APPENDIX

A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BENJAMIN JAMES BOATMAN,

Petitioner,

v.

JEFFREY A. BEARD,

Respondent.

Case No. ED CV 15-02271 GW (AFM)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the records on file, and the Final Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a *de novo* review of those portions of the Report to which objections have been made. Petitioner's objections are overruled. The citations to *Wright v. Van Patten* on pages 23 and 33 of the Report are corrected to 552 U.S. 120, 126 (2008).

The Court accepts the findings and recommendations of the Magistrate Judge. IT THEREFORE IS ORDERED that (1) the Final Report and Recommendation is accepted and adopted; (2) petitioner's request for an

evidentiary hearing is denied; and (3) Judgment shall be entered denying the Petition and dismissing this action with prejudice.

DATED: September 1, 2017

GEORGE H. WU
UNITED STATES DISTRICT JUDGE

APPENDIX

B

Case: 5:15cv02271 Doc: 29

Benjamin James Boatman AK1199
Ironwood State Prison
P.O. Box 2199
Blythe, CA 92226

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BENJAMIN JAMES BOATMAN,

Petitioner,

v.

JEFFREY A. BEARD,

Respondent.

Case No. ED CV 15-02271 GW (AFM)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable George H. Wu, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

INTRODUCTION

On November 4, 2015, petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody (28 U.S.C. § 2254). The Petition raises 15 grounds for federal habeas relief, directed to petitioner's conviction of second-degree murder. Petitioner fatally shot his girlfriend but claimed that the gun fired accidentally while they were playing with it.

For the reasons discussed below, the Court recommends that the Petition be denied and that this action be dismissed with prejudice.

PROCEDURAL HISTORY

On July 1, 2011, a Riverside County Superior Court jury convicted petitioner of first-degree murder and possession of marijuana for sale. The jury also found true a firearm allegation and an allegation that petitioner committed the offenses while on release from custody pending trial on another felony offense. He was sentenced to 52 years to life in state prison. (3 Reporter's Transcript ["RT"] 481-83, 532; 1 Clerk's Transcript ["CT"] 278-81; 2 CT 390-92.)

Petitioner appealed. (Respondent's notice of lodging, Lodgment 4.) In a partially published decision filed on December 4, 2013, the California Court of Appeal reversed petitioner's conviction of first-degree murder because the evidence presented at trial was insufficient to establish premeditation and deliberation. *See People v. Boatman*, 221 Cal. App. 4th 1253 (2013). In the remaining unpublished portion of the decision, the California Court of Appeal rejected seven other claims of error. (Lodgment 7.) On March 13, 2014, the California Supreme Court summarily denied a Petition for Review. (Lodgments 8 and 9.) Petitioner was resentenced to 40 years to life in state prison. (Lodgment 10 at 2.)

Petitioner then litigated a series of habeas petitions in the California courts. On June 11, 2015, petitioner filed a habeas petition in the Riverside County Superior Court. (Lodgment 10.) It was denied in a brief decision on July 13, 2015. (Lodgment 11.) On August 26, 2015, petitioner filed a habeas petition in the California Court of Appeal. (Lodgment 12.) It was denied without comment or citation of authority on September 1, 2015. (Lodgment 13.) On November 2, 2015, petitioner filed a habeas petition in the California Supreme Court. (Lodgment 14.) It was denied without comment or citation of authority on February 17, 2016. (Lodgment 15.)

In the interim, petitioner filed this Petition on November 4, 2015. Concurrently, petitioner filed a Motion for Stay and Abeyance while he completed exhaustion of his claims in the state courts. Petitioner's motion became moot on February 17, 2016, when the California Supreme Court denied his habeas petition.

Respondent filed an Answer on April 26, 2016. Petitioner filed a Traverse on June 27, 2016. Thus, this matter is ready for decision.

SUMMARY OF THE EVIDENCE

The California Court of Appeal set forth the following summary of the evidence from petitioner's trial. (Lodgment 7 at 3-9.)[1]

> At approximately 3:30 a.m. on March 18, 2010, [petitioner] was released from jail on bail. He walked home, where he lived with his father (Jim), a sister (Hanna), an older brother (Brandon), and a younger brother (Brenton). [footnote omitted.] Brandon's girlfriend, Victoria Williams, was also staying there at that time.
>
> After talking with Brenton for awhile, [petitioner] and Brenton drove to Marth's house, picked her up, and returned home. [Petitioner] had been dating Marth for about one year and, he testified, was in love with her. However, [petitioner] also had an ex-fiancée and was conflicted about whom he wanted to be with.
>
> Around 7:05 a.m., Officer Eric Hibbard responded to a report of a shooting at [petitioner's] house. When he arrived, he saw Brenton leaning up against the fender of a white Cadillac holding Marth in his

