 F.2d at 262. But the state court was fully apprised that petitioner was raising a federal constitutional claim. The claim is exhausted.

B. Respondent's Position - Reference to Joanna Polygraph.

Petitioner contends that his Fifth, Sixth, Eighth, and Fourteenth Amendment rights have been infringed. Specifically, Petitioner argues that the prosecutor committed misconduct when he elicited testimony from Joanna about a polygraph examination, and that the trial court erroneously denied his mistrial motion. Petitioner opines that these facts violated his rights to due process, a fair trial, confrontation, the proper application of state evidentiary rules, and a non-arbitrary penalty determination. Petition 109-10. Petitioner has failed to exhaust any federal claims based upon the Fifth and Eighth Amendments, the proper application of state evidentiary rules, and a non-arbitrary penalty determination, and he has procedurally defaulted any confrontation argument by failing to proffer a contemporaneous objection.

Beyond his prosecutorial misconduct claim and confrontation claim, Petitioner raised state law based claims regarding the polygraph reference in his AOB at pages 43-85. Simply put, Petitioner did not federalize the claims beyond his prosecutorial misconduct claim and confrontation claim, and did not fairly place the state court on notice that his assertions were anything but state law based claims. As such, these new theories have not been exhausted and

must be deleted, lest the entire petition should be dismissed. Jefferson v. Budge, 419 F.3d at 1016; Carriger v. Lewis, 971 F.2d at 333-34; Pappageorge v. Sumner, 688 F.2d at 1294-95.

During the meet and confer process, Petitioner argued that: the "federal constitutional dimension" of the claim including citations to the Sixth and Fourteenth Amendments are discussed in AOB at page 79 and again (citing the Fifth and Fourteenth Amendments) at pages 179-82. According to Petitioner, the need for extra reliability in a capital prosecution (Eighth Amendment aspect) was raised in the cites to Mattox v. United States, 146 U.S. 140, 149 (1892) at AOB page 78 and People v. Hogan, 31 Cal.3d 815, 847-48 at AOB 78 and 181-82.

Respondent does not agree that borrowing from Petitioner's cumulative evidence claim (AOB 179-182) is fair presentation of any Fifth or Eighth Amendment claim pertaining to the polygraph. The pleading does not reference the proper application of state evidentiary rules as a federal claim or non-arbitrary penalty determination. Finally, the cumulative evidence section of the AOB does not reference any denial of a mistrial motion.

The ruling by the California Supreme Court evinced no understanding that Petitioner was raising any Fifth or Eighth Amendment challenge or making a federal claim based upon entitlement to certain state evidentiary rulings or a non-arbitrary penalty determination. People v. Cox, 30 Cal.4th at 951-54. Petitioner should not be allowed to unfairly expand his claims here. Fields v. Waddington, 401 F.3d at 1021; Castillo v. McFadden, 399 F.3d at 999, 1003; Hiivala v. Wood, 195 F.3d at 1106.

CLAIM 23

A. Petitioner's Position.

Claim 23 involves the misconduct when the lead investigator in the case -- a prosecution witness -- asserted, in response to a question from the prosecutor, the purported fact that Joanna Napoletano was placed in protective custody after she asserted that she had witnessed petitioner commit murder. The claim was asserted in pleadings during the state court appeal: The claim was presented in the AOB, at pages 128-136, 179-182, the ARB, at pages 25-28, and Appellant's Letter Brief, filed March 7, 2002, at page 8. Traverse, at 46.

Nonetheless, respondent complains that petitioner "has not exhausted portions of this claim." Answer, 16. Respondent elaborates as follows: "Petitioner did not mention the Fifth, Sixth, or Eighth amendments or offer any argument that Bill Wilson committed misconduct or regarding 'non-arbitrary penalty determination.' As such, these additional theories are unexhausted . . ." Answer, 161. Respondent goes on to rely upon a lengthy quotation from the California Supreme Court analysis of this supposedly unexhausted claim. Answer, 161-162.

In responding to respondent's assertion, it is important to understand the structure of the AOB filed by state counsel in state court. As to a number of evidentiary and misconduct issues that took place during the guilt-phase portion of the trial, state appellate counsel emphasized state law. See AOB, 43-178 (Sections III, IV, V, VI, VII, VIII, IX). This approach is hardly surprising: counsel was arguing for reversal to a state court and evidently felt (not unreasonably) that state authorities would be more persuasive to that court. Then, in a separate section (Section X), state counsel federalized the issues, asserting that the federal constitution had also been violated in each instance of error.

Claim 23 began as Issue VI in the state court opening brief. The discussion there emphasizes state law and cites state cases. But, contrary to respondent's assertion, state counsel raised the federal aspects in the "cumulative" section X, at pages 179-182. There, the brief notes that the issues previously discussed (including the protective custody issue, see page 180) "deprived appellant of his right to a fundamentally fair trial under the constitutional guarantee of due process of law" and specifically cites the Fifth Amendment and the Fourteenth Amendment as well as Moore v. Illinois, 408 U.S. 786 (1972) and other federal cases. AOB, 179. The brief goes on to discuss the due process clause of the Fourteenth Amendment, fundamental fairness, and federal opinions at page 181-182. The section ends with a citation to People v. Hogan, 31 Cal.3d 815, 848 (1982). At that page, the Hogan case reads as follows:

> [A]lthough the order for a new trial would be compelled in a noncapital case under the circumstances presented here, the presumption of prejudice from jury contact with inadmissible evidence is even stronger in the context of a capital case. "It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated." (Mattox v. United States (1892) 146 U.S. 140, 149; accord, State v. Britt, supra [reversing

conviction and death sentence in favorem vitae where jury learned of defendant's refusal to take a lie detector test].)

Thus, petitioner fairly presented the substance of the claim, the federal basis of the claim, and the need for heightened reliability in a capital case, to the California court. The claim is exhausted.

B. Respondent's Position - Prosecutorial Misconduct - reference to Joanna protective custody.

Petitioner argues that his Fifth, Sixth, Eighth, and Fourteenth Amendment rights were violated by the prosecutor and Officer Bill Wilson because Wilson testified about Joanna's protective custody. Petitioner concludes that his rights to due process, a fair trial, and a non-arbitrary penalty determination were infringed. Petition 111-12. Petitioner's claims are baseless.

Petitioner raised a similar prosecutorial misconduct claim in his AOB at pages 128-36. However, Petitioner did not mention the Fifth, Sixth, or Eighth Amendments or offer any argument that Bill Wilson committed misconduct or regarding "non-arbitrary penalty determination." As such, these additional theories are unexhausted and must be deleted, lest the entire petition should be dismissed. Jefferson v. Budge, 419 F.3d at 1016; Carriger v. Lewis, 971 F.2d at 333-34; Pappageorge v. Sumner, 688 F.2d 1294.

During the meet and confer process, Petitioner argued that: the evidentiary error is federalized at AOB 179-82 with specific citations to the Fifth and Fourteenth Amendments and citations to federal cases. According to Petitioner, the Eighth Amendment aspect was raised at AOB pages 181-82 by citation to People v. Hogan, 31 Cal.3d 815.

Respondent does not agree that borrowing from the separate cumulative error claim is fair presentation of any Fifth, Sixth, or Eighth Amendment claim, further there is no reference to misconduct by Officer Wilson or non-arbitrary penalty determination. Also, the cumulative state evidentiary error section does not reference the Eighth Amendment.

The state high court addressed only prosecutorial misconduct in association with this

claim. People v. Cox, 30 Cal.4th at 959-60. Petitioner did not fairly present the Fifth, Sixth, or Eighth Amendments or offer any argument that Bill Wilson committed misconduct or regarding "non-arbitrary penalty determination." As such, these additional theories are unexhausted and must be deleted, lest the entire petition should be dismissed. Jefferson v. Budge, 419 F.3d at 1016; Carriger v. Lewis, 971 F.2d at 333-34; Pappageorge v. Sumner, 688 F.2d 1294.

