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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

CHARLES ANDREW WILLIAMS,  
  
Petitioner,  
  
vs.  
  
STUART J. RYAN, Warden,  
  
Respondent.

Civil No. 05cv0737-WQH (WMc)

**ORDER:**  
  
**(1) DENYING MOTION FOR AN EVIDENTIARY HEARING;**  
  
**(2) DENYING FIRST AMENDED PETITION FOR A WRIT OF HABEAS CORPUS; AND**  
  
**(3) ISSUING A CERTIFICATE OF APPEALABILITY**

**I.**

**INTRODUCTION**

Charles Andrew Williams (hereinafter “Petitioner”), is a California prisoner proceeding by and through counsel with a First Amended Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Doc. No. 69.) Petitioner was fifteen years old on March 5, 2001, when he brought a handgun to the school he attended, Santana High School in Santee, California, and shot fifteen people, killing two and wounding thirteen. He challenges here his San Diego County Superior Court convictions of two counts of premeditated murder and thirteen counts of attempted premeditated murder, entered as a result of a guilty plea, and his sentence of 50 years-to-life in state prison. (First Amended Petition [“FAP”] at 1-2.) He claims that his rights

1 under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution were  
2 violated because his sentence amounts to cruel and unusual punishment, and because he was  
3 denied the effective assistance of counsel at the pre-trial plea stage, at sentencing, and on appeal.  
4 (Id. at 6-9.) Petitioner has also filed a Motion for an Evidentiary Hearing which includes a  
5 request to conduct discovery, and which is accompanied by Petitioner's declaration setting forth  
6 details regarding the advice he received from counsel in connection to his guilty plea which were  
7 not presented to the state court. (Doc. No. 95.)

8 Warden Stuart J. Ryan (hereinafter "Respondent"), has filed an Answer to the First  
9 Amended Petition, accompanied by a Memorandum of Points and Authorities in support thereof,  
10 and has lodged portions of the state court record. (Doc. Nos. 16, 58, 74, 78.) Respondent  
11 contends habeas relief is unavailable because the adjudication of Petitioner's claims by the state  
12 court was neither contrary to, nor involved an unreasonable application of, clearly established  
13 federal law. (Memorandum of Points and Authorities in Support of Answer ["Ans. Mem."] at  
14 1, 11-46.) Respondent opposes Petitioner's evidentiary hearing motion, arguing that this Court  
15 is precluded from holding a hearing because Petitioner failed to develop the facts supporting his  
16 claims in state court, and because he has not stated a colorable claim. (Doc. No. 98.) Petitioner  
17 has filed a Traverse which contains allegations not presented in the First Amended Petition.  
18 (Doc. No. 87.)

## 19 II.

### 20 STATE PROCEEDINGS

21 In a 28-count Information filed in the San Diego County Superior Court on March 7,  
22 2001, Petitioner was charged with two counts of murder in violation of Cal. Penal Code sections  
23 187(a) and 189; thirteen counts of attempted premeditated murder in violation of Cal. Penal  
24 Code sections 187(a), 189 and 664; and thirteen counts of assault with a firearm in violation of  
25 Cal. Penal Code section 245(a)(2). (Lodgment No. 1, Clerk's Tr. ["CT"] at 1-23.) Special  
26 circumstance allegations of lying in wait pursuant to Cal. Penal Code section 190.2(a)(15) and  
27 multiple murders pursuant to Cal. Penal Code section 190.2(a)(3) were included. (CT 6-7.)  
28 Another special circumstance allegation (referred to hereinafter as the "Prop 21 allegation"),

1 alleged that Petitioner was 14 years of age or older at the time of the crimes and personally killed  
2 the victims within the meaning of Cal. Welfare and Institutions Code section 602(b).<sup>1</sup> (Id.)

3 The Information contained sentence enhancement allegations that Petitioner personally  
4 used a handgun, personally discharged a handgun, and personally inflicted great bodily injury  
5 during the commission of all twenty-eight counts, in violation of Cal. Penal Code sections  
6 12022.5(a)(1), 12022.7(a) and 12022.53(c-d). (CT 6-22.) With respect to the thirteen attempted  
7 murder counts, the Information alleged that at the time of the crimes Petitioner was 14 years of  
8 age or older within the meaning of Cal. Welfare and Institutions Code section 707(d)(2), which  
9 allows for discretionary filing of those charges in adult court. (CT 7-16.)

10 Petitioner's appointed trial counsel filed a demurrer contending that the Prop 21 allegation  
11 violated the single subject rule and separation of powers doctrine contained in the state  
12 constitution, as well as the prohibition on cruel and unusual punishment contained in the state  
13 and federal constitutions. (CT 89-111.) The trial court overruled the demurrer in an order filed  
14 on April 27, 2001. (CT 434-50.) On November 28, 2001, a panel of the state appellate court,  
15 over the dissent of one justice, denied an interlocutory petition for a writ of prohibition  
16 challenging the denial of the demurrer. (CT 477-511.) The appellate court's decision became  
17 final when a remittitur issued on May 23, 2002, following the decision of the California  
18 Supreme Court in Manduley v. Superior Court, 27 Cal.4th 537 (Feb. 28, 2002), which upheld  
19 the constitutionality of Proposition 21. (CT 476.)

20 A readiness conference was held on June 20, 2002, at which the parties informed the  
21 court that the information was to be amended and that Petitioner intended to enter a guilty plea  
22 to the murder counts (one and two) and the attempted murder counts (three through fifteen),  
23 without a plea agreement but with the understanding that the assault counts (sixteen through  
24 twenty eight) would necessarily be dismissed as lesser included offenses of the attempted murder  
25 counts. (Lodgment No. 2, Reporter's Tr. ["RT"] at 1-3.) The Information was amended to add

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26  
27 <sup>1</sup> California Welfare and Institutions Code section 602(b) was enacted as a result of Proposition  
28 21, approved by California voters on March 7, 2000. It provides for mandatory filing of murder charges  
in adult court for minors over the age of 14 who personally kill their victims and where one of the  
special circumstances enumerated in California Penal Code section 190.2(a) is alleged.

1 allegations that the murders were willful, premeditated and deliberate, and to strike the lying in  
2 wait special circumstance allegation. (CT 1, 6-7; RT 1-2) The court informed Petitioner that  
3 the maximum sentence he faced was 425 years-to-life in state prison and the minimum sentence  
4 was 50 years-to-life in state prison. (RT 4-6.) The trial judge indicated that based on the  
5 Manduley decision, commitment to the youth authority was not an option, although Petitioner  
6 would not be housed with adults prior to his eighteenth birthday. (RT 4-6.) Petitioner's counsel  
7 represented that Petitioner intended to plead guilty in order to avoid causing "any further pain  
8 to the victims, their families, or his own family." (RT 6.) Petitioner was placed under oath, was  
9 advised of and waived his constitutional rights, and signed and initialed a change of plea form  
10 acknowledging the waiver of those rights. (RT 7-12; CT 512-14.) He entered an unconditional  
11 plea of guilty to the first fifteen counts, admitted the special circumstance and sentence  
12 enhancement allegations with respect to those counts, and stipulated that the police reports  
13 would provide a factual basis for the plea along with his statement that: "At age fifteen, I brought  
14 a gun to school and intentionally shot fifteen people, killing two, and causing great bodily injury  
15 to thirteen others. I did so, willfully, deliberately and with premeditation." (RT 13-18.) The  
16 remaining thirteen counts of assault with a firearm, along with the associated sentence  
17 enhancement allegations, were dismissed as lesser included offenses. (RT 19-20.)

18 Petitioner's counsel filed a sentencing memorandum on August 9, 2002, requesting  
19 dismissal or striking of the Prop 21 allegation in order to have Petitioner remanded to the  
20 juvenile court for sentencing, or in the alternative, the imposition of a sentence of 35 years-to-  
21 life in order to provide for a realistic chance of release on parole. (CT 518-40.) The sentencing  
22 memorandum also requested a judicial determination that a 50 years-to-life sentence would  
23 violate the state and federal prohibitions against cruel and unusual punishment because Petitioner  
24 would not be eligible for parole prior to turning 66 years old, and it would in effect amount to  
25 a sentence of life without parole. (Id.)

26 A lengthy sentencing hearing was held on August 15, 2002. (RT 22-128.) The trial judge  
27 declined to strike the Prop 21 allegation, noting that remanding Petitioner to juvenile court  
28 would result in his being released from custody by the age of 25, which the judge found to be

1 an insufficient period of incarceration given the nature of the crimes. (RT 118-21.) With respect  
2 to the murder counts, Petitioner was sentenced to two concurrent state prison terms of 25 years-  
3 to-life, consecutive to two concurrent 25 years-to-life terms for the firearm use enhancements,  
4 for a total of 50 years-to-life. (RT 127; CT 1311.) He received 13 concurrent indeterminate life  
5 sentences for the attempted murder counts, and 13 concurrent 25 years-to-life terms for the  
6 firearm use enhancements as to those counts. (CT 1311-14, 1319-22.) An additional 39-year  
7 term arising from the great bodily injury enhancements was stayed. (CT 1321-22.)

8         Petitioner appealed his conviction and sentence, arguing that: (1) the trial judge violated  
9 state law by deciding not to remand the case to the juvenile court without ordering a fitness study  
10 to be prepared; (2) the Prop 21 allegation was required to have been stricken as a matter of state  
11 law; (3) the trial judge abused his discretion in refusing to strike the Prop 21 allegation; and  
12 (4) the sentence violated state and federal constitutional prohibitions against cruel and unusual  
13 punishment. (Lodgment No. 3.) The appellate court affirmed in all respects in an unpublished  
14 opinion. (Lodgment No. 5, People v. Williams, No. D040917 (Cal.Ct.App. Jan. 30, 2004).) A  
15 petition for rehearing was summarily denied by the appellate court. (Lodgment Nos. 6-7.)  
16 Petitioner filed a petition for review in the state supreme court presenting only the second claim  
17 raised in the appellate court, based solely on state law. (Lodgment No. 8.) That petition was  
18 denied by an order which stated in full: "Petition for review DENIED." (Lodgment No. 9,  
19 People v. Williams, No. S123169 (Cal. April 14, 2004).)

20         On February 16, 2005, more than two and one-half years after entering his plea, Petitioner  
21 filed a pro se motion to vacate his sentence in the trial court, raising some but not all of the  
22 claims presented in the First Amended Petition here. (Lodgment No. 10.) He claimed that his  
23 plea was not knowing and intelligent due to his age and immaturity, that he would have pled not  
24 guilty by reason of insanity if not for the ineffective assistance of his appointed counsel and the  
25 lack of diligence by the trial judge and prosecutor, and that those issues were not raised on  
26 appeal due to the deficiencies of his appointed appellate counsel. (Id. at 1-4.) The trial court  
27 denied the motion as untimely without reaching the merits of the claims. (Lodgment No. 11,  
28 People v. Williams, No. SCE211823 (Cal.Sup.Ct. Mar. 14, 2005).)



1 and 40 rounds of ammunition. At approximately 9:20 a.m. he entered a restroom  
2 stall and loaded the gun. He emerged and shot two students and a teacher who  
3 were in the restroom. He walked out of the restroom and began shooting  
4 randomly at school staff and students. He re-entered the restroom four times to  
5 reload. Before he was confronted by police officers and surrendered, he had shot  
15 persons. Two of them died. When questioned, appellant stated he shot the  
people because he was “mad at everything.” Appellant stated: “I didn’t want  
anybody to die, but if they did, then oh well.”

6 (Lodgment No. 5, People v. Williams, No. D040917, slip op. at 2.)

7 **IV.**

8 **PETITIONER’S CLAIMS**

9 (1) Petitioner was denied the effective assistance of counsel in violation of the Sixth and  
10 Fourteenth Amendments because his appointed appellate counsel failed to: (a) speak to or  
11 communicate with Petitioner prior to preparing and filing the appellate brief; (b) raise the issue  
12 of ineffective assistance of trial counsel or file a state habeas petition; (c) raise the issue of  
13 Petitioner’s mental state; and (d) raise the issue of trial counsel’s failure to have Petitioner plead  
14 not guilty by reason of insanity. (FAP at 6.)

15 (2) Petitioner was denied the effective assistance of counsel in violation of the Sixth and  
16 Fourteenth Amendments because his appointed trial counsel: (a) permitted entry of a guilty plea  
17 prior to a psychiatric examination; (b) failed to file a motion to suppress statements made during  
18 a police interrogation conducted without the presence of counsel or Petitioner’s parents;  
19 (c) failed to have an MRI examined by experts to determine if Petitioner had diminished brain  
20 capacity and development; and (d) allowed the entry of a guilty plea from a person who could  
21 not have entered into a binding contract due to his age and immaturity. (FAP at 7.)