[1] The Ninth Circuit has held that the factual summary set forth in a state appellate court opinion is entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1), which a party may rebut only by clear and convincing evidence that the facts were otherwise. *See Brown v. Horell*, 644 F.3d 969, 972 (9th Cir. 2011); *Moses v. Payne*, 555 F.3d 742, 746 n.1 (9th Cir. 2009); *Tilcock v. Budge*, 538 F.3d 1138, 1141 (9th Cir. 2008); *Mejia v. Garcia*, 534 F.3d 1036, 1039 n.1 (9th Cir. 2008). Petitioner has not attempted to rebut the Court of Appeal's factual summary.

arms. Marth had been shot in the face. Shortly after Officer Hibbard placed Marth on the ground, [petitioner] came running out of the house with blood on his clothes and face. [Petitioner] told Officer Gregory Hayden to "[c]all the ambulance for my girlfriend."

With both [petitioner] and Brenton detained, Officer Hibbard and two other officers conducted a safety sweep of the house. Inside, the officers found Brandon, Williams, and Hanna. Upon entering the bedroom where Marth had been shot, Officer Hibbard saw bloodstains on the bed and pillow. He also saw some marijuana and marijuana paraphernalia in the room. A trail of blood led Officer Hibbard from the bedroom to the kitchen. Officer Hibbard saw a black revolver on the kitchen floor. Both the floor and revolver appeared to be wet with water. The revolver contained five live .38–caliber rounds, as well as one fired round. During a subsequent search of the room where Marth was shot, a box containing a semiautomatic handgun, a box of .38–caliber bullets, and a duffel bag containing a sawed-off shotgun and a box of shotgun shells were found.

Brandon's bedroom shares a wall with the room in which Marth was shot. On the day of the shooting, Williams (who was in Brandon's room) told an investigating officer that she was awakened by a "[l]oud screaming argument between a guy and a girl for at least three minutes." She said she did not know where the yelling was coming from and that she could not tell what the "[l]oud screaming" was about. At trial, Williams did not remember characterizing the sounds she heard as "loud screaming," and said she was awoken by "loud talking." A couple of minutes after hearing the "loud talking," Williams heard a gunshot. Immediately afterward, Williams heard a commotion and screaming; "it seemed like someone was panicking,

like yelling or screaming like out of fear."

[Petitioner] was taken to the police station by a Riverside police officer. On the way to the police station, [petitioner] asked the officer if he knew if Marth was okay. [Petitioner] said: "I can't lose her. I would do anything for her. How is someone supposed to go on with their life when they see something like that? We were just going to watch a movie." [Petitioner] was crying with his head down for most of the trip.

[Petitioner] was interviewed by two homicide detectives. He gave different versions of what had happened that day and admitted at trial that he lied to the officers. In the first version, [petitioner] claimed that Marth had accidentally shot herself. He said he was showing her a gun he had recently purchased; he did not tell her it was loaded; and as she was playing around with it, she accidentally shot herself.

In [petitioner's] second version, he said he shot Marth, but claimed the shooting was accidental and that he did not think the gun was loaded. He explained that they were sitting on the couch; Marth pointed the gun at him, he pushed the gun away, and she pointed it at him again; he then took the gun, pointed it at her, and accidentally shot her.

In the third version, [petitioner] said he knew the gun was loaded. He described the events this way: "She pointed it at me. I slapped it away. She pointed it at me. I slapped it away. We both knew it was loaded. And then I went like that and I cocked back the hammer just jokingly and it slipped, pow." He later added: "I pulled it back. . . . [¶] . . . [¶] . . . and it slipped. [¶] . . . [¶] . . . Like I didn't get to pull it all the way back." In this version, [petitioner] claimed

that his finger was not on the trigger. At trial, this version was placed in doubt by a criminalist with an expertise in firearms who testified that, because of the multiple safeties on the gun, the gun cannot be fired by pulling the hammer back and releasing it before it is fully cocked.

[Petitioner] testified at trial. He stated that after a few restless nights in jail, he was released on bail around 3:30 a.m. and walked home. Along the way, he sent a text message to Marth to tell her he was going to come get her. He arrived at his house around 5:00 a.m. He and Brenton picked up Marth around 5:30 that morning and returned to their house. [Petitioner] and Marth were happy to see each other.

