No. _____

OCTOBER TERM, 2017

IN THE SUPREME COURT OF THE UNITED STATES

SAMUEL ISAAC MARQUEZ, Petitioner,

v.

JOE GENTRY, WARDEN, *et al.,* Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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Samuel Marquez requests leave to file the attached Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*. Mr. Marquez has been granted leave to so proceed in the district court and in the United States Court of Appeals. Counsel for Mr. Marquez was appointed by the United States District Court for the District of Nevada under 18 U.S.C. § 3599(a)(2). *See also* Supreme Court Rule 39.1 (authorizing leave to proceed *in forma pauperis*). Accordingly, not affidavit is attached

Dated this 5th day of July, 2018

Respectfully submitted,

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No. _____

OCTOBER TERM, 2017

IN THE SUPREME COURT OF THE UNITED STATES

SAMUEL MARQUEZ, Petitioner,

v.

TIMOTHY FILSON,[1] WARDEN, *et al.*, Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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[1] Timothy Filson replaced Jo Gentry as the Warden of Ely State Prison.

QUESTIONS PRESENTED

1. This Court in *Brumfield* granted federal habeas corpus relief, *despite* a lack of clearly established federal law, because the state-court decision relied on an unreasonable determination of fact. Here, the Ninth Circuit denied habeas relief on the theory that, *because of* a lack of clearly established federal law, a state-court determination of fact cannot be unreasonable. Did the Ninth Circuit's holding contradict *Brumfield?*

LIST OF PARTIES

Petitioner Samuel Marquez is an inmate at Ely State Prison, which is located in Ely, Nevada. Respondent Timothy Filson is the Warden of Ely State Prison, and replaces Joe Gentry, who was the originally named warden in this proceeding. Respondent Adam Paul Laxalt, Attorney General of the State of Nevada, is a party to the proceeding not listed in the caption.

TABLE OF CONTENTS

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. *State v. Marquez* 4

1. The defense — establishing legal insanity. 5

2. Instructions. 7

3. The verdict. 8

B. Proceedings below. 8

1. Direct appeal. 8

2. Federal Habeas Corpus Proceedings. 9

a. Federal Court — District of Nevada 9

b. Ninth Circuit Court of Appeals. 11

REASONS FOR GRANTING THE PETITION 12

I. The Ninth Circuit's Decision In This Case Signals A Departure From This Court's Decision In *Brumfield*. 12

A. The Ninth Circuit Court of Appeals failed to conduct a proper 28 U.S.C. § 2254(d)(2) analysis of Marquez's claim that he was denied due process when the state court refused to give an insanity instruction. 13

1. *Brumfield v. Cain* 14

2. The Ninth Circuit Court of Appeals failed to conduct the proper § 2254(d)(2) inquiry, as enunciated in *Brumfield*. 16

3. The Nevada Supreme Court's decision is based on an unreasonable determination of facts. 19

CONCLUSION 23

INDEX TO APPENDIX 25

TABLE OF AUTHORITIES

Federal Cases

Brumfield v. Cain, 135 S.Ct. 2269 (2015) ..... *passim*
Loughrin v. U.S., 134 S.Ct. 2384 (2014) 13
Marquez v. Gentry, 2018 WL 455918 (9th Cir. Jan. 17, 2018) 1
Pirtle v. Morgan, 313 F.3d 1160 (9th Cir. 2002) 18-19, 21
Stevenson v. U.S., 162 U.S. 313 (1896) 21, 22, 23

Federal Statutes

28 U.S.C. § 1254 2
28 U.S.C. § 2254 ..... 2, 12, 14, 15

State Cases

Finger v. State, 27 P.3d 66 (Nev. 2001) 16, 17, 18
Marquez v. McDaniels, 2014 WL 4704596 (D. Nevada March 18, 2016) 1

PETITION FOR WRIT OF CERTIORARI

Petitioner, Samuel Marquez, respectfully petitions this Court to issue a Writ of Certiorari to review the opinion issued by the United States Court of Appeals for the Ninth Circuit in *Marquez v. Gentry*, No. 16-15634, on January 17, 2018.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit denying relief is reported in a slip opinion as *Marquez v. Gentry*, 2018 WL 455918 (9th Cir. Jan. 17, 2018). *See* Append. A. The district court decision denying Petitioner Marquez's petition for writ of habeas corpus is found at *Marquez v. McDaniels*, 2014 WL 4704596 (D. Nevada March 18, 2016). *See* Append. B. The decision of the Supreme Court of Nevada is reported as *Marquez v. State*, No. 42305 (Nevada March 22, 2006). *See* Append. C.

JURISDICTION

The judgment of the court of appeals, from which this petition was filed, was rendered on January 17, 2018. Petitioner Marquez filed a timely Petition for Rehearing and Rehearing *En Banc*, which the Ninth Circuit denied on April 11, 2018. *See* Appends. D, E. Petitioner

Marquez has until July 10, 2018, in which to file this Petition. *See* S. Ct. R. 13(3). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 2254(d), which provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment, Section One, to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities if citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

> to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, §1.

STATEMENT OF THE CASE

At trial, Marquez presented some evidence of insanity when Dr. Chambers testified that Marquez's paranoid schizophrenia put him in a psychotic state at the time of the incident, which "prevent[ed] Marquez from knowing or understanding the nature and capacity of what he did" and that as a result he could not appreciate the wrongfulness of his actions.[2] Yet, the trial court refused to instruct the jury on insanity, the sole defense theory. The refusal to give the requested instructions meant the jury could not acquit Marquez based on insanity, and had no meaningful way to weigh the mental health evidence the defense did present. Marquez was thus denied his due process rights and was not afforded a meaningful opportunity to present his insanity defense.

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[2] Excerpts of Record (EOR) at 503, 507, 513-14.

A. *State v. Marquez*

During the early morning hours of December 13, 2001, bartender Richard Adamicki (Adamicki) was discovered unconscious and laying in a pool of blood at the Lake Mead Tavern (Tavern), which had been robbed.[3] The entire incident was recorded on the Tavern's video surveillance system and showed Adamicki being struck twice in the head with a baseball bat and the bar and Adamicki being robbed. Adamicki died two months later from the injuries he received on December 13, 2001.[4]

Police identified and arrested Marquez based on what they learned from watching the video of the incident at the Tavern.[5] Marquez initially denied his involvement in the incident, but when confronted with the videotape admitted his involvement and told police he planned the robbery because he was having money problems.[6]

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[3] EOR at 263-64.
[4] *Id.* at 266-72, 274, 333, 337-38, 427-29.
[5] *Id.* at 266-72, 366-70, 383-87.
[6] *Id.* at 188-90.

However, Marquez later explained that "he did not remember actually attacking or hitting or otherwise harming [Adamicki]."[7]

1. The defense — establishing legal insanity.

Marquez's defense at trial was legal insanity.[8] As a result, during opening statement trial counsel told the jury

> [c]learly this is not a case of whodunit . . . . It is pretty clear that Mr. Marquez did certain things.
>
> . . . .
>
> Rather, this is about what you're going to find is his legal responsibility for what he did. . . . What we don't yet fully know, and we're going to apprise you of . . . is his state of mind. And that is an important component of the charges that face him. . . . And when we get into final arguments . . . I will be presenting to you some arguments that will tell you what I believe his state of mind is.[9]

To demonstrate Marquez's legal insanity defense, the defense called clinical and forensic psychologist Dr. Mark Chambers to testify about Marquez's mental state at the time of the offense.[10] According to

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[7] EOR at 501.

[8] *Id.* at 178-79, 493.

[9] *Id.* at 492-93.

[10] *See generally id.* at 494-517.

Dr. Chambers, Marquez suffers from paranoid schizophrenia, which is a form of psychosis and explained that delusions can be psychosis, but psychosis may not be delusions.[11] Dr. Chambers also testified that Marquez had visual hallucinations since childhood about a neighbor woman who had died and that when Marquez told his older sister about seeing this apparition his sister died.[12] As a result of what happened to his older sister, Marquez was "very much afraid of [the apparition] and what she might do to him."[13] Scared that the apparition might kill him for not doing what he was told, Marquez did the apparition's bidding and took the money from the cash register.[14]

Dr. Chambers went on to explain that Marquez's paranoid schizophrenia put him in a psychotic state at the time of the incident, which "**prevent[ed] Marquez from knowing or understanding the**

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[11] EOR at 502-03, 513.

[12] *Id.* at 498-99.

[13] *Id.* at 500; *see also id.* at 499 (Marquez "had concerns, fears, worries that perhaps [his sister] had died . . . because he told her about this apparition").

[14] *See id.* at 500, 504; *see also id.* at 499.

nature and capacity of what he did" and that as a result **he could not appreciate the wrongfulness of his actions**.[15] Simply put,

> [c]onsideration of right or wrong [did not] cross[] [Marquez's] mind at the time of his actions . . . . **[Marquez] did what he did out of fear and out of self preservation** . . . .[16]

2. Instructions.

At the close of evidence, defense counsel asked for an insanity instruction.[17] The trial court refused because:

> [Dr. Chambers] was never asked, until [the court] pointed out, his opinion as to whether the defendant was capable of distinguishing between right and wrong. And that was thrown in at the last minute.[18]

The trial court then gave two additional reasons. First, it ruled that absent testimony demonstrating "the facts of the delusion, if true, would justify the commission of the criminal act[,]" the proposed instruction would be improper.[19] Second, it ruled that "as a matter of

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[15] EOR at 513-14 (emphasis added); *see also id.* at 503, 507.

[16] *Id.* at 504 (emphasis added); *see also id.* (Marquez believed that his own life might be in danger if he did not do the apparition's bidding).

[17] *See id.* at 522.

[18] *Id.* at 522.

[19] *Id.* at 524.

law . . . the testimony [of] Dr. Chambers was inadequate to raise the issue of the insanity defense . . . ."[20]

3. The verdict.

After deliberating for three hours, the jury found Marquez guilty of first-degree murder with a deadly weapon, robbery with a deadly weapon, and burglary while in possession of a deadly weapon.[21] Marquez was subsequently sentenced to an aggregate maximum sentence of 130 years with parole eligibility after 50 years.[22]

B. Proceedings below.

1. Direct appeal.

On direct appeal Marquez argued

> Defendant's legal insanity should have prohibited his conviction for robbery, absent the robbery he could not be convicted of first degree murder. Defendant's theory of defense was completely obliterated when the trial court refused to give jury instructions defining "legal insanity" and explain the appropriate consideration which the jury could give to lesser evidence of mental illness. In so ruling, the district court committed constitutional error.[23]

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[20] EOR at 525.

