UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 18 2017

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

ARRION LEE CREW, Jr.,

Petitioner-Appellant,

v.

W. L. MONTGOMERY, Acting Warden,

Respondent-Appellee.

No. 16-56850

D.C. No.
5:13-cv-01886-FMO-JEM
Central District of California,
Riverside

ORDER

Before: FARRIS and LEAVY, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 10) is denied. Appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ARRION LEE CREW, JR.,

Petitioner,

v.

W.L. MONTGOMERY, Warden,

Respondent.

Case No. EDCV 13-1886-FMO (JEM)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. Section 636, the Court has reviewed the pleadings, the records on file, and the Report and Recommendation of the United States Magistrate Judge. Petitioner has filed Objections, and the Court has engaged in a de novo review of those portions of the Report and Recommendation to which Petitioner has objected. The Court accepts the findings and recommendations of the Magistrate Judge.

IT IS ORDERED that: (1) the Petition for Writ of Habeas Corpus is denied; and (2) Judgment shall be entered dismissing the action with prejudice.

DATED: September 27, 2016

/s/
FERNANDO M. OLGUIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ARRION LEE CREW, JR.,

Petitioner,

v.

W.L. MONTGOMERY, Warden,

Respondent.

Case No. EDCV 13-1886-FMO (JEM)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

The Court submits this Report and Recommendation to the Honorable Fernando M. Olguin, United States District Judge, pursuant to 28 U.S.C. Section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

On October 16, 2013, Arrion Lee Crew, Jr. ("Petitioner"), a prisoner in state custody, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. Section 2254 ("Petition"). On December 3, 2013, Petitioner filed a First Amended Petition ("FAP"). Warden W. L. Montgomery ("Respondent") filed an Answer on February 21, 2014. On May 19, 2014, Petitioner filed a Traverse.

The matter is ready for decision.

PRIOR PROCEEDINGS

On January 7, 2011, a Riverside County Superior Court jury found Petitioner guilty of two counts of first degree murder (Cal. Penal Code § 187(a)) and one count of being a felon in possession of a firearm (Cal. Penal Code § 12021(a)(1)). The jury also found to be true the special circumstance allegation that Petitioner committed multiple murders (Cal. Penal Code § 190.2(a)(3)) and the allegations that Petitioner personally and intentionally discharged a firearm in the commission of each murder (Cal. Penal Code § 12022.53(d)). (Clerk's Transcript ["CT"] at 114-15, 122-27; Reporter's Transcript, Volume 2 ["2 RT"] at 342-44.) On April 29, 2011, the trial court sentenced Petitioner to state prison for an aggregate term of life without the possibility of parole. (CT147-48, 168-71; 2 RT 368-69.)[1]

Petitioner filed an appeal in the California Court of Appeal. (Lodgment ["LD"] 3, 4.) On August 7, 2012, the Court of Appeal modified Petitioner's sentence to a life term without the possibility of parole on each murder conviction, and otherwise affirmed the judgment and sentence in an unpublished, reasoned decision. (LD 5.) Petitioner filed a petition for review in the California Supreme Court, which was summarily denied on October 24, 2012. (LD 6, 7.)

SUMMARY OF EVIDENCE AT TRIAL

Based on its independent review of the record, the Court adopts the following factual summary from the California Supreme Court's opinion as a fair and accurate summary of the evidence presented at trial:[2]

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[1] Particularly, Petitioner was sentenced to life without the possibility of parole for the multiple murder special circumstance, with consecutive terms of twenty-five years to life for each murder, plus consecutive terms of twenty-five years to life for discharging a firearm in the commission of each of those offenses, and a concurrent term of three years for the felon in possession count. (CT147-48, 168-71; 2 RT 368-69.)

[2] The Court has substituted "Petitioner" for "defendant" where the court of appeal indicates it is referring to Petitioner. Additional factual background is set out below where necessary to address Petitioner's claims.

Kimberly Harris, the victim in count 2, known as "Cozy," lived in Moreno Valley with her 18-year-old son Arthur and two younger sons. Her friend, Raquel Reliford Robinson, the victim in count 1, also lived with Harris.[3] All five were at home on the night of October 22, 2007. Two of Arthur's friends were spending the night as well. Harris's friend Ramona Williams, also known as"Bons" or "Bonswi," was also at the house. Harris, Robinson and Williams often got together to "party," drinking alcohol and using drugs, specifically "weed" and cocaine. Petitioner, known as "E," was Harris and Robinson's drug dealer. Robinson regularly bought approximately $150 worth of drugs from him, and Harris regularly bought $80 worth of drugs from him.

Around 10:00 p.m., Petitioner and "some other guy" came to Harris's house. After the two men left, Harris and Robinson told Williams that "something went down" with Petitioner and Petitioner "ha[d] to bring them back some money." Williams later learned that Robinson had paid Petitioner $100 for some drugs, and Petitioner owed her $20 in change. Robinson had been drinking and was "all hyped up" and saying that Petitioner owed her $20. Robinson kept calling Petitioner and making unspecified threats, as well as telling him that she was going to get her husband and some other people to beat him up. Robinson kept calling Petitioner "cuz." Williams testified that she thought Petitioner might be a "Blood ex-gangbanger." If he was, calling him "cuz" would be insulting, because that is a term Crips use to refer to one another. She did not know whether Petitioner was a Blood, however.

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[3] At this point the court of appeal noted that "[d]uring the trial, Raquel Robinson was at times referred to as Raquel Reliford," and would be referred to in the decision as "'Robinson.'" (LD 5 at 3 n.2.)

Over the course of the evening, Robinson drank about a pint of cognac. She was intoxicated,[4] and was very agitated about the $20 Petitioner owed her. Harris repeatedly tried to calm her down.

Around 4:00 a.m., Arthur was awakened by voices outside the house, near his bedroom. He looked out the window and saw his mother and Robinson standing on the driveway. Robinson was asking his mother for money, but his mother refused to give it to her. His mother went inside the house, while Robinson approached Petitioner, who was standing nearby, next to his white SUV. The conversation went on for a few minutes. At one point, Petitioner became upset and walked away while Robinson was still talking to him. Robinson grabbed Petitioner by the shoulder. He shrugged her off and said, "Bitch, get the fuck off me." He got into the SUV and drove away.

Around 6:00 a.m., Petitioner knocked at the outside door to Harris's bedroom. Williams answered the door and saw Petitioner and his girlfriend. Both were wearing "hoodies" with the hoods pulled up over their heads. Petitioner said, "I thought you was coming to pick up this money," and that he had come to pay Robinson the $20. Harris told Williams to let them in.

Robinson and Williams were seated in chairs near Harris's bed, and Harris was lying on her bed with her feet at the head of the bed.[5] Petitioner asked why they were "blowing [his] phone up," meaning why were they calling him so much. Robinson replied, "I'm calling you for my money." Petitioner said that he was going to bring it by, but that Robinson could have come to pick it

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[4] Here, the court noted: "Toxicology results showed that at the time of her death, Robinson's blood alcohol level was 0.22." (LD 5 at 4 n. 3 .)

[5] The court noted here that "Harris, who weighed 378 pounds, spent most of her time in bed." (LD at 5 at n.4.)

up, or could have sent someone to pick it up. At that point, the conversation was "fine." Petitioner was calm and was not disrespectful.

At some point during the conversation, Robinson jumped up and became confrontational, saying, "I just need you to pay my money, cuz." Williams jumped in between them and attempted to calm Robinson down. Harris also told Robinson to calm down. Petitioner just stood there with his hands in his pockets. Robinson eventually sat back down.

Petitioner asked Harris how she could allow Robinson to talk to him like that, "disrespecting" him in her home. Robinson jumped up again and charged toward Petitioner. Williams again inserted herself between them, putting a hand on each of their chests to keep them separated. She told Petitioner that Robinson was drunk, and asked him just to leave. But Robinson said, "He's not going nowhere. He still ain't paid me my money." She kept calling him "cuz" and threatening to "do this and that" to him. She kept trying to jump over Williams to get to Petitioner.

Harris kept telling Robinson to sit down, but Robinson would not listen. She became combative with Williams, and Williams had difficulty keeping her from Petitioner.[6] Petitioner backed away from them as far as he could, and Robinson lunged toward him, reaching toward him with her right hand. Her hand was open, but she had something in her left hand. Williams thought it was her cell phone. As Robinson reached toward Petitioner, Petitioner pulled two guns out of his pockets and shot Robinson "point blank." Williams heard about eight gunshots.