After the three returned to [petitioner's] house, they planned to smoke a "blunt" — a cigarillo in which the tobacco has been removed and replaced with marijuana — and watch a movie. After showering, [petitioner] took some Xanax and Norcos pills. [Petitioner] said that these pills typically make him feel drunk and euphoric and that on the day in question the drugs made him disoriented.[fn]

> [fn] The detective who interviewed [petitioner] testified that he did not notice that defendant had any symptoms of being under the influence of drugs during their interview.

[Petitioner] and Marth were in a bedroom that had been converted from a back patio. [Petitioner] went to his safe, which contained marijuana and money, and began weighing the marijuana and counting the money. Marth said, "[h]ey, baby." [Petitioner] turned around and saw Marth pointing a gun at him. Marth had apparently retrieved the gun from underneath [petitioner's] pillow.

[Petitioner] was not worried because he trusted Marth. He slapped the gun away and continued to weigh the marijuana.

At this point, a mosquito landed on Marth, causing her to "scream[ ] a little bit." She "jumped up, started waving her hands, doing a whole bunch of girly stuff. . . ." In order to tease her, [petitioner] "grabbed the mosquito, and . . . brought it closer to her, and she got even more upset." To make up for the teasing, [petitioner] gave Marth a hug and a kiss, then went back to weighing his marijuana.

When [petitioner] turned around, Marth was sitting on the edge of the bed pointing the gun at him again. The bed did not have a frame and was low on the floor. [Petitioner], who had just finished putting the marijuana back into the safe on the floor, was squatting and about "eye to eye" with Marth. He took the gun away from Marth and pointed it at her. He knew the gun was loaded when he received it and it "had to be loaded because [he] didn't take the bullets out." He cocked the hammer back, but did not intend to threaten or shoot her. He was "[j]ust kind of being stupid[.]" [Petitioner] then described what happened next:

"[PETITIONER:] She slapped the gun, and as soon as she slapped the gun, the gun went off. I almost dropped it. I tried to grab hold of it. Still the gun didn't drop. As soon as I squeezed it, it went off.

"Q. Okay. Why are you squeezing it?

"A. I didn't want to drop it. I didn't want anything to happen. I guess just a reaction.

"Q. Okay.

"A. You drop something; you try not to drop it.

"Q. Did you sit there and think this through step by step or was it kind of more an instinctive reaction?

"A. It just happened so quick. It just happened. I didn't think about it at all."

Immediately after the shot, [petitioner] told Brenton "to call the cops," which he did. [Petitioner] tried to give Marth mouth-to-mouth resuscitation. When Marth told [petitioner] she could not breathe, [petitioner] and Brenton took her outside to the driveway in front of the house "to get her help."

[Petitioner] went back into the house to get his keys. From inside the house, he heard sirens and panicked. [Petitioner] grabbed the gun and rinsed it off in an attempt to wash off the fingerprints. He tossed the gun into the bottom of a kitchen cabinet. He then ran outside where he was met by police officers.

A recording of Brenton's 911 call was played to the jury. Brenton lied to the 911 operator, telling her his name was "Paul" and that he did not know who had shot Marth. [Petitioner] can be heard in the background of the telephone call crying and repeatedly saying things like, "[n]oooo," "[b]aby," and "[b]aby are you alive, baby. . . ."

A forensic pathologist estimated that the gun was fired roughly 12 inches from Marth's face. She arrived at this estimate based on evidence of stippling, "a phenomenon where some of the gunpowder comes out of the gun and actually tattoos and burns the skin." The doctor also opined on the trajectory of the bullet: "Essentially the projectile entered just to the left side of her nose. It was recovered in the back portion of her neck a little bit to the right. And so the trajectory would have been front to back, slightly left to right, and slightly downward."

Marth's best friend, Heather Hughes, testified that she and Marth had exchanged text messages in the hours before the shooting. A text sent at 10:29 p.m. on March 17, 2010 (the night before [petitioner] was released from jail) read: "Going to sleep soi [sic] can wake up when [defendant] calls." At 4:24 a.m. on March 18, 2010, Marth texted: "[Petitioner's] out." Two minutes later she sent: "I alrea[d]y fuckin wish he was locked back up. . . . [O]mg [you] have no clue." At 7:02 a.m., Marth wrote: "Just were [sic] fighting . . . with him right now."

PETITIONER'S CLAIMS

1. Trial counsel was ineffective for failing to investigate and present evidence of petitioner's mental condition. (Petition Attachment A at 1-27; Reply Memorandum ["Mem."] at 11-22.)

2. Trial counsel was ineffective for failing to elicit mitigating evidence about the fight between petitioner and the victim. (Petition Attachment A at 28-31; Reply Mem. at 22-24.)

3. Trial counsel was ineffective for failing to request jury instructions supporting defense theories. (Petition Attachment A at 32-66; Reply Mem. at 24-36.)