CLAIM 24

A. Petitioner's Position.

Claim 24 involves the presentation to the jury of the testimony of Joanna Napoletano that petitioner made a sexual overture to her and the trial court's erroneous denial of a mistrial with regard to this testimony. The claim was raised in the state court appellate briefing and presented to the California Supreme Court. The claim was presented in the AOB at pages 137-143, 179-182, the ARB at pages 29-31. Traverse, 46.

Nonetheless, respondent complains that petitioner "has not exhausted this claim." Answer, 16. Respondent elaborates: "Petitioner did not mention the Fifth, Sixth, Eighth or Fourteenth amendments or offer any argument that the testimony or the denial of the mistrial motion impacted his due process, fair trial, or non-arbitrary penalty determination rights. It appears that Petitioner's state arguments were based solely upon state law. As such, these theories are unexhausted . . ." Answer, 164.

Respondent is in error. The state court pleadings fail to support this mistaken assertion.

As discussed above regarding Claim 23, state appellate counsel discussed a number of evidentiary and misconduct issues that took place during the guilt-phase portion of the trial, emphasizing state law. Then, in a separate section, state counsel federalized the issues, asserting that the federal constitution had also been violated.

Claim 24 began as Issue VII in the state court opening brief. Then, as discussed above with reference to Claim 23, state counsel raised the federal aspects in the "cumulative" section X, at pages 179-182. There, the brief notes that the issues previously discussed (including the sexual overture/mistrial issue, see page 180) "deprived appellant of his right to a fundamentally

fair trial under the constitutional guarantee of due process of law" and specifically cites the Fifth Amendment and the Fourteenth Amendment as well as Moore v. Illinois, 408 U.S. 786 (1972) and other federal cases. AOB, 179. The brief goes on to discuss the due process clause of the Fourteenth Amendment, fundamental fairness, and federal opinions at page 181-182, and incorporates the importance of increased reliability for capital cases -- the Eighth Amendment aspect -- by citing People v. Hogan, 31 Cal.3d at 848.

Thus, petitioner fairly presented the substance of the claim, the federal basis of the claim, and the need for heightened reliability in a capital case, to the California court. The claim is exhausted.

B. Respondent's Position - Joanna's testimony about sexual overture.

Petitioner argues that his Fifth, Sixth, Eighth, and Fourteenth Amendment rights were violated by Joanna's testimony about a sexual overture, and the trial court's denial of his ensuing mistrial motion. Petitioner contends that as a result his rights to due process, a fair trial, and a non-arbitrary penalty determination were infringed. Petition 113-15. Petitioner's rights were not violated.

Petitioner raised a similar error claim in his AOB at pages 137-43. However, Petitioner did not mention the Fifth, Sixth, Eighth, or Fourteenth Amendments or offer any argument that the testimony or denial of the mistrial motion impacted his due process, fair trial, or non-arbitrary penalty determination rights. It appears that Petitioner's state arguments were based solely upon state law. As such, these theories are unexhausted and must be deleted, lest the entire petition should be dismissed. Jefferson v.Budge, 419 F.3d at 1016; Carriger v. Lewis, 971 F.2d at 333-34; Pappageorge v. Sumner, 688 F.2d 1294.

During the meet and confer process, Petitioner argued that: the claim was federalized in the cumulative error section of the AOB at pages 179-82. Simply put, failing to reference a federal argument in the appropriate argument section is not fair presentation. Fields v. Waddington, 401 F.3d at 1021; Castillo v. McFadden, 399 F.3d at 999, 1003; Hiivala v. Wood, 195 F.3d at 1106.

The state high court addressed the sexual overture claim solely under state law. People v. Cox, 30 Cal.4th at 960-61. Petitioner did not fairly present the Fifth, Sixth, Eighth, or Fourteenth Amendments or offer any argument that the testimony or denial of the mistrial motion impacted his due process, fair trial, or non-arbitrary penalty determination rights. As such, these additional theories are unexhausted and must be deleted, lest the entire petition should be dismissed. Jefferson v. Budge, 419 F.3d at 1016; Carriger v. Lewis, 971 F.2d at 333-34; Pappageorge v. Sumner, 688 F.2d 1294.

CLAIM 25

A. Petitioner's Position.

Claim 25 concerns the erroneous admission of evidence of firearms during the trial. This claim was presented to the state court in the state court appeal: the AOB at pages 86-102, 179-182, and the ARB at pages 16-17.[2]

Nonetheless, respondent complains that petitioner "has not exhausted this claim." Answer, 17. According to respondent: "Petitioner did not mention the Fifth, Sixth, Eighth or Fourteenth amendments or offer any argument that the testimony impacted rights to the proper application of state evidentiary rules, or non-arbitrary penalty determination. As such these theories are unexhausted . . ." Answer, 167.

It is difficult to understand respondent's attempt to subdivide this claim into different "theories." The claim is that the trial court erroneously admitted evidence that the petitioner possessed firearms, unfairly prejudicing petitioner's fundamental rights. The substance of the claim, and its federal constitutional aspects, were presented to the state court, which had a fair opportunity to rule on the merits. Duncan v. Henry, 513 U.S. at 365-366. Nothing more is necessary.

In the AOB at page 89, state counsel argued that this error was the equivalent to admitting

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[2] Petitioner inadvertently cited the wrong pages of the AOB and the ARB in the discussion of this claim in the Traverse at page 47, lines 5-7. The pages cited here are the correct ones. Petitioner regrets any confusion or inconvenience caused by this error.

evidence of other criminal acts, an error that "violate[s] a defendant's right to due process of law by denying him a fair trial." At page 101, note 39, of the AOB, the brief notes that the admission of the evidence of the firearms violated "due process."

If this was all that was presented, respondent might have an argument. See, e.g., Duncan v. Henry, 513 U.S. at 366. But, as with Claims 22, 23, and 24, petitioner's state counsel specifically federalized this claim in a separate section of the AOB, the "cumulative" section X, at pages 179-182. This claim began as Issue III. At page 101, note 39, the brief directs the reader to the federalization of the issue in section X. There, the brief asserts that the error of admitting evidence of appellant's possession of firearms (specifically identified on page 180), among other errors, "deprived appellant of his right to a fundamentally fair trial under the constitutional guarantee of due process of law" and specifically cites the Fifth Amendment and the Fourteenth Amendment as well as Moore v. Illinois, 408 U.S. 786 (1972) and other federal cases. AOB, 179. As noted, the brief then goes on to discuss the due process clause of the Fourteenth Amendment, fundamental fairness, and federal opinions at page 181-182, and incorporates the importance of increased reliability for capital cases -- the Eighth Amendment aspect -- by citing People v. Hogan, 31 Cal.3d at 848.

The claim was fairly presented, with the federal constitutional underpinnings identified, and the California Supreme Court had an opportunity to -- and in fact did -- rule on the claim. The claim is exhausted.

B. Respondent's Position - Testimony about gun possession.

Petitioner argues that his Fifth, Sixth, Eighth, and Fourteenth Amendment rights were violated by testimony about his firearm possession. Petitioner contends that as a result his rights to due process, a fair trial, the proper application of state evidentiary rules, and a non-arbitrary penalty determination were infringed. Petition 116-17. Petitioner's rights were not violated.

Petitioner raised a similar error claim in his AOB at pages 86-102. However, Petitioner did not mention the Fifth, Sixth, Eighth, or Fourteenth Amendments or offer any argument that the testimony impacted rights to the proper application of state evidentiary rules, or non-arbitrary

penalty determination. As such, these theories are unexhausted and must be deleted, lest the entire petition should be dismissed. Jefferson v. Budge, 419 F.3d at 1016; Carriger v. Lewis, 971 F.2d at 333-34; Pappageorge v. Sumner, 688 F.2d 1294.

During the meet and confer process, Petitioner argued that: the claim was raised in the AOB at pages 86-102 and the direct appeal reply brief (ARB) at pages 16-17. According to Petitioner, the federal aspect of the evidentiary error ("due process" challenge) were noted in the AOB at pages 89 and 101 with citation to Moore v. Illinois, 408 U.S. 786, 798-800 (1972) and the claim was federalized at AOB pages 179-182.