22 (3) Petitioner was denied the effective assistance of counsel in violation of the Sixth and  
23 Fourteenth Amendments because his appointed trial counsel failed “to explore and present  
24 Petitioner with all options regarding defenses, including diminished capacity, insanity and others  
25 prior to inducing Petitioner to enter a guilty plea,” in that: (a) Petitioner had an underdeveloped  
26 mental capacity; (b) trial counsel failed to thoroughly investigate his mental maturity and the  
27 limitations on his ability to exercise reasoned judgment and control his impulses due to his  
28 youth, including how that may have provided defenses based on insanity, diminished capacity



1 and/or lack of intent; and (c) trial counsel improperly advised him to plead guilty despite his lack  
2 of understanding of the consequences of the plea and the waiver of constitutional rights due to  
3 his youth and physical immaturity. (FAP at 8.)

4 (4) Petitioner's sentence violates the Eighth Amendment's prohibition on cruel and  
5 unusual punishment because Petitioner's culpability was mitigated by his age and immaturity,  
6 and was imposed as a result of counsel's failure to consider expert evidence. (FAP at 9.)

7 **V.**

8 **DISCUSSION**

9 For the following reasons the Court finds that habeas relief is not available with respect  
10 to the claims which were adjudicated on the merits by the state court because an independent  
11 review of the record reveals that the adjudication was neither contrary to, nor involved an  
12 unreasonable application of, clearly established federal law. With respect to the remaining  
13 claims, which were denied by the state court on procedural grounds without reaching the merits,  
14 Petitioner is not entitled to relief because, based on a de novo review, he has not established  
15 constitutionally ineffective assistance of counsel. The Court also denies Petitioner's Motion for  
16 an evidentiary hearing and his related request for discovery because the Court is precluded from  
17 conducting an evidentiary hearing or allowing discovery due to Petitioner's failure to develop  
18 facts supporting his claims in the state court, and, alternately, because neither discovery nor an  
19 evidentiary hearing is needed to resolve any of the claims presented.

20 **A. Standard of Review.**

21 Title 28, United States Code, § 2254(a), sets forth the following scope of review:

22 The Supreme Court, a Justice thereof, a circuit judge, or a district  
23 court shall entertain an application for a writ of habeas corpus in  
24 behalf of a person in custody pursuant to the judgment of a State  
25 court only on the ground that he is in custody in violation of the  
Constitution or laws or treaties of the United States.

26 28 U.S.C.A. § 2254(a) (West 2006) (emphasis added).

27 As discussed in detail below, there are two categories of claims presented in the First  
28 Amended Petition. These include claims which were adjudicated on the merits by the state court  
and claims which the state court declined to consider on the merits because they were untimely.



1 With respect to the claims which were adjudicated on their merits, Title 28, United States Code,  
2 § 2254(a), as amended by the Anti-terrorism and Effective Death Penalty Act of 1996  
3 (“AEDPA”), Pub. L. No. 104-132, 110 Stat. 1214, provides that:

4 (d) An application for a writ of habeas corpus on behalf of a  
5 person in custody pursuant to the judgment of a State court shall not  
6 be granted with respect to any claim that was adjudicated on the  
7 merits in State court proceedings unless the adjudication of the  
8 claim—

9 (1) resulted in a decision that was contrary to, or involved an  
10 unreasonable application of, clearly established Federal law, as  
11 determined by the Supreme Court of the United States; or

12 (2) resulted in a decision that was based on an unreasonable  
13 determination of the facts in light of the evidence presented in the  
14 State court proceeding.

15 28 U.S.C.A. § 2254(d) (West 2006).

16 A state court’s decision may be “contrary to” clearly established Supreme Court  
17 precedent: (1) “if the state court applies a rule that contradicts the governing law set forth in [the  
18 Court’s] cases” or (2) “if the state court confronts a set of facts that are materially  
19 indistinguishable from a decision of [the] Court and nevertheless arrives at a result different from  
20 [the Court’s] precedent.” Williams v. Taylor, 529 U.S. 362, 405-06 (2000). A state court  
21 decision may involve an “unreasonable application” of clearly established federal law, “if the  
22 state court identifies the correct governing legal rule from this Court’s cases but unreasonably  
23 applies it to the facts of the particular state prisoner’s case.” Id. at 407. An unreasonable  
24 application may also be found, “if the state court either unreasonably extends a legal principle  
25 from [Supreme Court] precedent to a new context where it should not apply or unreasonably  
26 refuses to extend that principle to a new context where it should apply.” Id.

27 “[A] federal habeas court may not issue the writ simply because the court concludes in  
28 its independent judgment that the relevant state-court decision applied clearly established federal  
law erroneously or incorrectly. . . . Rather, that application must be objectively unreasonable.”  
Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003) (internal quotation marks and citations omitted).  
Clearly established federal law “refers to the holdings, as opposed to the dicta, of [the United  
States Supreme] Court’s decisions.” Taylor, 529 U.S. at 412. Habeas relief is also available if

1 the state court's adjudication of a claim "resulted in a decision that was based on an  
2 unreasonable determination of the facts in light of the evidence presented in state court." 28  
3 U.S.C.A. § 2254(d)(2) (West 2006). In order to satisfy this provision, Petitioner must  
4 demonstrate that the factual findings upon which the state court's adjudication of his claims rest,  
5 assuming it rests on a factual determination, are objectively unreasonable. Miller-El v. Cockrell,  
6 537 U.S. 322, 340 (2003).

7 The second category of claims presented here are those that were not addressed on the  
8 merits by the state court because they were rejected on procedural grounds as untimely. Because  
9 these claims were not adjudicated on the merits in the state court, AEDPA deference does not  
10 apply and the Court must conduct a de novo review of those claims.<sup>3</sup> Killian v. Poole, 282 F.3d  
11 1204, 1208 (9th Cir. 2002). Although AEDPA deference does not apply to these claims, the  
12 Court must remain mindful that "judgments of conviction and sentence carry a presumption of  
13 finality and legality and may be set aside only when a state prisoner carries his burden of proving  
14 that [his] detention violates the fundamental liberties of the person, safeguarded against state  
15 action by the Federal Constitution." Hayes v. Brown, 399 F.3d 972, 978 (9th Cir. 2005) (en  
16 banc).

## 17 **B. Claim Two**

18 The Court will begin its analysis with the allegations of ineffective assistance of trial  
19 counsel presented in claims two and three, as these claims inform the disposition of the claims  
20 of ineffective assistance of appellate counsel presented in claim one. Petitioner contends in  
21 claim two that he was denied the effective assistance of counsel in violation of the Sixth and  
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23 <sup>3</sup> Such claims are likely procedurally defaulted in this Court, ordinarily requiring Petitioner to  
24 demonstrate, prior to the Court addressing the merits of the claims, cause and prejudice to overcome the  
25 default or that a fundamental miscarriage of justice would result from the Court's refusal to address the  
26 merits of the claims. See Coleman v. Thompson, 501 U.S. 722, 752 (1991). However, Respondent has  
27 waived the affirmative defense of procedural default by failing to raise it in the Answer. Morrison v.  
28 Mahoney, 399 F.3d 1042, 1046-47 (9th Cir. 2005). Petitioner could show cause to excuse a default by  
establishing constitutionally ineffective assistance of counsel in failing to raise the claims on appeal,  
as he has alleged in claim one. See Murray v. Carrier, 477 U.S. 478, 488 (1986). As set forth below,  
however, Petitioner has not established constitutionally ineffective assistance of appellate counsel as  
a result of failing to raise the claims on appeal. Nor has Petitioner identified any other basis for finding  
cause to excuse a default. Thus, whether the claims are procedurally defaulted or considered on their  
merits does not affect the outcome of this action.

1 Fourteenth Amendments because his appointed trial counsel: (1) permitted entry of a guilty plea  
2 prior to a psychiatric examination; (2) failed to file a motion to suppress statements made by  
3 Petitioner during a police interrogation conducted outside the presence of counsel or his parents;  
4 (3) failed to have an MRI examined by experts to determine if Petitioner had diminished brain  
5 capacity and development; and (4) allowed the entry of a guilty plea from a person who could  
6 not have entered into a binding contract due to his age and immaturity. (FAP at 7.)

7 Respondent replies that claim two should be denied as vague and speculative in that  
8 Petitioner has failed to provide any supporting facts for this claim, including whether and to what  
9 extent he was advised by counsel in connection to his plea, whether and to what extent his  
10 parents were contacted prior to the interrogation or made any attempt to participate, and where,  
11 when or by whom the MRI was performed, whether it was available to counsel and what it  
12 revealed about his brain development. (Ans. Mem. at 22-32.) Respondent contends that this  
13 claim relies on speculation that the guilty plea was based on advice of counsel or somehow  
14 induced by counsel, when in fact the record discloses that Petitioner pled guilty without a plea  
15 agreement in order to take responsibility for his actions and to bring closure to the events. (Id.  
16 at 32.) Respondent also argues that even to the extent the claim should be addressed on its  
17 merits, the adjudication of the claim by the state court was neither contrary to, nor involved an  
18 unreasonable application of, clearly established federal law, because Petitioner is unable to  
19 demonstrate that the performance of counsel was deficient or that he was prejudiced by the  
20 alleged mistakes of counsel as required by controlling federal authority. (Id. at 23-34.) As  
21 discussed in detail below, Petitioner replies to Respondent's contention regarding the lack of  
22 supporting facts by submitting his own declaration in support of the Motion for an Evidentiary  
23 Hearing, in which he sets forth, at least in part, the advice he received from counsel regarding  
24 the plea. (Evid. Hr'g Mot., Ex. A, Pet.'s Decl. at ¶ 4.)

25 Petitioner presented the second and third aspects of claim two, absent his declaration, to  
26 the state supreme court in a habeas petition. (Lodgment No. 16 at 19, 23.) The state supreme  
27 court denied the petition without citation of authority or a statement of reasoning. (Lodgment  
28 No. 17.) Such a silent denial is ordinarily considered to be a decision on the merits of the claims.

1 Hunter v. Aispuro, 982 F.2d 344, 347-48 (9th Cir. 1992). There is an overriding presumption,  
2 however, that a silent denial adopts the reasoning of the last reasoned state court decision, even  
3 if the last state court decision relied on or imposed a procedural bar. Ylst v. Nunnemaker, 501  
4 U.S. 797, 803 (1991) (“[W]here, as here, the last reasoned opinion on the claim explicitly  
5 imposes a procedural default, we will presume that a later decision rejecting the claim did not  
6 silently disregard that bar and consider the merits.”)

7         Petitioner presented a claim of ineffective assistance of trial counsel to the state appellate  
8 court in his petition for writ of coram vobis, alleging that his trial counsel: (1) allowed entry of  
9 a guilty plea prior to a full psychiatric examination; (2) failed to move to suppress a transcribed  
10 interrogation; (3) failed to obtain parental approval prior to entry of the guilty plea from a minor  
11 who lacked legal standing to enter a binding contract; and (4) improperly limited the appeal by  
12 the manner in which counsel filled out the appeal form. (Lodgment No. 12.) Petitioner argued  
13 that the recent opinion in Roper v. Simmons, and in particular an amicus curiae brief filed by the  
14 American Medical Association (“AMA”) in that case which identifies expert opinions related  
15 to adolescent brain development as it relates to criminal culpability, supported his claim that  
16 Petitioner’s mental capacity and its relation to his culpability had been overlooked by his  
17 counsel, the trial judge and the prosecutor. (Id. at 1-5.) That petition was summarily denied  
18 without a statement of reasoning. (Lodgment No. 13 at 1-4.) Petitioner presented the same  
19 claims to the trial court in a motion to vacate his sentence, absent any citation to Roper or its  
20 amicus brief, and his motion was denied as untimely. (Lodgment Nos. 10-11.) Thus, subparts  
21 one, two and four of claim two (absent the allegations regarding Roper and Petitioner’s  
22 declaration) were raised in the trial court, denied on procedural grounds, and silently denied by  
23 the state appellate and supreme courts, whereas the third aspect of claim two (absent Petitioner’s  
24 declaration) was raised only in the state supreme court and silently denied.