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[6] Here, the court noted: "Robinson was also a large woman, weighing 270-275 pounds. She outweighed Williams by about 100 pounds." (LD 5 at 6 n.5.)

Williams was "surprised" when Petitioner pulled out the guns. She did not view the situation as "life or death," and she did not anticipate it at all.

Thinking that she herself had been shot, Williams fled. As she was leaving the room, she saw Petitioner approach Harris and say angrily, "You letting her talk to me like this in your house?" She then heard eight more gunshots. According to Williams, Harris never left her bed during the incident. Williams saw Petitioner and his girlfriend run out of the house, down the driveway and to the street.

Arthur was awakened by the gunshots. He heard four gunshots separated by a second or two. He opened his bedroom door and saw Williams running down the hall. He asked, "Is my mom shot?" Williams said she didn't know and told him to call 911. She then ran out the front door and disappeared.

Arthur entered his mother's bedroom and found both of them injured but apparently still alive. He called 911. When sheriff's deputies arrived, they found Robinson on the floor at the foot of the bed. Harris was face down on the bed with her feet at the head of the bed. She was bleeding from her ear, and there was a pool of blood on the bed. Paramedics arrived shortly thereafter and pronounced both women dead.

Three Winchester .45-caliber bullet casings were found near Robinson's body. All three were fired from the same gun. A pair of scissors was found close to Robinson's right hand, and a carpet knife or box cutter, in an open position, was found in or near Robinson's left hand. Robinson had two gunshot wounds, including a fatal wound to her chest and a wound to her abdomen. The bullets entered from the front of her body. The trajectories were consistent with Robinson leaning forward when she was shot. Harris had a gunshot

wound to the head, apparently fired from close range, and a gunshot wound to her thigh.

Blood samples taken from both women during the autopsy tested positive for cocaine. Robinson's blood alcohol content was 0.22.

The day after the shooting (October 24, 2007), Shawn Sinclair, the manager of the apartment complex where Petitioner lived, noticed that Petitioner's door was standing open. He knocked but received no answer. He went inside and saw that the apartment appeared to have been "went through." He saw bullets on the floor and .45-caliber bullets on a table. Near the complex's Dumpster, he found a magazine that contained nine Winchester .45-caliber rounds. He called the police and gave them the magazine. The rounds in the magazine matched the casings found in Harris's bedroom.

The next day (October 25, 2007), Petitioner's mother, Troylyn Gammage, came to Petitioner's apartment and took a box of ammunition that had a few rounds missing, as well as the .45–caliber rounds that Sinclair had seen on the table the day before.

On November 1, 2007, police arrested Petitioner and his girlfriend, Wanda Mitchell, on outstanding felony warrants unrelated to the homicides. Early in November 2007, police executed a search warrant at the home of Petitioner's mother. Petitioner's SUV was parked at her residence. The vehicle had plastic covering the seats. Petitioner's mother said she had had the vehicle cleaned and the seats vacuumed and shampooed a few days before, on November 4.

The parties stipulated that Petitioner had a prior felony conviction.

(LD 5 at 3-8.)

PETITIONER'S CONTENTIONS

1. The trial court prejudicially erred by failing to instruct the jury on the lesser included offense of voluntary manslaughter based on sudden quarrel and heat of passion.

2. The trial court failed to properly instruct the jury on the essential element of malice aforethought.

3. The jury instructions on self-defense and imperfect self-defense voluntary manslaughter were prejudicially ambiguous, incomplete, and misleading.

4. The trial court prejudicially erred in instructing the jury on the principles of law governing concealment or destruction of evidence.

5. Trial counsel rendered ineffective assistance of counsel by failing to ensure that the trial court properly instructed the jury on self-defense, voluntary manslaughter, and on the principles of law governing a third party's concealment or destruction of evidence, and by failing to object to evidence that Petitioner belonged to a gang.

6. Cumulative prejudice from the foregoing errors deprived Petitioner of his rights to due process and a fair trial.

STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs the Court's consideration of Petitioner's cognizable federal claims. 28 U.S.C. § 2254(d), as amended by AEDPA, states:

> 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.

In Williams v. Taylor, 529 U.S. 362 (2000), the United States Supreme Court held that a state court's decision can be contrary to federal law if it either (1) fails to apply the correct controlling authority, or (2) applies the controlling authority to a case involving facts materially indistinguishable from those in a controlling case, but nonetheless reaches a different result. Id. at 405-06. A state court's decision can involve an unreasonable application of federal law if it either (1) correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or (2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable. Id. at 407-08. The Supreme Court has admonished courts against equating the term "unreasonable application" with "clear error." "These two standards . . . are not the same. The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." Lockyer v. Andrade, 538 U.S. 63, 75 (2003). Instead, in this context, habeas relief may issue only if the state court's application of federal law was "objectively unreasonable." Id. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Harrington v. Richter, 562 U.S. 86, 101 (2011).

Under AEDPA, the "clearly established Federal law" that controls federal habeas review of state court decisions consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." Williams, 529 U.S. at 412 ("§ 2254(d)(I) restricts the source of clearly established law to this Court's jurisprudence"); see also Andrade, 538 U.S. at 71. If there is no Supreme Court precedent that controls a legal issue raised by a habeas petitioner in state court, the state court's decision cannot be contrary to, or an unreasonable application of, clearly established federal law. Wright v. Van Patten, 552 U.S. 120, 125-26 (2008) (per curiam); see also Carey v. Musladin, 549

U.S. 70, 76-77 (2006). A state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam); see also Bell v. Cone, 543 U.S. 447, 455 (2005) (per curiam).

A state court's silent denial of federal claims constitutes a denial "on the merits" for purposes of federal habeas review, and the AEDPA deferential standard of review applies. Richter, 562 U.S. at 98-99. Under the "look through" doctrine, federal habeas courts look through a state court's silent decision to the last reasoned decision of a state court, and apply the AEDPA standard to that decision. See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) ("Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding the judgment or rejecting the same claim rest upon the same ground."). The AEDPA standard applies, however, even if no state court issued a decision explaining the reasons for its denial of the federal claim. Richter, 562 U.S. at 98-99.

Petitioner presented Grounds One through Six to the state courts on direct appeal. (LD 3.) The California Court of Appeal rejected all six grounds in a reasoned decision and the California Supreme Court summarily denied review. (LD 5, 7.) Accordingly, the Court will look through the California Supreme Court's silent denial to the Court of Appeal's reasoned decision, and will apply the AEDPA standard to that decision. See Ylst, 501 U.S. at 803.

DISCUSSION

I. GROUND ONE DOES NOT WARRANT FEDERAL HABEAS RELIEF.

In Ground One, Petitioner contends that the trial court prejudicially erred in failing to instruct the jury on the lesser included offense of voluntary manslaughter based on sudden quarrel and heat of passion with respect to the killing of Robinson. (FAP at 5, 7; see also LD 6 at 4-10.)[7]

[7] For the sake of convenience and clarity, the court utilizes the PACER page numbers when citing to the First Amended Petition and attachments thereto. (See Docket No. 10.)

A. Background[8]

On direct appeal, Petitioner claimed that there was sufficient evidence to permit a reasonable juror to conclude that Robinson's death was provoked and occurred in a sudden quarrel and/or in the heat of passion, and thus the trial court was required to instruct the jury sua sponte on the lesser-included offense of voluntary manslaughter based on this theory. In support, Petitioner argued the instruction was warranted based on evidence of "the earlier confrontation between Robinson and [Petitioner] outside the house, Robinson's multiple telephone calls haranguing and threatening [Petitioner], the continued verbal assault by Robinson when [Petitioner] came to the house, and Robinson's physically charging at [Petitioner], all of which culminated in [Petitioner's] shooting Robinson[.]" (LD 5 at 19; see also LD 6 at 4-10.)