The passing reference to Moore v. Illinois and "due process" failed to fairly present a claim under the Fifth, Sixth, Eighth, or Fourteenth Amendments, and Petitioner failed to offer any argument that the testimony impacted his rights to the proper application of state evidentiary rules, or a non-arbitrary penalty determination. It is simply not fair presentation to fail to mention either amendment in the state pleading and expect the state high court to search through the myriad of case citations and speculate that Petitioner meant to assert matters not stated plainly in the heading or within the body of the pleading. In addition, the California Supreme Court interpreted Petitioner's claim as based solely upon state evidentiary law. People v. Cox, 30 Cal.4th at 955-57. Petitioner failed to properly federalize his claim in state court. These added references were simply not fairly presented and remain unexhausted here. Fields v. Waddington, 401 F.3d at 1021; Castillo v. McFadden, 399 F.3d at 999, 1003; Hiivala v. Wood, 195 F.3d at 1106.

CLAIM 26

A. Petitioner's Position.

Claim 26 concerns the erroneous admission of evidence of Debbie Galston's fear of petitioner. This claim was exhausted as it was presented to the state court in the state court appeal: the AOB at pages 103-116, 179-182, the ARB at pages 18-19, and the Reply to the Attorney General's Letter Brief, filed April 4, 2002, at pages 1-2.

Nonetheless, respondent complains that petitioner "has not exhausted this claim."

Answer, 17. According to respondent: "Petitioner did not mention the Fifth, Sixth, Eighth or Fourteenth Amendments or offer any argument that the testimony impacted rights to due process, a fair trial, confrontation, the proper application of state evidentiary rules, or non-arbitrary penalty determination. As such, these theories are unexhausted . . ." Answer, 172.

Once again, the respondent's position is contradicted by the state court pleadings.

This claim began as Issue IV in the AOB. The appellate brief argued that the admission of Shawn Philpott's testimony that Debbie Galston was fearful of petitioner was irrelevant and erroneously admitted, in violation of evidentiary rules. See, e.g., AOB, 108-110. As with Claims 22, 23, 24, and 25, state appellate counsel specifically federalized this issue in section X, pages 179-182, asserting that the error violated petitioner's federal due process and fair trial rights, the Fifth and Fourteenth Amendments, and the heightened reliability requirement of capital cases.

Further, in a letter brief submitted on April 4, 2002, petitioner's state court counsel specifically reminded the California Supreme Court that this evidentiary error was not just a state law error: "appellant's claim, in addition to the evidentiary admissibility of the statement pursuant to state law, is that admission of the statement denied him his federal constitutional right to confront and cross-exam [sic] witnesses against him." Reply to the Attorney General's Letter Brief, filed April 4, 2002, 2. The letter brief then cited People v. Noguera, 4 Cal.4th 599, 623 (1992), pinpointing a reference in that opinion to a claim that hearsay statements violated the confrontation clause of the Sixth Amendment. Id.

Obviously, petitioner's state briefing raised more than a state law evidentiary claim. "While the petitioner must refer to federal law in state court explicitly, exhaustion is satisfied once the petitioner makes that explicit reference even if the petitioner relies predominantly on state law before the state courts." Insyxiengmay v. Morgan, 403 F.3d 657, 658 (9th Cir. 2005). The claim is exhausted.

B. Respondent's Position - Testimony about Debbie Galston's fear of Petitioner.

Petitioner argues that his Fifth, Sixth, Eighth, and Fourteenth Amendment rights were violated by testimony about Debbie's fear of him. Petitioner contends that as a result of the testimony his rights to due process, a fair trial, confrontation, the proper application of state evidentiary rules, and a non-arbitrary penalty determination were infringed. Petition 118-20. Petitioner's rights were not violated.

Petitioner raised a similar error claim in his AOB at pages 103-16. However, Petitioner did not mention the Fifth, Sixth, Eighth, or Fourteenth Amendments or offer any argument that the testimony impacted rights to due process, a fair trial, confrontation, the proper application of state evidentiary rules, or non-arbitrary penalty determination. As such, these theories are unexhausted and must be deleted, lest the entire petition should be dismissed. Jefferson v. Budge, 419 F.3d at 1016; Carriger v. Lewis, 971 F.2d at 333-34; Pappageorge v. Sumner, 688 F.2d at 1294.

During the meet and confer process, Petitioner argued that: the claim was federalized via the cumulative error section at AOB pages 179-182.

Respondent disagrees that borrowing language from other discrete claims is fair presentation. Fields v. Waddington, 401 F.3d at 1021; Castillo v. McFadden, 399 F.3d at 999, 1003; Hiivala v. Wood, 195 F.3d at 1106. In addition, the state high court analyzed Petitioner's claim as one involving purely state law. People v. Cox, 30 Cal.4th at 957-58. Petitioner failed to properly federalize his claim in state court. These references were simply not fairly presented and remain unexhausted here. Fields v. Waddington, 401 F.3d at 1021; Castillo v. McFadden, 399 F.3d at 999, 1003; Hiivala v. Wood, 195 F.3d at 1106.

CLAIM 27

A. Petitioner's Position.

Claim 27 concerns the erroneous admission of evidence of Darlene Sindle's purported fear of petitioner. This claim was exhausted as it was presented to the state court in the state court appeal: the AOB, at pages 117-127, 179-182, the ARB, at pages 20-24, and the Reply to

the Attorney General's Letter Brief, filed April 4, 2002, at pages 1-2.

Nonetheless, respondent complains that petitioner "has not exhausted this claim." Answer, 17. According to respondent: "Petitioner did not mention the Fifth, Sixth, Eighth or Fourteenth amendments or offer any argument that the testimony impacted his rights to due process, a fair trial, the proper application of state evidentiary rules, or non-arbitrary penalty determination. As such, these theories are unexhausted . . ." Answer, 176.

As with Claim 26, the respondent's position is directly contradicted by the state court pleadings.

This claim began as Issue V in the AOB. The appellate brief argued that the admission of the testimony about Darlene's fear of petitioner was irrelevant and therefore improperly admitted. This claim, as with Claims 22, 23, 24, 25, and 26, was then specifically federalized in section X of the AOB, pages 179-182, where counsel asserted that the error violated petitioner's federal due process and fair trial rights, the Fifth and Fourteenth Amendments, and the heightened reliability requirement of capital cases. As with Claim 26, counsel further federalized this claim in the letter brief of April 4, 2002,[3] specifically reminding the California Supreme Court that this evidentiary error was not just a state law error, but also " federal constitutional" error under the confrontation clause of the Sixth Amendment.

The claim is exhausted.

B. Respondent's Position- Testimony about Darlene's fear of Petitioner.

Petitioner argues that his Fifth, Sixth, Eighth, and Fourteenth Amendment rights were violated by testimony about Darlene's fear of him. Petitioner contends that as a result of the testimony his rights to due process, a fair trial, the proper application of state evidentiary rules, and a non-arbitrary penalty determination were infringed. Petition 121-22. Petitioner's rights were not violated.

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[3] The April 4, 2002, letter brief discussed the two similar issues -- the admission of the testimony regarding Debbie Galston's fear (now Claim 26) and the admission of the testimony regarding Darlene Sindle's fear (now Claim 27) -- together.

Petitioner raised a similar error claim in his AOB at pages 117-27. However, Petitioner did not mention the Fifth, Sixth, Eighth, or Fourteenth Amendments or offer any argument that the testimony impacted his rights to due process, a fair trial, the proper application of state evidentiary rules, or non-arbitrary penalty determination. As such, these theories are unexhausted and must be deleted, lest the entire petition should be dismissed. Jefferson v. Budge, 419 F.3d at 1016; Carriger v. Lewis, 971 F.2d at 333-34; Pappageorge v. Sumner, 688 F.2d at 1294.