4. The cumulative effect of trial counsel's failure to request necessary judgment instructions was prejudicial. (Petition Attachment A at 66-70.)

5. The cumulative effect of trial counsel's other errors was prejudicial. (Petition Attachment A at 70-73; Reply Mem. at 36-37.)

6. The prosecutor committed misconduct by misstating the evidence and failing to meet his burden of proof. (Petition Attachment A at 73-88; Reply Mem. at 37-41.)

7. The cumulative effect of the prosecutor's errors was prejudicial.

(Petition Attachment A at 88-93; Reply Mem. at 41-43.)

8. Sentencing counsel was ineffective for failing to prepare for a motion for new trial. (Petition Attachment A at 93-107; Reply Mem. at 43-45.)

9. Appellate counsel was ineffective for failing to raise meritorious claims on appeal. (Petition Attachment A at 107-113; Reply Mem. at 45-46.)

10. The cumulative effect of at least nine constitutional errors was prejudicial. (Petition Attachment A at 113-118; Reply Mem. at 46-49.)

11. The trial court erred by failing to instruct the jury *sua sponte* on the lesser-included offense of voluntary manslaughter. (Lodgment 8 at 7-9; Reply Mem. at 49-51.)

12. The trial court erred by admitting evidence of petitioner's unrelated criminal charge and bad acts. (Lodgment 8 at 10-12; Reply Mem. at 51-52.)

13. Trial counsel was ineffective for failing to object to the evidence of petitioner's unrelated criminal charge and bad acts. (Lodgment 8 at 12-15; Reply Mem. at 52-53.)

14. The trial court erred in instructing the jury on circumstantial evidence. (Lodgment 8 at 15-19.)

15. The trial court's instructional error in Ground 14 denied petitioner a right to a fair trial and a jury determination of guilt. (Lodgment 8 at 19-23; Reply Mem. at 53-54.)

STANDARD OF REVIEW

Under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

> "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."

Under the 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 v. Taylor*, 529 U.S. 362, 412 (2000); *see also Carey v. Musladin*, 549 U.S. 70, 74 (2006).

Although a particular state court decision may be both "contrary to" and "an unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. *See Williams*, 529 U.S. at 391, 413. A state court decision is "contrary to" clearly established federal law if the decision either applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. *See Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam); *Williams*, 529 U.S. at 405-06. When a state court decision adjudicating a claim is contrary to controlling Supreme Court law, the reviewing federal habeas court is "unconstrained by § 2254(d)(1)." *See Williams*, 529 U.S. at 406. However, the 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." *See Early*, 537 U.S. at 8.

State court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review only "if they are not merely erroneous, but 'an *unreasonable* application' of clearly established federal law, or based on 'an *unreasonable* determination of the facts.'" *See Early*, 537 U.S. at 11 (citing 28 U.S.C. § 2254(d)) (emphasis added). A state-court decision that correctly identified the governing legal rule may be rejected if it unreasonably applied the rule to the

facts of a particular case. *See Williams*, 529 U.S. at 406-10, 413 (*e.g.*, the rejected decision may state the *Strickland* standard correctly but apply it unreasonably); *Woodford v. Visciotti*, 537 U.S. 19, 24-27 (2002) (per curiam). However, to obtain federal habeas relief for such an "unreasonable application," a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." *Visciotti*, 537 U.S. at 24-27; *Williams*, 529 U.S. at 413. An "unreasonable application" is different from an erroneous or incorrect one. *See Williams*, 529 U.S. at 409-10; *Visciotti*, 537 U.S. at 25; *Bell v. Cone*, 535 U.S. 685, 699 (2002). Moreover, review of state court decisions under § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." *See Cullen v. Pinholster*, 563 U.S. 170, 180 (2011).

As the Supreme Court explained in *Harrington v. Richter*, 562 U.S. 86, 102 (2011):

> "Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here [i.e., where there was no reasoned state-court decision], could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court."

Furthermore, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

Petitioner's claims in Grounds One to Ten were denied by the Riverside County Superior Court in a brief decision denying petitioner's habeas petition. The claims then were presented in petitioner's habeas petitions in the California Court of Appeal and the California Supreme Court, and both courts denied the petitions

without comment or citation of authority. Thus, the Superior Court's decision on collateral review constitutes the relevant state court adjudication on the merits for purposes of the AEDPA standard of review with respect to Grounds One to Ten. *See Cannedy v. Adams*, 706 F.3d 1148, 1159 (9th Cir. 2014) (federal habeas courts look through summary denials to the last reasoned state court decision, whether denials are on the merits or of discretionary review).