[21] *Id.* at 556-59.

[22] *Id.* at 16-18.

[23] *Id.* at 732.

On March 22, 2006, the Nevada Supreme Court (NSC) affirmed Marquez's conviction and sentence — finding the trial court did not abuse its discretion in its refusal of the insanity or diminished capacity instructions.[24]

2. Federal Habeas Corpus Proceedings.

a. Federal Court — District of Nevada.

In his Amended Petition, Marquez argued:

> The district court erred in refusing to instruct the jury with regard to "legal insanity," violating Marquez's due process rights pursuant to the Fifth and Fourteenth Amendments.[25]

The district court concluded that the NSC decision was not "contrary to, or involve[] an unreasonable application of, clearly established federal law, as determined by the U.S. Supreme Court, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding."[26] The court reasoned

> First, the . . . evaluation that Dr. Chambers "expressed his opinion that Marquez was not in a delusional state and that he failed to consider, rather than was unable to appreciate, right from wrong, is not unreasonable. Second, the jury was

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[24] Append. C at App27-App28.

[25] EOR at 73-77.

[26] Append. B at App19.

> free to consider [Dr.] Chamber's testimony with respect to intent and was urged to do so by trial counsel during closing argument. In the context of this trial, the failure to instruct the jury on legal insanity cannot be said to have, by itself, "so infected the entire trial that the resulting conviction violates due process."[27]

The district court also found that even if the trial court erred in not giving the instruction, any error was harmless because: (1) Marquez confessed, expressed remorse, and acknowledged his wrongdoing; (2) never gave any indication that he acted out of fear of his visual hallucination; and (3) Dr. Chamber's testimony lacked credibility.[28] The district court denied a certificate of appealability; but the Ninth Circuit Court of Appeals granted a certificate of appealability.[29]

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[27] Append. B at App18-App19.

[28] *Id.* at App19.

[29] *Id.* at App23; *cf.* EOR-VI at 1245-46.

b. Ninth Circuit Court of Appeals.

On appeal, Marquez argued he was denied due process when the state court refused to instruct the jury on either insanity of diminished capacity.[30]

A majority of the Panel (Panel) denied relief.[31] According to the Panel:

> There is no federal right to present an insanity defense. Thus, we are bound by the decisions of state courts interpreting the state law affirmative defense of insanity. Further, the extent of the right to present a "complete defense" under federal law does not extend to "restrictions imposed on a defendant's ability to present an affirmative defense," but only the "exclusion of evidence" and "the testimony of defense witnesses." As such, there was no "unreasonable application" of clearly established federal law, nor an unreasonable determination of fact.[32]

Judge Graber dissented.[33]

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[30] *Marquez v. Baker*, No. 16-15634 (9th Cir. April 6, 2017) (Appellant's Opening Brief at 20-37).

[31] Append. A at App5.

[32] *Id.* at App2-App3 (internal citations omitted).

[33] *Id.* at App6-App9. (Graber, J., dissenting).

Subsequently, Marquez filed a timely Petition for Rehearing and Rehearing *EnBanc.*[34] On April 11, 2018, it was denied.[35]

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's decision in this case signals a departure from this Court's decision in *Brumfield.*

Federal habeas relief, under 28 U.S.C. § 2254, is available to a petitioner if the petitioner can demonstrate the state court's decision:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; **or**
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2) (emphasis added).

In other words, there are 2 paths—(d)(1) **or** (d)(2)—which a petitioner can travel in order to obtain federal habeas relief. However, the Ninth Circuit failed to give meaning to Congress's disjunctive use of the word "or" between (d)(1) and (d)(2); and instead conflated (d)(2) to include the requirement that there must be clearly established federal

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[34] Append. D.

[35] Append. E.

law. *See Loughrin v. U.S.*, 134 S.Ct. 2384, 2390 (2014) (finding: (1) a construction that reads "or" to mean "including" is "foreign to any dictionary [known;]" and (2) "when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presumes' that Congress intended a different meaning'"); *see also Brumfield v. Cain*, 135 S.Ct. 2269 (2015).

A. The Ninth Circuit Court of Appeals failed to conduct a proper 28 U.S.C. § 2254(d)(2) analysis of Marquez's claim that he was denied due process when the state court refused to give an insanity instruction.

In denying relief, the Panel found:

> There is no federal right to present an insanity defense. Thus, we are bound by the decisions of state courts interpreting the state law affirmative defense of insanity. Further, the extent of the right to present a "complete defense" under federal law does not extend to "restrictions imposed on a defendant's ability to present an affirmative defense," but only the "exclusion of evidence" and "the testimony of defense witnesses." As such, there was no "unreasonable application" of clearly established federal law, nor an unreasonable determination of fact.[36]

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[36] Append. A at App2-App3 (internal citations omitted).

In other words, the Panel found a state court decision cannot be based on an unreasonable determination of fact if there is no clearly established federal law. This contradicts *Brumfield*. *See, e.g.,* 132 S.Ct. at 2276-83.

1. *Brumfield v. Cain*

In *Brumfield*, Brumfield had amended his state post-conviction petition to raise an *Atkin's* claim under Louisana law and requested an evidentiary hearing on it. *Id.* at 2274. Brumfield supported his *Atkin's claim* with evidence introduced during the sentencing phase of his trial. *Id.* Without holding a hearing, the state trial court denied Brumfield's claim, which was affirmed on appeal. *Id.* at 2275.

Brumfield then filed a §2254 petition in federal court raising his claim that he was intellectually disabled. *Id.* at 2275. The federal district court granted relief finding the requirements were met, and in the alternative that the state court decision was an unreasonable determination of fact in violation of § 2254(d)(2). *Id.* The Fifth Circuit Court of Appeals reversed finding Brumfield did not meet "either of § 2254(d)'s requirements." *Id.* at 2276. This Court granted certiorari, vacated the Fifth Circuit's decision, and remanded the case. *Id.*

In vacating and remanding the Fifth Circuit Court of Appeals decision, this Court found:

> In conducting the § 2254(d)(2) inquiry, we, like the courts below, "look through" the Louisiana Supreme Court's summary denial of Brumfield's petition for review and evaluate the state trial court's reasoned decision refusing to grant Brumfield an *Atkins* evidentiary hearing. See *Johnson v. Williams*, 568 U.S. ——, ——, n. 1, 133 S.Ct. 1088, 1094, n. 1, 185 L.Ed.2d 105 (2013); *Ylst v. Nunnemaker*, 501 U.S. 797, 806, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). Like Brumfield, we do not question the propriety of the legal standard the trial court applied, and presume that a rule according an evidentiary hearing only to those capital defendants who raise a "reasonable doubt" as to their intellectual disability is consistent with our decision in *Atkins*. Instead, we train our attention on the two underlying factual determinations on which the trial court's decision was premised—that Brumfield's IQ score was inconsistent with a diagnosis of intellectual *2277 disability and that he had presented no evidence of adaptive impairment. App. to Pet. for Cert. 171a–172a.[3]

Brumfield, 132 S.Ct. at 2276 (highlights added). In other words, a § 2254(d)(2) inquiry focuses only on the factual determination of a state court and not on the legal standard applied or whether there exists clearly established federal law.

2. The Ninth Circuit Court of Appeals failed to conduct the proper § 2254(d)(2) inquiry, as enunciated in *Brumfield*.

Here, the Ninth Circuit required Marquez to demonstrate that the state court unreasonably determined the facts when it applied clearly established federal law.[37] This is not the proper § 2254(d)(2) inquiry. *See Brumfield*, 132 S.Ct. at 2276.

Applying the proper § 2254(d)(2) inquiry, as demonstrated below, Marquez presented some evidence, which entitled him to the requested insanity instruction that was authorized under *Finger*. *See Finger v. State*, 27 P.3d 66 (Nev. 2001).

Finger v. State	**Evidence Presented**	**Argument**
"[D]efendant must be in a delusional state . . . ." *Id.* at 85.	Dr. Chambers testified that at the time of the offense Marquez believed his life was endanger by an apparition that Marquez had seen since childhood. *See* EOR at 497-500. According to Dr. Chambers, Marquez firmly believed, based on a past experience, that this apparition would take his life if he	A delusion is a "false or erroneous belief[] that usually involve a misinterpretation of perceptions or experiences." https://psychcentral.com /lib/whats-the-difference-between-a-delusion-and-a-hallucination/, (last visited Sept. 13, 2017). Here, Marquez was delusional in his belief that his visual hallucination

[37] *See* Append. A at App2-App3.

Finger v. State	**Evidence Presented**	**Argument**
	did not do what the apparition told him to do. *See id.* at 499-500; *see also id.* at 504.	would kill him if he did not do as he was told by the apparition. This delusional belief was based on his perception that his older sister died as a result of him telling her about his visual hallucination because his visual hallucination informed Marquez not to say anything about seeing it. *See* EOR at 499.
The defendant "cannot know or understand the nature and capacity of his acts, or his delusion must be such that he cannot appreciate the wrongfulness of his acts . . . ." *Finger*, 27 P.3d at 85.	Dr. Chambers testified that at the time of the incident – [Marquez] did what he did out of fear and out of self preservation . . . [which] prevent[ed] Marquez from knowing or understanding the nature and capacity of what he did [and that as a result Marquez could not appreciate the wrongful ness of his actions]. EOR at 503-04, 507, 513-14.	As Dr. Chambers's testimony demonstrates, Marquez did not know or understand, **and** could not appreciate the wrongfulness of his actions because Marquez delusional belief his life was endanger from the visual hallucination he saw. In other words, Dr. Chambers went beyond that which is required under *Finger* by testifying that all criteria were met. *See Finger*, 27 P.3d at 85 (the defendant cannot **know or understand . . . or . . . appreciate** the wrongfulness of his acts . . .") (emphasis added).