25         With respect to the first, second and fourth subparts of claim two which do not rely on  
26 Petitioner’s declaration or the Roper materials, the Court will look through the silent denial by  
27 the state supreme court to the last reasoned state court decision which addressed those aspects  
28 of the claims, the trial court’s order denying them as untimely. Therefore, as to these aspects of

1 those subparts of claim two, the Court will conduct a de novo review in order to determine  
2 whether Petitioner received constitutionally ineffective assistance of counsel. Killian, 282 F.3d  
3 at 1208. With respect to the third subpart of claim two, as well as those aspects of subparts one,  
4 two and four which rely on Petitioner’s declaration or the Roper materials, there is no decision  
5 by any state court which articulates its reasoning for denying the claims. As such, this Court  
6 must conduct an independent review of the record to determine whether the silent denial of those  
7 aspects of claim two by the state supreme court was contrary to, or involved an unreasonable  
8 application of, clearly established federal law. See Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th  
9 Cir. 2002) (holding that when the state court reaches the merits of a claim but provides no  
10 reasoning to support its conclusion, “although we independently review the record, we still defer  
11 to the state court’s ultimate decision.”); Greene v. Lambert, 288 F.3d 1081, 1089 (9th Cir. 2002)  
12 (“(W)hile we are not required to defer to a state court’s decision when that court gives us nothing  
13 to defer to, we must still focus primarily on Supreme Court cases in deciding whether the state  
14 court’s resolution of the case constituted an unreasonable application of clearly established  
15 federal law.”)<sup>4</sup>

16 \_\_\_\_\_  
17 <sup>4</sup> Although Petitioner’s declaration was not presented to the state supreme court, it does not  
18 render any claims which rely upon it unexhausted. The exhaustion requirement is satisfied, “if it is clear  
19 that (the habeas petitioner’s) claims are now procedurally barred under (state) law.” Gray v. Netherland,  
20 518 U.S. 152, 161 (1996), quoting Castille v. Peoples, 489 U.S. 346, 351 (1989); Engle v. Isaac, 456  
21 U.S. 107, 125-26 n.28 (1982) (noting that the exhaustion requirement applies “only to remedies still  
22 available at the time of the federal petition.”); Valerio v. Crawford, 306 F.3d 742, 770 (9th Cir. 2002)  
23 (same), citing Phillips v. Woodford, 267 F.3d 966, 974 (9th Cir. 2001) (“the district court correctly  
24 concluded that [the] claims were nonetheless exhausted because ‘a return to state court for exhaustion  
25 would be futile.’”). “A habeas petitioner who has defaulted his federal claims in state court meets the  
26 *technical* requirements for exhaustion; there are no state remedies any longer ‘available’ to him.”  
27 Cassett v. Stewart, 406 F.3d 614, 621 n.5 (9th Cir. 2005) (quoting Coleman v. Thompson, 501 U.S. 722,  
28 732 (1991)). It appears clear that Petitioner has satisfied the technical requirements of exhaustion with  
respect to any aspect of claim two not presented to the state courts because he no longer has state court  
remedies available. Any attempt by Petitioner to return to state court at this time in order to seek further  
post-conviction relief based on the allegations contained in his declaration would certainly meet with  
the imposition of a procedural bar. See In re Robbins, 18 Cal.4th 770, 788 n.9 (1998) (In re Clark  
“serves to notify habeas corpus litigants that we shall apply the successiveness rule when we are faced  
with a petitioner whose prior petition was filed after the date of finality of *Clark*.”), see also In re Clark,  
5 Cal.4th 750, 797-98 (1993) (“the general rule is still that, absent justification for the failure to present  
all known claims in a single, timely petition for writ of habeas corpus, successive and/or untimely  
petitions will be summarily denied,” and describing the “fundamental miscarriage of justice” exception  
to that rule). In any case, as discussed throughout this Order, the aspects of Petitioner’s claims which  
rely on his declaration are without merit, and the exhaustion requirement is generally inapplicable to  
such claims. Acosta-Huerta v. Estelle, 7 F.3d 139, 142 (9th Cir. 1982).

1 For ineffective assistance of counsel to provide a basis for habeas relief, Petitioner must  
2 first show that counsel's performance was deficient. Strickland v. Washington, 466 U.S. 668,  
3 687 (1984). "This requires showing that counsel made errors so serious that counsel was not  
4 functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. "The  
5 reasonableness of counsel's actions may be determined or substantially influenced by the  
6 defendant's own statements or actions." Id. at 691. A defendant's intention to plead guilty can  
7 mitigate, although not eliminate, an attorney's duty to reasonably investigate. See Langford v.  
8 Day, 110 F.3d 1380, 1386-88 (9th Cir. 1996).

9 Petitioner must also demonstrate that counsel's deficient performance prejudiced the  
10 defense. Strickland, 466 U.S. at 687. In the context of a guilty plea, prejudice requires a  
11 showing that "there is a reasonable probability that, but for counsel's errors, [Petitioner] would  
12 not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S.  
13 52, 59 (1985). A reasonable probability in this context is "a probability sufficient to undermine  
14 confidence in the outcome." Strickland, 466 U.S. at 694.

15 **1) Entry of a guilty plea prior to a psychiatric examination**

16 Petitioner first contends that he received ineffective assistance of counsel because he was  
17 permitted to enter a guilty plea prior to a psychiatric examination, which he alleges denied him  
18 "a possible plea of not guilty by reason of insanity and/or lack of adult culpability due to age and  
19 undeveloped mental status." (FAP at 7.) Respondent argues that trial counsel's performance  
20 was not deficient because, assuming the plea was entered based on advice of counsel, counsel  
21 was fully aware of the facts and circumstances of the crimes, including the status of Petitioner's  
22 mental health, his age and immaturity, and Petitioner expressed a desire to accept responsibility  
23 for his actions and prevent further trauma to the victims, a factor counsel used, along with  
24 Petitioner's age and immaturity, to procure the lowest possible sentence. (Ans. Mem. at 24.)  
25 Respondent contends that Petitioner has failed to allege a single fact which was known or should  
26 have been known to counsel prior to entry of the guilty plea which would have led a reasonable  
27 attorney to believe a psychiatric examination may have revealed that Petitioner possessed a  
28 diminished capacity defense or was eligible to be handled by the juvenile court system. (Id.)



1           Petitioner admits that his trial counsel had him examined by a psychiatrist, who diagnosed  
2 him as suffering from “Major Depressive Disorder, recurrent, severe without psychotic features,  
3 Cannabis Dependence and Attention Deficit Hyperactivity Disorder not otherwise specific.”  
4 (Traverse at 18-19.) Although not alleged in the First Amended Petition, he contends in his  
5 Traverse, as he did in the state court, that “[t]here was no psychiatric examination for the express  
6 purpose of assessing diminished capacity and/or insanity prior to the plea and that is the basis  
7 of the ineffective assistance of counsel as it relates to these defenses.” (Id. at 19.)

8           The claim in the First Amended Petition that trial counsel allowed Petitioner to enter a  
9 guilty plea without first obtaining a psychiatric examination is without merit on its face because  
10 Petitioner admits that trial counsel arranged for just such an examination. The Probation  
11 Officer’s Report indicates that Dr. Charles Scott, a psychiatrist and medical doctor employed as  
12 the Clinical Director of Psychiatry at the University of California-Davis, evaluated Petitioner at  
13 the request of defense counsel. (CT 1195.) A copy of Dr. Scott’s lengthy and detailed written  
14 evaluation is attached to the sentencing memorandum filed by Petitioner’s counsel, and begins  
15 by stating:

16           At the request of his attorneys, I conducted a psychiatric evaluation of Andrew  
17 Williams to determine the presence, if any, of a psychiatric disorder. In addition,  
18 I was asked to evaluate why Andy shot and killed two students and injured 13  
19 other individuals at Santana High School on March 5, 2001. I also reviewed  
Andy’s insight and understanding regarding his actions on March 5, 2001, his  
empathy towards the victims and their families, as well as his risk of future  
dangerousness and potential psychiatric treatment needs.

20 (CT 685-752.)

21           The report states that Dr. Scott spent more than fourteen hours personally interviewing  
22 Petitioner during four meetings in March and August of 2001, well before Petitioner’s June 20,  
23 2002, guilty plea. (CT 716.) Dr. Scott diagnosed Petitioner as suffering from depression,  
24 cannabis dependence and attention deficit disorder, but “without psychotic features.” (CT 708.)  
25 Thus, Petitioner’s contention that he was permitted to enter a guilty plea prior to a psychiatric  
26 examination is entirely without merit.

27           Petitioner indicates in his Traverse that Dr. Scott’s report contains statements by  
28 Petitioner that he felt like he was “going through the motions” and experienced the event “as if



1 he was watching it from afar.” (Traverse at 19.) He contends that Dr. Scott’s diagnosis of  
2 depression, coupled with these “descriptions of classic dissociation,” should have alerted  
3 Petitioner’s counsel to obtain another “psychiatric examination for the expressed purpose of  
4 assessing diminished capacity and/or insanity prior to the plea.” (*Id.*) To the extent Petitioner  
5 is presenting a new claim in the Traverse which was not presented in the First Amended Petition,  
6 the Court has the discretion to consider it or refuse to consider it because Petitioner was  
7 specifically warned in this Court’s February 26, 2009, Order directing a response to the First  
8 Amended Petition [Doc. No. 71] that his Traverse “shall not raise new grounds for relief that  
9 were not asserted” in the First Amended Petition. See *Cacoperdo v. Demosthenes*, 37 F.3d 504,  
10 507 (9th Cir. 1994) (stating that court may ignore issue raised for first time in traverse when  
11 scope of traverse has been specifically limited by court order and petitioner ignores order to file  
12 a separate pleading indicating intent to raise claim); but see *Boardman v. Estelle*, 957 F.2d 1523,  
13 1525 (9th Cir. 1992) (holding that district court erred in failing to address issue raised in  
14 traverse). The Court will exercise its discretion to consider this aspect of claim two because  
15 allegations that Petitioner was not adequately diagnosed prior to entering his guilty plea are  
16 intertwined with, and inform the resolution of, his other claims.

17 Petitioner has failed to show that Dr. Scott’s psychiatric examination was conducted for  
18 some purpose other than identifying possible mental health defenses, or that his diagnosis was  
19 not accurate or complete. Neither has Petitioner shown that it was in any manner unreasonable  
20 for counsel to rely on Dr. Scott’s diagnosis. As discussed below, Petitioner’s reliance on the  
21 Supreme Court’s decision in *Roper* and the materials submitted by the AMA as amicus in  
22 support of that case does not establish that further psychiatric testing was necessary, does not  
23 provide evidence that Petitioner had any viable mental health defenses available to him, and does  
24 not in any manner call into question Dr. Scott’s diagnosis that Petitioner was free from  
25 psychosis. Thus, Petitioner has not shown that counsel acted unreasonably in failing to procure  
26 a second opinion. Moreover, the record clearly indicates that Petitioner wished to plead guilty  
27 in order to avoid causing “any further pain to the victims, their families, or his own family.” (RT  
28 6.) Petitioner’s stated desire to plead guilty mitigated counsel’s duty to procure further

1 psychiatric opinions, to the extent such a duty existed. Langford, 110 F.3d at 1386-88. Thus,  
2 Petitioner has not established deficient performance in this regard.

3         Neither has Petitioner provided any factual basis for establishing prejudice from counsel's  
4 failure to insist on further psychiatric testing. Petitioner merely speculates that further testing  
5 might have provided a basis for a diminished capacity defense, or a basis for him to be sentenced  
6 in juvenile court. (FAP at 7.) Speculative and conclusory allegations are insufficient to prove  
7 that counsel provided ineffective assistance. Blackledge v. Allison, 431 U.S. 63, 74 (1977);  
8 James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994). As discussed below, Petitioner has failed to  
9 establish that a plea of not guilty by reason of insanity, or any type of diminished capacity  
10 defense, was a viable option for him. In addition, the trial judge was clear in his reasons for  
11 refusing to allow Petitioner to be sentenced in juvenile court, indicating that an abbreviated  
12 sentence would not be proportional to the crimes, and that he was in any case precluded from  
13 doing so by controlling California Supreme Court authority. (RT 4-6, 118-21.) The trial judge  
14 was provided with a lengthy sentencing memorandum by Petitioner's counsel which included  
15 Dr. Scott's report containing the psychiatric examination results, as well as detailed information  
16 regarding Petitioner's personal history, along with a request to have Petitioner sentenced in  
17 juvenile court. (CT 518-76.) As the appellate court noted, however, as long as any of  
18 Petitioner's convictions or firearm use findings were left in place he was not eligible for  
19 commitment to the California Youth Authority. (Lodgment No. 5, People v. Williams, No.  
20 D040917, slip op. at 17-18.) Thus, Petitioner has not demonstrated that there is a reasonable  
21 probability that he would not have pled guilty and would have insisted on going to trial but for  
22 counsel's failure to procure an additional psychiatric evaluation. Hill, 474 U.S. at 59. Based on  
23 a de novo review, it is clear that Petitioner has not shown he received constitutionally ineffective  
24 assistance of counsel in this regard, as he has demonstrated neither deficient performance nor  
25 prejudice. Id.; Strickland, 466 U.S. at 687, 691.

## 26         **2) Failure to move to suppress interrogation**

27         Petitioner next contends that his trial counsel was ineffective for failing to move to  
28 suppress statements Petitioner made to the police during an interrogation conducted without the

1 presence of counsel or his parents. (FAP at 7.) Respondent argues that Petitioner has failed to  
2 provide a factual basis for this claim in that he does not allege whether his counsel or parents  
3 were contacted prior to the interrogation, whether he was given the choice of having them  
4 present, or whether they made any effort to be present. (Ans. Mem. at 26.) Respondent also  
5 contends that counsel reasonably determined that a suppression motion would fail and that no  
6 prejudice resulted from not filing the motion. (Id. at 26-27.)

7 Petitioner replies that a motion to suppress might have been successful, that the statement  
8 contained devastating evidence against him and was one of the reasons he pled guilty, and that  
9 if the statement had been suppressed he might not have pled guilty or might have been offered  
10 a more favorable plea. (Traverse at 15-16.) In his declaration attached to the Motion for an  
11 Evidentiary Hearing, Petitioner states that Ron Bobo, one of the two Deputy Public Defenders  
12 appointed to represent him, “told me he could get my statement to the police excluded from  
13 evidence because my father was not present. However, neither he nor Mr. [Randy] Mize brought  
14 a motion to exclude it.” (Evid. Hr’g Mot., Ex. A, Pet.’s Decl. ¶ 5.)