The court of appeal agreed and disagreed, in part, stating:

> . . . . Robinson's haranguing and insulting Petitioner was not sufficient provocation to invoke heat-of-passion voluntary manslaughter. Insults, such as calling . . . Petitioner a "mother fucker," and taunting him that if he had a weapon, he "should take it out and use it," or calling . . . Petitioner a "faggot" and pushing him, have been held not to constitute provocation sufficient to cause an ordinary person of average disposition to lose reason and judgment under an objective standard . . . . Similarly, repeated telephone calls over a few hours, insults, unspecified threats and haranguing someone over a $20 debt do not objectively suffice as provocation sufficient to cause an ordinarily reasonable person to lose reason and control. Even Robinson's repeatedly insulting Petitioner by calling him "cuz" does not amount to sufficient provocation, even assuming he was indeed a Blood: The standard for legally

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[8] Petitioner's trial counsel did not request the omitted instructions or object to the instructional errors at issue in Grounds One through Four. Petitioner contended on direct appeal, and repeats here in Ground Five, that counsel provided ineffective assistance of counsel in this regard.

sufficient provocation is the reasonable person, not the reasonable gang member. . . .

Combined, however, with Robinson's lunging at Petitioner, possibly with a box cutter in her hand, the circumstances arguably did warrant an instruction on heat-of-passion voluntary manslaughter . . . .

. . . .

. . . . [T]he situation Petitioner faced – an enraged 280-pound woman launching herself toward him in a small, enclosed space, holding something that might have been a box cutter – was arguably sufficient to engender an emotional response which obscured his reason and cause him to act out of fear.

(LD at 19-22 (internal citations omitted).) Applying California's Watson harmless error standard,[9] the court of appeal nevertheless concluded that, even assuming that the evidence supported that conclusion:

. . . . Here, it is not reasonably probable that the jury would have returned a verdict of heat-of-passion voluntary manslaughter if the instruction had been given. The jury was instructed that if Petitioner reasonably feared that he was in danger of imminent bodily injury or death, the homicide was justifiable, and that if he unreasonably acted out of that fear, the homicide was voluntary manslaughter on an imperfect self-defense theory. Thus, the precise factual scenario which Petitioner posits as the basis for the heat-of-passion instruction, i.e., that he shot Robinson out of fear for his safety, either reasonably or unreasonably, was rejected by the jury under the self-defense and imperfect self-defense instructions.

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[9] See People v. Watson, 46 Cal.2d 818, 836 (1956) (providing that in reviewing non-constitutional magnitude trial-type errors, the pertinent inquiry is whether "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error"). California's Watson standard is the equivalent of the Brecht standard under federal law. Bains v. Cambra, 204 F.3d 964, 971 n.2 (9th Cir. 2000).

. . . . 'Once the jury rejected [Petitioner's] claims of reasonable and imperfect self defense, there was little if any independent evidence remaining to support his further claim that he killed in the heat of passion, and no direct testimonial evidence from [Petitioner] himself to support an inference that he subjectively harbored such strong passion, or acted rashly or impulsively while under its influence for reasons unrelated to his perceived need for self-defense . . . . Moreover, the jury having rejected the factual basis for the claims of reasonable and unreasonable self-defense, [there is no reasonable probability that] the jury would have found the requisite objective component of a heat of passion defense (legally sufficient provocation) even had it been instructed on that theory of voluntary manslaughter.' . . . [Thus,] the omission of a heat-of-passion instruction was not prejudicial in this case.

(LD 5 at 22-23 (italics, internal quotation marks and citations omitted).)

B. Applicable Clearly Established Federal Law

As a general rule, claims of error concerning state jury instructions are matters of state law that are not cognizable on federal habeas review. See Estelle v. McGuire, 502 U.S. 62, 71-72 (1991) (federal habeas review is available to correct violations of federal law only); see also Menendez v. Terhune, 422 F.3d 1012, 1029 (9th Cir. 2005) ("Failure to give a jury instruction which might be proper as a matter of state law, by itself, does not merit federal habeas relief."). Rather, a claim of state instructional error will warrant federal habeas relief only when the petitioner demonstrates that the error, when considered in the context of the instructions and the trial record as a whole, "so infected the entire trial that the resulting conviction violated due process.'" Estelle, 502 U.S. at 71 (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). Where the alleged error is the failure to give an instruction, the burden on the petitioner is "'especially heavy'" because "an omission . . . is less likely to be prejudicial than a misstatement of the law." Henderson v. Kibbe, 431 U.S. 145, 155 (1977); Clark v. Brown, 450 F.3d 898, 904 (9th Cir. 2006) (same); see also

Duckett v. Godinez, 67 F.3d 734, 746 (9th Cir. 1995) ("We ask whether, under the instructions as a whole and given the evidence in the case, the failure to give the [omitted] instruction rendered the trial so fundamentally unfair as to violate federal due process." (citing Cupp, 414 U.S. at 147)).

It is clearly established that the failure in a capital case to give a lesser included offense instruction supported by the evidence is constitutional error; however, the Supreme Court has expressly reserved judgment "whether the Due Process Clause would require the giving of such instructions in a non-capital case." Beck v. Alabama, 447 U.S. 625, 637, 638 n.14 (1980). Absent further word from the Supreme Court, controlling Ninth Circuit authority holds that "the failure of a state trial court to instruct on lesser included offenses in a non-capital case does not present a federal constitutional question." Koering v. Gonzalez, 516 F. App'x 665, 666 (9th Cir. 2013) (quoting Windham v. Merkle, 163 F.3d 1092, 1106 (9th Cir. 1998); see also United States v. Rivera–Alonzo, 584 F.3d 829, 834 n.3 (9th Cir. 2009) ("In the context of a habeas corpus review of a state court conviction, we have stated that there is no clearly established federal constitutional right to lesser included instructions in non-capital cases." (citing Solis v. Garcia, 219 F.3d 922, 929 (9th Cir. 2000) (per curiam)); Bashor v. Risley, 730 F.2d 1228, 1240 (9th Cir. 1984) (same).[10]

By the same token, the Ninth Circuit has recognized that "the defendant's right to adequate jury instructions on his or her theory of the case might, in some cases, constitute an exception to the [foregoing] general rule." Solis, 219 F.3d at 929 (citing Bashor, 730 F.2d at 1240); see also Matthews v. United States, 485 U.S. 58, 63 (1988) ("As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."). However, the failure to instruct on a defense theory implicates due process "only if the theory is legally

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[10] See also Turner v. Marshall, 63 F.3d 807, 819 (9th Cir. 1995) (recognizing that there is no constitutional right to a lesser-included offense instruction in a non-capital case and that to hold otherwise would create a new rule in violation of Teague v. Lane, 489 U.S. 288 (1989)), overruled on other grounds by Tolbert v. Page, 182 F.3d 677 (9th Cir. 1999) (en banc).

sound and evidence in the case makes it applicable." Clark, 450 F.3d at 904-05 (citation and quotation marks omitted); see also Henderson, 431 U.S. at 155-56 (due process is not implicated absent a sound legal and factual basis justifying the instruction); Murray v. Schiro, 746 F.3d 418, 452 (9th Cir.2014) (a defendant is entitled to an instruction on a defense theory only if the theory is supported by the evidence (citing Matthews, 485 U.S. at 63)).

Finally, even if the failure to give a particular instruction was constitutionally erroneous, under the Brecht harmless error standard applicable in all federal habeas cases, "relief is proper only if the federal court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict." Davis v. Ayala, 133 S. Ct. 2187, 2197-98 (2015) (citing O'Neal v. McAninch, 513 U.S. 432, 436 (1995), and Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)); Hedgpeth v. Pulido, 555 U.S. 57, 61-62 (2008) (per curiam) (applying Brecht prejudice standard to habeas claims of instructional error); see also Fry v. Pliler, 551 U.S. 112, 121-22 (2007) (holding that federal habeas courts must apply Brecht's "substantial and injurious effect" standard to assess the prejudicial impact of constitutional error in a state court criminal trial regardless of whether the state court recognized the error or the harmlessness standard the state court applied). "A 'substantial and injurious effect' means a 'reasonable probability' that the jury would have arrived at a different verdict had the instruction been given." Byrd v. Lewis, 566 F.3d 855, 860 (9th Cir. 2009) (quoting Clark, 450 F.3d at 916).