Petitioner's remaining claims in Grounds Eleven to Fifteen were denied by the California Court of Appeal in a reasoned decision on direct appeal. The claims then were presented in the Petition for Review, which the California Supreme Court summarily denied. Thus, the California Court of Appeal's decision on direct appeal constitutes the relevant state court adjudication on the merits under the AEDPA standard of review with respect to Grounds Eleven to Fifteen. *See Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010) (where state supreme court denied discretionary review of decision on direct appeal, the decision on direct appeal is the relevant state-court decision for purposes of the AEDPA standard of review).

For purposes of the discussion below, the order of petitioner's claims has been rearranged to correspond to the approximate chronology of petitioner's trial.

DISCUSSION

A. Trial counsel's failure to investigate and present evidence of petitioner's mental condition (Ground One).

In Ground One, petitioner claims that his trial counsel was ineffective for failing to investigate and present evidence of petitioner's mental condition when he shot the victim. (Petition Attachment A at 1-27; Reply Mem. at 11-22.)

1. Legal standard for ineffective assistance of counsel.

In *Strickland v. Washington*, 466 U.S. 668, 694 (1984), the Supreme Court held that there are two components to an ineffective assistance of counsel claim:

"deficient performance" and "prejudice." "Deficient performance" in this context means unreasonable representation falling below professional norms prevailing at the time of trial. *See Strickland*, 466 U.S. at 688-89. To show "deficient performance," petitioner must overcome a "strong presumption" that his lawyer "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. Further, petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* The Court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance." *Id.* The Supreme Court in *Strickland* recognized that "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689. Accordingly, to overturn the strong presumption of adequate assistance, petitioner must demonstrate that "the challenged action cannot reasonably be considered sound trial strategy under the circumstances of the case." *See Lord v. Wood*, 184 F.3d 1083, 1085 (9th Cir. 1999).

To meet his burden of showing the distinctive kind of "prejudice" required by *Strickland*, petitioner must affirmatively "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *See Strickland*, 466 U.S. at 694; *see also Richter*, 562 U.S. at 111 ("In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently."); *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) (noting that the "prejudice" component "focuses on the question whether counsel's

deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair").

Moreover, it is unnecessary to address both *Strickland* requirements if the petitioner makes an insufficient showing on one. *See Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed."); *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."); *Williams v. Calderon*, 52 F.3d 1465, 1470 and n.3 (9th Cir. 1995) (disposing of an ineffective assistance of counsel claim without reaching the issue of deficient performance because petitioner failed to make the requisite showing of prejudice).

In *Richter*, the Supreme Court reiterated that the AEDPA requires an additional level of deference if state court has rejected an ineffective assistance of counsel claim. "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard." *See Richter*, 562 U.S. at 101. As the Supreme Court further observed (*id.* at 105):

> "'Surmounting *Strickland*'s high bar is never an easy task.' *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S. Ct. 2052. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and

interacted with the client, with opposing counsel, and with the judge. It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.' *Id.*, at 689, 104 S. Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). [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. *Strickland*, 466 U.S., at 690, 104 S .Ct. 2052.]

"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 123, 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 not whether counsel's actions were reasonable. [The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard."]

completely neglects DSM-IV

2. Background of Ground One. See Hinton v. Ala Banc 134 Sct 1081, 1087 – 1090

Fifteen minutes before he shot the victim, petitioner took one Xanax pill and three Norco pills. (2 RT 177-78, 253, 267.) Petitioner was addicted to drugs. (2 RT 253.) Although petitioner testified that Xanax and Norco made him feel

"drunk," "euphoric," and "disoriented," he also admitted on cross-examination that the drugs normally took longer than fifteen minutes to affect him. (2 RT 178, 269.)

Petitioner is not claiming in Ground One that trial counsel failed to show that petitioner was under the influence of drugs when he shot the victim. Rather, petitioner is claiming that trial counsel unreasonably failed to investigate and present evidence, including expert testimony, showing that petitioner was suffering from drug withdrawal and related mental problems at that time. He allegedly was suffering from drug withdrawal because, shortly before the shooting, he had been in jail for two days and therefore was unable to take drugs. And a few days after the shooting, petitioner was hospitalized with a "psychotic disorder" and drug dependence.