During the meet and confer process, Petitioner argued that: the claim was federalized in the cumulative error section of the AOB at pages 179-182 along with a reference to the confrontation clause of the Sixth Amendment in a letter brief filed April 4, 2002 at page 2. Respondent disagrees that borrowing language from other discrete claims is fair presentation. Fields v. Waddington, 401 F.3d at 1021; Castillo v. McFadden, 399 F.3d at 999, 1003; Hiivala v. Wood, 195 F.3d at 1106. In addition, the state high court analyzed Petitioner's claim as one involving purely state law. People v. Cox, 30 Cal.4th at 958-59. Petitioner failed to properly federalize his claim in state court. These references were simply not fairly presented and remain unexhausted here. Fields v. Waddington, 401 F.3d at 1021; Castillo v. McFadden, 399 F.3d at 999, 1003; Hiivala v. Wood, 195 F.3d at 1106.

CLAIM 28

A. Petitioner's Position.

Claim 28 concerns the erroneous admission of evidence of Joanna Napoletano's three attempts to direct law enforcement personnel to the purported scene of the Denise Galston homicide. The claim was exhausted as it was presented to the state courts in the state appeal: AOB, at pages 144-163, 179-182, and the ARB, at pages 32-37.

Nonetheless, respondent complains that petitioner "has not exhausted this claim." Answer, 17. According to respondent: "Petitioner did not mention the Fifth, Sixth, Eighth or Fourteenth amendments or offer any argument that the testimony impacted his rights to due process, the proper application of state evidentiary rules, confrontation, or non-arbitrary penalty

determination. As such these theories are unexhausted . . ." Answer, 180.

Once again, the state court record refutes respondent's assertions.

This claim began as Issue VIII in the AOB. The appellate brief argued that the admission of this evidence was contrary to evidentiary rules. But, at the risk of being repetitious: this claim, as with Claims 22, 23, 24, 25, 26, and 27, was then specifically federalized in section X of the AOB, pages 179-182, where counsel asserted that the error violated petitioner's federal due process and fair trial rights, the Fifth and Fourteenth Amendments, and the heightened reliability requirement of capital cases.

Respondent's complaint appears to be with the methodology of state appellate counsel, who pitched the claims primarily as state law trial error, then presented the federal constitutional aspects of the error in a separate section of the AOB. But this is perfectly acceptable, as long as the federal constitutional aspects are presented to the state court. Insyxiengmay v. Morgan, 403 F.3d at 658; Tamapua v. Shimoda, 796 F.2d at 262. The claim is exhausted.

B. Respondent's Position - Testimony about Joanna's trips to the scene.

Petitioner argues that his Fifth, Sixth, Eighth, and Fourteenth Amendment rights were violated by testimony about Joanna's trips to the scene of Denise's murder with law enforcement. Petitioner contends that as a result his rights to due process, a fair trial, the proper application of state evidentiary rules, confrontation, and a non-arbitrary penalty determination were infringed. Petition 123-26. Petitioner's rights were not violated.

Petitioner raised a similar error claim in his AOB at pages 144-63. However, Petitioner did not mention the Fifth, Sixth, Eighth, or Fourteenth Amendments or offer any argument that the testimony impacted his rights to due process, the proper application of state evidentiary rules, confrontation, or non-arbitrary penalty determination. As such, these theories are unexhausted and must be deleted, lest the entire petition should be dismissed. Jefferson v. Budge, 419 F.3d at 1016; Carriger v. Lewis, 971 F.2d at 333-34; Pappageorge v. Sumner, 688 F.2d at 1294.

During the meet and confer process, Petitioner argued that: the claim was federalized in the cumulative error section of the AOB at pages 179-182.

Respondent disagrees that borrowing language from other discrete claims is fair presentation. Fields v. Waddington, 401 F.3d at 1021; Castillo v. McFadden, 399 F.3d at 999, 1003; Hiivala v. Wood, 195 F.3d at 1106. In addition, the state high court analyzed Petitioner's cumulative error claim as one involving purely state law. People v. Cox, 30 Cal.4th at 961-63. Petitioner failed to properly federalize his claim in state court. These references were simply not fairly presented and remain unexhausted here. Fields v. Waddington, 401 F.3d at 1021; Castillo v. McFadden, 399 F.3d at 999, 1003; Hiivala v. Wood, 195 F.3d at 1106.

CLAIM 31

A. Petitioner's Position.

Claim 31 involves the allegation that petitioner was denied his right to be present during a critical stage of the proceeding, when, during deliberations, the jury requested that a portion of the transcript be reread, in violation of the Constitution. Petition, 131. As noted in the Traverse, the claim was presented to the California Supreme Court in the AOB at pages 164-178, and the ARB at pages 38-42. Further discussion was had in the Letter Brief, filed March 7, 2002, at page 8. Traverse, 49-50.

The respondent asserts that certain "theories are unexhausted and must be deleted," including but not limited to claims involving the Eighth Amendment and "to be free of an arbitrary deprivation of a state law entitlement, to confrontation, to trial by jury, and to a non-arbitrary sentencing determination." Answer, 190. Respondent admits that a "similar error claim" was raised in the direct appeal. Answer, 190.

In addressing respondent's crabbed approach, it should be noted that the claim in the petition alleges that the "convictions and sentence are unlawfully and unconstitutionally imposed, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, because petitioner, his counsel, and even the trial court were absent from critical proceedings during which important testimony was reread to the jury during deliberations." Petition, 131. The petition alleges that the purported waiver of petitioner's presence was inadequate and ineffective. The procedure violated a state statutory directive which

constituted an arbitrary deprivation of a state law entitlement, in abrogation of petitioner's federal due process rights. The reread to the jury included prejudicial testimony that the court had previously directed not be disclosed to the jurors, and which would have been objected to and excluded had counsel been present. Finally, the petition alleges that this was structural error, denying petitioner fair and reliable verdicts. Petition, 131.

In the state court briefing, appellate counsel raised this claim primarily as a denial of a state statutory right and of his federal rights to presence, to a fair trial, due process and the effective assistance of counsel under the Fifth, Sixth, and Fourteenth Amendments and the California Constitution. See, e.g., AOB at 164, 175, 178. Such are the fundamental aspects of this claim. But the claim also inherently invokes the Eighth Amendment.

First, the state court briefing referred to the Eighth Amendment elements -- including the right to a non-arbitrary sentencing determination -- in the citations to Burger v. Kemp ,483 U.S. 776 (1987), Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982)(see AOB, page 177; ARB 41-42) and Hall v. Wainwright, 733 F.2d 766, 775 (11th Cir. 1984) (see AOB 177) and in the extensive discussion of Bustamante v. Eyman, 456 F. 2d 269, 273-275 (9th Cir. 1972) (see AOB page 174-177). In quoting from Bustamante, appellate counsel argued, "The defendant's right to be present at all proceedings of the tribunal which may take his life or liberty is designed to safeguard the public's interest in a fair and orderly judicial system." (See AOB 177.)

Petitioner's right to be free of an arbitrary deprivation of a state law entitlement was raised in the discussion of Hopt v. Utah, 110 U.S. 574, 578 (1884) (see AOB 174-175, e.g. "That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused; much less by his mere failure, when on trial and in custody, to object to unauthorized methods.")

Petitioner's right to confrontation and to trial by jury was also addressed within the discussion of Bustamante v. Eyman, 456 F.2d at 272 ["In Illinois v. Allen, 397 U.S. 337, 338, 90 . . . (1970), the Court emphasized that 'One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."], and in references to Lewis v. United States, 146 U.S. 370, 372-374 (1892) ["Out of

abundant tenderness for the right secured to the accused by our Constitution, to be confronted by the witnesses against him, and to be heard by himself or counsel, our court has gone a step further, and held that it must be shown by the record that the accused was present in court pending the trial."] and United States v. Crutcher, 405 F.2d 239, 242 (1968) ["Article II, §2 of the Federal constitution and the Sixth Amendment thereto give the defendant in a criminal case the right to a public jury trial, and it is an elementary principle of due process that a defendant must be allowed to be present at his own trial."](see AOB 174-177).