C. Analysis

Here, Petitioner does not contend that the failure to instruct the jury on the lesser included offense of heat-of-passion voluntary manslaughter deprived him of his due process right to present a complete defense. (See FAP at 5,7; LD 6 at 4.) Rather, Petitioner's essential claim is that the state court was required to give the lesser included offense instruction sua sponte because it was supported by substantial evidence. As there is no clearly established federal law establishing a right to such an instruction in a non-capital

case, Petitioner's claim is not, on that ground, cognizable on federal habeas review. See Solis, 219 F.3d at 929. To the extent that Petitioner may otherwise properly state a cognizable claim of due process error, he has not met his "especially heavy" burden of establishing prejudicial constitutional error under the foregoing authority.

Under California law, "[h]eat of passion is a mental state that precludes the formation of malice and reduces an unlawful killing from murder to manslaughter." People v. Beltran, 56 Cal.4th 935, 942 (2013); see also Cal. Penal Code § 192(a)(defining voluntary manslaughter as the unlawful killing of a human being without malice). "Heat of passion, which . . . reduces murder to manslaughter, arises when the defendant is provoked by acts that would render an ordinary person of average disposition liable to act rashly and without deliberation and reflection, and from such passion rather than from judgment, . . . and kills while under the actual influence of such a passion." People v. Duff, 58 Cal.4th 527, 562 (2014) (internal quotation marks and citations omitted); Beltran, 56 Cal.4th at 942 ("Heat of passion, then, is a state of mind caused by legally sufficient provocation that causes a person to act, not out of rational thought but out of unconsidered reaction to the provocation."). Heat-of-passion voluntary manslaughter, thus, has objective and subjective components: the defendant's response to the provocation must be objectively reasonable, and the defendant must actually, subjectively, kill under the heat of passion. People v. Moye, 47 Cal.4th 537, 549-50, 554 (2009) (citations and internal quotation marks omitted); see also People v. Johnson, 113 Cal. App. 4th 1299, 1311 (2003) ("[T]he essence of the sudden quarrel/heat of passion voluntary manslaughter is that the killer is so provoked by the acts of the victim that he strikes out in the heat of passion, an emotion that obliterates reason that would prevail in the mind of a reasonable person.").

Here, the court of appeal found that the situation Petitioner faced – an enraged 280 pound woman [Robinson], lunging toward him in a small, enclosed space, holding something that might have been a box cutter – "was arguably sufficient to engender an emotional response which obscured [Petitioner's] reason and caused him to act out of

fear[.]" (LD 5 at 22.) Nonetheless, the court concluded that omission of a heat-of-passion voluntary manslaughter instruction at trial did not prejudice Petitioner. (LD 5 at 22 (citing People v. Breverman, 19 Cal.4th 142, 165 (1998) (applying Watson's "reasonable probability" standard to review of claimed failure to instruct on a lesser included offense)).) Particularly, the court observed that the precise factual scenario relied upon by Petitioner in support of his heat-of-passion theory of voluntary manslaughter underlay his claims of reasonable and imperfect self-defense, on which the jury was instructed. The court accordingly reasoned that, having rejected that Petitioner, reasonably or unreasonably, shot Robinson out of fear for his safety, it was not reasonably probable that the jury nevertheless would have found legally sufficient provocation (i.e., that Robinson's conduct was so provocative as would cause an ordinarily reasonable person to lose reason and control) based on the same facts. (LD 5 at 22-23).

The foregoing assessment of prejudice under Watson, California's counterpart to Brecht, is not contrary to or an objectively unreasonable application of the Brecht standard. See Davis, 135 S. Ct. at 2199 (AEDPA deference properly afforded to state court's determination of harmlessness). Moreover, it is buttressed by evidence that, when Petitioner returned to the Harris residence after the initial argument with Robinson and her persistent phone calls, he arrived with a concealed, loaded firearm, he parked some distance away and out of sight of the house rather than right outside Harris's door in the driveway has he had before, and he was dressed head to toe in black clothing with a "hoodie" pulled over his head. As the prosecutor argued, this evidence suggests a degree of planning and reflection well before Petitioner entered Harris's bedroom and faced Robinson. In addition, other evidence established that Petitioner had reason to believe that Robinson was quite intoxicated when he encountered her and that her intoxication fueled her aggression toward him. If the jury was not persuaded that Robinson's drunken aggression did not support Petitioner's perceived need for self-defense, it is not reasonably likely that the jury nevertheless would have found that same behavior sufficient to cause an

average, ordinarily reasonable person to become so inflamed as to lose reason and judgment.

Moreover, in conjunction with standard instructions on the general principles of homicide (CALCRIM No. 500), on the elements of murder and types of malice aforethought (CALCRIM No. 520), on the degrees of murder (CALCRIM No. 521), and on manslaughter based on imperfect self-defense (CALCRIM No. 571) (see CT at 117; 2 RT at 285-88), the jury was instructed that "[a] decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated[;] that "[p]rovocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter[;]" that "[t]he weight and significance of the provocation, if any, are for you to decide[;]" that "[i]f you conclude that the defendant committed murder and was provoked, consider the provocation in deciding whether the crime was first or second degree murder[;] and to "[a]lso consider the provocation in deciding whether the defendant committed murder or manslaughter." (2 RT at 287.) The jury also was instructed, pursuant to CALCRIM No. 640, that although they could consider the different kinds of homicide in any order they wished, they had to first conclude that Petitioner was not guilty of first degree murder before the court could accept a verdict on second degree murder or voluntary manslaughter. (CT at 117; 2 RT at 288.)

After less than four hours of deliberations, the jury returned first degree murder verdicts on both counts (see CT at 114-15), necessarily concluding that Petitioner acted willfully, deliberately, and with premeditation. The speed at which the jury arrived at that finding effectively forecloses any reasonable likelihood that the jury would have weighed the evidence of provocation differently had they been offered the additional option of voluntary manslaughter based on heat of passion. Because omission of the instruction did not substantially affect the verdict, the error, if any, was harmless under the Brecht standard. See, e.g. Marks v. Biter, 522 F. App'x 374, 374-75 (9th Cir. 2013) (concluding that "the jury necessarily rejected the possibility that Marks was 'not conscious of acting' when it found that his attempted murder was willful, deliberate, and premeditated" and thus failure to instruct on the defense of unconsciousness was harmless).

Accordingly, Ground One does not warrant federal habeas relief.

II. GROUND TWO DOES NOT WARRANT FEDERAL HABEAS RELIEF.

In Ground Two, Petitioner contends that the trial court erred by failing to instruct the jury properly on the essential element of malice aforethought. (FAP at 5, 7; see also LD 6 at 11.) Particularly, Petitioner contends that the trial court failed to instruct the jury that in order to convict Petitioner of murder, the prosecution had to prove the killing of Robinson was not committed upon a sudden quarrel and/or heat of passion, and that the failure to do so relieved the prosecution of its burden to prove the essential element of malice beyond a reasonable doubt. (FAP at 5, 7; LD 6 at 11-14.)

A. Background

Petitioner claimed on direct appeal that because there was evidence of provocation, the trial court was required pursuant to People v. Rios, 23 Cal.4th 450, 462 (2000), to instruct the jury that, to establish malice, the prosecution had the burden of proving the absence of heat of passion/sudden quarrel. (LD 6 at 11.) Particularly, Petitioner argued that Rios held that "malice aforethought is a specific intent to kill in the absence of sudden quarrel, heat of passion, and imperfect self-defense," and that when the issue of provocation or imperfect self defense is "properly presented" in a murder case, the prosecution must prove beyond reasonable doubt their absence in order to establish the murder element of malice. (LD 6 at 12-13.) Petitioner further argued because the jury was not so instructed, the prosecution was relieved of its burden of proving the essential element of malice beyond a reasonable doubt, and reversal of the verdict of first degree murder of Robinson was required under the standard of Chapman v. California, 368 U.S. 18 (1967) (on direct appeal, federal constitutional error requires reversal unless court can conclude that the error is harmless beyond a reasonable doubt). (LD 6 at 11-14.)