Petitioner has attached the medical record of his hospitalization. (ECF No. 1-4 at 24-120; ECF No. 1-5 at 1-49.) Petitioner was admitted on March 23, 2010 — five days after the shooting — and discharged on March 28, 2010. (ECF No. 1-4 at 24.) An earlier physical examination on March 21 could not be completed because of petitioner's "grossly psychotic behavior." (*Id.* at 24, 51.) Upon admission on March 23, petitioner was "grossly psychotic with marked response to visual hallucinations and perhaps auditory hallucinations." (*Id.* at 24.) He had refused his medication (Remeron) while in custody, but while in the hospital he took Haldol and "showed brisk response in approximately 48 hours with resolution of hallucinations and improved cognition." (*Id.* at 24, 47.) Within a few days of admission, petitioner "improved significantly and was deemed stable enough for discharge and was subsequently returned to jail." (*Id.* at 24.) Upon discharge, petitioner's diagnosis was "Psychotic disorder, not otherwise specified, resolving" and "Positive substance dependence." (*Id.*)

Petitioner also has attached declarations from his mother and a family friend. (ECF No. 1-4 at 11, 13-14.) According to petitioner's mother, she personally discussed petitioner's defense with trial counsel on multiple occasions, and he

"promised to investigate the possibility of a mental health defense as well as present experts to testify in [petitioner's] behalf." (*Id.* at 11.) On the day of trial, however, trial counsel informed petitioner's family that he did no investigation of the mental health issues and that no experts would assist in the defense. (*Id.*) According to the family friend, she personally informed trial counsel that petitioner "was not right in the right mind on the day of the incident" and promised to pay for any experts. (*Id.* at 13.) After trial counsel failed to present any mental health evidence during the trial, the family friend personally obtained petitioner's medical record and learned that she had been the first person to do so. (*Id.* at 14.)

3. Analysis of Ground One.

"[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments," *Cox v. Del Papa*, 542 F.3d 669, 679 (9th Cir. 2008), and "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation," *Reynoso v. Giurbino*, 462 F.3d 1099, 1114 (9th Cir. 2006) (quoting *Strickland*, 466 U.S. at 690-91). The Ninth Circuit has held that an attorney renders deficient performance when he fails to investigate a mental-state defense when the information available to him puts him on notice that such a defense could be successful. *See, e.g.*, *Bemore v. Chappell*, 788 F.3d 1151, 1165-69 (9th Cir. 2015); *Douglas v. Woodford*, 316 F.3d 1079, 1085-87 (9th Cir. 2003); *Franklin v. Johnson*, 290 F.3d 1223, 1234-37 (9th Cir. 2002); *Jennings v. Woodford*, 290 F.3d 1006, 1013-16 (9th Cir. 2002); *Seidel v. Merkle*, 146 F.3d 750, 755-57 (9th Cir. 1998); *United States v. Burrows*, 872 F.2d 915, 918 (9th Cir. (1989).

Trial counsel had notice of petitioner's mental hospitalization but never attempted to obtain the hospitalization record or to consult with a psychiatric

expert. Had this notice been the only available information on the issue, trial counsel's failure to investigate a mental-state defense may have been so unreasonable as to constitute deficient performance. But it was not the only available information about petitioner's mental state at the time of the shooting. Trial counsel had access to audiotapes of petitioner's police interviews, conducted a few hours after the shooting, which were compelling evidence that petitioner had no mental problem when he shot the victim: Petitioner was coherent and responsive throughout the lengthy interviews, and apparently displayed no signs consistent with a mental problem such as odd behavior. (1 CT 113-249.)[1] Trial counsel also had access to petitioner's own account of the shooting, which did not include any allegations of mental symptoms consistent with drug withdrawal, hallucinations, or psychosis. Rather, petitioner eventually testified at trial with precise recall that he deliberately pointed a loaded gun at the victim but was "being kind of stupid" and "just wasn't thinking" when he did so. (2 RT 183-84.) Petitioner's own account of the shooting would have shaped trial counsel's decision not to investigate a mental-state defense. *See Strickland*, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.").

The available information taken as a whole, particularly petitioner's interviews with the police, would have been sufficient for trial counsel to make a reasoned decision not to investigate a mental-state defense. It follows that trial counsel's failure to consult a psychiatric expert also was not deficient performance. *See Wilson v. Henry*, 185 F.3d 986, 990 (9th Cir. 1999) ("A decision not to pursue testimony by a psychiatric expert, when no mental state defense seems likely, is not unreasonable under *Strickland*.") Accordingly, trial counsel's failure to investigate the evidence of petitioner's post-arrest mental hospitalization was not unreasonable in all the circumstances and therefore did not constitute deficient performance.

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But in any event, even if trial counsel's investigation of the mental evidence was deficient performance, petitioner has not demonstrated prejudice. "In a case in which counsel's error was a failure adequately to investigate, demonstrating *Strickland* prejudice requires showing both a reasonable probability that counsel would have made a different decision had he investigated, and a reasonable probability that the different decision would have altered the outcome." *Bemore*, 788 F.3d at 1169 (citing *Wiggins v. Smith*, 539 U.S. 510, 535-36 (2003)).