Within the appellate briefing, mention of Badger v. Cardwell, 587 F.2d 968, 970 (9th Cir. 1978) ["More recently, the Supreme Court has stated that the confrontation clause of the Sixth Amendment guarantees the right of an accused to be present not only whenever testimony is taken, Snyder, supra, 291 U.S. at 102, 54 S.Ct. 330, but 'in the courtroom at every stage of his trial.' Illinois v. Allen, 397 U.S. 337, 338, . . (1970)"]; Hall v. Wainwright, 733 F.2d 766, 775 (11th Cir. 1984)["Hall urges that his due process rights and his right to confrontation were violated by his absence during" various stages of the proceedings]; Near v. Cunningham, 313 F.2d 929, 932 n.1 (4th Cir. 1963) ["the cases cited in the margin, while by no means exhausting the authorities, sufficiently illustrate and amply sustain the proposition that the right is fundamental and assures him who stands in jeopardy that he may in person, see, hear and know all that is placed before the tribunal having power by its finding to deprive him of liberty or life"]; and Blackwell v. Brewer, 562 F.2d 596, 599 (8th Cir. 1977) ["On direct appeal to the Iowa Supreme Court, Blackwell made arguments similar to those presented in federal court on his habeas petition - that his exclusion from the voir dire examination of the jury deprived him of the constitutional right, guaranteed by the sixth amendment to the Constitution, to confront the witnesses against him. . . ."]; evidenced a confrontation element to the claim. AOB 177-178.

Additionally, reliance upon Fisher v. Roe, 263 F.3d 906 (9th Cir. 2001) in the March 7, 2002 Letter Brief indicates the federal constitutional facets to this claim, including the right to confrontation and trial by jury. In Fisher, the Ninth Circuit set forth the impact of the denial of

counsel's presence during a jury readback:

> If present and participating, Fisher and Collins or their lawyers could have made certain, where appropriate, that testimony of defense witnesses was read as well as that of the state's witnesses. They could also have ensured that any cross-examination of prosecution witnesses would be read in addition to direct testimony. They could also have made certain that the court reporter's notes were accurate, that her notes accurately reflected the witnesses' testimony, and that she did not unduly emphasize any part of the requested testimony or use any improper voice inflections. . . .

263 F.3d at 915.

The focus of the instant claim is on the prejudice wrought by petitioner and counsel's absence during the jury readback. The discussion within the state court briefing was amplified in the "cumulative" section X, at pages 179-182. See, Claims 23 and 24, supra. There, the brief notes that the issues previously discussed, including the re-reading of testimony "in the absence of counsel and the defendant is itself error of federal constitutional dimension", AOB 180, "deprived appellant of his right to a fundamentally fair trial under the constitutional guarantee of due process of law" and specifically cites the Fifth Amendment and the Fourteenth Amendment as well as Moore v. Illinois, 408 U.S. 786 (1972) and other federal cases. AOB, 179. The brief goes on to discuss the due process clause of the Fourteenth Amendment, fundamental fairness, and federal opinions at page 181-182, and incorporates the importance of increased reliability for capital cases -- the Eighth Amendment aspect -- by citing People v. Hogan, 31 Cal.3d at 848.

As noted, the California Supreme Court was aware that this was a capital case. Petitioner's state counsel raised the federal constitutional aspects of the claim through specific citations to the federal Constitution and specific citations of federal opinions. The state court had a fair opportunity to act on the claim. Davis v. Silva, 511 F.3d at 1009. The claim is exhausted.

B. Respondent's Position - Absence from reread of testimony.

Petitioner argues that his Fifth, Sixth, Eighth, and Fourteenth Amendment rights were violated by his absence during a jury reread of testimony. Petitioner contends that as a result his rights to be free of an arbitrary deprivation of a state law entitlement, to be present at all critical proceedings, due process, a fair trial, confrontation, trial by jury, effective assistance, and a

non-arbitrary sentencing determination were infringed. Petition 131. Petitioner's rights were not violated.

Petitioner raised a similar error claim in his AOB at pages 164-78. However, Petitioner did not offer any argument that his rights under the Eighth Amendment, to be free of an arbitrary deprivation of a state law entitlement, to confrontation, to trial by jury, and to a non-arbitrary sentencing determination were infringed. As such, these theories are unexhausted and must be deleted, lest the entire petition should be dismissed. Jefferson v. Budge, 419 F.3d at 1016; Carriger v. Lewis, 971 F.2d at 333-34; Pappageorge v. Sumner, 688 F.2d at 1294.

During the meet and confer process, Petitioner argued that: the claim was federalized at AOB pages 171-177 in citations to Burger v. Kemp, 483 U.S. 776 (1987); Hopt v. Utah, 110 U.S. 574, 578 (1884); Bustamonte v. Eyman, 456 F.2d 269, 274-75 (9th Cir. 1972); and Lewis v. United States, 146 U.S. 370, 373-79 (1892) and that the Eighth Amendment aspect was presented in the direct appeal reply brief (ARB) at pages 41-42.

The passing reference to the cited cases, failed to fairly present the Eighth Amendment, arbitrary deprivation of a state law entitlement, confrontation, trial by jury, or non-arbitrary sentencing determination nature of the claim. It is simply not fair presentation to fail to mention the operative theories in the state pleading and expect the state high court to search through the myriad of case citations and speculate that Petitioner meant to assert matters not stated plainly by heading or within the body of the pleading. In addition, the California Supreme Court interpreted Petitioner's claim as based solely upon due process. People v. Cox, 30 Cal.4th at 963. These added references were simply not fairly presented and remain unexhausted here. Fields v. Waddington, 401 F.3d at 1021; Castillo v. McFadden, 399 F.3d at 999, 1003; Hiivala v. Wood, 195 F.3d at 1106.

CLAIM 32

A. Petitioner's Position.

Claim 32 involves the misconduct committed by the prosecutor in the penalty phase argument, whereby he evoked highly emotional images which were irrelevant to the sentencing

factors and prejudicial to petitioner's right to a fair and non-arbitrary sentencing determination. The claim was asserted in pleadings during the state court appeal: The claim was presented in the AOB, at pages 202-206, and Appellant's Letter Brief, filed March 7, 2002, at page 10. Traverse, at 51.

Nonetheless, respondent complains that petitioner "has not exhausted portions of this claim." Answer, 18. Respondent maintains: "Petitioner did not offer any argument that his rights under the Fifth or Sixth Amendments, or to a non-arbitrary sentencing determination were infringed. As such these additional theories are unexhausted . . ." Answer, 194. Respondent goes on to rely upon a lengthy quotation from the California Supreme Court analysis of this supposedly unexhausted claim. Answer, 195.

Claim 32 was raised in Appellant's Opening Brief as Issue XIV. The discussion there emphasizes the Eighth and Fourteenth Amendments, including the non-arbitrary sentencing determination which is an inherent element of the Eighth Amendment. See, e.g. Eddings v. Oklahoma, 455 U.S. 104 (1982); Woodson v. North Carolina, 428 U.S. 280 (1976). AOB at 203-205.

Additionally, contrary to respondent's assertion, state counsel raised the Fifth and Sixth Amendments aspects in the references to various federal cases. The briefing specifically cites a line of cases addressing the Sixth Amendment. The references to Booth v. Maryland, 482 U.S. 496 (1987) in the AOB (at page 208) and in the Letter Brief (at page 10), raised petitioner's Sixth Amendment right to confrontation. The essence of Booth is that victim impact testimony impinges upon a defendant's right to challenge the impact of the loss of a loved one to the victim's family. See, 482 U.S. at 506. The appellate briefing noted that "If there is no evidence produced, as is true in the instant case, then the prosecutor's argument rests on improper speculation and appeal to emotion." Letter Brief of March 7, 2002 at 10. Similarly, the quotation from Hance v. Zant, 696 F.2d 940, 952-953, (9th Cir. 1983) cited in the briefing, that a "dramatic appeal to gut emotion [which] has no place in the courtroom, especially in a case involving the penalty of death," AOB at 204, focused the issue that when the prosecutor acts as an unsworn witness, the defendant is denied his right to confrontation.