15 The record contains a copy of the transcript of Petitioner’s police interrogation, which  
16 was conducted a few hours after the shooting. (CT 847-97.) Petitioner was twice informed,  
17 prior to the beginning of questioning, that he had the right to remain silent and that anything he  
18 said could be held against him in court, was twice informed that he had the right to the presence  
19 of an attorney during questioning and that an attorney would be appointed if he could not afford  
20 one, and twice indicated he understood those rights and was willing to speak to the detectives.  
21 (CT 848-49; 853-54.) A determination as to the validity of Petitioner’s waiver of his Miranda<sup>5</sup>  
22 rights requires an analysis of the totality of the circumstances surrounding the waiver. Fare v.  
23 Michael C., 442 U.S. 707, 724-25 (1979). The lack of parental notification is one of the factors  
24 to be considered in assessing the voluntariness of a juvenile’s confession or the waiver of his or  
25

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26 <sup>5</sup> Miranda v. Arizona, 384 U.S. 436, 479 (1966) (holding that in order for a statement made  
27 during custodial interrogation to be admitted into evidence, a suspect “must be warned prior to any  
28 questioning that he has the right to remain silent, that anything he says can be used against him in a  
court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney  
one will be appointed for him prior to any questioning if he so desires.”)

1 her rights during an interrogation. U.S. v. Doe, 155 F.3d 1070, 1075 (9th Cir. 1998). In  
2 addition, the Supreme Court “has emphasized that admissions and confessions of juveniles  
3 require special caution.” In re Gault, 387 U.S. 1, 45 (1967).

4 The Court need not determine whether a motion to suppress would have been successful  
5 in order to determine whether counsel’s decision to advise Petitioner without filing a suppression  
6 motion ““was within the range of competence demanded of attorneys in criminal cases.”” Hill,  
7 474 U.S. at 56, (quoting McMann v. Richardson, 397 U.S. 759, 771 (1990)). Petitioner states  
8 in his declaration that his attorney was prepared to file a motion to suppress and was confident  
9 that the statements would be suppressed. (Evid. Hr’g Mot., Ex. A, Pet.’s Decl. ¶ 5.) As such,  
10 any contention that counsel’s advice to plead guilty was made with a mistaken belief by counsel  
11 that the statements would not be suppressed is without merit. Likewise, any contention that  
12 Petitioner entered his guilty plea based on the belief that the statements would be used against  
13 him at trial is also without merit. It was Petitioner’s decision to plead guilty which rendered the  
14 filing of a suppression motion unnecessary, and Petitioner has not shown deficient performance  
15 arising from the failure of his counsel to file the motion. Strickland, 466 U.S. at 69 (“[The]  
16 reasonableness of counsel’s actions may be determined or substantially influenced by the  
17 defendant’s own statements or actions.”); Langford, 110 F.3d at 1386-88 (petitioner failed to  
18 demonstrate ineffective assistance of counsel based on a failure to file suppression motion where  
19 he insisted on pleading guilty). Neither can Petitioner demonstrate prejudice, as he was told by  
20 counsel that the statements would be suppressed if such a motion was filed. As such, he has  
21 failed to show a reasonable probability that he would not have pled guilty and would have  
22 insisted on going to trial but for counsel’s failure to actually file the motion. Hill, 474 U.S. at  
23 59. Based on a de novo review of this aspect of claim two, Petitioner has not established  
24 constitutionally ineffective assistance of counsel. Id.; Strickland, 466 U.S. at 687, 691.

### 25 **3) Failure to have MRI examined by an expert**

26 Petitioner next contends that trial counsel failed to “have an available MRI examined by  
27 experts to determine if Petitioner had diminished capacity of brain development as a 15 year  
28 old.” (FAP at 7.) Respondent counters that Petitioner has failed to present a factual basis for

1 this claim in that he does not allege when, where or by whom the MRI was performed, when it  
2 became available or whether his attorney knew or should have known of its existence, and does  
3 not specify if the MRI applies to his plea or sentence, nor what if anything it revealed about his  
4 brain development. (Ans. Mem. at 31.) Petitioner replies simply that counsel should have had  
5 the MRI examined to determine if any physical evidence of lack of brain development might  
6 have been discernable, so as to potentially serve as a mitigating factor in sentencing or as a  
7 defense at trial. (Traverse at 21.) He states in his declaration that: “Within one month of my  
8 arrest I was taken to Children’s Hospital where an MRI was taken of my brain. Neither of my  
9 attorneys spoke to me about the results of the MRI nor did they present it to any expert physician  
10 or other person for analysis.” (Pet.’s Dec. ¶ 6.)

11 This claim relies on speculation that the MRI provides insight into Petitioner’s condition  
12 as it relates to his ability to enter a guilty plea or his level of culpability for his crimes. Even if  
13 it could be shown to contain such information, Petitioner has failed to demonstrate that it was  
14 not among the medical records reviewed by Dr. Scott. The psychiatric report prepared by Dr.  
15 Scott indicates that Petitioner’s medical history and records were examined, and revealed that  
16 although Petitioner had a history of head trauma, he “did not have a history of seizures, serious  
17 head trauma, loss of consciousness, coma nor any other serious medical condition.” (CT 693,  
18 708, 739.) Thus, the record is clear that at the request of counsel, Petitioner’s medical records  
19 were examined by Dr. Scott, M.D., the Chief of the Forensic Psychiatry Division at the  
20 University of California-Davis, and Petitioner has failed to establish that the MRI was not part  
21 of that examination. Neither has Petitioner presented any evidence, here or to the state courts,  
22 that assuming the MRI was not part of his medical records reviewed by Dr. Scott it actually  
23 reveals something relevant to his ability to present a mental health or diminished capacity  
24 defense. As such, there is nothing in the record to support a claim of deficient performance or  
25 prejudice with respect to the MRI. See Wildman v. Johnson, 261 F.3d 832, 839 (9th Cir. 2001)  
26 (speculation that counsel could have retained an expert does not establish prejudice where there  
27 was no evidence that an expert would testify favorably to petitioner). Accordingly, based on an  
28 independent review of the record, it is clear that the state supreme court’s silent denial of this

1 claim was neither contrary to, nor involved an unreasonable application of, clearly established  
2 federal law. Hill, 474 U.S. at 59; Strickland, 466 U.S. at 687, 691.

3         Petitioner contends that if an evidentiary hearing is held he would call a number of the  
4 experts listed in the AMA's amicus curiae brief filed in the Roper case "to testify to their  
5 expertise regarding juveniles and their brain development, MRI evidence, and their maturity and  
6 restricted ability to make judgments all as it relates to culpability and appropriate punishment  
7 with focus on Petitioner and the sentence he received in the present case." (Evid. Hr'g Mot. at  
8 10.) Petitioner indicates that an evidentiary hearing would serve to develop the record with  
9 respect to evidence contained in the AMA amicus brief which the Roper Court relied on to  
10 recognize general differences between juveniles and adults, including: (1) the lack of maturity  
11 and an underdeveloped sense of responsibility which often result in impetuous and ill-considered  
12 actions; and (2) a heightened vulnerability to outside influences, including peer pressure. (Id.  
13 at 9-10.) Petitioner has attached as exhibits to his original Petition filed in this action a copy of  
14 the AMA amicus brief, along with a report of the American Bar Association on adolescent brain  
15 development as it relates to legal culpability, and an article from the National Institute of Mental  
16 Health containing a brief overview of research into brain development during adolescence. (Pet.  
17 Exs. [Doc. No. 3] 8-10.)

18         Respondent replies that the Roper materials were known to, considered by, and taken for  
19 granted by trial counsel and every court to which Petitioner has presented his claims, and that  
20 they merely stand for the obvious and undisputed principle that juveniles, as a general rule, are  
21 immature, more susceptible to peer pressure, lack impulse control and have incomplete character  
22 development, all of which affect their judgment and decision making and are appropriate factors  
23 to be considered in assessing their culpability. (Ans. Mem. at 36.) Respondent also contends  
24 that this information was in fact presented to the trial court by Petitioner's counsel in the  
25 sentencing memorandum and was the basis for procuring the lowest possible sentence to which  
26 Petitioner was exposed. (Id.)

27         In presenting his claim to the state appellate court in the coram vobis petition, Petitioner  
28 contended that the MRI was taken shortly after he committed the crimes, "so there is evidence

1 frozen in time within the prosecution's and lower court's custody which can be submitted for  
2 an expert opinion." (Lodgment No. 12 at 2.) He alleged that the AMA's amicus curiae brief in  
3 Roper sets out expert opinions and descriptions of normal adolescent brain development, and  
4 contains conclusions of the National Institute of Mental Health and the Laboratory of Neuro  
5 Imaging at the University of California Los Angeles that "intellectual maturity, the age of  
6 reason, does not arrive until age 25." (Id. at 1-2.) When presenting the claim to the state  
7 supreme court in the habeas petition, Petitioner merely alleged that counsel had not provided the  
8 MRI to an expert for examination, and referred to the claim as presented in the coram vobis  
9 petition. (Lodgment No. 16 at 23.)

10 Petitioner did not provide the state court, just as he has not provided this Court, with  
11 evidence demonstrating that the results of the MRI actually support a finding that he had an  
12 overlooked mental health defense, that it was not among his medical records referenced in Dr.  
13 Scott's report, or that it in any way calls into question Dr. Scott's diagnosis. Petitioner has  
14 therefore failed to develop in the state courts facts supporting the MRI aspect of claim two. See  
15 Baja v. Ducharme, 187 F.3d 1075, 1079 (9th Cir. 1999) (holding that petitioner had failed to  
16 develop a factual basis for his claim in state proceedings because he had the opportunity to come  
17 forward with affidavits and other evidence in support of his ineffective assistance claim but  
18 failed to do so); see also Williams v. Taylor, 529 U.S. 420, 435 (finding that diligence in  
19 developing the record in state court "depends upon whether the prisoner made a reasonable  
20 attempt, in light of the information available at the time, to investigate and pursue claims in state  
21 court."). As a result, Petitioner's request for an evidentiary hearing is subject to the requirements  
22 of 28 U.S.C. § 2254(e)(2), which provides that where a federal habeas petitioner has failed to  
23 develop the factual basis for his claim in the state court, this Court shall not hold an evidentiary  
24 hearing unless Petitioner shows that the claim: (1) rests on a new rule of constitutional law made  
25 retroactive to cases on collateral review by the Supreme Court, or (2) is based on a factual  
26 predicate that could not have been previously discovered through the exercise of due diligence  
27 and the facts underlying the claim would be sufficient to establish by clear and convincing  
28 evidence that but for the constitutional error no reasonable factfinder would have found



1 Petitioner guilty of the underlying offense. Bragg v. Galaza, 242 F.3d 1082, 1089-90 (9th Cir.  
2 2001); 28 U.S.C. § 2254(e)(2). To the extent Petitioner seeks discovery in order to develop  
3 factual support for this aspect of claim two (see Evid. Hr’g Mot. at 13), such a request is also  
4 subject to the requirement of § 2254(e)(2). Holland v. Jackson, 542 U.S. 649, 653 (2004). In  
5 addition, mere speculation that the MRI might be favorable to Petitioner is insufficient to permit  
6 discovery. Calderon v. District Court, 98 F.3d 1102, 1106 (9th Cir. 1996) (“[C]ourts should not  
7 allow prisoners to use federal discovery for fishing expeditions to investigate mere speculation.”)

8 Petitioner contends that “the holding and rationale in Roper v. Simmons, *supra*, meets the  
9 criteria of 28 U.S.C. § 2254(e)(2) in that a new rule of constitutional law made retroactive by  
10 the Supreme Court which was previously unavailable has set new standards for Eighth  
11 Amendment considerations as they pertain to juveniles thereby justifying the court granting the  
12 request for an evidentiary hearing.” (Evid. Hr’g Mot. at 11-12.) Respondent replies that Roper  
13 was decided in 2005, long before Petitioner filed his habeas petition in the state supreme court  
14 in 2007, and is therefore neither a new rule of constitutional law nor the basis for a new factual  
15 predicate within the meaning of § 2245(e)(2). (Opp’n Evid. Hr’g Mot. at 4-5.)

16 Although there is a valid argument that Roper announced a new rule of constitutional law  
17 which is retroactive on collateral appeal, see e.g. Arroyo v. Dretke, 362 F.Supp.2d 859, 883  
18 (W.D. Tex. 2005), Petitioner has failed to demonstrate that the Supreme Court itself has made  
19 Roper’s holding retroactive. See Tyler v. Caine, 533 U.S. 656, 663 (2001) (holding that a case  
20 is “made retroactive to cases on collateral review” within the meaning of 28 U.S.C.  
21 § 2244(b)(2)(A) only when the Court expressly says so either in the case itself or in a subsequent  
22 case.) In any event, the rule announced in Roper by its expressed holding applies only to  
23 juveniles sentenced to death, not to juveniles sentenced to terms of imprisonment.