It was not reasonably probable that trial counsel would have made a different decision had he investigated petitioner's hospitalization record for March 23 to 28, 2010. That record is silent about petitioner's mental condition on the morning of March 18, 2010, when he shot the victim. It only shows that a few days later petitioner's condition deteriorated, apparently in part because of medication non-compliance, but quickly improved with appropriate treatment. (ECF No. 1-4 at 24.) Trial counsel therefore could have decided that the evidence of petitioner's psychotic symptoms, which were documented as surfacing at the earliest on March 21, 2010, had little tendency to show whether petitioner actually had the requisite mental state for murder three days earlier. *See People v. Panah*, 35 Cal. 4th 395, 484-85 (2005) (evidence that defendant received emergency treatment *one day* after the crimes because he was psychotic, agitated, delusional, and hallucinatory did not constitute evidence of defendant's mental state at the time of the crimes). Indeed, the hospitalization record reflects that prior to his admission, petitioner had "no known past psychiatric history." (ECF No. 1-4 at 24, 57.) Petitioner contends that he was not hospitalized until several days after his condition deteriorated (Reply at 14), but his contention was unsupported by any physician who observed him during his hospitalization. *See People v. Moore*, 96 Cal. App. 4th 1105, 1117 (2002) (petitioner's mental state at the time of the crime must be established by competent medical evidence).

For similar reasons, it was not reasonably probable that even if trial counsel had presented evidence of petitioner's psychosis and drug withdrawal, it would have altered the outcome. The evidence of petitioner's behavior during his hospitalization was completely at odds with the evidence of petitioner's behavior at the time of the shooting. Neither petitioner nor his brother (the only other eyewitness to petitioner's behavior at the time of the shooting) testified that petitioner exhibited any symptoms consistent with psychosis, hallucinations, or drug withdrawal when he shot the victim. And petitioner's police interviews conducted a few hours after the shooting were inconsistent with any such symptoms. (1 CT 113-249.) Petitioner's mental-health evidence therefore would not have established prejudice from trial counsel's investigation. *See Totten v. Merkle*, 137 F.3d 1172, 1175 (9th Cir. 1998) (finding no reasonable probability of a different outcome where the mental-impairment evidence that counsel failed to present was "completely at odds" with petitioner's actions in committing the crime); *see also Franklin*, 290 F.3d at 1237 (same where the evidence of a mental disease or defect did not show that petitioner did not have the requisite mental state for the crimes); *Douglas*, 316 F.3d at 1078 (same).

In sum, it would not have been objectively unreasonable for the Superior Court to reject this claim because petitioner had failed to show deficient performance and prejudice under the *Strickland* standard.

B. The trial court's admission of character evidence (Ground Twelve).

In Ground Twelve, petitioner claims that his right to a fair trial was violated by the admission of character evidence. (Lodgment 8 at 10-12; Reply Mem. at 51-52.) The jury heard an audiotape of petitioner's statements during a police interview about his prior firearm use and his connection to a gang: Petitioner mentioned that he had a pending criminal charge for discharging a firearm, that he had fired a gun before, and that he had turned to his "gang" or "crew" around the

time he experienced relationship problems with his ex-fiancée. (1 CT 151, 187, 222-25.)

Federal habeas relief only is available if the petitioner is contending that he is in custody in violation of the Constitution or laws or treaties of the United States. *See* 28 U.S.C. § 2254(a); *see also Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."); *Smith v. Phillips*, 455 U.S. 209, 221 (1982) ("A federally issued writ of habeas corpus, of course, reaches only convictions obtained in violation of some provision of the United States Constitution."). To the extent that petitioner's claim in Ground Twelve is premised on an erroneous ruling under California's rules of evidence, it is not cognizable on federal habeas review. Federal habeas courts "do not review questions of state evidence law." *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991); *see also Windham v. Merkle*, 163 F.3d 1092, 1103 (9th Cir. 1998) ("We have no authority to review alleged violations of a state's evidentiary rules in a federal habeas proceeding.").