Finger v. State	**Evidence Presented**	**Argument**
"Delusional beliefs can only be the grounds for legal insanity, when the facts of the delusion, if true, would justify the commission of the criminal act." *Finger*, 27 P.3d at 85.	Dr. Chambers testified that at the time of the offense Marquez believed his life was endanger by an apparition that Marquez had seen since childhood. *See* EOR at 497-500. According to Dr. Chambers, Marquez firmly believed, based on a past experience, that this apparition would take his life if he did not do what the apparition told him to do. *See id.* at 499-500, 504.	Here, Marquez truly believed that his visual and hallucination would kill him if he did not do as he was commanded by the hallucination. This belief was based on Marquez's perception that his older sister died as a result of him telling her about his visual hallucination because the hallucination informed Marquez not to say anything about seeing it. *See* EOR at 499 (Marquez "had concerns, fears, worries that perhaps [his sister] had died . . . because he told her about this apparition").

Marquez suffered injury as a result of the trial court's failure to provide the requested insanity instruction. Without the insanity instruction, the jury was unable to find Marquez not guilty by reason of insanity because it was not given that option. *See Pirtle v. Morgan*, 313 F.3d 1160, 1174 (9th Cir. 2002) ("There is no . . . possibility that the jury rejected the diminished capacity defense on the merits, because [the jury] was not told of the availability of the defense. If the jury had been given the . . . instruction, then it reasonably could have found [the

petitioner] did not premeditate the murders . . ."). Additionally, without an instruction on insanity the jury did not know what to make of the mental health evidence presented and it thus became irrelevant.

3. The Nevada Supreme Court's decision is based on an unreasonable determination of facts.

In denying this claim, the Nevada Supreme Court found that the trial court did not abuse its discretion in failing to give the insanity instruction because:[38]

> We conclude that the district court committed no abuse of discretion in its refusal of the basic insanity instruction.[2] Marquez's expert opined that appellant was not in a delusional state and likely did not consider, rather than did not appreciate, whether his actions were right or wrong, as required to warrant issuance of this instruction under Finger, i.e., the M'Naghten standard.[3]
>
> . . . .

[38] Append. C at App27-App28 (footnote citations omitted).

> First, Marquez's statement to police belies his claim that he was mentally ill when he committed the crimes. Second, the district court permitted Marquez to present evidence and closing argument along the lines of the proposed instruction. Third, the jury was instructed on the elements of two types of first-degree murder: (1) that which requires proof of malice aforethought in the killing, and (2) that which requires proof of the killing during the perpetration of a felony. Fourth, the jury was informed that the prosecution must prove all elements beyond a reasonable doubt. Fifth, the jury was instructed that in order to convict on each of the crimes charged, it must ascertain the joint operation of act and intent.[4]

However, this decision is based on an unreasonable determination of facts for five reasons.

First, in rejecting this claim, the Nevada Supreme Court grasped on to a difference between psychosis and delusions, and the supposed difference between the failure to consider and the failure to appreciate. This was an unreasonable determination of facts.

Here, Dr. Chambers made clear that Marquez's psychosis was delusional based because Marquez was under the perception that the

visual hallucination of the dead woman he saw would kill him if he did not do its bidding.[39]

Additionally, any distinction between a failure to consider or a failure to appreciate makes little sense; as Dr. Chambers testified that Marquez's paranoid schizophrenia put him in a psychotic state at the time of the incident, which "prevente[ed] Marquez from knowing or understanding the nature and capacity of what he did" and that as a result **he could not appreciate the wrongfulness of his actions**.[40]

Second, the Nevada Supreme Court required Marquez to prove he was insane before it would instruct the jury on the defense. It reasoned that Marquez's statement to police "belie[d]" any claim that Marquez was mentally ill. However, this was the precise question the jury should have decided, after proper instruction. *See Stevenson v. U.S.*, 162 U.S. 313, 321-23 (1896) (It is the providence of the jury to decide the credibility of witness and the weight to be given to the evidence presented). Furthermore, any factual dispute about Marquez's sanity at the time of the offense weighs in favor of providing the defense

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[39] EOR at 498-500, 503, 504, 507, 513-14.

[40] *Id.* at 503, 507, 513-14 (emphasis added).

instruction, not against it. *See, e.g., id.* (finding the factual disputes provided sufficient evidence to entitle the defendant to his requested manslaughter instruction, but also provided evidence that the jury should have been instructed on self-defense as well).

Third, in the Nevada Supreme Court's view, the trial court's refusal to give the diminished capacity instruction did not matter because the jury was instructed on the elements of murder, that the prosecution had to prove its case beyond a reasonable doubt, and instructed on the "joint operation of act and intent."[41] However, these instructions not only fail to describe the relevance of Marquez's mental health evidence, they also fail to mitigate the damage caused by the missing insanity instruction.

Fourth, the state court's analysis of the missing insanity instruction unreasonably failed to take into account the effect of the trial court's denial of any instruction on mental illness. The court's analysis that trial counsel could still "present evidence and closing

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[41] Append. C at App28.

argument along the lines of the proposed instruction" is also unreasonable.[42] In reality, the evidence had concluded when the trial court refused to give any mental health instruction, and any further argument by counsel about Marquez's mental health to the jury during closing argument would have been irrelevant and meaningless without a jury instruction from the court on its relevance.

Fifth, trial counsel's ability to argue Marquez's state of mind does nothing to replace the missing instruction. Insanity was the sole defense, and the trial court should have instructed the jury on that defense. *See Stevenson*, 162 U.S. 313.

Therefore, the Nevada Supreme Court's decision was based on an unreasonable determination of facts and Marquez was prejudiced when he was denied his right to have the jury instructed on his theory of the case.

CONCLUSION

Petitioner respectfully requests this Court grant *Certiorari,* vacate the judgment, and remand the case to the Ninth Circuit Court of Appeals

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[42] Append. C at App27.

for further consideration in light of *Brumfield v. Cain*, 135 S.Ct. 2269 (2015).

Dated this 5th day of July, 2018

Respectfully submitted,

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INDEX TO APPENDIX

Page No.

A. MEMORANDUM; Ninth Circuit Court of Appeals 001
Filed January 17, 2018

B. ORDER; United States District Court 010
Filed March 30, 2016

C. ORDER OF AFFIRMANCE; Nevada Supreme Court..... 024
Filed March 22, 2006

D. PETITION FOR PANEL REHARING AND REHEARING EN BANC; Ninth Circuit Court of Appeals 031
Filed March 19, 2018

E. ORDER; Ninth Circuit Court of Appeals 050
Filed April 11, 2018

FILED

JAN 17 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAMUEL ISAAC MARQUEZ, Petitioner-Appellant, v. JO GENTRY, Warden and ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellees.	No. 16-15634 D.C. No. 3:08-cv-00647-LRH-VPC MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Argued and Submitted December 6, 2017
San Francisco, California

Before: GRABER and N.R. SMITH, Circuit Judges, and ZIPPS,** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Jennifer G. Zipps, United States District Judge for the District of Arizona, sitting by designation.

Samuel Marquez appeals the district court's denial of habeas corpus relief for his jury conviction for first-degree murder with a deadly weapon. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

1. The district court did not err in denying Marquez's claim that the Nevada state district court's refusal to give an insanity instruction[1] violated his due process rights. Under the Antiterrorism and Effective Death Penalty Act (AEDPA), habeas relief for a state court judgment may only be granted if the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d); *see also Harrington v. Richter*, 562 U.S. 86, 100 (2011). Neither is present in this case.

There is no federal right to present an insanity defense. *Medina v.California*, 505 U.S. 437, 449 (1992); *Clark v. Arizona*, 548 U.S. 735, 752 n.20 (2006). Thus, we are bound by the decisions of state courts interpreting the state law affirmative defense of insanity. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Gilmore v.*

[1] We decline to address Marquez's claim regarding a diminished capacity instruction as the Certificate of Appealability did not grant him a right to appeal that issue. 28 U.S.C. § 2253(c)(3); Ninth Rule 22-1(e).

Taylor, 508 U.S. 333, 342 (1993) ("[I]nstructions that contain errors of state law may not form the basis for federal habeas relief."); *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). Further, the extent of the right to present a "complete defense" under federal law does not extend to "restrictions imposed on a defendant's ability to present an affirmative defense," but only the "exclusion of evidence" and the "testimony of defense witnesses." *Gilmore*, 508 U.S. at 343-44; *see also Estelle*, 502 U.S. at 71-72 ("[T]he fact that the instruction was allegedly incorrect under state law is not a basis for habeas relief.").[2] As such, there was no "unreasonable application" of clearly established federal law, nor an unreasonable determination of the facts. 28 U.S.C. § 2254(d). The Nevada Supreme Court held that the state

[2] The dissent makes three errors. First, the dissent cites *Bradley v. Duncan*, 315 F.3d 1091 (9th Cir. 2002), as controlling precedent. *Bradley* neither cites nor examines the United States Supreme Court precedent directly on point, namely *Estelle*, 502 U.S. at 71-72, and *Gilmore*, 508 U.S. at 343-44. As required in habeas review, we must follow the Supreme Court's precedent to resolve this case. 28 U.S.C. § 2254(d) (requiring a state court decision that was "an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*" for habeas review (emphasis added)); *Harrington*, 562 U.S. at 100. Second, both *United States v. Johnson*, 459 F.3d 990 (9th Cir. 2006), and the primary case relied upon by the *Bradley* panel, *Mathews v. United States*, 485 U.S. 58 (1988), are direct appeals from a *federal* district court, not habeas cases reviewing: (1) a state trial; or (2) the applicability of a *state* defense not recognized in federal law. Finally, *Bradley* used a pre-AEDPA case, *Conde v. Henry*, 198 F.3d 734 (9th Cir. 1999), to justify its use of *Mathews*, a non-habeas case. *See Bradley*, 315 F.3d at 1098. Thus, we must instead follow the mandatory requirements in 28 U.S.C. § 2254(d) and adhere to United States Supreme Court precedent for resolution of this case.

district court properly refused to give the insanity instruction under Nevada law, and we are bound by that determination.

2. The district court did not err in denying Marquez's ineffective assistance of counsel claim. Under the AEDPA's "doubly" highly deferential review for deficient performance claims, *Harrington*, 562 U.S. at 105, Marquez's counsel did not perform "below an objective standard of reasonableness," nor was counsel's performance prejudicial to Marquez, *id.* at 104.