24 Moreover, assuming, *arguendo*, that Roper could satisfy the provisions of § 2254(e)(2),  
25 Petitioner has not attempted to establish that the expert opinions he refers to regarding the  
26 general nature of juvenile development directly attack or contradict the conclusions or diagnosis  
27 actually arrived at by Dr. Scott following his examination of Petitioner. Nor has Petitioner  
28 demonstrated, nor even alleged, that Dr. Scott was not aware of the materials referenced in the

1 AMA's amicus brief or the other studies submitted by Petitioner, nearly all of which rely on  
2 published materials which predate Petitioner's psychiatric examination and diagnosis. (See Pet.  
3 Exs. [Doc. No. 3] 8-10.) Petitioner has also failed to demonstrate that he was diagnosed  
4 inconsistently with the conclusions contained in those materials. In fact, the factual predicate  
5 of this aspect of claim two has been known to Petitioner since he pled guilty, or at least since  
6 Roper was decided over five years ago, and he has failed to develop the facts supporting this  
7 claim either here or in the state courts by having an expert examine the MRI or requesting the  
8 appointment of an expert for that reason, by determining whether the MRI was or was not among  
9 his medical records examined by Dr. Scott, by determining whether Dr. Scott was aware of and  
10 took into consideration the Roper materials, or by determining whether Dr. Scott's diagnosis was  
11 inconsistent with the expert opinions and conclusions supporting Roper. As a result, the Court  
12 is precluded from conducting an evidentiary hearing, or allowing discovery, with respect to  
13 allegations that counsel did not have the MRI examined by an expert. Bragg, 242 F.3d at 1090;  
14 28 U.S.C. § 2254(e)(2); Holland, 542 U.S. at 653.

15       However, even if the Court is not precluded by § 2254(e)(2) from conducting an  
16 evidentiary hearing or allowing discovery, either because § 2254(e)(2) does not apply or because  
17 Petitioner could satisfy one of its exceptions, neither a hearing nor discovery is warranted in this  
18 case. When not precluded by § 2254(e)(2), an evidentiary hearing is available "where the  
19 petitioner's allegations, if proved, would establish the right to relief." Campbell v. Wood, 18  
20 F.3d 662, 679 (9th Cir. 1994). Petitioner has not alleged facts which, if proved, would  
21 demonstrate that his trial counsel rendered deficient performance by failing to have the MRI  
22 examined by an expert because he has failed to allege that the MRI was not among his medical  
23 records examined by Dr. Scott at the request of his attorneys. Even assuming the First Amended  
24 Petition could be read to include such an allegation, Petitioner has not alleged facts which, if  
25 true, would demonstrate prejudice, because he has not alleged that the MRI actually contains  
26 information helpful to the determination as to whether he had defenses available to him which  
27 were overlooked by counsel. Rather, he merely alleges that the MRI contains evidence of  
28 Petitioner's brain development at that time of the crimes, and relies on the general principles set

1 forth in Roper regarding juvenile development to assume that potential evidence may exist  
2 regarding his mental capacity as it relates to his culpability. Such conclusory allegations are  
3 insufficient to justify an evidentiary hearing or discovery. Campbell, 18 F.3d at 679; Calderon,  
4 98 F.3d at 1106.

5 In sum, there are no factual allegations that the MRI reveals that Petitioner had an  
6 undiagnosed mental defect or disease which would support a mental health defense, or that it  
7 was not examined as part of Dr. Scott's examination. Nor are there any concrete allegations  
8 which, if true, support a finding that there is a reasonable probability that Petitioner would not  
9 have pled guilty, or would have pled not guilty by reason of insanity, but for counsel's failure  
10 to have the MRI examined by an expert. Accordingly, Petitioner's request for an evidentiary  
11 hearing or discovery as to this aspect of claim two is denied because he has failed to develop  
12 facts supporting the claim in state court and because his allegations, even if true, do not entitle  
13 him to relief. As set forth above, habeas relief is denied as to this aspect of claim two because,  
14 based on an independent review of the record, Petitioner has demonstrated neither deficient  
15 performance nor prejudice in connection to the MRI, and the silent denial of the claim by the  
16 state supreme court was therefore neither contrary to, nor involved an unreasonable application  
17 of, clearly established federal law.

#### 18 **4) Age and immaturity**

19 In the final aspect of claim two, Petitioner contends that he received ineffective assistance  
20 of counsel because trial counsel induced "a plea of guilty from Petitioner who could not have  
21 entered into such a binding contract due to his age and immaturity." (FAP at 7.) Respondent  
22 contends that there is no evidence to support an allegation that Petitioner was induced to plead  
23 guilty, as there are no facts alleged whatsoever regarding the advice he was given in connection  
24 to his plea. (Ans. Mem. at 32.) Rather, Respondent contends that the record shows Petitioner  
25 told his psychiatrist that he wanted to plead guilty in order to take responsibility for what he had  
26 done in order to spare further trauma to the victims and their families, and that he deserved  
27 punishment and felt that a burden had been lifted following his plea. (Id.)

28 ///

1           Because Petitioner’s decision to plead guilty involved the waiver of constitutional trial  
2 rights, he must enter the guilty plea knowingly, intelligently and voluntarily. McCarthy v.  
3 United States, 394 U.S. 459, 466 (1969). Petitioner’s counsel indicated in open court that  
4 Petitioner pled guilty in order to avoid causing “any further pain to the victims, their families,  
5 or his own family.” (RT 6.) Petitioner signed and initialed a change of plea form after he was  
6 placed under oath and was advised of and waived his constitutional rights. (CT 7-12, 512-14.)  
7 He then provided, again through counsel, as a factual basis for the plea, in addition to the police  
8 reports, his statement that: “At age fifteen, I brought a gun to school and intentionally shot  
9 fifteen people, killing two, and causing great bodily injury to thirteen others. I did so, willfully,  
10 deliberately and with premeditation.” (RT 13-18.)

11           Petitioner first contends that he was unable to enter a guilty plea because he was not able  
12 to enter a binding contract due to his age and immaturity. To the extent he contends contract  
13 principles are implicated here he is mistaken because he entered an unconditional guilty plea  
14 with no accompanying promises. See Santabello v. New York, 404 U.S. 257, 262 (1971)  
15 (holding that “when a plea rests in any significant degree on a promise or agreement of the  
16 prosecutor, so that it can be said to be part of the inducement or consideration, such promise  
17 must be fulfilled.”)

18           To the extent he contends that he was too young and immature to enter a guilty plea, the  
19 record is clear that his counsel and the trial judge took his age and immaturity into consideration.  
20 The sentencing memorandum identified these circumstances in mitigation:

- 21           1. Although Dr. Scott’s psychiatric report clearly states that Petitioner does not  
22           suffer from any “conduct disorder,” his depression and attention deficit disorder  
23           played a factor in the commission of the offenses, and his conduct was influenced  
24           by emotional and psychological factors as explained by Dr. Scott;
- 25           2. He was encouraged by his peers to commit the crimes;
- 26           3. He has no prior criminal record of any kind and was an immature 15 year-old  
27           at the time of the crimes;
- 28           4. He was suffering from a mental condition that helps explain why a 15 year-old  
              who is not criminally oriented could commit such awful crimes;
5. He admitted the offenses to the police at the time of his arrest and entered a  
              guilty plea prior to the preliminary hearing, saving the victims additional pain;

1           6. He is extremely remorseful and cooperated with the District Attorney and the  
2           Federal Bureau of Investigation in the hope that he could add something that  
3           might be helpful in understanding or preventing school shootings.

3           (CT 528-29.)

4           The record supports a finding that trial counsel and the trial judge were aware that  
5           Petitioner's age and immaturity were important factors to be taken into consideration. To the  
6           extent Petitioner relies on the expert opinion evidence presented in support of Roper to support  
7           a claim that as a juvenile he was unable to enter a plea, he has not demonstrated that the  
8           materials support a finding that a juvenile cannot enter a plea simply by virtue of his or her status  
9           as a juvenile. Moreover, Petitioner has not attempted to demonstrate, either here or in the state  
10          court, that Dr. Scott's diagnosis is inconsistent with the Roper materials, that Dr. Scott was not  
11          aware of those materials or failed to take them into consideration when making his diagnosis,  
12          or that general expert opinions regarding the nature of juvenile development are superior to an  
13          actual diagnosis. Thus, Petitioner has failed to develop the facts supporting this claim in the  
14          state court, and this Court is precluded from conducting an evidentiary hearing or permitting  
15          discovery. Bragg, 242 F.3d at 1090; 28 U.S.C. § 2254(e)(2); Holland, 542 U.S. at 653. Even  
16          to the extent the Court is not precluded from conducting an evidentiary hearing, Petitioner is not  
17          entitled to one because, for the following reasons, his allegations, even if true, do not entitle him  
18          to habeas relief.

19          Petitioner indicates that he and his two trial attorneys will testify at an evidentiary hearing  
20          as to the circumstances of the plea. (Evid. Hr'g Mot. at 7-8.) Although he makes no proffer  
21          regarding the expected testimony of his attorneys, in his own declaration he states:

22                My trial attorney Randy Mize came to me & presented the change of plea form  
23                telling me I do not have a viable defense and I should sign the form because there  
24                is nothing he could do. He told me if I didn't sign it I would receive 435 years as  
25                I would lose at trial. He did not discuss any defenses with me nor did he explain  
26                any other alternatives such as explaining my mental capacity or insanity defense.  
27                I read the change of plea form he presented to me and told him I could not sign it  
28                because it stated I willfully & intentionally committed the offenses of 1st degree  
                  murder which was not true as I did not intend to kill anyone. He responded that  
                  I had to sign it and if I did not I would get 435 years. So I signed it but under  
                  duress. He did not investigate my mental maturity and ability to exercise reasoned  
                  judgment and control my impulses.

28          (Evid. Hr'g Mot., Ex. A, Pet.'s Decl. ¶ 4.)

1           Petitioner has failed to demonstrate deficient performance based on his contention that  
2 counsel ignored his belief that he could not be guilty of premeditated murder since he did not  
3 intend to kill anyone. The record indicates that counsel was aware that Petitioner stated that he  
4 did not want anyone to die as a result of the shooting, as statements to that effect are contained  
5 in the transcript of Petitioner's police interrogation as well as the account of the shooting he  
6 provided to Dr. Scott. (CT 704, 880.) However, Petitioner's actions support a finding of  
7 deliberation and premeditation despite his stated desire that he did not want anyone to die. The  
8 record indicates that Petitioner had been planning on taking a gun to school for several days, that  
9 he took 40 rounds of ammunition with him to school on the day of the shooting along with a gun,  
10 and that he entered the bathroom stall, loaded the gun, exited the stall and fired the first shot into  
11 the back of the head of a fellow student. (CT 704-05.) As the state court found,

12           [Petitioner] shot two students and a teacher who were in the restroom. He walked  
13 out of the restroom and began shooting randomly at school staff and students. He  
14 re-entered the restroom four times to reload. Before he was confronted by police  
15 officers and surrendered, he had shot 15 persons. Two of them died. When  
questioned, appellant stated he shot the people because he was "mad at  
everything." Appellant stated: "I didn't want anybody to die, but if they did, then  
oh well.

16 (Lodgment No. 5, People v. Williams, No. D040917, slip op. at 2.)

17           Petitioner's actions clearly support a finding of premeditation and deliberation. People  
18 v. Manriquez, 37 Cal.4th 547, 577-78 (2005) (premeditation and deliberation can be shown by  
19 planning, motive and manner of killing sufficient to support an inference that the killing  
20 occurred as the result of preexisting reflection rather than unconsidered or rash impulse); People  
21 v. Hawkins, 10 Cal.4th 920, 956-57 (1995) (shooting victim in the back of the head was  
22 sufficient evidence of premeditation and deliberation despite minimal evidence of planning and  
23 motive); People v. Koontz, 27 Cal.4th 1041, 1080-82 (2002) (evidence that the defendant fired  
24 a shot at a vital area of victim's body and prevented a witness from calling an ambulance  
25 represented "a manner of killing indicative of a deliberate intent to kill.") Thus, Petitioner has  
26 not established that counsel rendered deficient performance by advising him to plead guilty  
27 despite Petitioner's contention that he could not be guilty of premeditated murder because he did  
28 not want anyone to die. For the same reason, Petitioner has failed to demonstrate a reasonable



1 probability that, but for counsel's determination or advice in that regard, he would not have pled  
2 guilty and insisted on going to trial.

3 Based on a de novo review, it is clear that Petitioner has not established constitutionally  
4 ineffective assistance of counsel with respect to the final aspect of claim two. Hill, 474 U.S. at  
5 59; Strickland, 466 U.S. at 687, 691. Petitioner's claim that he was too immature to understand  
6 the consequences of his plea or intelligently waive his constitutional trial rights, and the  
7 allegations contained in his declaration that counsel coerced him into pleading guilty without  
8 explaining his options regarding mental health or diminished capacity defenses, are discussed  
9 immediately below in claim three. Accordingly, habeas relief is **DENIED** as to claim two.