Caldwell v. Mississippi, 472 U.S. 320, 341 (1985), which was also briefly mentioned in the appellate briefing, is the quintessential case for the integral nature of the jury's role in sentencing in a capital case: "In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death."

Thus, petitioner fairly presented the substance of the claim, the federal basis of the claim, and the need for heightened reliability in a capital case, non-arbitrary sentencing, due process of law, and the Sixth Amendment guarantees to the California court. The claim is exhausted.

B. Respondent's Position - Prosecutorial Misconduct Penalty phase argument.

Petitioner argues that his Fifth, Sixth, Eighth, and Fourteenth Amendment rights were violated by the prosecutor's penalty phase argument because it appealed to the jury's passions. Petitioner contends that as a result his rights to due process, a fair trial, and a non-arbitrary sentencing determination were infringed. Petition 132. Petitioner's rights were not violated.

Petitioner raised a similar error claim in his AOB at pages 202-06. However, Petitioner did not offer any argument that his rights under the Fifth or Sixth Amendments, or to a non-arbitrary sentencing determination were infringed. As such, these theories are unexhausted and must be deleted, lest the entire petition should be dismissed. Jefferson v. Budge, 419 F.3d at 1016; Carriger v. Lewis, 971 F.2d at 333-34; Pappageorge v. Sumner, 688 F.2d at 1294.

During the meet and confer process, Petitioner argued that: the federal constitutional right to a reliable sentencing determination was emphasized in the discussion in AOB pages 203-205 with citation to Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982). Petitioner's failure to mention the Fifth or Sixth Amendments, or non-arbitrary sentencing determination did not fairly present those issues to the state high court. In addition, the state high court interpreted and resolved Petitioner's claim based solely upon prosecutorial misconduct and due process. People v. Cox, 30 Cal.4th at 966. These added references were simply not fairly presented and remain unexhausted here. Fields v. Waddington, 401 F.3d at 1021; Castillo v. McFadden, 399 F.3d at 999, 1003; Hiivala v. Wood, 195 F.3d at 1106.

CLAIM 33

A. Petitioner's Position.

Claim 33 involves the trial court's prohibition of arguments describing the execution of the death penalty. The claim was raised in the state court appellate briefing and presented to the California Supreme Court. The claim was presented in the AOB at pages 230-239, the ARB at pages 57-59, Appellant's Letter Brief, filed March 11, 1988, at page 1, and Appellant's Letter Brief, filed March 7, 2002, at page 17. Traverse, 53.

Nonetheless, respondent complains that petitioner "has not exhausted portions of this claim." Answer, 18-19. Respondent maintains: "Petitioner did not offer any argument that his rights under the Eighth or Fourteenth Amendments or due process, a fair trial, and a non-arbitrary sentencing determination were infringed. As such these theories are unexhausted . . ." Answer, 196.

Respondent is in error. The state court pleadings fail to support this mistaken assertion.

The federal aspects of the claim, including the Eighth Amendment element, are discussed in pages 232-234 of the AOB, which includes citations to the Supreme Court's capital jurisprudence, including references to Lockett v. Ohio, 438 U.S. 586, 605 (1978), Gregg v. Georgia, 428 U.S. 153 (1976), and Woodson v. North Carolina, 428 U.S. 280 (1976). Similar references were cited in the March 11, 1988, Letter Brief. Moreover, appellant relied upon California v. Brown, 479 U.S. 538 (1987) as a basis for his federal constitutional arguments in support of allowing the jury to consider the method of execution in determining whether death was the appropriate penalty. ARB at 57-58.

The essence of this claim is that the trial court precluded the jury from hearing an account of the torturous punishment of execution by denying defense counsel from presenting arguments on the nature of an execution and from reading actual accounts of the imposition of the manner in which the death penalty is imposed. The Eighth Amendment claim that death by asphyxiation in the gas chamber constitutes cruel and unusual punishment perforce implicitly incorporated the Fourteenth Amendment, since the Eighth Amendment is only applicable to state court proceedings pursuant to the incorporation doctrine underlying the due process clause of the

Fourteenth Amendment. See Malloy v. Hogan, 378 U.S. 1, 6, n.6 (1964); Robinson v. California, 370 U.S. 660, 666 (1962).

Thus, petitioner fairly presented the substance of the claim, the federal basis of the claim, and the need for heightened reliability in a capital case, to the California court. The claim is exhausted.

B. Respondent's Position - Restriction upon defense penalty argument.

Petitioner argues that his Eighth and Fourteenth Amendment rights were violated by the court's restriction upon defense penalty phase argument regarding the method of execution. Petitioner contends that as a result his rights to due process, a fair trial, effective assistance of counsel, full consideration of mitigating evidence, and a non-arbitrary sentencing determination were infringed. Petitioner also argues that he was arbitrarily deprived a state law entitlement. Petition 133-34. Petitioner's rights were not violated.

Petitioner raised a similar error claim in his AOB at pages 230-39. However, Petitioner did not offer any argument that his rights under the Eighth or Fourteenth Amendments, due process, a fair trial, or to a non-arbitrary sentencing determination were infringed. As such, these theories are unexhausted and must be deleted, lest the entire petition should be dismissed. Jefferson v. Budge, 419 F.3d at 1016; Carriger v. Lewis, 971 F.2d at 333-34; Pappageorge v. Sumner, 688 F.2d at 1294.

During the meet and confer process, Petitioner argued that: the federal aspects of the claim including the Eighth Amendment aspect were discussed in the AOB at pages 232-34 with citations to Lockett v. Ohio, 438 U.S. 586; Gregg v. Georgia, 428 U.S. 153, 203-04 (1976); and Woodson v. North Carolina, 428 U.S. 280 (1976).

Petitioner failed to mention the Eighth or Fourteenth Amendments, or due process, a fair trial, and a non-arbitrary sentencing determination, and thus did not fairly present those issues to the state high court. In addition, the state high court interpreted and resolved Petitioner's claim based solely upon state law. People v. Cox, 30 Cal.4th at 969. These added references were

simply not fairly presented and remain unexhausted here. Fields v. Waddington, 401 F.3d at 1021; Castillo v. McFadden, 399 F.3d at 999, 1003; Hiivala v. Wood, 195 F.3d at 1106.

CLAIM 34

A. Petitioner's Position.

Claim 34 concerns the trial court's misleading instruction that the jurors must assume that a death sentence will result in the imposition of the death penalty, yet was unaccompanied by a parallel instruction that the jurors must assume that a life sentence will result in incarceration for one's natural life, without the possibility of parole. This claim was presented to the state court in the state court appeal: the AOB at pages 207-214, the ARB at pages 52-53, Appellant's Letter Brief, filed March 7, 2002, at pages 10-11; and Reply to Attorney General's Letter Brief, filed April 4, 2002, at page 3.

Nonetheless, respondent complains that petitioner "has not exhausted portions of this claim." Answer, 19. Respondent maintains: "However, Petitioner did not offer any argument that his rights under the Eighth Amendment or a reliable individualized penalty verdict, and to be free of improper sentencing considerations were infringed. As such, these theories are unexhausted . . ." Answer, 198.

Respondent's attempt to parse this claim into different "theories" is unavailing. The claim is that the trial court's penalty phase instructions failed to assure that the imposition of a death sentence not be inflicted in an arbitrary or capricious manner. The federal aspects of the claim, including the Eighth Amendment aspect, is discussed in appellate briefing, which included citations to Gregg v. Georgia, 428 U.S. 153, Furman v. Georgia, 408 U.S. 238, and Caldwell v. Mississippi, 472 U.S. 320. AOB at 212-213. The substance of the claim, and its federal constitutional aspects, were presented to the state court, which had a fair opportunity to rule on the merits. Duncan v. Henry, 513 U.S. at 365-366. Nothing more is necessary.