"An attorney undoubtedly has a duty to consult with the client regarding important decisions, including questions of overarching defense strategy," however such an obligation "does not require counsel to obtain the defendant's consent to every tactical decision." *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (internal citations and quotation marks omitted). Marquez's argument only establishes that counsel may not have conferred with him just before the closing statement. However, Marquez and his counsel may have established an overall defense strategy at an earlier time. Counsel's closing statement was clearly in concert with the opening statement and reflected the overall defense strategy. Moreover, when the state district court denied Marquez's attempt to get an instruction on insanity, it was not objectively unreasonable, nor prejudicial, to argue for second-degree

murder in light of the overwhelming evidence, including security footage and a voluntary confession, that Marquez had committed the charged crime.

AFFIRMED.

FILED

JAN 17 2018

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U.S. COURT OF APPEALS

Marquez v. Gentry, No. 16-15634

GRABER, Circuit Judge, concurring in part and dissenting in part:

I concur in part and dissent in part. I agree with the majority that the district court did not err in denying Petitioner's ineffective assistance of counsel claim, but I part ways with the majority with respect to the jury instruction issue.

Every criminal defendant has the right to a meaningful opportunity to present a complete defense. California v. Trombetta, 467 U.S. 479, 485 (1984). As we explained in Bradley v. Duncan, 315 F.3d 1091, 1099 (9th Cir. 2002), that right "would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense." (Internal quotation marks omitted.) Accordingly, we have held consistently that a criminal defendant has a federal constitutional right to have the jury instructed according to his or her theory of the case if the theory has "some foundation in evidence." United States v. Johnson, 459 F.3d 990, 992 (9th Cir. 2006) (internal quotation marks omitted).

Here, Petitioner presented some evidence supporting his insanity defense.[1]

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[1] Under Nevada law, to qualify as being legally insane, a person

> must be in a delusional state such that he cannot know or understand the nature and capacity of his act, or his delusion must be such that he cannot appreciate the wrongfulness of his act, that is, that the act is not authorized by law. So, if a jury believes he was suffering from a delusional state, and if the facts as he believed them to be in his delusional state would justify his actions, he is insane and entitled to

(continued...)

For example, Dr. Chambers testified that, at the time of the alleged offense, Petitioner was laboring under the delusion that an apparition would kill him if he did not do as it wanted. Dr. Chambers further testified that Petitioner did not consider "right and wrong" when he acted; rather, Petitioner "did what he did out of fear and out of self preservation."

The majority, relying on Gilmore v. Taylor, 508 U.S. 333, 342 (1993), and Estelle v. McGuire, 502 U.S. 62, 67–68 (1991), asserts that the right to present a complete defense does not, under clearly established federal law, include the right to present an affirmative defense. But Bradley, which we decided after Gilmore, is to the contrary. There, we held that the trial court's failure to instruct the jury on an affirmative defense (entrapment) violated the defendant's federal constitutional right to present a complete defense. Bradley, 315 F.3d at 1098–99. That failure, we held, amounted to a violation of "clearly established federal law." Id. at 1100 (emphasis added).

The cases on which the majority relies predate our decision in Bradley. The majority has not identified—and nor is there—any "intervening higher authority"

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[1](...continued)
acquittal.

Finger v. State, 27 P.3d 66, 84–85 (Nev. 2001).

that would permit us to revisit the matter. Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). We are thus bound by Bradley's holding that there is a clearly established federal right to a jury instruction on an affirmative defense, provided that the defense has some foundation in evidence. Id. Indeed, we may not fail to follow that holding even if we were convinced that Bradley was wrongly decided or poorly reasoned. Nat'l Fed'n of the Blind v. United Airlines Inc., 813 F.3d 718, 728 (9th Cir. 2016).[2]

The majority further suggests that Bradley does not apply here because AEDPA limits our review to only Supreme Court precedent. True, 28 U.S.C. § 2254(d) requires us to determine whether there was "an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court of the

[2] The majority correctly points out that Bradley did not cite the cases that the majority considers most relevant; rather, Bradley relied on Mathews v. United States, 485 U.S. 58, 63 (1988), California v. Trombetta, 467 U.S. 479, 485 (1984), and Williams v. Taylor, 529 U.S. 362, 407 (2000). Bradley, 315 F.3d at 1098, 1099, 1101. But the Bradley court also cited Barker v. Yukins, 199 F.3d 867, 875–76 (6th Cir. 1999), cert. denied, 530 U.S. 1229 (2000), in which the Sixth Circuit had applied Trombetta and other Supreme Court cases to find, under AEDPA, a due process violation in the context of a state court's error in instructing a Michigan jury with respect to a claim of self-defense under Michigan law. Bradley, 315 F.3d at 1099. Whatever Supreme Court cases Bradley cited, though, the court held that clearly established Supreme Court law requires a jury instruction on an affirmative defense if the defense is supported by evidence. And, as noted, we must follow Bradley's on-point holding even if we disagree with that panel's reasoning.

United States." (Emphasis added.) But, as the Supreme Court has explained, "an appellate panel may, in accordance with its usual law-of-the-circuit procedures, look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent." Marshall v. Rodgers, 569 U.S. 58, 64 (2013) (per curiam).

Finally, I agree with the majority that there is no free-standing federal right to present an insanity defense specifically. But there is a clearly established federal constitutional right to a jury instruction on "any recognized defense for which there exists evidence sufficient for a reasonable jury to find in [the defendant's] favor." Bradley, 315 F.3d at 1098 (emphasis added) (quoting Mathews v. United States, 485 U.S. 58, 63 (1988)). We have framed that right broadly to include any recognized defense. Id. That is, the right does not depend on the nature of the particular defense asserted. Because Nevada provides an affirmative defense of insanity, the Federal Constitution requires an instruction when some evidence supports that defense. I therefore respectfully dissent as to Petitioner's claim regarding his proposed jury instruction.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

SAMUEL ISAAC MARQUEZ, Petitioner, v. RENEE BAKER, et al., Respondents.	Case No. 3:08-cv-00647-LRH-VPC ORDER

This counseled habeas petition is before the court for a decision on the merits (ECF No. 19). Respondents filed an answer to the remaining grounds (ECF No. 48), and petitioner Samuel Isaac Marquez filed a reply (ECF No. 51).

I. Procedural History and Background

A jury convicted Marquez of count I: murder with use of a deadly weapon; count II: robbery with use of a deadly weapon; and count III: burglary while in possession of a deadly weapon (exhibits to first-amended petition, ECF No. 19, exhibit 15).[1] The state district court sentenced Marquez as follows: count I – 40 to 100 years; count II – 60 to 180 months plus an equal and consecutive term for the deadly weapon enhancement; and count III – 48 to 180 months, count II consecutive to count I and count III concurrent with count II. Exh. 16.

The Nevada Supreme Court affirmed the convictions on March 22, 2006, and remittitur issued on May 5, 2006. Exhs. 39, 40. Marquez filed a counseled, state

[1] The exhibits referenced in this order are exhibits to the first amended petition, ECF No. 19, and are found at ECF Nos. 20 and 35.

postconviction habeas corpus petition on March 21, 2007. Exh. 41. On October 21, 2008, the Nevada Supreme Court affirmed the state district court's denial of the petition, however it remanded because it determined that the sentence of 40 to 100 years on count I exceeded the permissible sentence for murder. Exh. 53. The amended judgment of conviction was filed on November 14, 2008, and amended the sentence on count 1 to 20 to 50 years with an equal and consecutive term for the deadly weapon enhancement. Exh. 54. Remittitur issued on November 18, 2008. Exh. 55.

Marquez dispatched this federal habeas petition for filing on December 16, 2008 (ECF No. 10). This court appointed counsel, and a first-amended petition was filed on November 24, 2009 (ECF No. 19). Respondents have now answered the remaining grounds (ECF No. 48).

II. LEGAL STANDARDS

a. Antiterrorism and Effective Death Penalty Act (AEDPA)

28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty Act (AEDPA), provides the legal standards for this court's consideration of the petition in this case:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). This Court's ability to grant a writ is limited to cases where "there is no possibility fair-minded jurists could disagree that the state court's decision conflicts

with [Supreme Court] precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The Supreme Court has emphasized "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the AEDPA standard as "a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt") (internal quotation marks and citations omitted).

A state court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court's] precedent." *Lockyer*, 538 U.S. at 73 (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell*, 535 U.S. at 694.

A state court decision is an unreasonable application of clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Lockyer*, 538 U.S. at 74 (quoting *Williams*, 529 U.S. at 413). The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous; the state court's application of clearly established law must be objectively unreasonable. *Id*. (quoting *Williams*, 529 U.S. at 409).

To the extent that the state court's factual findings are challenged, the "unreasonable determination of fact" clause of § 2254(d)(2) controls on federal habeas review. *E.g., Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir.2004). This clause requires that the federal courts "must be particularly deferential" to state court factual determinations. *Id*. The governing standard is not satisfied by a showing merely that the

state court finding was "clearly erroneous." 393 F.3d at 973. Rather, AEDPA requires substantially more deference:

> .... [I]n concluding that a state-court finding is unsupported by substantial evidence in the state-court record, it is not enough that we would reverse in similar circumstances if this were an appeal from a district court decision. Rather, we must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record.

Taylor v. Maddox, 366 F.3d 992, 1000 (9th Cir.2004); *see also Lambert*, 393 F.3d at 972.

Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be correct unless rebutted by clear and convincing evidence. The petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to habeas relief. *Cullen*, 563 U.S. at 181.

b. Ineffective Assistance of Counsel

Ineffective assistance of counsel claims are governed by the two-part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court held that a petitioner claiming ineffective assistance of counsel has the burden of demonstrating that (1) the attorney made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) that the deficient performance prejudiced the defense. *Williams*, 529 U.S. at 390-91 (citing *Strickland*, 466 U.S. at 687). To establish ineffectiveness, the defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id*. To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. A reasonable probability is "probability sufficient to undermine confidence in the outcome." *Id*. Additionally, any review of the attorney's performance must be "highly deferential" and must adopt counsel's perspective at the time of the challenged conduct, in order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the

petitioner's burden to overcome the presumption that counsel's actions might be considered sound trial strategy. *Id*.

Ineffective assistance of counsel under *Strickland* requires a showing of deficient performance of counsel resulting in prejudice, "with performance being measured against an objective standard of reasonableness, . . . under prevailing professional norms." *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (internal quotations and citations omitted). When the ineffective assistance of counsel claim is based on a challenge to a guilty plea, the *Strickland* prejudice prong requires a petitioner to demonstrate "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

If the state court has already rejected an ineffective assistance claim, a federal habeas court may only grant relief if that decision was contrary to, or an unreasonable application of, the *Strickland* standard. *See Yarborough v. Gentry*, 540 U.S. 1, 5 (2003). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id*.