### 10 **C. Claim Three**

11 Petitioner alleges in claim three that he was denied the effective assistance of counsel in  
12 violation of the Sixth and Fourteenth Amendments because his appointed trial counsel failed "to  
13 explore and present Petitioner with all options regarding defenses, including diminished  
14 capacity, insanity and others prior to inducing Petitioner to enter a guilty plea" in that:  
15 (1) Petitioner had an underdeveloped mental capacity; (2) trial counsel failed to thoroughly  
16 investigate his mental maturity and the limitations on his ability to exercise reasoned judgment  
17 and control his impulses due to his youth and how that may have provided defenses based on  
18 insanity, diminished capacity and/or lack of intent; and (3) trial counsel improperly advised him  
19 to plead guilty despite his lack of understanding of the consequences of the plea and the waiver  
20 of constitutional rights due to his youth and physical immaturity. (FAP at 8.)

21 Respondent argues that even assuming Petitioner had "an undeveloped mental capacity"  
22 he has not described any conduct of his counsel which was deficient or caused him prejudice.  
23 (Ans. Mem. at 35.) Respondent contends that the Roper materials, aside from being generally  
24 known to and considered by counsel and the court, merely expound obvious and undisputed  
25 principles which were actually articulated by trial counsel at Petitioner's sentencing hearing to  
26 secure the lowest possible sentence. (Id.) Respondent also contends that because the defense  
27 of diminished capacity is no longer a viable defense in California, there were obvious tactical  
28 reasons for counsel to advise Petitioner to plead guilty, and no prejudice because the psychiatric



1 evaluation completely undermines any argument that Petitioner had a viable mental health  
2 defense. (Id. at 36-37.)

3 Claim three was presented to the state supreme court in a habeas petition, without the  
4 benefit of Petitioner's declaration, and silently denied. (Lodgment No. 16 at 20-23; Lodgment  
5 No. 17.) It was also presented without the declaration to the appellate court in the coram vobis  
6 petition, and was silently denied by that court and by the state supreme court in the subsequent  
7 petition for review. (Lodgment Nos. 12-15.) Although the claim was presented to the trial court  
8 and denied as untimely, it was not based on the materials filed in support of Roper or on  
9 Petitioner's declaration. (Lodgment No. 10.) In fact, Petitioner did not present any evidence in  
10 support of his claim to the trial court, but relied upon conclusory allegations that he lacked the  
11 ability to enter a plea due to his age and immaturity. (Id.)

12 Because the claim as presented to the state appellate and supreme courts was cast in a  
13 different light by referencing the expert evidence in the Roper amicus brief, the first time any  
14 evidence was presented in support of the claim, the Court will not look through the silent denials  
15 by those courts to the trial court's procedural bar. See Vasquez v. Hillery, 474 U.S. 254, 260  
16 (1986) (supplemental evidence which "fundamentally alter the legal claim already considered  
17 by the state courts" can render a claim unexhausted). Rather, with respect to the aspects of claim  
18 three which rely on the Roper materials, the Court will conduct an independent review of the  
19 record in order to determine whether the silent denial by the state supreme court was contrary  
20 to, or involved an unreasonable application of, clearly established federal law applicable to  
21 claims of ineffective assistance of counsel. Pirtle, 313 F.3d at 1167; Greene, 288 F.3d at 1089.  
22 With respect to the aspects of claim three which rely on Petitioner's declaration, which was  
23 never presented to any state court,<sup>6</sup> the Court will conduct a de novo review. Killian, 282 F.3d  
24 at 1208.

### 25 **1) Undeveloped mental capacity/failure to investigate mental maturity**

26 Petitioner contends he received ineffective assistance of counsel because trial counsel  
27 advised him to plead guilty despite the fact that he had an undeveloped mental capacity. (FAP  
28

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<sup>6</sup> See footnote 4, supra.

1 at 8.) He also contends that trial counsel failed to thoroughly investigate his mental maturity and  
2 the limitations on his ability to exercise reasoned judgment and control his impulses due to his  
3 youth and how that may have provided defenses based on insanity, diminished capacity and/or  
4 lack of intent. (Id.) However, Petitioner does not provide any evidence that a plea of not guilty  
5 by reason of insanity was available to him, and does not identify any viable mental health  
6 defenses overlooked by counsel. Rather, he merely speculates that such defenses might have  
7 been available to him and concludes that his trial counsel rendered deficient performance  
8 because no such defenses were discussed prior to entering the plea.

9 Respondent is technically correct that California has eliminated diminished capacity  
10 defenses. See People v. Mejia-Lenares, 135 Cal.App.4th 1437, 1450 (2006) (noting that  
11 although diminished capacity defenses were eliminated by the California Legislature in 1981 and  
12 by voter initiative in 1982, “diminished actuality” remains a viable concept.), citing Cal. Penal  
13 Code section 25(a) (“The defense of diminished capacity is hereby abolished. . . . evidence  
14 concerning an accused person’s intoxication, trauma, mental illness, disease, or defect shall not  
15 be admissible to show or negate capacity to form that particular purpose, intent, motive, malice,  
16 aforethought, knowledge, or other mental state required for the commission of the crime  
17 charged.”). California permits “introduction of evidence of mental illness when relevant to  
18 whether a defendant actually formed a mental state that is an element of a charged offense, but  
19 [does] not permit an expert to offer an opinion on whether a defendant had the mental capacity  
20 to form a specific mental state or whether the defendant actually harbored such a mental state.”  
21 People v. Coddington, 23 Cal.4th 529, 582 (2000), overruled on other grounds Price v. Superior  
22 Court, 25 Cal.4th 1046 (2001). In order to show legal insanity in California, the accused must  
23 have been “incapable of knowing or understanding the nature and quality of his or her act and  
24 of distinguishing right from wrong at the time of the commission of the offense.” Mejia-  
25 Lenares, 135 Cal.App.4th at 1447.

26 As quoted above, Petitioner alleges in his declaration that his counsel: “told me if I didn’t  
27 [plead guilty] I would receive 435 years as I would lose at trial. He did not discuss any defenses  
28 with me nor did he explain any other alternatives such as explaining my mental capacity or

1 insanity defense.” (Evid. Hr’g Mot., Ex. A, Pet.’s Decl. ¶ 4.) Petitioner cannot demonstrate  
2 deficient performance arising from counsel’s decision to advise him to plead guilty without  
3 discussing mental health defenses if he did not have any viable mental health defenses to be  
4 discussed. Thus, Petitioner would need to establish that evidence could have been introduced  
5 at his trial that he suffered from a mental illness which was relevant to whether he actually  
6 formed the intent necessary to commit premeditated murder, that is, whether he acted with the  
7 requisite willful, premeditated and deliberate intent to kill. Coddington, 23 Cal.4th at 582. In  
8 order to support his claim that he would have pled not guilty by reason on insanity but for  
9 ineffective assistance of counsel, he would need to establish that evidence could have been  
10 introduced that he was incapable of knowing or understanding the nature and quality of his  
11 actions or distinguishing right from wrong. Mejia-Lenares, 135 Cal.App.4th at 1447.

12         Petitioner contends that he made statements to Dr. Scott which demonstrate “classic  
13 disassociation,” including that he felt like he was “going through the motions” and experienced  
14 the shootings “as if watching it from afar.” (Traverse at 19.) However, Dr. Scott did not  
15 diagnose Petitioner with a dissociative disorder or any other form of psychosis. The materials  
16 submitted by Petitioner, which merely set forth general principles regarding juvenile brain  
17 development, do not provide evidence that he did not achieve the mental state necessary to  
18 commit premeditated murder. Neither do they call into question Dr. Scott’s diagnosis, which  
19 was based in part on the statements which Petitioner now contends contain classic symptoms of  
20 dissociative disorder. As stated previously, Petitioner has also failed to demonstrate that Dr.  
21 Scott did not take the Roper materials into consideration when making his diagnosis. Moreover,  
22 Petitioner’s allegation that he believed he was not guilty of premeditated murder because he did  
23 not want anyone to die is without merit for the reasons set forth above, as there is overwhelming  
24 evidence in this case of deliberation and premeditation.

25         Dr. Scott’s psychiatric report does not support a finding that Petitioner had an insanity  
26 defense available to him. See Mejia-Lenares, 135 Cal.App.4th at 1447 (an insanity defense in  
27 California is available only to defendants “incapable of knowing or understanding the nature and  
28 quality of his or her act and of distinguishing right from wrong at the time of the commission of

1 the offense.”) Rather, Petitioner was examined and evaluated by a psychiatrist at the request of  
2 counsel and found to be free from any conduct disorders or psychotic features. (CT 696, 708,  
3 714.) Petitioner’s declaration stating that he was advised that he would be sentenced to the  
4 maximum term if he went to trial because he would be found guilty appears to be sound analysis  
5 in light of the overwhelming evidence of his guilt and Petitioner’s failure to identify any viable  
6 mental health defense. Petitioner has certainly not demonstrated otherwise. Thus, Petitioner has  
7 not satisfied the highly demanding standard required to show that counsel’s performance fell  
8 below prevailing professional norms. Strickland, 466 U.S. at 689-92.

9 Petitioner has failed, both here and in the state courts, to present any factual support for  
10 the conclusory allegation that he pled guilty without knowledge of available mental health  
11 defenses. In state court, his claim relied on the general principles set forth in the Roper amicus  
12 brief that juveniles are less developed mentally and therefore less culpable than adults. In this  
13 Court, he goes a little further by presenting his own declaration and seeking to conduct discovery  
14 and hold an evidentiary hearing in order to introduce evidence underlying the principles behind  
15 Roper’s holding that the Eighth and Fourteenth Amendments prohibit the execution of persons  
16 who were juveniles when they committed their crimes. Petitioner is correct that his status as a  
17 juvenile at the time of the crimes is an important consideration, particularly with respect to  
18 sentencing issues. See Roper, 543 U.S. at 569 (“as any parent knows and as the scientific and  
19 sociological studies respondent and his *amici* cite tend to confirm, ‘(a) lack of maturity and an  
20 undeveloped sense of responsibility are found in youth more often than in adults and are more  
21 understandable among the young. These qualities often result in impetuous and ill-considered  
22 actions and decisions.”), quoting Johnson v. Texas, 509 U.S. 350, 367 (1993). In fact, as  
23 discussed below with respect to claim four, after briefing closed in this case the Supreme Court  
24 decided in Graham v. Florida, 560 U.S. \_\_\_, 130 S.Ct. 2011 (2010), that the Eighth and  
25 Fourteenth Amendments prohibit the imposition of a life without parole for juvenile offenders  
26 who did not commit a homicide.<sup>7</sup>

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27  
28 <sup>7</sup> The Graham case did not alter California law, which at the time of Petitioner’s offense  
precluded a sentence of life imprisonment without the possibility of parole for minors. See footnote 2,  
supra.

1           However, the defect in Petitioner's position is that he has not, and apparently cannot,  
2 establish that he himself, by virtue of his age, immaturity, or some other factor inherent within  
3 him, possessed a viable mental health defense to the charges of premeditated murder and  
4 attempted premeditated murder. Petitioner has set forth no basis for finding that his psychiatric  
5 examination and diagnosis support a valid mental health defense of any kind, or that Dr. Scott  
6 did not take into considerations the materials Petitioner has submitted regarding adolescent brain  
7 development. Nor has Petitioner shown that Dr. Scott's opinion is called into question by those  
8 materials, or that reliance by counsel on Dr. Scott's opinion was unreasonable. Thus, Petitioner  
9 has not shown that counsel provided anything other than sound, reasonable advice regarding the  
10 chance of success if Petitioner decided to go to trial. Neither has Petitioner shown a reasonable  
11 probability that, but for the failure of his trial counsel to discuss potential mental health defenses  
12 with him, he would not have pled guilty and would have insisted on going to trial. Hill, 474 U.S.  
13 at 59; Strickland, 466 U.S. at 687, 691. Petitioner's failure to develop facts supporting this claim  
14 in the state court, and his failure to allege facts which, if true, would entitle him to relief,  
15 preclude an evidentiary hearing or discovery. Holland, 542 U.S. at 653; Bragg, 242 F.3d at  
16 1090; 28 U.S.C. § 2254(e)(2); Calderon, 98 F.3d at 1106; Campbell, 18 F.3d at 679.

17           Based on an independent review of the record, it is clear that the silent denial by the state  
18 supreme court of the first two aspects of claim three which rely on the Roper materials, was  
19 neither contrary to, nor involved an unreasonable application of, clearly established federal law.  
20 In addition, a de novo review of the first two aspects of claim three which rely on Petitioner's  
21 declaration demonstrates that Petitioner has not established constitutionally ineffective assistance  
22 of counsel.

### 23           **3) Voluntariness of plea and waiver of constitutional rights**

24           Petitioner contends that trial counsel advised him to plead guilty despite a lack of  
25 understanding of the consequences of the plea and his inability to understand the waiver of his  
26 constitutional rights due to his youth and physical immaturity. (FAP at 8.) He contends that he  
27 knew of no alternatives other than proceeding to trial on a factual case that would have certainly  
28 resulted in a conviction. (Traverse at 20.)