Moreover, the United States Supreme Court has ruled that instructions that "introduce a level of uncertainty and unreliability into the factfinding process. . . cannot be tolerated in a capital case." Beck v. Alabama, 447 U.S. 625, 643 (1980). The constitutional underpinning of

the Beck decision is the Due Process Clause. In the AOB, appellate counsel argued: "Further, since the seriously misleading instruction given here is contrary to the rationale of [People v.] Ramos [37 Cal. 3d 136 (1984)], and equally violative of due process, the error must be deemed reversible per se. . . . ." AOB at 209. Petitioner's counsel expressly referenced the Due Process Clause.

The claim was fairly presented, with the federal constitutional underpinnings identified, and the California Supreme Court had an opportunity to -- and in fact did -- rule on the claim. The claim is exhausted.

B. Respondent's Position - Due process instructional error failure to instruct that life means life.

Petitioner argues that his Eighth and Fourteenth Amendment rights were violated by the court's refusal to instruct the jury that life without the possibility of parole means life in prison. Petitioner contends that as a result his rights to due process, a reliable individualized penalty verdict, and to be free of improper sentencing considerations were infringed. Petition 135. Petitioner's rights were not violated.

Petitioner raised a similar error claim in his AOB at pages 207-14. However, Petitioner did not offer any argument that his rights under the Eighth Amendment, or to a reliable individualized penalty verdict, and to be free of improper sentencing considerations were infringed. As such, these theories are unexhausted and must be deleted, lest the entire petition should be dismissed. Jefferson v. Budge, 419 F.3d at 1016; Carriger v. Lewis, 971 F.2d at 333-34; Pappageorge v. Sumner, 688 F.2d at 1294.

During the meet and confer process, Petitioner argued that: the federal aspects of the claim are noted in the letter brief filed March 7, 2002, at pages 10-11 and the letter brief filed April 4, 2002 at page 3. Petitioner failed to mention that his rights under the Eighth Amendment, or a reliable individualized penalty verdict, and to be free of improper sentencing considerations were infringed in those letter briefs and thus failed to fairly present these theories. In addition, the state high court interpreted and resolved Petitioner's claim based solely upon state law.

People v. Cox, 30 Cal.4th at 967. These added references were simply not fairly presented and remain unexhausted here. Fields v. Waddington, 401 F.3d at 1021; Castillo v. McFadden, 399 F.3d at 999, 1003; Hiivala v. Wood, 195 F.3d at 1106.

CLAIM 35

A. Petitioner's Position.

Claim 35 concerns the trial court's failure at the penalty phase to instruct the jury that it could not consider "other crimes" evidence in determining the sentencing verdict unless the jurors found such crimes to have been proven beyond a reasonable doubt. This claim was exhausted as it was presented to the California Supreme Court in the appellate briefing: the AOB at pages 179-189, and the ARB at pages 47-48.

Nonetheless, respondent complains that petitioner "has not exhausted portions of this claim." Answer, 19. Respondent acknowledges that "Petitioner raised a similar error claim. . ." however maintains: "Petitioner did not offer any argument that his right to be free of an arbitrary deprivation of a state law entitlement was infringed." Additionally, according to Respondent, "Petitioner omitted any argument that his interaction with Joanna could be viewed as other crimes evidence, preferring instead to argue only that the possession of guns and the testimony about sex with the victims could be other crimes evidence. As such these theories are unexhausted . . ." Answer, 200-201.

The focus of the instant claim is the trial court's failure to render an instruction regarding other crimes evidence and their prohibition from being considered in aggravation by the jury unless proven beyond a reasonable doubt. The federal aspects of the claim were raised in the discussion regarding the abridgement of appellant's constitutional right to a fair and reliable penalty determination and citation to the Eighth Amendment opinion of Lockett v. Ohio, 438 U.S. 586. AOB at 189. The substance of the claim, and its federal constitutional aspects, were presented to the state court, which had a fair opportunity to rule on the merits. Duncan v. Henry, 513 U.S. at 365-366. Nothing more is necessary.

Alternatively, any additional evidentiary support cited by petitioner in support of the

claim, i.e. the reference to argument regarding his interaction with Joanna, did not fundamentally alter the claim and, therefore, the claim is properly exhausted. Petitioner presented the substance of his claim to the state court. See, e.g., Vasquez v. Hillery, 474 U.S. 254, 257-58, 260 (1986) (rejecting challenge to new evidence because it did not fundamentally alter the legal claim the state courts previously considered.)

Petitioner's state briefing raised more than a claim to a state law entitlement. "While the petitioner must refer to federal law in state court explicitly, exhaustion is satisfied once the petitioner makes that explicit reference even if the petitioner relies predominantly on state law before the state courts." Insyxiengmay v. Morgan, 403 F.3d at 658. The claim is exhausted.

B. Respondent's Position - Failure to instruct that other crimes must be shown beyond a reasonable doubt.

Petitioner argues that his Sixth, Eighth, and Fourteenth Amendment rights were violated by the court's failure to instruct that other crimes evidence must be shown beyond a reasonable doubt before it can be considered in aggravation. Petitioner contends that as a result his right to be free of an arbitrary deprivation of a state law entitlement was infringed. Petition 136-37. Petitioner's rights were not violated.

Petitioner raised a similar error claim in his AOB at pages 183-89. However, Petitioner did not offer any argument that his right to be free of an arbitrary deprivation of a state law entitlement was infringed. In addition, Petitioner omitted any argument that his interaction with Joanna could be viewed as other crimes evidence, preferring instead to argue only that his possession of guns and the testimony about sex with the victims could be other crimes evidence. As such, these theories are unexhausted and must be deleted, lest the entire petition should be dismissed. Jefferson v. Budge, 419 F.3d at 1016; Carriger v. Lewis, 971 F.2d at 333-34; Pappageorge v. Sumner, 688 F.2d at 1294.

During the meet and confer process, Petitioner argued that: the text at AOB page 189 discusses appellant's constitutional right to a fair and reliable penalty determination and cites Lockett v. Ohio, 438 U.S. 586. Petitioner failed to argue any due process claim based upon his

right to be free from an arbitrary deprivation of a state law entitlement. In addition, Petitioner did not argue that his interaction with Joanna could be viewed as other crimes evidence. Petitioner only argued that the possession of guns and the testimony about sex with the victims could be other crimes evidence. Further, the state high court interpreted and resolved Petitioner's claim based solely upon state law. People v. Cox, 30 Cal.4th at 964. These added references were simply not fairly presented and remain unexhausted here. Fields v. Waddington, 401 F.3d at 1021; Castillo v. McFadden, 399 F.3d at 999, 1003; Hiivala v. Wood, 195 F.3d at 1106.

CLAIM 39

A. Petitioner's Position.

Claim 39 concerns the trial court's erroneous response to the jury's request at the sentencing phase for further information concerning Dr. Edwards's report. The claim was exhausted as it was presented to the California Supreme Court in the state appellate briefing: AOB, at pages 220-229, and the ARB, at pages 54-56.

Respondent maintains that petitioner "raised a similar error claim in his direct opening brief." Answer, 213. Nonetheless, respondent complains that "[p]ortions of this claim are unexhausted." Answer, 20. Respondent maintains: "However, Petitioner did not offer any argument regarding an arbitrary deprivation of a state law entitlement. As such, this theory is unexhausted . . ." Answer, 213.

Once again, the state court record refutes respondent's assertions.

This claim began as Issue XVII in the AOB. The appellate brief argued that the court's failure to properly respond to the jury's request for information violated the due process right to a fair jury trial, and cited to the Sixth and Fourteenth Amendments to the United States Constitution. AOB 225-226. This argument was expanded upon in the brief:

> To the extent that the jurors, or any of them, were prevented by the jury's actions from accurately recalling such evidence regarding Dr. Edwards' report, they were unable to give "'independent mitigating weight' to all relevant evidence proffered by the defendant for that purpose,'" thereby "'creat[ing] the risk that the death penalty [was] imposed in spite of factors which may call for a less severe

> penalty.'" Such a risk "'is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.'" (People v. Brown (1985) 40 Cal. 3d 512, 539, quoting Lockett v. Ohio, supra, 438 U.S. at p. 605.)