The United States Supreme Court has described federal review of a state supreme court's decision on a claim of ineffective assistance of counsel as "doubly deferential." *Cullen*, 563 U.S. at 190 (quoting *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1413 (2009)). The Supreme Court emphasized that: "We take a 'highly deferential' look at counsel's performance . . . through the 'deferential lens of § 2254(d).'" *Id.* at 1403 (internal citations omitted). Moreover, federal habeas review of an ineffective assistance of counsel claim is limited to the record before the state court that adjudicated the claim on the merits. *Cullen*, 563 U.S. at 181-84. The United States Supreme Court has specifically reaffirmed the extensive deference owed to a state court's decision regarding claims of ineffective assistance of counsel:

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards

> created by *Strickland* and § 2254(d) are both "highly deferential," *id*. at 689, 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is "doubly" so, *Knowles*, 556 U.S. at ——, 129 S.Ct. at 1420. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S. at ——, 129 S.Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.

Harrington, 562 U.S. at 105. "A court considering a claim of ineffective assistance of counsel must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Id*. at 104 (quoting *Strickland*, 466 U.S. at 689). "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Id*. (internal quotations and citations omitted).

III. Instant Petition

In the remaining grounds, Marquez sets forth two claims of ineffective assistance of counsel and one claim of trial court error.

Ground 1

Marquez asserts that the trial court refused to instruct the jury on legal insanity in violation of his Fifth and Fourteenth Amendment due process rights (ECF No. 19, pp. 5-9).

This court must consider whether no reasonable jurist could conclude that, viewed in context, the failure to instruct the jury on legal insanity "by itself so infected the entire trial that the resulting conviction violates due process." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Cupp v. Naughten*, 414 U.S. 141(1973)).

The trial testimony reflected the following. The owners of a Lake Mead bar received a call in the early hours of December 13, 2001, by the alarm company calling to report that the alarm had gone off at the bar. Exh. 8, pp. 3, 89-106. Ultimately, the couple and a police officer went to the bar and discovered the bartender unconscious, extremely

bloody, and with a head wound. Surveillance cameras showed a Hispanic man of slight build in a black jacket with a large, white Nike logo on the back had been at the bar, made several unsuccessful attempts to get money from an ATM machine and left. He returned about six minutes later; the bartender was reading the newspaper. The man approached the bartender from behind and struck him in the head with a baseball bat. He struck the victim again after the victim fell to the ground. He took money from the cash register and left. *Id*. The State played the surveillance video for the jury. *Id*. at 100.

Police used the ATM credit card information to ascertain that it was Marquez's card that was used at the ATM during the time in question. *Id*. at 106-111. When police went to Marquez's house several hours later, he answered the door. He fit the physical appearance of the man on the surveillance video, and he was arrested. Police conducted a protective sweep of the house at that time and noted a black Nike jacket with a white logo. *Id*. at 112-115.

Officers brought Marquez to the station and he was read his *Miranda* rights. He initially claimed that when he left the bar the bartender was there and nothing was wrong. When he was informed of the surveillance video, he confessed that he had money problems and drug and alcohol problems, that he drank a couple of beers at the bar, went out to his car and concealed a baseball bat, screwdriver and plastic bags on his person, returned and struck the bartender, stole the cash in the register and stole the victim's wallet and left. Marquez mentioned that he had thought about and planned the robbery, either the day before or earlier that day. The victim never regained consciousness and died about two months later. Marquez told police he had not intended to injure the victim so severely. He said that he knew the law was the law and that what he had done was wrong. Exh. 9, pp. 11-17. An officer testified that when she told Marquez that if the victim died he would be charged with murder, "he said that he knew that would be right . . . the law's the law." *Id*. at 14.

Police offers obtained a search warrant and a search of Marquez's car and house yielded a bloody baseball bat, a screwdriver, cash and rolled coins in a plastic bag, and the victim's wallet concealed in the ceiling in the laundry room. A pair of Marquez's pants contained the same credit card that was used at the bar. Exh. 8, pp. 120-125.

Clinical psychologist Mark Chambers testified for the defense at trial. Exh. 10, pp. 5-28. He explained that Marquez's brother had hired him and that based on his examination he concluded that Marquez suffered from paranoid schizophrenia. Chambers also testified that Marquez told him that "for a significant period of time, possibly dating back to childhood," he has experienced visual hallucinations. He would see an apparition of a neighbor who had died when he was a child in El Salvador. He was always very afraid of the vision. The apparition appeared to him at the bar that night and wanted money and he reacted as he did out of fear for his life. *Id*. Chambers testified that he had taken into account possible lying or malingering, but that he believed Marquez was having an episode of psychosis that night in question. *Id*. at 24-25. Chambers opined that Marquez did not consciously consider issues of right and wrong when he acted. *Id*. at 19.

Marquez's counsel presented the following jury instruction for the court's approval:

> Evidence has been presented that the Defendant was legally insane at the time of the commission of the offense. To qualify as being legally insane, a Defendant must be in a delusional state such that he cannot know or understand the nature and capacity of his act, or his delusion must be such that he cannot appreciate the wrongfulness of his act, that is, that the act is not authorized by law.
>
> The burden is upon the Defendant to establish his insanity by a preponderance of the evidence.
>
> If you find the Defendant is legally insane, you must acquit him of the crimes with which he is charged.
>
> Evidence that does not rise to the level of legal insanity may be considered in evaluating whether the prosecution has proven each element of an offense beyond a reasonable doubt for example in determining whether a killing is first or second degree murder.

Exh. 19. Defense counsel based this instruction on *Finger v. State*, 27 P.3d 66 (Nev. 2001), and the court took a recess to review that case. Exh. 10, pp. 33-37.

The court then concluded that the instruction was not proper, failed to fully encompass the *Finger* decision and that no testimony supported the instruction. *Id*. The court indicated that it found Chambers' testimony "incredible" and stated: "I just find as a matter of law that the testimony as provided by Dr. Chambers was inadequate to raise the issue of the insanity defense in this case, and for that reason we'll not give an instruction on it." *Id*. at 36-37. The court also refused to give just the last paragraph of the proposed jury instruction, concluding that it was adequately covered by other instructions on intent. *Id*. at 34-35.

In affirming the denial of this claim, the Nevada Supreme Court explained:

> We conclude that the district court committed no abuse of discretion in its refusal of the basic insanity instruction. Marquez's expert opined that appellant was not in a delusional state and likely did not consider, rather than did not appreciate, whether his actions were right or wrong, as required to warrant issuance of this instruction under *Finger* [*v. State*, 27 P.3d 66 (Nev. 2001), *i.e*., the *M'Naghten* standard].
>
> We also conclude that it was not an abuse of discretion for the district court to refuse the instruction regarding the probative value of evidence of mental illness that does not rise to the level of legal insanity. First, Marquez's statement to police belies his claim that he was mentally ill when he committed the crimes. Second, the district court permitted Marquez to present evidence and closing argument along the lines of the proposed instruction. Third, the jury was instructed on the elements of two types of first-degree murder: (1) that which requires proof of malice aforethought in the killing, and (2) that which requires proof of the killing during the perpetration of a felony. Fourth, the jury was informed that the prosecution must prove all elements beyond a reasonable doubt. Fifth, the jury was instructed that in order to convict on each of the crimes charged, it must ascertain the joint operation of act and intent.

Exh. 39, pp. 5-6.

Marquez has failed to meet his burden here. First, the state supreme court's evaluation that Chambers expressed his opinion that Marquez was not in a delusional state and that he failed to consider, rather than was unable to appreciate, right from wrong, is not unreasonable. *See, e.g.*, exh. 10, pp. 19, 23-24. Second, the jury was free to consider Chambers' testimony with respect to intent and was urged to do so by

defense counsel during closing arguments. In the context of this trial, the failure to instruct the jury on legal insanity cannot be said to have, by itself, "so infected the entire trial that the resulting conviction violates due process." *Estelle*, 502 U.S. at 72. Accordingly, Marquez has failed to demonstrate that the Nevada Supreme Court's decision is contrary to, or involves an unreasonable application of, clearly established federal law, as determined by the U.S. Supreme Court, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

Moreover, even if the trial court had erred in not giving some form of the instruction, any error was harmless. *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Marquez confessed, in detail, within hours of the incident to planning to rob the bar and then executing his plan; he expressed remorse and acknowledged that what he had done was wrong, and he never gave any indication that he acted out of fear of a visual hallucination. Chambers' testimony that he believed Marquez's apparition claims, which Marquez first mentioned long after the incident, and disbelieved Marquez's contemporaneous, detailed confession, simply lacked credibility. Federal habeas relief is denied as to ground 1.

Ground 3(A)

Marquez claims trial counsel was ineffective when he conceded Marquez's guilt during closing arguments (ECF No. 19, pp. 14-16). He argues that it was only after the trial court rejected the defense's jury instruction on insanity that defense counsel conceded Marquez's guilt.

Counsel's concession of guilt can violate the Sixth Amendment right to counsel when the concession amounts to a total breakdown in the adversarial process such that the State is relieved of its burden of proof. *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991). Concession of guilt can also be tactical. *Stenson v. Lambert*, 504 F.3d 873 (9th Cir. 2007).

In his opening statement, which he delivered after the State rested, Marquez's counsel stated:

> Clearly, this is not a case of whodunit . . . . It is pretty clear that Mr. Marquez did certain things . . . . Rather, this is about what you're going to find is his legal responsibility for what he did . . . . What we don't yet fully know, and we're going to apprise you of this very shortly, is his state of mind . . . . But next we're going to be hearing from a doctor who is going to try to give you more information about what this person's state of mind is.

Exh. 10, pp. 3-4.

In closing, defense counsel acknowledged that Marquez had hit the bartender and robbed the bar. Exh. 10, pp. 54-62. He argued that Marquez ran out of money while at the bar, and only then did he decide to act. He asserted that there was no intent to kill and no premeditation or deliberation. He noted specifically Chambers' testimony about the apparition. *Id*. at 59. Counsel further urged:

> You can . . . consider all of the evidence presented to you, including his mental state, whether you tackle –when you tackle the subject of what was it that he intended to do. Did he have the intention to kill? No. Did he have the specific—as the instructions asked you to find, did he have the specific intent to commit robbery given his mental state? Given his doctor's conclusion about his mental state, that he suffered from a psychosis which he referred to as paranoid schizophrenia, it is likely that he lacked specific intent that the State is asking you to find in the commission of the robbery.