1 A guilty plea must be voluntary and intelligent, and entered with a sufficient awareness  
2 of the relevant circumstances and likely consequences resulting from a waiver of certain  
3 fundamental rights. Boykin v. Alabama, 395 U.S. 238, 242-44 (1969). Voluntariness must be  
4 demonstrated by tangible evidence in the record, as determined by the totality of the  
5 circumstances surrounding the plea. Id. A defendant in a criminal proceeding must be able to,  
6 “with the help of counsel, rationally weigh the advantages of going to trial against the  
7 advantages of pleading guilty.” Brady v. United States, 397 U.S. 742, 750 (1970).

8 Petitioner may obtain habeas relief by demonstrating that due to counsel’s deficiencies,  
9 his guilty plea did not represent “a voluntary and intelligent choice among the alternative courses  
10 of action open to the defendant.” North Carolina v. Alford, 400 U.S. 25, 31 (1970). “[T]he  
11 voluntariness of the plea depends on whether counsel’s advice ‘was within the range of  
12 competence demanded of attorneys in criminal cases.’” Hill, 474 U.S. at 56 (quoting McMann,  
13 397 U.S. at 771).

14 The trial judge explained to Petitioner in open court the rights he was giving up as a result  
15 of his guilty plea, the punishment he faced, and the consequences of his plea. (RT 7-12.)  
16 Petitioner indicated that he read and understood the change of plea form which he signed and  
17 initialed. (RT 11-12.) He then admitted his guilt and entered his plea “freely and voluntarily.”  
18 (RT 13-18.) Although the record reflects that Petitioner’s plea was informed and voluntary, he  
19 now contends that he received ineffective assistance of counsel in connection to the plea because  
20 his counsel failed to investigate alternatives to a guilty plea, including potential mental health  
21 defenses. (FAP at 8; Traverse at 20.) However, as discussed above, Petitioner has not provided  
22 any evidence in support of those allegations.

23 Because Petitioner has failed to identify a viable mental health defense to the charges  
24 which was overlooked by his counsel, he has failed to show that the advice he received from  
25 counsel was not “within the range of competence demanded of attorneys in criminal cases,”  
26 Hill, 474 U.S. at 56, or that his decision to plead guilty did not represent “a voluntary and  
27 intelligent choice among the alternative courses of action open to him.” Alford, 400 U.S. at 31.  
28 Because Petitioner has failed to develop the facts supporting this claim in the state court, this

1 Court is precluded from conducting an evidentiary hearing or permitting discovery. Holland,  
2 542 U.S. at 653; Bragg, 242 F.3d at 1090; 28 U.S.C. § 2254(e)(2). Nor would the Court conduct  
3 an evidentiary hearing or permit discovery if it had discretion to do so, due to the conclusory  
4 nature of the claim and the lack of concrete allegations which, if proven true, would entitle  
5 Petitioner to relief. Calderon, 98 F.3d at 1106; Campbell, 18 F.3d at 679.

6 Petitioner has not demonstrated that the silent denial by the state supreme court of that  
7 aspect of claim three which relies on the Roper materials was contrary to, or involved an  
8 unreasonable application of, clearly established federal law. Lockyer, 538 U.S. at 75-76;  
9 Williams, 529 U.S. at 412; Hill, 474 U.S. at 59; Strickland, 466 U.S. at 687, 691. Furthermore,  
10 even with the benefit of the allegations contained in his declaration and the contentions set forth  
11 in the Traverse, a de novo review reveals that he has not established he received constitutionally  
12 ineffective assistance of counsel. Hill, 474 U.S. at 59; Strickland, 466 U.S. at 687, 691. Habeas  
13 relief is **DENIED** as to claim three.

#### 14 **D. Claim One**

15 Petitioner contends in claim one that he was denied the effective assistance of counsel in  
16 violation of the Sixth and Fourteenth Amendments because his appointed appellate counsel  
17 failed to: (1) speak to or communicate with Petitioner in any manner prior to preparing and  
18 filing the appellate brief; (2) raise the issue of ineffective assistance of trial counsel or file a  
19 habeas petition in state court; (3) raise the issue of Petitioner's mental state; and (4) raise the  
20 issue of trial counsel's failure to have Petitioner plead not guilty by reason of insanity. (FAP at  
21 6.) Petitioner requests an evidentiary hearing at which he will testify that his appellate attorney  
22 never communicated with him or met with him, and never discussed the grounds raised or the  
23 strategy for the appeal. (Evid. Hr'g Mot., Ex. A, Pet.'s Decl. at ¶ 3.)

24 Respondent contends that because there is no reasoned decision by a lower state court  
25 addressing the claim, this Court must conduct an independent review of the record in order to  
26 determine whether the silent denial by the state supreme court was contrary to or involved an  
27 unreasonable application of clearly established federal law, or was based on an unreasonable  
28 determination of the facts. (Ans. Mem. at 11-12.) Respondent argues that habeas relief is



1 unavailable because Petitioner has not made such a showing. (Id. at 15-21.) Respondent also  
2 argues that Petitioner failed to develop the facts supporting his claims in the state court, and has  
3 not stated a colorable claim. (Opp. to Evid. Hr'g Mot. at 4-8.)

4 Petitioner presented claim one to the state supreme court in his habeas petition, absent his  
5 declaration. (Lodgment No. 16.) The state supreme court denied the petition without citation  
6 of authority or a statement of reasoning. (Lodgment No. 17.) In his state appellate court petition  
7 for a writ of coram vobis, Petitioner alleged that his claims of ineffective assistance of trial  
8 counsel were not raised on appeal because his appointed appellate counsel "neither visited the  
9 petitioner not accepted collect telephone calls or expanded the record on appeal by means of an  
10 accompanying petition for habeas corpus relief as to ineffective assistance of counsel at the trial  
11 level but simply filed an appeal brief without prior approval by the petitioner." (Lodgment No.  
12 12 at 4.) That petition was denied with an unexplained order. (Lodgment No. 13.) Petitioner  
13 presented the same allegations of ineffective assistance of appellate counsel to the trial court in  
14 his motion to vacate his sentence, which was denied as untimely.<sup>8</sup> (Lodgment No. 10 at 4;  
15 Lodgment No. 11.)

16 Accordingly, with respect to the first two aspects of claim one, which were presented to  
17 the trial court and denied as untimely, the Court will look through the silent denials of those  
18 claims by the state supreme and appellate courts to the trial court's order denying the claims on  
19 the procedural ground of untimeliness. Ylst, 501 U.S. at 803. Because those claims were not  
20 adjudicated on the merits in the state court, but were denied on procedural grounds, the Court  
21 must conduct a de novo review of the record in addressing the merits of those claims. Killian,  
22 282 F.3d at 1208.

23 ///

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24  
25 <sup>8</sup> Respondent contends that these aspects of claim one were not actually raised in the motion to  
26 vacate Petitioner's sentence, but were only "alluded to" in providing an explanation for not raising other  
27 claims on appeal. (Ans. Mem. at 13.) Because the motion to vacate and the coram vobis petition were  
28 filed by Petitioner pro se, the Court must liberally construe the allegations set forth therein. Erickson  
v. Pardus, 551 U.S. 89, 94 (2007); Corjasso v. Ayers, 278 F.3d 874, 878 (9th Cir. 2002). Under a liberal  
construction of those pleadings, it appears that Petitioner intended to raise a claim of ineffective  
assistance of appellate counsel based on counsel's failure to consult with him and failure to file a habeas  
petition raising a claim of ineffective assistance of trial counsel. (See Lodgment No. 10 at 4; Lodgment  
No. 12 at 4.)

1 As to the third and fourth aspects of claim one, which were not presented to the lower  
2 state courts, the silent denial constitutes an adjudication on the merits, and AEDPA deference  
3 applies. Hunter, 982 F.2d at 347-48. As to these claims, the Court must conduct an independent  
4 review of the record in order to determine whether the silent denial by the state court was  
5 contrary to or involved an unreasonable application of clearly established federal law. Pirtle,  
6 313 F.3d at 1167; Lambert, 288 F.3d at 1089.

7 The Strickland standard applies to claims of ineffective assistance of appellate counsel.  
8 Smith v. Robbins, 528 U.S. 259, 285 (2000). The failure to raise meritless or untenable claims  
9 does not constitute ineffective assistance of appellate counsel. Featherstone v. Estelle, 948 F.2d  
10 1497, 1507 (9th Cir. 1991) (where “trial counsel’s performance, although not error-free, did not  
11 fall below the Strickland standard[,] . . . petitioner was not prejudiced by appellate counsel’s  
12 decision not to raise issues that had no merit.”); Baumann v. United States, 692 F.2d 565, 572  
13 (9th Cir. 1982) (stating that an attorney’s failure to raise a meritless legal argument does not  
14 constitute ineffective assistance); Gustave v. United States, 627 F.2d 901, 906 (9th Cir. 1980)  
15 (“There is no requirement that an attorney appeal issues that are clearly untenable.”)

16 **a) Failure to communicate**

17 Petitioner first contends that his appellate counsel “neither met with, spoke with, or  
18 communicated with Petitioner in any manner prior to writing and filing the brief.” (FAP at 6.)  
19 There are no allegations in the First Amended Petition regarding in what manner Petitioner was  
20 disadvantaged by counsel’s failure to meet or consult with him. (Id.) Respondent argues that  
21 there is no clearly established federal law which requires an appellate attorney to consult with  
22 a client prior to filing an appellate brief, and under AEDPA review the claim must therefore fail.  
23 (Ans. Mem. at 15.) Because this aspect of claim one was denied on procedural grounds,  
24 however, AEDPA deference does not apply, and the Court must conduct a de novo review as  
25 to this claim. Killian, 282 F.3d at 1208; see also Hayes, 399 F.3d at 978 (9th Cir. 2005) (noting  
26 that even under de novo review, a habeas petition carries the “burden of proving that [his]  
27 detention violates the fundamental liberties of the person, safeguarded against state action by the  
28 Federal Constitution.”)

1 As set forth above, Petitioner is required to demonstrate that his appellate counsel's  
2 performance was both deficient and prejudicial. However, Petitioner does not explain why, or  
3 even allege that, his appellate counsel's failure to meet with him amounted to deficient  
4 performance or resulted in prejudice. (See FAP at 6.) Petitioner indicates in his Traverse that  
5 he "had a number of additional issues to include in the [appellate] brief which he was precluded  
6 from appealing due to the lack of contact by his appellate attorney," but does not identify which  
7 claims he is referring to. (Traverse at 14.) If the First Amended Petition had been filed pro se,  
8 the Court would liberally construe this aspect of claim one as alleging that appellate counsel's  
9 failure to consult with Petitioner resulted in the claims of ineffective assistance of trial counsel  
10 raised by Petitioner in his pro se state pleadings not being raised on appeal. Erickson, 551 U.S.  
11 at 94; Corjasso, 278 F.3d at 878. However, the First Amended Petition was filed by counsel.  
12 As such, the lack of allegations regarding why the failure to meet with Petitioner constituted  
13 deficient performance or resulted in prejudice renders the claim wholly conclusory and without  
14 merit. See James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) (conclusory allegations that are not  
15 supported by specific facts do not merit habeas relief). Nevertheless, assuming the First  
16 Amended Petition could be amended to include allegations that the failure to consult resulted  
17 in the failure to raise the claims Petitioner now contends should have been raised on appeal, that  
18 is, the claims of ineffective assistance of trial counsel discussed above, the claim is duplicative  
19 of the second aspect of claim one discussed immediately below, and it relies on a finding that  
20 he was in fact deprived of constitutionally effective assistance of trial counsel, which, as  
21 discussed above, he was not.

22 **b) Failure to raise IAC claims in a habeas petition**

23 Petitioner next contends his appellate counsel "failed to raise the issue of ineffective  
24 assistance of trial counsel at pre-trial, trial or post-trial and did not file a Petition for Writ of  
25 Habeas Corpus so as to go outside the record on appeal." (FAP at 6.) Respondent contends that  
26 this aspect of claim one should be denied on the basis that it is vague, conclusory and  
27 unsupported by facts. (Ans. Mem. at 16-17.) Alternately, Respondent argues the claim fails on  
28 its merits because the issues Petitioner contends should have been raised on appeal are without

1 merit, and because his appellate counsel acted reasonably in pursuing the strongest claims on  
2 appeal. (Id. at 17-18.)