AOB at 228.

The arbitrary deprivation of the state law entitlement is a component of the violation of due process. "While the petitioner must refer to federal law in state court explicitly, exhaustion is satisfied once the petitioner makes that explicit reference even if the petitioner relies predominantly on state law before the state courts." Insyxiengmay v. Morgan, 403 F.3d at 658. The claim is exhausted.

B. Respondent's Position - Error regarding the jury's request for information.

Petitioner argues that his Sixth, Eighth, and Fourteenth Amendment rights were violated by the court's failure to properly respond to the jury's request for information. Petitioner contends that as a result his rights to jury trial, due process, a fair trial and an individualized sentencing determination were infringed. Petitioner also contends that he was arbitrarily deprived of a state law entitlement. Petition 143-44. Petitioner's rights were not violated.

Petitioner raised a similar error claim in his AOB at pages 220-29. However, Petitioner did not offer any argument regarding an arbitrary deprivation of a state law entitlement. As such, this theory is unexhausted and must be deleted, lest the entire petition should be dismissed. Jefferson v. Budge, 419 F.3d at 1016; Carriger v. Lewis, 971 F.2d at 333-34; Pappageorge v. Sumner, 688 F.2d at 1294.

During the meet and confer process, Petitioner argued that: the arbitrary deprivation of the state law entitlement is a component of the violation of due process referenced in the AOB at pages 225-26. Petitioner failed to mention his right to be free of an arbitrary deprivation of a state law entitlement was infringed. Further, the state high court interpreted and resolved Petitioner's claim based solely upon state law. People v. Cox, 30 Cal.4th at 967-69. The added reference was simply not fairly presented and remains unexhausted here. Fields v. Waddington, 401 F.3d at 1021; Castillo v. McFadden, 399 F.3d at 999, 1003; Hiivala v. Wood, 195 F.3d at 1106.

CLAIM 49

A. Petitioner's Position.

Claim 49 is a cumulative error claim, with the Petition asserting that the cumulative effect of the many errors and constitutional violations deprived petitioner of a fundamentally fair trial proceeding in violation of due process of law and resulted in an unreliable death judgment.

Respondent asserts that this claim is unexhausted. Answer, 21, 242.

Preliminarily, it is debatable whether a cumulative error claim must be independently exhausted if the other errors raised in the petition are themselves exhausted.[4] Since the Ninth Circuit in Wooten v. Kirkland, 540 F.3d 1019 (9th Cir. 2008), and Solis v. Garcia, 219 F.3d 922 (9th Cir. 2000), appears to have held that a cumulative error claim must be separately and specifically exhausted, petitioner will assume, without conceding, this point.

Petitioner's state counsel asserted a partial "cumulative" error claim in the AOB at pages 179-182, and the ARB at pages 43-46. The AOB specifically noted the federal constitutional nature of the claim, citing the federal due process and fair trial rights, the Fifth and Fourteenth Amendments, and alluding to the heightened reliability requirement of capital cases via the citation to People v. Hogan, 31 Cal.3d at 848. In the ARB, state counsel argued that "[t]he accumulation of the errors in appellant's trial, which combined to support the prosecution case and to denigrate the defendant, resulted in a fundamentally unfair trial." ARB 45. The ARB also attempted to incorporate the habeas corpus petition filed in state court and the assertions raised in that petition. ARB 45-46. In the Traverse to Return to Order to Show Cause, filed November 5, 1988, at page 7, state counsel further made the assertion that:

> [T]he cumulative effect of these errors is alleged to be prejudicial under the state and federal constitutions. . . [citing the Sixth and Fourteenth Amendments]
>
> 7. Petitioner further alleges. . .that all of the denials of due process and effective assistance of counsel which were alleged in the petition and are alleged in this traverse [citations to the Sixth and Fourteenth Amendments] . . . individually and in combination, resulted in a death judgment which is unreliable within the meaning of the Eighth and Fourteenth Amendment to the Unites States Constitution.

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[4] Petitioner reserves the right to assert that exhaustion is not required for a cumulative error claim.

And, additionally, in the Supplemental Petition for Writ of Habeas Corpus filed April 6, 1990, at page 5, state counsel alleged that petitioner's detention under sentence of death was illegal under the Fifth, Sixth, Eighth and Fourteenth Amendments, incorporating "as if fully set forth herein, all of the allegations and exhibits contained in the traverse filed on November 15, 1988, and in the petition filed on February 8, 1988." At page 23, the allegations stated that the ineffective assistance of counsel and suppression of evidence claims "have a prejudicial effect, not only in themselves, but also in conjunction with the errors alleged in the petition. Petitioner must be permitted to show that the cumulative effect of these errors deprived him of a fair trial."

A fair and sensible reading of the state court pleadings reveals that the petitioner's counsel did raise a cumulative error claim and the state court had a fair opportunity to consider the cumulative effect of any errors on the judgment. The claim is exhausted.

B. Respondent's Position - Cumulative error.

Petitioner contends that claims 5, 8, 10, 22-28, 31, and 40 support an argument that he suffered from cumulative error in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights. Petition 260. Petitioner has not exhausted this claim and it should therefore be dismissed. Jefferson v. Budge, 419 F.3d at 1016; Carriger v. Lewis, 971 F.2d at 333-34; Pappageorge v. Sumner, 688 F.2d at 1294.

During the meet and confer process, Petitioner argued that: the cumulative error claim was referenced in the Supplemental Petition for writ of habeas corpus filed April 6, 1990, at pages 5 and 23. Petitioner also stated that he was not conceding that the claim required exhaustion. Those pages simply did not fairly present any cumulative error argument as now advanced. The California Supreme Court merely addressed cumulative evidentiary error arguments advanced by Petitioner below (AOB 179-182). People v. Cox, 30 Cal.4th at 963. There was no cumulative error claim advanced or resolved in the state habeas proceedings. In re Cox, 30 Cal.4th 974 (2003). This cumulative error claim was simply not fairly presented and remains unexhausted here. Fields v. Waddington, 401 F.3d at 1021; Castillo v. McFadden, 399 F.3d at 999, 1003; Hiivala v. Wood, 195 F.3d at 1106.

IV. CONCLUSIONS.

A. PETITIONER'S CONCLUSION.

Petitioner maintains that all claims in the petition are exhausted. The Court should reject Respondent's hyper-technical approach as unsupported and unrealistic.

However, as noted in the "Reservation of Rights" in the Traverse (page 73), should the Court find that some of the claims in the Petition are wholly or partially unexhausted, petitioner reserves his rights to request any appropriate actions by this Court. Dismissal of the petition, without considering a stay and abeyance procedure or allowing petitioner a chance to amend the petition, would be improper. King v. Ryan, 564 F.3d 1133, 1140 (9th Cir. 2009); Jackson v. Roe, 425 F.3d 654, 660-662 (9th Cir. 2005).

B. RESPONDENT'S CONCLUSION.

Based upon the foregoing along with the records before this Court, Respondent respectfully asks that the unexhausted claims and subclaims be deleted or the entire petition should be dismissed.

Dated: March 19, 2012

Respectfully submitted,

DANIEL J. BRODERICK
Federal Defender

/s/ Lissa J. Gardner
LISSA J. GARDNER
Assistant Federal Defender

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Dated: March 19, 2012

Respectfully submitted,

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/s/ R. Todd Marshall
R. TODD MARSHALL
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE

Re: *In re Reno* Case No: S124660

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is 819 Delaware Street, Berkeley, CA 94710.

On April 20, 2012, I served the attached **PETITIONER'S SECOND SUPPLEMENT TO HIS TRAVERSE TO RESPONDENT'S RETURN TO THE SECOND PETITION FOR WRIT OF HABEAS CORPUS AND SUPPORTING EXHIBIT,** by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Berkeley, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, for there is regular communication by mail between the place of mailing and each of the places so addressed.

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I declare under penalty of perjury that the foregoing is true and correct.

Signed on April 20, 2012 at Berkeley, California.

BRIAN C. McCOMAS