Id. at 59-60.

In his appeal of the denial of his state postconviction petition, Marquez relied on *Jones v. State*, 877 P.2d 1052 (Nev. 1994). In that case, the Nevada Supreme Court determined counsel rendered ineffective assistance when counsel conceded guilt during closing arguments after the defendant had pleaded not guilty and had testified at trial that he did not commit the crime. *Jones*, 877 P.2d at 1056-1057.

The Nevada Supreme Court affirmed the denial of Marquez's postconviction petition, readily distinguishing *Jones*:

> During Jones' murder trial, he testified that he never harmed the victim. However, trial counsel's closing argument directly contradicted the

> testimony of Jones by acknowledging that the evidence showed Jones killed the victim but argued that Jones was only guilty of second-degree murder.
>
> In the instant case, counsel's closing argument was consistent with appellant's trial strategy to argue that appellant performed the physical act, but that he lacked the necessary state of mind. During the opening statement, counsel informed the jury that they would hear evidence concerning appellant's state of mind and that the jury needed to find that appellant had performed the physical act together with the necessary state of mind to find appellant guilty of murder.
>
> ***
>
> As counsel was precluded from arguing that appellant was insane during the commission of the crime, he attempted to argue that the mental difficulties Dr. Chambers concluded appellant suffered from should lessen appellant's culpability. Thus counsel's argument was consistent with the theory of defense.

Exh. 53, pp. 4-5.

The Nevada Supreme Court reasonably concluded that defense counsel's tactics and arguments remained essentially consistent throughout the trial. The record belies the claim that his counsel first conceded that Marquez had performed the physical acts during his closing arguments. Marquez, therefore, has failed to demonstrate that the Nevada Supreme Court's decision is contrary to, or involves an unreasonable application of, *Strickland*, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). The court accordingly denies ground 3(A).

Ground 3(B)

Marquez asserts that trial counsel failed to investigate witnesses—specifically, his brother Abraham Marquez—and endorse them in Marquez's case-in-chief (ECF No. 19, pp. 16-18).

Defense counsel had originally informed the court that the defense had one witness, Dr. Chambers. Exh. 10, p. 32. After Chambers testified, defense counsel sought to call Abraham Marquez as a witness. *Id*. at 29-33. Counsel admitted that he had not endorsed Abraham. He indicated that he wanted to call Abraham to testify that he and

Marquez worked at a convenience store, that Marquez had access to fairly significant amounts of cash at the store, that Marquez owed Abraham $3,000, that Marquez had a significant history of drug, alcohol and gambling problems, and that Marquez admitted that what he had done that night was wrong. Finally, counsel stated that Abraham would be able to explain what he told Chambers regarding his brother's mental health history. *Id*. at 28-29.

The prosecutor objected that he was not aware Abraham would testify and was unprepared. He further argued that Abraham's proffered testimony was not relevant and that there was no testimony to corroborate because Marquez hadn't testified. *Id*. at 29-31. The state district court agreed with the prosecutor on the basis that the defense had not endorsed Abraham as a witness and he had been present in court throughout the trial and also found that Abraham's testimony would not be relevant or helpful. *Id*. at 32-33.

In affirming the denial of this claim, the Nevada Supreme Court reasoned:

> Abraham Marquez's testimony concerning appellant's drug and alcohol abuse would have been redundant because Dr. Chambers had already testified concerning appellant's drug use. Further, appellant did not advance any factual evidence in the district court concerning Abraham Marquez's possible testimony of appellant's mental health history. In addition, appellant fails to demonstrate that information concerning appellant's debt or his access to money would have had a reasonable probability of changing the results of the trial. As such, appellant fails to demonstrate a reasonable probability of a different outcome had Abraham Marquez testified at trial.

Exh. 53, pp. 5-6.

As the state courts explained, Marquez has not shown that any of Abraham's proffered testimony had a reasonable probability of changing the result of the trial. Marquez has failed to demonstrate that the Nevada Supreme Court's decision is contrary to, or involves an unreasonable application of, *Strickland*, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Federal habeas relief is denied as ground 3(B).

Accordingly, the petition is denied in its entirety.

IV. Certificate of Appealability

This is a final order adverse to the petitioner. As such, Rule 11 of the Rules Governing Section 2254 Cases requires this court to issue or deny a certificate of appealability (COA). Accordingly, the court has *sua sponte* evaluated the claims within the petition for suitability for the issuance of a COA. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id*.

Having reviewed its determinations and rulings in adjudicating Marquez's petition, the court finds that none of those rulings meets the *Slack* standard. The court therefore declines to issue a certificate of appealability for its resolution of any of Marquez's claims.

IT IS THEREFORE ORDERED that the amended petition (ECF No. 19) is **DENIED** in its entirety.

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

IT IS FURTHER ORDERED that the Clerk shall enter judgment accordingly and close this case.

DATED this 18th day of March, 2016.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMUEL ISAAC MARQUEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42305

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon, one count of robbery with the use of a deadly weapon, and one count of burglary while in possession of a deadly weapon. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

In this appeal, we consider the adequacy of jury instructions in connection with the insanity defense. First, we examine whether the instructions required an explanation of the insanity defense. Second, we consider whether the defendant was entitled to an instruction regarding the probative value of evidence of mental illness that does not rise to the level of legal insanity. Third, we determine whether the district court erred in failing to instruct the jury that criminal intent requires a sound mind. We affirm.

FACTS AND PROCEDURAL HISTORY

Samuel Isaac Marquez entered the Lake Mead Tavern, struck bartender Richard Adamicki unconscious with a baseball bat, and stole approximately $2,700 from the cash register. Marquez also removed Mr. Adamicki's wallet from his person. Based on video surveillance and ATM records generated at the bar, police ascertained Marquez's identity and arrested him at his apartment. Several hours after the incident, he

confessed to planning and committing the crimes, and expressed remorse for committing what he considered to be wrongful acts. Mr. Adamicki never regained consciousness, and died approximately two months after the incident.

The State charged Marquez with one count each of murder with the use of a deadly weapon, robbery with the use of a deadly weapon, and burglary while in possession of a deadly weapon.

At trial, forensic psychologist, Dr. Mark Chambers, testified that Marquez experienced a visual hallucination during the night in question. Dr. Chambers told of an apparition of a dead woman seen by Marquez throughout his life since he was a young boy in El Salvador. Dr. Chambers explained that Marquez feared this woman, believing that she was responsible for his sister's death, and that this woman wished to take Marquez into the afterlife with her as well. At the bar, Marquez saw the apparition, who demanded money from the cash register. Out of self-preservation, Marquez did her bidding. Dr. Chambers stressed that Marquez acted out of fear, without consideration as to whether what he was doing was right or wrong. However, on cross-examination, Dr. Chambers opined that Marquez was not in a delusional state when he committed the crimes at issue.

Based on Dr. Chambers' testimony, the defense sought the following instructions: (1) an instruction defining legal insanity and explaining the probative value of an insanity finding; and (2) an instruction that evidence of mental illness, although insufficient to warrant an insanity finding, could be considered for other purposes, such as conviction on a reduced charge. Specifically, the first proposed instruction provided in relevant part:

> Evidence has been presented that the Defendant was legally insane at the time of the commission of the offense. To qualify as being legally insane, a Defendant must be in a delusional state such that he cannot know or understand the nature and capacity of his act, or his delusion must be such that he cannot appreciate the wrongfulness of his act, that is, that the act is not authorized by law.
>
> . . . .
>
> If you find the Defendant legally insane, you must acquitg [sic] him of the crimes with which he is charged.

The second proposed instruction provided the following:

> Evidence that does not rise to the level of legal insanity may be considered in evaluating whether the prosecution has proven each element of an offense beyond a reasonable doubt for example in determining whether a killing is first or second degree murder.

These instructions mirrored those approved in Finger v. State.[1]

The district court rejected both instructions. The district court refused the first instruction because it found Dr. Chambers' testimony incredible. It refused the second instruction because it concluded that other instructions adequately encompassed its substance.

In closing argument, the State primarily based its case on felony murder, but it also argued that sufficient evidence existed to prove Marquez acted with malice aforethought. The district court issued instructions on both theories of murder.

The jury convicted Marquez on all counts, after which the district court imposed the following sentences: 100 years imprisonment on

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[1]117 Nev. 548, 576-77, 27 P.3d 66, 84-85 (2001).

the murder conviction, with parole eligibility beginning after 40 years; consecutive terms of 60 to 180 months on the conviction for robbery with use of a deadly weapon; and 48 to 180 months on the conviction for burglary while in possession of a deadly weapon. The district court ordered concurrent service of the robbery and burglary sentences, and imposed consecutive service of the murder sentence. Marquez appeals.

DISCUSSION

We conclude that the district court committed no abuse of discretion in its refusal of the basic insanity instruction.[2] Marquez's expert opined that appellant was not in a delusional state and likely did not consider, rather than did not appreciate, whether his actions were right or wrong, as required to warrant issuance of this instruction under Finger, i.e., the M'Naghten standard.[3]

We also conclude that it was not an abuse of discretion for the district court to refuse the instruction regarding the probative value of evidence of mental illness that does not rise to the level of legal insanity. First, Marquez's statement to police belies his claim that he was mentally ill when he committed the crimes. Second, the district court permitted Marquez to present evidence and closing argument along the lines of the proposed instruction. Third, the jury was instructed on the elements of two types of first-degree murder: (1) that which requires proof of malice aforethought in the killing, and (2) that which requires proof of the killing during the perpetration of a felony. Fourth, the jury was informed that

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[2]See Crawford v. State, 121 Nev. ___, ___, 121 P.3d 582, 585 (2005).