3 As discussed above with respect to claims two and three, Petitioner has not established  
4 that he received constitutionally ineffective assistance of trial counsel. As such, the failure of  
5 his appointed appellate counsel to raise those claims on direct appeal did not amount to deficient  
6 performance. Featherstone, 948 F.2d at 1507; Baumann, 692 F.2d at 572. Petitioner requests  
7 that an evidentiary hearing be held to resolve the “factual issue in dispute regarding that which  
8 Petitioner would have requested his appellate attorney include in the brief.” (Traverse at 14.)  
9 Petitioner fails to identify any viable claims which were overlooked by appellate counsel.  
10 Moreover, counsel’s decision did not deprive Petitioner of the opportunity to present the claims  
11 to the state courts because the claims of ineffective assistance of trial counsel were ultimately  
12 presented to the state courts and, as discussed above, for the most part were resolved on their  
13 merits in the state court. Even to the extent they were denied as untimely rather than on their  
14 merits, Petitioner has not established that the delay in presenting the claims was caused by his  
15 appellate attorney’s actions. Rather, Petitioner admits that a copy of the appellate brief was  
16 provided to him upon its filing. (Traverse at 13.) He was then on notice that the claims he  
17 wished to be raised were not included, and he could have presented them in a pro se brief at that  
18 time. Petitioner’s ability to raise the claims pro se is proven by the fact that he did in fact raise  
19 them in the pro se briefs he filed in the state superior, appellate and supreme courts.  
20 Accordingly, a de novo review reveals that Petitioner has demonstrated neither deficient  
21 performance nor prejudice as a result of his appellate attorney’s decision not to raise claims of  
22 ineffective assistance of trial counsel on appeal. Hill, 474 U.S. at 59; Strickland, 466 U.S. at  
23 687, 691; Featherstone, 948 F.2d at 1507.

24 **c) Failure to raise the issue of Petitioner’s mental state**

25 Petitioner claims that appellate counsel “failed to raise the issue of Petitioner’s mental  
26 state.” (FAP at 6.) Petitioner cannot succeed on a claim based on appellate counsel’s failure to  
27 raise a claim alleging that trial counsel rendered constitutionally ineffective assistance by  
28 allowing or advising Petitioner to plead guilty despite Petitioner’s mental state because, as

1 discussed above in claims two and three, Petitioner did not receive constitutionally ineffective  
2 assistance of counsel in that regard. Accordingly, based on an independent review of the record,  
3 the silent denial of this aspect of claim one by the state supreme court was neither contrary to,  
4 nor involved an unreasonable application of clearly established federal law. Hill, 474 U.S. at  
5 59; Strickland, 466 U.S. at 687, 691; Featherstone, 948 F.2d at 1507.

6 **d) Failure to have Petitioner plead not guilty by reason of insanity**

7 Similarly, Petitioner cannot succeed on a claim based on appellate counsel's failure to  
8 raise a claim alleging that trial counsel rendered constitutionally ineffective assistance by failing  
9 to advise or insist that Petitioner plead not guilty by reason of insanity because, as discussed  
10 above in claims two and three, Petitioner did not receive constitutionally ineffective assistance  
11 of counsel in that regard. Rather, Petitioner was examined prior to entering a guilty plea by a  
12 psychiatrist/medical doctor and was found to be free of conduct disorders or psychosis at the  
13 time of the offenses. There is no support in the record for the allegation that Petitioner had a  
14 viable plea of not guilty by reason of insanity, and Petitioner has not established that trial  
15 counsel rendered deficient performance, or that he was prejudiced, by the failure to enter a plea  
16 of not guilty by reason on insanity. Accordingly, based on an independent review of the record,  
17 the silent denial of this aspect of claim one by the state supreme court was neither contrary to,  
18 nor involved an unreasonable application of clearly established federal law. Lockyer, 538 U.S.  
19 at 75-76; Williams, 529 U.S. at 412; Hill, 474 U.S. at 59; Strickland, 466 U.S. at 687, 691;  
20 Featherstone, 948 F.2d at 1507.

21 **D. Claim Four**

22 Petitioner alleges in his final claim that he was sentenced in violation of the Eighth  
23 Amendment's prohibition on cruel and unusual punishment. (FAP at 9.) He contends that his  
24 culpability was mitigated by his age and maturity, and that "[f]ailure of counsel to read and  
25 consider available expert evidence that Petitioner at 15 years of age was not mentally culpable  
26 due to an undeveloped brain and with diminished mental capacity to determine risks and  
27 consequences of on school campus shooting spree of individuals for real or imagined reasons."  
28 (Id.) Respondent contends that there is no clearly established United States Supreme Court

1 authority holding that imposition of a life sentence for someone in Petitioner's situation violates  
2 the Eighth Amendment. (Ans. Mem .at 43-45.)

3 Petitioner presented claim four, absent the allegations of ineffective assistance of counsel,  
4 to the state supreme court in his habeas petition. (Lodgment No. 16.) The state supreme court  
5 denied the petition without citation of authority or a statement of reasoning. (Lodgment No. 17.)  
6 Petitioner presented the same claim to the state appellate court on direct appeal. (Lodgment No.  
7 3.) The appellate court, in an unpublished opinion, denied the claim on its merits. (Lodgment  
8 No. 5, People v. Williams, No. D040917 (Cal.Ct.App. Jan. 30, 2004).) The Court will therefore  
9 look through the silent denial of claim one by the state supreme court to the state appellate  
10 court's opinion. Ylst, 501 U.S. at 804.

11 In addressing the merits of Petitioner's Eighth Amendment claim, the appellate court here  
12 stated:

13 Appellant argues that while it might be reasonable and constitutional to  
14 apply a section 12022.53, subdivision (d), 25-years-to-life enhancement to a 16-  
15 or 17-year-old gang member with an entrenched criminal lifestyle (see *People v.*  
16 *Ortiz* (1997) 57 Cal.App.4th 480, 486-487), it was cruel and/or unusual  
punishment to apply it to him, an immature 15-year-old, who was suffering a  
major depressive episode at the time he murdered two persons and attempted to  
murder thirteen others.

17 "To determine whether a sentence is cruel or unusual as applied to a  
18 particular defendant, a reviewing court must examine the circumstances of the  
19 offense, including the defendant's motive, the extent of the defendant's  
20 involvement in the crime, the manner in which the crime was committed, and the  
21 consequences of the defendant's acts. The court must also consider the  
22 defendant's age, prior criminality and mental capabilities. [Citation.] If the court  
concludes that the penalty imposed is 'grossly disproportionate to the defendant's  
culpability' [citation] or, stated another way, that the punishment shocks the  
conscience and offends fundamental notions of human dignity [citation], the court  
must invalidate the sentence as unconstitutional." (*People v. Cox* (2003) 30  
Cal.4th 916, 969-970.)

23 Appellant was 15 years of age and had no prior history of criminality when  
24 he committed these very serious crimes. He was apparently depressed at the time.  
25 Against this we note appellant's motive for the crime was apparently to cause  
26 widespread pain and suffering. He premeditated the crimes and personally carried  
27 them out at a school. He was suffering from no serious mental disorder and was  
28 not of limited intelligence. Having shot three persons in the restroom, rather than  
recoiling at the enormity of his act, he repeatedly reloaded his gun and continued  
to shoot students and school staff. The consequences of appellant's act not only  
on his victims and their families but on the school and on the community is  
incalculable.

1           The imposition of a section 12022.53, subdivision (d), enhancement on  
2           appellant was not cruel and/or unusual punishment.

3           (Lodgment No. 5, People v. Williams, No. D040917, slip op. at .)

4           In Harmelin v. Michigan, 501 U.S. 957 (1991), the United States Supreme Court upheld  
5           against an Eighth Amendment challenge a sentence of life without parole for possession of  
6           cocaine. The Court stated that a comparison between the gravity of the offense and the severity  
7           of the sentence must be made first in order to determine whether it is one of the “rare” cases  
8           which leads to an inference of gross disproportionality. Id. at 1005. The Supreme Court has also  
9           upheld life sentences for recidivists with such nonviolent felonies as the theft of golf clubs,  
10          Ewing v. California, 538 U.S. 11, 28 (2003), and obtaining money by false pretenses, Rummel  
11          v. Estelle, 445 U.S. 263, 284 (1980).

12          Respondent is correct that there is no United States Supreme Court opinion holding that  
13          juveniles cannot be sentenced to life imprisonment for homicide offenses. See Graham, 130  
14          S.Ct. at 2043 (opinion of Thomas, J., dissenting) (“The Court holds today that it is ‘grossly  
15          disproportionate’ and hence unconstitutional for any judge or jury to impose a sentence of life  
16          without parole on an offender less than 18 years old, *unless he has committed a homicide.*”)  
17          (italics added). In order for Petitioner to be entitled to relief, therefore, he must demonstrate that  
18          it was objectively unreasonable for the appellate court to determine that this is not one of the rare  
19          cases which leads to an inference of gross disproportionality. Lockyer, 538 U.S. at 75-76;  
20          Harmelin, 501 U.S. at 1005.

21          As the state court here correctly noted, the gravity of Petitioner’s offense can hardly be  
22          overstated. He killed two people and wounded thirteen others, mostly fellow high school  
23          students, while the victims were attending school. And although he was sentenced to life in  
24          prison, he will be eligible for parole at age 66. Petitioner’s crimes were much worse than those  
25          in Harmeline, Ewing and Rummel, and his sentence comparable with sentences imposed in those  
26          cases, all of which were found not to be disproportional. However, Petitioner is correct that his  
27          status as a juvenile must be taken into consideration when analyzing an Eighth Amendment  
28          claim. See Roper, 543 U.S. at 569; Johnson, 509 U.S. at 367. But in finding that life without



1 the possibility of parole was prohibited for juveniles who had not committed a homicide, the  
2 Supreme Court noted that “juveniles offender who committed both homicide and nonhomicide  
3 crimes present a different situation for a sentencing judge than juvenile offenders who  
4 committed no homicide. It is difficult to say that a defendant who receives a life sentence on an  
5 nonhomicide offense but who was at the same time convicted of homicide is not in some sense  
6 being punished in part for the homicide when the judge makes the sentencing determination.”  
7 Graham, 130 S.Ct. at 2023. Thus, the Supreme Court has at least tacitly recognized that life  
8 without parole for a juvenile who has committed homicide does not violate the Eighth  
9 Amendment, or at least it has never so held. Since there is no clearly established federal law  
10 holding that a sentence of 50 years-to-life for a juvenile who killed two people and wounded  
11 thirteen others violates the Eighth Amendment, and because it is objectively reasonable to find  
12 that such a sentence is not grossly disproportionate to those crimes, the appellate court’s  
13 adjudication of this claim was neither contrary to, nor involved an unreasonable application of,  
14 clearly established federal law. Lockyer, 538 U.S. at 75-76; Williams, 529 U.S. at 412;  
15 Harmelin, 501 U.S. at 1005.

16 To the extent the allegations in the First Amended Petition that counsel failed to read and  
17 consider available expert evidence on the subject of juvenile brain development is an attempt  
18 to state a claim for ineffective assistance of counsel, it is without merit. The claim was presented  
19 to the state appellate court in the coram vobis petition. (Lodgment No. 12 at 3.) It was also  
20 presented to the state supreme court in the petition for review of the denial of the coram vobis  
21 petition. (Lodgment No. 14.) Both petitions were denied without a statement of reasoning or  
22 citation of authority. (Lodgment Nos. 13, 15.) It was not presented in the motion to vacate filed  
23 in the trial court. (Lodgment No. 10.) Accordingly, the Court must conduct an independent  
24 review in order to determine whether the silent denial by the state court was contrary to, or  
25 involved an unreasonable application of, clearly established federal law. Pirtle, 313 F.3d at  
26 1167; Greene, 288 F.3d at 1089.

27 As discussed above, the sentencing memorandum filed by Petitioner’s counsel conveyed  
28 to the trial court the necessity of taking into consideration Petitioner’s youth and immaturity


1 when imposing a sentence. (CT 518-40.) Thus, Petitioner has not shown deficient performance  
2 in regard to the information counsel provided to the sentencing court. Strickland, 466 U.S. at  
3 687. In addition, the appellate court noted that California law required imposition of Petitioner's  
4 sentence unless his convictions or sentence enhancements were dismissed. (Lodgment No. 5,  
5 People v. Williams, No. D040917, slip op. at 17-18.) Petitioner in fact received the lowest  
6 possible sentence to which he was exposed. Thus, Petitioner has not shown prejudice because  
7 he has not shown a reasonable probability that he would not have pled guilty and would have  
8 insisted on going to trial had counsel provided additional information regarding juvenile  
9 development to the sentencing court. Hill, 474 U.S. at 59. Thus, the silent denial of this aspect  
10 of claim four by the state court was neither contrary to, nor involved an unreasonable application  
11 of, clearly established federal law. Lockyer, 538 U.S. at 75-76; Williams, 529 U.S. at 412; Hill,  
12 474 U.S. at 59; Strickland, 466 U.S. at 687, 691. Accordingly, habeas relief is **DENIED** as to  
13 claim four.

14 **VI.**

15 **CONCLUSION AND ORDER**

16 Based on the foregoing, **IT IS ORDERED** that Petitioner's Motion for an Evidentiary  
17 Hearing is **DENIED** and the First Amended Petition for a Writ of Habeas Corpus is **DENIED**.  
18 The Court **ISSUES** a Certificate of Appealability as to all claims presented in the First Amended  
19 Petition.

20 DATED: September 21, 2010

21   
22 **WILLIAM Q. HAYES**  
23 United States District Judge