The court of appeal rejected this claim, stating that Rios does not hold "that a murder instruction is always incomplete unless it defines malice as excluding heat-of-passion or imperfect defense"; rather, Rios held that such an instruction is required "only in a murder trial where the evidence warrants an instruction on voluntary manslaughter as a lesser

included offense. . . [in which case] the trial court must instruct that provocation or imperfect self defense negates malice and reduces the offense to voluntary manslaughter." (LD 5 at 24-25.) Accordingly, the state court reasoned:

> . . . . [T]o say, as Petitioner does, that the [trial] court erroneously failed to instruct that malice is the intent to kill in the absence of sudden quarrel or heat of passion is merely a recasting of Petitioner's [foregoing] argument that an instruction on heat-of-passion voluntary manslaughter was required because it was warranted by the evidence. It is not a new or different issue. Moreover, the omission of an instruction explicitly stating that malice aforethought requires the absence of heat of passion or imperfect self defense does not affect the jury's deliberations on first or second degree murder; it only affects their deliberations on voluntary manslaughter. Consequently, the absence of the instruction is irrelevant to the murder convictions.

(LD 5 at 25.) The court of appeal dismissed outright that the claimed error should be reviewed under the Chapman standard, stating that the failure to instruct on a lesser included offense in a non-capital case is state-law error subject to review under California's Watson harmless error standard. (LD 6 at 25 (citing Breverman, 19 Cal.4th at 165).)

B. Applicable Clearly Established Federal Law

Under well-established federal law, the Due Process Clause imposes on the prosecution "the burden of proving all elements of the offense charged" and requires that the prosecution "persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements[.]" Sullivan v. Louisiana, 508 U.S. 275, 277-78 (1993) (citations omitted). It is further established that, in a homicide case, "[t]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented[.]" Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975). Because "the State must prove every element of the offense, . . . a jury instruction violates due process if it fails to give effect to that requirement." Dixon v. Williams, 750 F.3d 1027, 1032 (9th Cir. 2014) (per curiam) (quoting

Middleton v. McNeil, 541 U.S. 433, 437 (2004) (per curiam)). As stated above, the court assesses the prejudicial effect of any constitutional instructional error under the Brecht standard, irrespective of the harmless error standard the state court may or should have applied. Fry, 551 U.S. at 121-22; see also Hedgpeth v. Pulido, 555 U.S. 57, 60-61 (2008) (applying Brecht standard to claim of instructional error in the context of multiple theories of guilt); Neder v. United States, 527 U.S. 1, 8-11 (1999) (errors in jury instructions involving "omissions or incorrect descriptions of elements are considered trial errors" subject to harmless error analysis); Pope v. Illinois, 481 U.S. 497, 501-02 (1987) (same where instruction misstated an element of charged offense); Rose v. Clark, 478 U.S. 570, 579-80 (1986) (same where instruction erroneously shifted the burden of proof as to malice element of charged murder); Byrd v. Lewis, 566 F.3d 855, 863-64 (9th Cir. 2009) (same as to instruction that did not properly define each element of the charged offense).

C. Analysis

Under California law, "evidence of heat of passion . . . is relevant only to determine whether malice has been established, thus allowing for a conviction of murder, or has not been established, thus precluding a murder conviction and limiting the crime to the lesser included offense of voluntary manslaughter. . . . [Accordingly], unless the [prosecution's] own evidence suggests that the killing may have been provoked . . . it is the defendant's obligation to proffer some showing on these issues sufficient to raise a reasonable doubt of his guilt of murder." Rios, 23 Cal.4th at 461-62 (citations and emphasis in original omitted). If the issue of provocation is thus "properly presented" in a murder case, the prosecution's burden under Mullaney to "prove beyond a reasonable doubt that these circumstances are lacking in order to establish the murder element of malice" is triggered. Rios, 23 Cal.4th at 462 (citing Mullaney, 421 U.S. at 704) (additional citations and emphasis in original omitted).

Here, the court of appeal concluded that the prosecution's evidence arguably supported a heat of passion voluntary manslaughter instruction (LD 5 at 20, 22), that the failure to give the lesser-included offense instruction was subject to review under

California's Watson harmless error standard applicable to non-constitutional magnitude trial errors, i.e., a determination "whether examination of the entire record establishes a reasonable probability that the error affected the outcome of the trial" (LD 5 at 22), and that any error was not prejudicial under this standard (LD 5 at 22, 25). Petitioner appears to claim that, although the court of appeal effectively acknowledged that the issue of provocation was "properly presented," it failed to recognize that the prosecution's burden to prove the absence of provocation under Mullaney was thus triggered and further failed to review the consequent Mullaney error under the Chapman standard.

Assuming that the state court so erred, this Court's review is limited to whether the error had substantial and injurious effect or influence in determining the jury's verdict under the Brecht standard. Fry, 551 U.S. at 121-22. For the same reasons and as concluded above, Petitioner has not established a reasonable probability that the verdict would have been different had the jury been instructed on heat-of-passion voluntary manslaughter and the prosecution's tandem burden of proving the absence of provocation to establish malice, nor does the Court have "grave doubt" as to whether record facts satisfy the Brecht standard. See Davis, 133 S. Ct. at 2197-98; O'Neal, 513 U.S. at 435-36.

Accordingly, habeas relief is not warranted on Ground Two.

III. GROUND THREE DOES NOT WARRANT FEDERAL HABEAS RELIEF

In Ground Three, Petitioner contends that the jury instructions on self-defense and imperfect self-defense voluntary manslaughter were prejudicially ambiguous, incomplete and misleading. (FAP at 5-7; LD 6 at 14-19.)

A. Background

On direct appeal, Petitioner contended that the instructions given to the jury on self-defense and imperfect self-defense "allowed the jury to presume that [Robinson] was acting lawfully and that [Petitioner] was not entitled to use deadly force in response to her actions" and thus "effectively removed [Petitioner's] defense of perfect or imperfect self-defense from the jury's consideration," and as a result, violated due process by failing to require the prosecution to prove the absence of self-defense–complete or imperfect-beyond a

reasonable doubt and Petitioner's right to have the jury determine all material issues presented by the evidence. (LD 6 at 19-20.)

In a lengthy discussion rejecting this claim, the court of appeal concluded that the instructions were "legally correct" and that "there is no reasonable likelihood that the jury was misled or confused in the manner Petitioner suggests." (LD 5 at 10.) The court stated:

> The [trial] court gave the standard instruction, CALCRIM No. 505, on self-defense. That instruction provides:
>
> The defendant is not guilty of murder or manslaughter if he was justified in killing someone in self-defense. The defendant acted in lawful self-defense if:
>
> 1. The defendant reasonably believed that he was in imminent danger of being killed or suffering great bodily injury;
>
> 2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger;
>
> AND
>
> 3. The defendant used no more force than was reasonably necessary to defend against that danger.
>
> Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of great bodily injury to himself. Defendant's belief must have been reasonable and he must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the killing was not justified.
>
> When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation

with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

A defendant is not required to retreat. He is entitled to stand his ground and defend himself and, if reasonably necessary, to pursue an assailant until the danger of death or great bodily injury has passed. This is so even if safety could have been achieved by retreating.

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

The People have the burden of proving beyond a reasonable doubt that the killing was not justified. If the People have not met this burden, you must find the defendant not guilty of murder or manslaughter.

The court then gave CALCRIM No. 3472, which provides:

A person does not have the right to self-defense if he provokes a fight or quarrel with the intent to create an excuse to use force.

On imperfect self-defense, the court gave a modified version of CALCRIM No. 571:

A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense.

If you conclude the defendant acted in complete self-defense, his action was lawful and you must find him not guilty of any crime. The difference between complete self-defense and imperfect self-defense depends on whether the defendant's belief in the need to use deadly force was reasonable.

The defendant acted in imperfect self-defense if:

1. The defendant actually believed that he was in imminent danger of being killed or suffering great bodily injury;

AND

2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger;

BUT

3. At least one of those beliefs was unreasonable.

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be.

In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant.

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

However, this principle is not available if the defendant by his wrongful conduct created the circumstances which legally justified his adversary's use of force.

The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of murder. (Italics added.)

The italicized paragraph is not part of the standard instruction on self-defense. The parties agree, however, that it is a correct statement of the law.[] Petitioner contends, however, that the court should have clarified the instructions by adding, 'Where the original aggressor is not guilty of a deadly attack, but of a simple assault or trespass, the victim has no right to use deadly or other excessive force . . . . If the victim uses such force, the aggressor's right of self-defense arises[.]' . . . or by adding, "If, however, the counter assault be so sudden and perilous that no opportunity be given to decline or to make known to his adversary his willingness to decline the strife, if he cannot retreat with safety, then as the greater wrong of the deadly assault is upon his opponent, he would be justified in slaying, forthwith, in self-defense[.]'. . . . .