[3]See id. at 557, 576, 27 P.3d at 84-85 (citing M'Naghten's Case, 8 Eng. Rep. 718, 10 Cl. & Fin. 200, 211 (1843)).

the prosecution must prove all elements beyond a reasonable doubt. Fifth, the jury was instructed that in order to convict on each of the crimes charged, it must ascertain the joint operation of act and intent.[4]

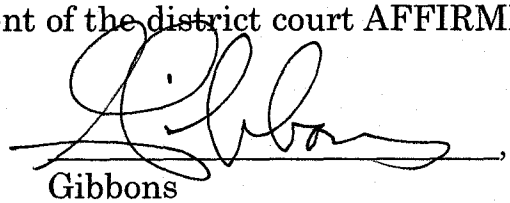
For these same reasons, we also reject Marquez's contention that the district court erred in failing to instruct the jury that criminal intent requires a sound mind.

We have considered Marquez's other arguments, and conclude they are without merit.

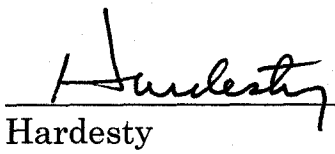
CONCLUSION

We conclude the district court committed no abuse of discretion in denying the jury instructions at issue. Therefore, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Gibbons



_____, J.
Hardesty

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[4]We note that jury instruction no. 14 erroneously stated that to convict a defendant of murder in the perpetration of robbery, the jury must find that the defendant possessed specific intent to commit robbery. Robbery requires general, rather than specific, intent. See Litteral v. State, 97 Nev. 503, 508, 634 P.2d 1226, 1228 (1981). However, we also note that this error benefited the appellant, because general intent need only be inferred from voluntary commission of the act. See id. at 506, 634 P.2d at 1228.

cc: Hon. Kathy A. Hardcastle, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

MAUPIN, J., dissenting:

In my view, the district court should have given instruction on the probative value of mental illness that does not rise to the level of legal insanity. In Crawford v. State, this court stated that "'the defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be.'"[1] In this, I believe the majority opinion in Finger v. State wrongly overruled Aldana v. State,[2] which correctly required an instruction on legal insanity upon presentation of any evidence of mental illness.[3]

_____, J.
Maupin

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[1]121 Nev. ___, ___, 121 P.3d 582, 586 (2005) (quoting Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 76-77 (2002)).

[2]117 Nev. 548, 577, 27 P.3d 66, 85 (2001).

[3]See Aldana v. State, 102 Nev. 245, 246-47, 720 P.2d 1217, 1218 (1986).

Appeal No. 16-15634

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

***

SAMUEL ISAAC MARQUEZ, Petitioner-Appellant, vs. RENEE BAKER, ET AL., Respondents-Appellees.	D.C. No. 3:08-CV-00647-LRH-VPC (District of Nevada, Reno)

Appeal from the United States District Court
for the District of Nevada

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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TABLE OF CONTENTS

I. SUMMARY BASIS FOR REHEARING 1

II. ARGUMENT FOR REHEARING 2

A. The Majority's errors in the opinion requires rehearing of Marquez's claim that he was denied his federal constitutional right to due process and a fair trial due to the trial court's failure to provide an insanity instruction after Marquez had presented some evidence to support such an instruction 2

1. Clearly established constitutional law. 3

2. 28 U.S.C. § 2254. 7

III. CONCLUSION 13

CERTIFICATE OF COMPLIANCE 14

CERTIFICATE OF SERVICE 15

Table of Authorities

Supreme Court Opinions

California v. Trombetta, 467 U.S. 479 (1984) 2, 3, 5
Estelle v. McGuire, 502 U.S. 62 (1991) 6
Gilmore v. Taylor, 508 U.S. 333 (1993) 4, 5, 6
Marshall v. Rodgers, 569 U.S. 58 (2013) 2, 7
Mathews v. U.S., 485 U.S. 58 (1988) 2, 3
Miller-El v. Cockrell, 537 U.S. 322 (2003) 8
Stevenson v. U.S., 162 U.S. 313 (1896) 3

U.S. Constitution

U.S. Const. amend. XIV 3

Federal Court Opinions

Beardslee v. Woodford, 358 F.3d 560 (9th Cir. 2004) 9
Bradley v. Duncan, 315 F.3d 1091 (9th Cir. 2002) 2, 3, 5, 6
Davis v. Grigas, 443 F.3d 1155 (9th Cir. 2006) 2, 8-9
Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990) 4
Miller v. Gammie, 335 F.3d 889 (9th Cir. 2003) (en banc) 6
Nat'l Fed'n of the Blind v. United Airlines Inc., 813 F.3d 718 (9th Cir. 2016) 7
United States v. Morton, 999 F.2d 435 (9th Cir. 1993) 9
United States v. Johnson, 459 F.3d 990 (9th Cir. 2006) 6, 9

United States Code

28 U.S.C. § 2254 ..... *passim*

State Cases

Books v. State, 747 P.2d 893 (Nev. 1987) 9-10
Finger v. State, 27 P.3d 66 (Nev. 2001) 3-4, 10, 11, 12

Rules

Fed. R. App. P. 40 1
Fed. R. App. P. 32 13
Fed. R. App. P. 35 2

I. Summary Basis For Rehearing

Samuel Marquez was denied his federal due process right to a fair trial when the trial court refused to instruct the jury on Marquez's requested insanity instruction; despite Marquez presenting some evidence to support such an instruction. *See, e.g.,* Docket 22 at 41 n.16, 42-44, 46-47 (Respondent implicitly recognizing that Marquez presented some evidence of insanity, but that the evidence presented was weak and insufficient).

However, a Panel of this Court, over Judge Graber's dissent, denied relief and affirmed the denial of habeas corpus relief. *See* Docket 43 at 2-4; 1-4 (Graber, J., dissenting). According to the Majority, because there is "no clearly established federal law, as determined by the Supreme Court of the United States" – that there exists a federal right to present an insanity defense or an affirmative defense – the Nevada Supreme Court's decision cannot be unreasonable or contrary to clearly established federal law or an unreasonable determination of fact. Docket 43 at 2-4.

Marquez respectfully disagrees with the Majority's ruling, which "overlook[s] or misapprehend[s]" controlling legal authority and material

facts. Fed. R App. P. 40(a)(2). Marquez also asks that the *en banc* Court hear his case because the Majority's decision directly contradicts clearly established Supreme Court authority and this Court's authority. *See. e.g., Marshall v. Rodgers,* 569 U.S. 58 (2013); *Mathews v. U.S.,* 485 U.S. 58 (1988); *California v. Trombetta*, 476 U.S. 479 (1984); *Bradley v. Duncan*, 315 F.3d 1091 (9th Cir. 2002); *Davis v. Grigas*, 443 F.3d 1155 (9th Cir. 2006); *see also* Fed. R. App. P. 35; 28 U.S.C. § 2254(d)(1)-(2).

II. Argument for Rehearing

A. The Majority's errors in the opinion requires rehearing of Marquez's claim that he was denied his federal constitutional right to due process and a fair trial due to the trial court's failure to provide an insanity instruction after Marquez had presented some evidence to support such an instruction.

The Majority erroneously concluded: (1) there exists no clearly established federal law to support Marquez's claim that the failure to have the jury instructed on his affirmative defense – insanity – violated his right to present a complete defense; and (2) because there exists no federal law to support Marquez's claim the Nevada Supreme Court's decision was not based an unreasonable determination of facts. Docket 43 at 3. However, these conclusions conflict with decisions of the Supreme Court, this Court, as well as the plain language of 28 U.S.C. § 2254(d)(2).

1. **Clearly established constitutional law.**

Contrary to the Majority's conclusion the Due Process Clause of the Fourteenth Amendment requires criminal prosecutions to "comport with prevailing notions of fundamental fairness[,which] require criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984); *see also* U.S. Const. amend. XIV. As a result, the failure to instruct a jury on a defendant's theory of defense violates a defendant's due process right to present a complete defense. *See Bradley v. Duncan*, 315 F.3d 1091, 1098 (9th Cir. 2002) (citing *Trombetta*, 467 U.S. at 485); *see Mathews v. U.S.*, 485 U.S. 58, 63 (1988) (finding "a defendant is entitled to an instruction as to any recognized defense for which there is evidence sufficient for a reasonable jury to find in his favor"); *Stevenson v. U.S.*, 162 U.S. 313 (1896) (remanding for a new trial because sufficient evidence existed to entitled the defendant his requested manslaughter instruction, but also provided evidence that he jury should have been instructed on self-defense as well); *Finger v. State*, 27 P.3d 66, 84 (Nev. 2001) (**finding "legal insanity is a well-established and fundamental principle of the law of the**

United States[, and] [i]t is therefore protected by the Due Process Clauses of both the United States and Nevada Constitutions") (emphasis added).

Furthermore, any doubt that Marquez had a federal constitutional right to have the jury instructed on his affirmative defense was resolved in *Gilmore v. Taylor*, 508 U.S. 333 (1993).

In *Gilmore*, the Seventh Circuit granted federal habeas relief to Taylor, the criminal defendant, based on its decision in *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990). *Gilmore*, 508 U.S. at 335. The *Falconer* decision was announced 11 days after Taylor had filed his federal habeas petition. *See id.* at 338. The Supreme Court reversed the Seventh Circuit's decision in Taylor's case stating:

> [w]e have previously stated that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" But the cases in which we have invoked this principle dealt with the exclusion of evidence. None of them involved the restrictions imposed on a defendant's ability to present an affirmative defense.
>
> . . . .
>
> [We] therefore hold that the rule announced in *Falconer* is "new" within the meaning of *Teague*.

Gilmore, 508 U.S. at 343-44 (citing *Teague v. Lane*, 489 U.S. 288 (1989)) (internal citations omitted).

In other words from *Gilmore* forward — there can be a violation of due process when a court fails to instruct on an affirmative defense. *See, e.g., Gilmore*, 508 U.S. at 352 (O'Connor, J., concurring); *see also id.* at 364 ("The omission of an adequate affirmative-defense instruction constitutes a profound violation of a defendant's constitutional rights . . . . The right to an affirmative-defense instruction that jurors can understand when there is evidence to support an affirmative defense is as significant to the fairness and accuracy of a criminal proceeding as is the right to counsel") (Blackmun, J., dissenting). Marquez gets the benefit of *Gilmore* because his date of finality is June 20, 2006.

Assuming *arguendo*, the Majority is correct that there exists no clearly established federal law, as enunciated by the United States Supreme Court, to support Marquez's claim — this Circuit has decided otherwise and the Majority failed to follow Circuit precedent as it was required to do.