Petitioner does not explain *why* these clarifying or amplifying instructions were necessary. In any event, these instructions were not supported by the evidence. They would have been appropriate if there had been evidence that had committed a minor assault, to which Robinson responded with an attempt at deadly force. As Petitioner himself notes, however, [his] failure to pay [Robinson] the $20 he owed her as change from an earlier drug transaction or his verbal quarrel with [Robinson] in Harris's residence did not amount to an initiation of a physical assault or the commission of a felony. . . . An instruction should not be given unless there is substantial evidence from which the jury could reasonably conclude that the specific facts supporting the instruction existed. . . . Because there was no evidentiary support for the instructions Petitioner now contends were necessary, their omission was not error.

Petitioner goes on to contend that giving CALCRIM No. 3472 ("A person does not have the right to self-defense if he provokes a fight or quarrel with the intent to create an excuse to use force.") in combination with the portion of CALCRIM No. 571 which provides that self-defense 'is not available if that by his wrongful conduct created the circumstances which legally justified his adversary's use of force' was misleading because, '[a]lthough as a convicted felon [he] engaged in felonious conduct by coming armed with a firearm to Harris's residence, [he] did not, solely by reason of his unlawful conduct, forfeit his right to self-defense because Raquel was not entitled to respond to [his] wrongful conduct, by escalating the encounter and threatening and assaulting [him] with a box cutter and/or scissors.'

The problem with this contention is that there was no evidence that Robinson escalated the encounter by responding to Petitioner's felonious conduct of arming himself with a firearm, because there was no evidence that Robinson *knew* he had a firearm until he pulled it out and shot her as she was moving toward him. Moreover, neither attorney argued for that scenario. The

prosecutor's position was that Williams's testimony showed that Petitioner was angry at being disrespected by Robinson, not that he was afraid she was about to assault him with a box cutter. With respect to self-defense, the prosecutor argued that Petitioner's use of force was disproportionate because Robinson did not pose any threat of death or serious injury because if she did have a box cutter in her hand, it was in her left hand, and Williams testified that Robinson reached toward Petitioner with her open right hand. Moreover, Williams made it abundantly clear that she viewed Robinson as the instigator of the quarrel and that Petitioner did nothing but protest verbally about being disrespected until Robinson jumped to her feet the second time and moved toward Petitioner. Consequently, the record does not support the inference that jurors did or might have misapplied the instructions in the manner defendant suggests. . . .

Petitioner also contends that CALCRIM No. 571 was ambiguous, incomplete and misleading because it does not define the terms 'wrongful conduct' or 'legally justified' [referring to the principle that imperfect self-defense is not available if the defendant by his wrongful conduct created the circumstances which legally justified his adversary's use of force]. He contends that jurors could have interpreted this language to mean that Robinson was justified in assaulting him with a box cutter or scissors because he was 'a drug dealer who failed to pay her back her $20, [and] because he became involved in a quarrel, verbal altercation, and physical confrontation with [Robinson].' Again, however, the prosecutor's position was not that anything Petitioner did gave Robinson the legal right to assault him. Rather, his position was that Petitioner came to the house with the intent of killing Robinson because of her haranguing and disrespecting him over the trivial matter of $20 owed to her. And, he argued that Petitioner's use of force was disproportionate to any actual or perceived threat posed by Robinson. Moreover, CALCRIM No. 505 told the jury that self-defense is justified only when a person reasonably believes that

he or she is imminent danger of serious bodily harm or death. Accordingly, the jurors were aware that 'wrongful conduct' which would 'legally justify' the use of force would be conduct which caused the adversary to believe that he or she is in imminent danger of serious injury or death. They were also aware that trivial 'wrongful conduct,' such as engaging in failing to repay a debt or engaging in a verbal altercation, would not legally justify self-defense.

Because neither the evidence nor the prosecutor's theory of the case supported the inference Petitioner suggests, and because the instructions as a whole correctly informed jurors of the factual basis necessary to create a legal right to self-defense, there is no reasonable likelihood that the jurors were misled by the omission of definitions of 'wrongful conduct' and 'legally justified.'

Accordingly, there was no error with respect to the instructions on self-defense and imperfect self-defense.

(LD 5 at 10-17 (citations, internal quotation marks and footnotes omitted).)

B. Applicable Clearly Established Federal Law

"[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation[;]" what matters is whether the ailing instruction(s) "so infected the entire trial that the resulting conviction violates due process." Dixon, 750 F.3d at 1032 (quoting Middleton, 541 U.S. at 437). To establish constitutional error due to an ambiguous jury instruction, a petitioner "must show both that the instruction was ambiguous and that there was a reasonable likelihood that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." Mora v. Lewis, 630 F. App'x 658, 660 (9th Cir. 2015) (quoting Waddington v. Sarausad, 555 U.S. 179, 190-91 (2009); see also Middleton, 541 U.S. at 437 ("If the charge as a whole is ambiguous, the question is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." (internal quotation marks and citations omitted)); Boyde v. California, 494 U.S. 370, 380-81 (1990) ("reasonable likelihood" inquiry applies to claim that an otherwise correct instruction is

ambiguous and thus subject to an erroneous interpretation). Some slight possibility that the jury misapplied the instructions is not enough. Waddington, 555 U.S. at 19; see also Khajarian v. Evans, 512 F. App'x 706, 707 (9th Cir. 2013) (a mere hypothesis or possibility that the jury erroneously applied the instructions is insufficient to show a reasonable likelihood). As stated above, the disputed instruction(s) may not be evaluated in artificial isolation, but must be evaluated in the context of the instructions and record as a whole. Estelle, 502 U.S. at 72; Cupp, 414 U.S. at 147. Moreover, if constitutional instructional error is established, habeas relief is not available unless the error 'had substantial and injurious effect or influence in determining the jury's verdict," or the court has "grave doubt" as to the harmlessness of the error. Davis, 133 S. Ct. at 2197-98; Fry, 551 U.S. at 121-22; O'Neal, 513 U.S. at 436.

C. Analysis

The state court's determination that the instructions on self-defense and imperfect self-defense voluntary manslaughter were legally correct and that there was no reasonable likelihood that the jury applied them in an unconstitutional manner is not objectively unreasonable on the law or the facts. Preliminarily, "it is not the province of a federal court to reexamine state-court determinations on state law questions." Estelle, 502 U.S. at 67-68. Here, the court of appeal found that the evidence did not support the clarifying instructions Petitioner contends should have been given – namely, that an aggressor's right to self-defense arises if the victim responds with deadly or excessive force to an initial simple assault or trespass, and that killing in self-defense is justified if the victim's counter assault is so sudden and perilous that the initial aggressor has no opportunity to decline or make known his willingness to decline the assault or retreat with safety. (See LD 5 at 13-14.) This finding is properly afforded a presumption of correctness, see 28 U.S.C. section 2254 (e)(1), and is amply supported by the recorded.

Moreover, as the court of appeal reasonably concluded, it was not likely that the jury was misled by CALCRIM No. 3472 (providing that the right of self-defense cannot be invoked by a person who provokes a fight or quarrel with the intent to create an excuse to

use force), in combination with CALCRIM No. 571 (providing that self-defense is not available if the defendant, by his wrongful conduct, created the circumstances that legally justified the victim's use of force) into believing that Petitioner forfeited his right to self-defense simply by reason of his unlawful possession of the firearm when he entered the residence, or that that circumstance precipitated Robinson's conduct. (See LD 5 at 14-15.) Foremost, and as the court of appeal found, the prosecution never contended that anything Petitioner did legally justified Robinson's assault on him. Morever, as the court of appeal further noted, there is no evidence that Robinson knew Petitioner was armed until he pulled out the gun and shot her, and thus, her assertive conduct could not have been in response to "wrongful conduct." Instead, according to Williams, it was Robinson who instigated the confrontation and Petitioner merely protested her disrespect toward him until Robinson lunged at him for a second time. Further, the prosecution contended that Petitioner's use of deadly force was excessive and disproportionate to any actual or perceived threat by Robinson, not that Petitioner had no right to self-defense at all because his status as a felon made it unlawful for him to possess a gun. Thus, and as the court of appeal concluded, the contention that the jury might have inferred otherwise is not supported by the record.

Likewise, the state court reasonably rejected Petitioner's related claim that the instructions on self-defense and imperfect self-defense were ambiguous, misleading, and incomplete because they did not define the terms "wrongful conduct" and "legally justified" in CALCRIM No. 571 (providing, as noted above, that self-defense is not available if the defendant, by his wrongful conduct, created the circumstances that legally justified the victim's use of force). The jury was instructed pursuant to CALCRIM No. 505 (defining the elements of self-defense) (defining imperfect self defense) that, in effect, the "wrongful conduct" that "legally justifies" the use of force is conduct that causes the person to believe he or she is in imminent danger of being killed or suffering significant or substantial physical injury and that immediate use of deadly force was necessary to defend against the danger. The jury was also instructed pursuant to CALCRIM No. 571 (imperfect self-defense) that what distinguishes complete from imperfect self-defense is whether the person's belief in

the need to use deadly force was reasonable. (See LD 5 at 10-12.) Considering the instructions as a whole, it is not reasonably likely that the jury would have interpreted CALCRIM No. 571 to mean that Petitioner's $20 debt to Robinson from a drug sale and verbal quarrel with Robinson qualified as "wrongful conduct" as a consequence of which Petitioner forfeited his right of self-defense and instead "legally justified" Robinson in assaulting Petitioner with a box cutter or scissors as Petitioner contends. As stated above, the prosecution did not argue that anything Petitioner did justified Robinson's assault on him; rather, the prosecution's theory was that Petitioner returned to the Harris residence with the intent to kill Robinson because she disrespected him and would not stop haranguing him over the $20 debt, and that Petitioner's use of force was excessive under the circumstances and disproportionate to any actual or perceived threat posed by Robinson. (LD 5 at 16.) Thus, as the state court reasonably concluded, the inferences Petitioner posits are not supported by the record, and there is no reasonable likelihood that the jury was misled as to the meaning of the terms "wrongful conduct" or "legally justified" or applied the instructions in a way that violated the Constitution.

Accordingly, Petitioner is not entitled to habeas relief on Ground Three.

IV. GROUND FOUR DOES NOT WARRANT FEDERAL HABEAS RELIEF.

In Ground Four, Petitioner contends that the trial court prejudicially erred in instructing the jury on the principles of law governing concealment or destruction of evidence. (FAP at 6,8; LD 6 at 19-23.)

A. Background

The prosecution introduced evidence at trial that Petitioner's mother removed bullets laying on a table and a box that appeared to contain .45 caliber bullets from Petitioner's apartment a couple of days after the shooting and that Petitioner's mother subsequently told investigators executing a search warrant at her house that she recently had Petitioner's SUV shampooed and vacuumed. (1 RT at 236-37, 244-47.) During closing argument, the prosecutor argued that Petitioner's flight after the shootings and his mother's actions were "the actions of a guilty man." (2 RT at 301.)

The trial court instructed the jury, pursuant to CALCRIM No. 371, that "if the defendant tried to hide evidence, that conduct may show that he was aware of his guilt. If you concluded that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself." (CT at 116; 2 RT at 282-83.) The trial court did not instruct the jury, as CALCRIM No. 371 further provides, that efforts by a person other than the defendant to conceal or destroy evidence may also show consciousness of guilt, but only if the defendant was either present and knew about, or otherwise authorized, the other person's actions. (See LD 5 at 27.) On direct appeal, Petitioner claimed that because the trial court failed to complete the instruction by instructing on third-party suppression of evidence, the jury could have found his "consciousness of guilt" stemming from his mother's actions, and used this "consciousness of guilt" to corroborate Williams's testimony and reject his defense of perfect or imperfect self-defense. (LD 6 at 21.) He further argued that the error deprived him of his constitutional rights to have the jury determine every material issue presented by the evidence and resolve disputed facts. (LD 6 at 23.)

The court of appeal, however, concluded that CALCRIM No. 3.71 should not have been given at all because "there was no evidence that [Petitioner] himself attempted to suppress evidence, and no evidence that [Petitioner] knew of and authorized his mother's efforts to sanitize his SUV," and that, "[a]lthough it is error to give an instruction that, while correctly stating the law, has no application to the facts of the case," the error was harmless under both the Chapman and California's Watson standard of prejudice:

> Here, the evidence that Petitioner shot and killed two people was overwhelming and was not contested by the defense. Rather, he contended that he acted in self-defense or imperfect self-defense. Consciousness of guilt is at most marginally relevant to whether a killer acted with or without deliberation and premeditation, or whether he or she acted in self-defense. We are convinced beyond a reasonable doubt that the instructional error Petitioner asserts did not contribute to the guilty verdicts. Any error in the consciousness

of guilt instruction was also not prejudicial under California's *Watson* test for prejudice, i.e., that there is no reasonable probability that the outcome would have been more favorable to Petitioner in the absence of the error.

(LD 5 at 28-29 (citations omitted).)

B. Applicable Clearly Established Federal Law

As set out above, a state instructional error will not warrant federal habeas relief unless the petitioner demonstrates that the error, when considered in the context of the instructions and the trial record as a whole, so infected the entire trial that the resulting conviction violated due process. Estelle, 502 U.S. at 71; Cupp, 414 U.S. at 147. An unnecessary or incomplete instruction violates due process only when there is a reasonable likelihood that the jury applied the instruction in a way that violates the Constitution. Waddington, 555 U.S. at 190-91; Middleton, 541 U.S. at 437. A state court's determination that an instructional error is harmless beyond a reasonable doubt is reviewed under AEDPA's deferential standard of review. Davis, 135 S. Ct. at 2199. Further, and notwithstanding the harmlessness standard applied by the state court, habeas relief is not warranted if the error was harmless under the Brecht standard. Fry, 551 U.S. at 121-22; see also Dixon, 750 F.3d at 1035 (the Brecht test applies "without regard for the state court's harmlessness determination") (citations and internal quotation marks omitted).

C. Analysis

As set out above, the court of appeal concluded that CALCRIM No. 371 should not have been given at all, which error would not have been cured had the jury also been instructed on third-party suppression of evidence as Petitioner contends it should have been; the court further concluded that the instructional error was harmless beyond a reasonable doubt and because there is no reasonable probability that the outcome would have been different had the error not occurred. (LD 5 at 28-29 (citations omitted).) Applying Brecht's harmlessness standard, this Court concurs. As succinctly put by the court of appeal, there was no dispute that Petitioner shot and killed Harris and Robinson; rather what was disputed was whether Petitioner acted in perfect or imperfect self-defense and

with or without premeditation and deliberation. As to these issues, the court of appeal reasoned that "consciousness of guilt is at most marginally relevant." (LD 5 at 29.) That reasoning is particularly apt here given the compelling eyewitness testimony and forensic evidence, the undisputed testimony that Petitioner immediately fled the scene after the shooting, the discovery by Petitioner's apartment building manager of .45 caliber bullets on a table in Petitioner's apartment and a loaded magazine containing .45 caliber rounds by a dumpster at the apartment building the morning after the robbery (1 RT at 233-35), and evidence that the live rounds contained in the found magazine matched the caliber and manufacturer of the spent casings recovered from Harris's bedroom (1 RT at 205-09, 239-40, 261). Considering the record and instructions as a whole, it is not reasonably likely that the jury was inordinately swayed by Petitioner's mother's actions or that the unnecessary and incomplete instruction on consciousness of guilt based on suppression of evidence affected the jury's resolution of disputed facts and material issues.

Accordingly, habeas relief is not warranted on Ground Four.

V. GROUND FIVE DOES NOT WARRANT FEDERAL HABEAS RELIEF.

In Ground Five, Petitioner contends that trial counsel rendered ineffective assistance, in violation of the Sixth Amendment, by failing to ensure that the trial court properly instructed the jury on self-defense, voluntary manslaughter, and the principles of law governing a third party's concealment or destruction of evidence, and by failing to object to evidence that Petitioner belonged to a gang. (FAP at 6, 8; LD 6 at 26-28.)