As Judge Graber noted:

> Every criminal defendant has the right to a meaningful opportunity to present a complete defense. California v. Trombetta, 467 U.S. 479, 485 (1984). As we explained in Bradley v. Duncan, 315 F.3d 1091, 1099 (9th Cir. 2002), that right "would be empty if it did not entail the further

right to an instruction that allowed the jury to consider the defense." (Internal quotation marks omitted.) **Accordingly, we have held consistently that a criminal defendant has a federal constitutional right to have the jury instructed according to his . . . theory of the case if the theory has "some foundation in evidence**." United States v. Johnson, 459 F.3d 990, 992 (9th Cir. 2006) (internal quotation marks omitted).

Here, [Marquez] presented some evidence supporting his insanity defense.

. . . .

The majority, relying on Gilmore v. Taylor, 508 U.S. 333, 342 (1993), and Estelle v. McGuire, 502 U.S. 62, 67-68 (1991), assert that the right to present a complete defense does not, under clearly established federal law, include the right to present an affirmative defense. But **Bradley**, which we decided after Gilmore, is to the contrary. There, **we held that the trial court's failure to instruct the jury on an affirmative defense . . . violated the defendant's federal constitutional right to present a complete defense**. Bradley, 315 F.3d at 1098-99. **That failure, we held, amounted to a violation of "clearly established federal law**." Id. at 1100 (emphasis added).

[Furthermore, there is no] "intervening higher authority" that would permit us to revisit the matter. Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). **We are thus bound by Bradley's holding that there is a clearly established federal right to a jury instruction on an affirmative defense**, provided that the defense has some foundation in evidence. Id. Indeed, we

> may not fail to follow that holding even if we were convinced that Bradley was wrongly decided or poorly reasoned. Nat'l Fed'n of the Blind v. United Airlines Inc., 813 F.3d 718, 728 (9th Cir. 2016).
>
> The majority further suggests that Bradley does not apply here because AEDPA limits our review to only Supreme Court precedent. . . . [However,] the Supreme Court has explained, "an appellate panel may, in accordance with its usual law-of-the-circuit procedures, look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent." Marshall v. Rodgers, 569 U.S. 58, 64 (2013) (per curiam).

Docket 43 at 1-4 (Graber, J., dissenting) (bolded emphasis added; underlined emphasis in original).

As outlined, herein, the Marjority's failure to find clearly established federal law to support Marquez's claim is in conflict with decisions of the Supreme Court and this Court. *En banc* rehearing should be granted.

2. 28 U.S.C. § 2254.

In denying Marquez relief, the Majority found that because there was no clearly established federal law, the Nevada Supreme Court's decision was not an unreasonable determination of facts. *See* Docket 43

at 2-3. However, this finding conflates 28 U.S.C. § 2254(d) because it makes meaningless the disjunctive language contained within it.

28 U.S.C. § 2254 states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody . . . shall not be granted . . . unless the adjudication of the claim —
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; **or**
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d), (d)(1)-(d)(2) (emphasis added).

In other words, § 2254(d)(2) provides an alternative and independent basis for relief that does not require Supreme Court case law. *See id.*; *see also Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (recognizing that "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence present in the state-court proceeding") (citing 28 U.S.C. § 2254(d)(2)); *Davis v. Grigas*, 443 F.3d 1155 (9th Cir. 2006) (finding that when there is no

clearly established Federal law, the court conducts *de novo* review to determine if the federal habeas corpus petitioner is entitled to federal relief because the state court decision was based on an unreasonable determination of fact), *overruled on other grounds by Daire v. Lattimore*, 812 F.3d 766 (9th Cir. 2016) (*en banc*). All § 2254(d)(2) requires is that the petitioner be able to establish that his state court decision "was based on an unreasonable determination of facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

Marquez can meet this burden.

Briefly, "[a] defendant is entitled to an instruction on his theory of the case if the theory is legally cognizable and there is [some] evidence upon which the jury could rationally find for the defendant." *U.S. v. Morton*, 999 F.2d 435, 437 (9th Cir. 1993) (citing *Mathews*, 485 U.S. at 63); *see also U.S. v. Johnson*, 459 F.3d 990, 993 (9th Cir. 2006); *Beardslee v. Woodford*, 358 F.3d 560, 577 (9th Cir. 2004). In fact, evidence to support a defendant's theory of the case is sufficient even if the evidence is "**weak, insufficient, inconsistent, or of doubtful credibility**." *Johnson*, 459 F.3d at 993 (emphasis added); *see also Books v. State*, 747 P.2d 893. 895 (Nev. 1987) ("A defendant in a criminal case is entitled to have the

jury instructed on his theory of the case, no matter how weak or incredible the evidence supporting the theory may appear to be"). . Thus, once some evidence is presented — weak, insufficient, inconsistent, or even doubtful — a defendant is entitled to the requested jury instruction(s).

As the following table demonstrates, Marquez presented some evidence, which entitled him to the requested insanity instruction that was authorized under *Finger*. *See Finger v. State*, 27 P.3d 66 (Nev. 2001).

***Finger v. State*, 27 P.3d 66 (Nev. 2001)**	**Evidence Presented**	**Argument**
"[D]efendant must be in a delusional state . . . ." *Id.* at 85.	Dr. Chambers testified that at the time of the offense Marquez believed his life was endanger by an apparition that Marquez had seen since childhood. *See* EOR-IV at 497-500 (Tr.7/10/03 at 7-10). According to Dr. Chambers, Marquez firmly believed, based on a past experience, that this apparition would take his life if he did not do what the apparition told him to do. *See id.* at 499-500 (Tr.7/10/03 at 9-10); *see also id.* at 504 (Tr.7/10/03 at 14).	As Respondent correctly notes, a delusion is a "false or erroneous belief[] that usually involve a misinterpretation of perceptions or experiences." https://psychcentral.com/lib/whats-the-difference-between-a-delusion-and-a-hallucination/, (last visited Sept. 13, 2017); *see also* AB at 41-42 n.16. Here, Marquez was delusional in his belief that the apparition would kill him if he did not do as he was told by the apparition. This delusional belief was

Finger v. State, 27 P.3d 66 (Nev. 2001)	Evidence Presented	Argument
		based on his perception that his older sister died as a result of him telling her about the apparition because the apparition informed Marquez not to say anything about seeing it. *See* EOR-IV at 499 (Tr.7/10/03 at 9).
The defendant "cannot know or understand the nature and capacity of his acts, or his delusion must be such that he cannot appreciate the wrongfulness of his acts . . . ." *Finger*, 27 P.3d at 85.	Dr. Chambers testified that at the time of the incident – [Marquez] did what he did out of fear and out of self preservation . . . [which] prevent[ed] Marquez from knowing or understanding the nature and capacity of what he did [and that as a result Marquez could not appreciate the wrongfulness of his actions]. EOR-IV at 504, 513-14 (Tr.7/10/03 at 14, 23-24); *see also* EOR-IV at 503, 507 (Tr.7/10/03 at 13, 17).	As Dr. Chambers's testimony demonstrates, Marquez did not know or understand, **and** could not appreciate the wrongfulness of his actions because Marquez delusionally believed that his life was endanger from the apparition he saw. In other words, Dr. Chambers went beyond that which is required under *Finger* by testifying that all criteria were met. *See Finger*, 27 P.3d at 85 (the defendant cannot **know or understand . . . or . . . appreciate** the wrongfulness of his acts . . .") (emphasis added).

Finger v. State, 27 P.3d 66 (Nev. 2001)	Evidence Presented	Argument
"Delusional beliefs can only be the grounds for legal insanity, when the facts of the delusion, if true, would justify the commission of the criminal act." *Finger*, 27 P.3d at 85.	Dr. Chambers testified that at the time of the offense Marquez believed his life was endanger by an apparition that Marquez had seen since childhood. *See* EOR-IV at 497-500 (Tr.7/10/03 at 7-10). According to Dr. Chambers, Marquez firmly believed, based on a past experience, that this apparition would take his life if he did not do what the apparition told him to do. *See id.* at 499-500 (Tr.7/10/03 at 9-10); *see also id.* at 504 (Tr.7/10/03 at 14).	Here, Marquez truly believed that the apparition would kill him if he did not do as he was told by the apparition. This belief was based on Marquez's perception that his older sister died as a result of him telling her about the apparition because the apparition informed Marquez not to say anything about seeing it. *See* EOR-IV at 499 (Tr.7/10/03 at 9 — Marquez "had concerns, fears, worries that perhaps [his sister] had died . . . because he told her about this apparition").

As demonstrated, Marquez can demonstrate that his state court decision "was based on an unreasonable determination of facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); *see also* Docket 43 at 1 (Graber, J., dissenting) (finding Marquez "presented some evidence supporting his insanity defense").

As outlined, herein, the Majority's finding failed to properly apply § 2254(d)(2), and thus it is in conflict with decisions of the Supreme

Court, this Court, and 28 U.S.C. § 2254(d)(1)-(2). *En banc* rehearing should be granted.

III. Conclusion

For the reasons outlined herein, Marquez respectfully requests his case be reheard by the Panel or the *En Banc* Court.

Dated this 19th day of March, 2018.

Respectfully submitted,

/s/ T. Kenneth Lee
T. KENNETH LEE
Assistant Federal Public Defender

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,691 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word and Century 14-point font.

Dated this 19th day of March, 2018.

Respectfully submitted,

/s/ T. Kenneth Lee
T. KENNETH LEE
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing by First-Class Mail, postage pre-paid, or have dispatched it to a third-party commercial carrier for delivery within three calendar days, to the following non-CM/ECF participants:

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/s/ Dayron Rodriguez
An Employee of the
Federal Public Defender

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAMUEL ISAAC MARQUEZ, Petitioner-Appellant, v. JO GENTRY, Warden and ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellees.	No. 16-15634 D.C. No. 3:08-cv-00647-LRH-VPC District of Nevada, Reno ORDER

Before: GRABER and N.R. SMITH, Circuit Judges, and ZIPPS,* District Judge.

Judge N.R. Smith and Judge Zipps vote to deny the petition for panel rehearing. Judge N.R. Smith votes to deny the petition for rehearing en banc, and Judge Zipps so recommends. Judge Graber votes to grant the petition for panel rehearing and rehearing en banc.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

* The Honorable Jennifer G. Zipps, United States District Judge for the District of Arizona, sitting by designation.

The petition for rehearing and the petition for rehearing en banc are DENIED.