A. Background

The court of appeal rejected Petitioner's claim of ineffective assistance of counsel with respect to the foregoing instructional errors, concluding that Petitioner failed to demonstrate prejudice "from any of these asserted failings." (LD 5 at 31.) The court further rejected Petitioner's claim that counsel rendered ineffective assistance by failing to object to "unduly prejudicial evidence that Petitioner was a gang member and that he had committed another felony crime," stating:

. . . [T]the evidence of [Petitioner's] gang membership consisted solely of Williams's testimony that she *thought* defendant was "a Blood ex-gangbanger," and that as a Blood, he would find it insulting to be addressed as "cuz." Williams expressly stated that she did not *know* whether [Petitioner] was or had been a Blood. Ineffective assistance of counsel claims based on failure to object to evidence are rarely cognizable on appeal because there are many instances in which it is a rational choice of trial tactics not to object even if the objection might be successful . . . . Here, [Petitioner's] attorney could have made the rational decision not to object in order to avoid highlighting the issue, especially since Williams conceded that she did not know whether [Petitioner] was a gang member. Because the record is silent as to counsel's reason for not objecting, the issue must be raised, if at all, via a petition for a writ of habeas corpus . . . .

[Petitioner's objection to the evidence of another felony] is based on Investigator Patterson's testimony that on November 1, 2007, [Petitioner] and his girlfriend "both had outstanding felony arrest warrants, not involving this case, that they were arrested for." Again, defense counsel could have rationally decided not to object in order to avoid highlighting the implication. Moreover, the jury had already been informed that [Petitioner] was a drug dealer who routinely sold drugs to both Harris and Robinson, and at the end of trial, they were informed that as of the date of the homicides, [Petitioner] had one prior unspecified felony conviction. The additional information that there was an outstanding felony warrant for his arrest – not a prior felony conviction, as [Petitioner's] argument implies – was not of such great significance that there is a reasonable probability that he would not have been convicted of first degree murder if the evidence had not been admitted.

(LD 5 at 31-32.)

B. Applicable Clearly Established Federal Law

Review of an ineffective assistance of counsel claim involves a two-step analysis. See Strickland v. Washington, 466 U.S. 668, 687 (1984). First, Petitioner must prove that his attorney's representation fell below an objective standard of reasonableness. Id. at 687-88. Second, Petitioner must show that he was prejudiced by counsel's deficient performance. Id. at 687. Petitioner must prove both elements. Id. The Court may reject the petitioner's claims upon finding either that counsel's performance was reasonable or that the claimed error was not prejudicial. Id. at 697; see Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the Strickland test obviates the need to consider the other.").

Moreover, courts generally maintain a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Indeed, the Supreme Court dictates that "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. In order to show that his counsel's performance was objectively unreasonable, Petitioner must overcome the strong presumption that the challenged action might be considered sound trial strategy under the circumstances. Id. A reasonable tactical decision by counsel with which Petitioner disagrees cannot form a basis for an ineffective assistance of counsel claim. See id. at 690. The Court does not consider whether another lawyer with the benefit of hindsight would have acted differently than Petitioner's trial counsel. Id. at 689. Instead, the Court looks only to whether Petitioner's trial counsel made errors so serious that counsel failed to function as guaranteed by the Sixth Amendment. Id. at 687. In conducting this analysis, the Court must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689.

Assuming that Petitioner can show that his counsel's performance was unreasonable, the Court still must determine whether counsel's performance prejudiced Petitioner. See Strickland, 466 U.S. at 694. Petitioner can prove prejudice by

demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Id.

"The standards created by Strickland and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." Richter, 562 U.S. at 105 (internal citations omitted). To succeed on an ineffective assistance of counsel claim governed by Section 2254(d), "it is not enough" to persuade a federal court that the Strickland test would be satisfied if a claim "were being analyzed in the first instance." Bell v. Cone, 535 U.S. 685, 698-99 (2002). It also "is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied Strickland incorrectly." Id. at 699. Rather, Petitioner must show that the state courts "applied Strickland to the facts of his case in an objectively unreasonable manner." Id.; see also Woodford v. Visciotti, 537 U.S. 19, 24-25 (2002).

C. Analysis

Petitioner's claim fails under the doubly deferential standard applicable to Strickland claims on federal habeas review. Irrespective of whether counsel's performance was deficient as alleged, Petitioner has not demonstrated "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See Strickland, 466 U.S. at 694. As concluded above, Petitioner failed to establish actual prejudice under the Brecht standard with respect to any of the cited instructional errors. Because the Brecht standard for establishing prejudice is lower than that of Strickland, see Kyles v. Whitley, 514 U.S. 419, 436 (1995) (Strickland prejudice standard requires greater showing of harm to petitioner than Brecht's harmless-error standard); Pirtle v. Morgan, 313 F.3d 1160, 1173 n.8 (9th Cir. 2002) ("[H]armless error analysis under Brecht . . . involves a low standard than Strickland's standard for prejudice."(citing Kyles)), it follows that Petitioner cannot establish he was prejudiced under Strickland's more demanding standard. Similarly, Petitioner has not established, nor does the record otherwise indicate, any reasonable likelihood that the challenged evidence would have been excluded had counsel objected to

it or that exclusion of the evidence would have led to a different verdict. See Kimmelman v. Morrison, 477 U.S. 365, 375 (1986) (to establish Strickland prejudice based on counsel's failure to object or move to exclude evidence, Petitioner must show that the objection or motion is meritorious, and that there is a reasonable probability that the verdict would have been different absent the evidence).

Accordingly, habeas relief is not warranted on Ground Five.

V. GROUND SIX DOES NOT WARRANT FEDERAL HABEAS RELIEF.

In Ground Six, Petitioner contends that the cumulative effect of the foregoing errors deprived him of due process and to a fair trial. (FAP at 9; LD 6 at 28.)

A. Background

The court of appeal rejected this claim, stating:

> Defendant contends that even if the multiple errors he asserts were not individually reversible, their cumulative effect "irreparably prejudiced" his right to a fair trial. We found no error with respect to the instructions on self-defense and imperfect self-defense, no ineffective assistance of counsel, and no prejudicial error with respect to the omission of an instruction on heat-of-passion voluntary manslaughter or as to the consciousness of guilt instruction. Defendant has failed to persuade us that the two nonprejudicial errors had any cumulative effect.

(LD 5 at 33 (citation omitted).)

B. Applicable Clearly Established Federal Law

The Supreme Court has clearly established that "[t]he cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." Parle v. Runnels, 505 F.3d 922, 928 (9th Cir. 2007) (citing Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974), and Chambers v. Mississippi, 410 U.S. 284, 290 n.3 (1973)). Habeas relief is warranted on a claim of cumulative error only when the alleged confluence of errors "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Parle, 505

F.3d at 927 (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)). "[T]he fundamental question in determining whether the combined effect of trial errors violated a defendant's due process rights is whether the errors rendered the criminal defense 'far less persuasive,' Chambers, 410 U.S. at 294, and thereby had a 'substantial and injurious effect or influence' on the jury's verdict, Brecht, 507 U.S. at 637[.]" Id. at 928.

C. Analysis

Here, the evidence that Petitioner shot and killed Harris and Robinson was compelling and undisputed. For example, unrefuted forensic evidence established that Harris was shot in the forehead at point blank range as she was lying on her stomach, and evidence that Petitioner reached over Williams's arm as she was between and separating him from Robinson and shot Robinson twice in the chest also was unrefuted. "If the evidence of guilt is otherwise overwhelming, the errors are considered 'harmless' and the conviction will generally be affirmed." Parle, 505 F.3d at 928; see also Strickland, 466 U.S. 696 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."). Considering the strong evidence against Petitioner, there was no cumulative error because the combined effect of the individually harmless errors alleged here did not undermine or render "far less persuasive" Petitioner's defense that he killed Robinson in self-defense (reasonable or imperfect) and did not act willfully, deliberately, and with premeditation. See Parle, 505 F.3d at 927 ("[W]here the combined effect of individually harmless errors renders a criminal defense far less persuasive than it might otherwise have been, the resulting conviction violates due process.") (internal quotation marks and brackets omitted).

Accordingly, habeas relief is not warranted on Ground Six.

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RECOMMENDATION

THE COURT, THEREFORE, RECOMMENDS that the District Court issue an Order: (1) accepting this Report and Recommendation; (2) denying the First Amended Petition; and (3) directing that Judgment be entered dismissing this action with prejudice.

DATED: July 22, 2016

/s/ John E. McDermott
JOHN E. MCDERMOTT
UNITED STATES MAGISTRATE JUDGE

Additional material from this filing is available in the Clerk's Office.