Petitioner appears to be arguing further that the admission of this "irrelevant" and "prejudicial" evidence violated his federal due process right to a fair trial. (Lodgment 8 at 11; Reply Mem. at 52.) Where the challenged issue is relevant to a case, however, its admission cannot be said to have violated a defendant's due process rights. *See Estelle*, 502 U.S. at 70. Thus, even if the Court were to accept petitioner's characterization of his recorded statements to the police as "prejudicial," this evidence still was relevant to issues in the case. Petitioner's statements about his pending criminal case was relevant to the enhancement allegation under Cal. Penal Code § 12022.1(b) that petitioner committed his instant crimes while he was out on bail for another felony. Petitioner's statement about his prior discharge of a firearm was relevant to the issue of mistake and petitioner's claim that he shot Rebecca Marth accidentally. Petitioner's statements about his

"gang" or "crew" were relevant to the issue of petitioner's relationship problems as a possible motive to shoot Marth.

In any event, even if petitioner is correct that the evidence of his statements was irrelevant and unduly prejudicial, habeas relief still would not be warranted because the Supreme Court "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." *See Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009). Specifically, even if petitioner was correct in characterizing his statements as "character evidence" or "propensity evidence," the Supreme Court explicitly left open in *Estelle* the question of whether due process is violated by the admission of evidence of other crimes or bad acts solely to prove propensity. *See* 502 U.S. at 75 n.5 ("[W]e express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime"); *see also Alberni v. McDaniel*, 458 F.3d 860, 866-67 (9th Cir. 2006) (declining to declare a constitutional principle relating to the propriety of admitting propensity evidence clearly established where the Supreme Court "had expressly concluded the issue was an 'open question'").

Accordingly, since Ground Twelve involves an issue that has not been squarely addressed by the Supreme Court, the Court has no basis for finding that the California Court of Appeal's rejection of this claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law. *See, e.g., Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) (holding that "it is not 'an unreasonable application of clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court"); *Wright v. Van Patten*, 522 U.S. 120, 126 (2008) (per curiam) ("Because our cases give no clear answer to the question presented, let alone one in [the petitioner's] favor, it cannot be said that the state court

unreasonabl[y] appli[ed] clearly established Federal law." (internal quotation marks omitted)); *Brewer v. Hall*, 378 F.3d 952, 955 (9th Cir. 2004) ("If no Supreme Court precedent creates clearly established federal law relating to the legal issue the habeas petitioner raised in state court, the state court's decision cannot be contrary to or an unreasonable application of clearly established federal law.").

In sum, habeas relief is unavailable for petitioner's claim of evidentiary error.

C. Trial counsel's failure to request exclusion of the character evidence (Ground Thirteen).

In Ground Thirteen, petitioner claims that his trial counsel was ineffective for failing to request redaction of petitioner's police interview to remove petitioner's statements about his bad acts. (Lodgment 8 at 12-15; Reply Mem. at 52-53.) As discussed above, petitioner told the police that he had a pending criminal charge for discharging a firearm, that he had fired a gun before, and that he had turned to a "gang" or "crew" around the time of his relationship problems with his ex-fiancée. (1 CT 151, 187, 222-25.)

In order to establish deficient performance in this context, petitioner must show that counsel's failure to bring a motion was out of "the wide range of professionally competent assistance." *See Styers v. Schriro*, 547 F.3d 1026, 1030 (9th Cir. 2008) (quoting *Strickland*, 466 U.S. at 690). In order to establish prejudice in this context, petitioner must show that (1) had his counsel filed the motion, it is reasonable that the trial court would have granted it as meritorious; and (2) had the motion been granted, it is reasonable that there would have been an outcome more favorable to him. *See Wilson*, 185 F.3d at 990 (citing *Kimmelman v. Morrison*, 477 U.S. 365, 373-74 (1986)).

The California Court of Appeal rejected petitioner's claim because he had failed to show both deficient performance and prejudice from trial counsel's failure to request exclusion of petitioner's statements (Lodgment 8 at 45-47):

As noted above, the challenged evidence was relevant to issues in the case and admissible. Counsel may have thus reasonably concluded that there was no benefit to asserting objections that likely would have been overruled. Moreover, there was a possible tactical benefit in allowing the interviews to be played in full — to show the jury he had nothing to hide. While the recordings contained information favorable to the prosecution, they also included his explanations of the unfavorable evidence. Perhaps more importantly, the interviews set the foundation for [petitioner's] explanation of how the events unfolded that day. For example, when [petitioner] testified as to the mosquito incident, the prosecutor asked: "You mentioned the mosquito to the police? [Defendant] responded by citing the interviews: "I mentioned that there was a — that there was something that had happened. . . ." He continued on: "Detective Sanfilippo says, 'So there's no argument going on?' And I respond, 'No. We were joking. No we were, we were joking. What happened was, uh, me and my little brother were, oh, we're like, we're kind of like tag-teamed on a joke, and me and him started laughing, and she got mad.'"

Because the recordings contained both [petitioner's] rebuttal to the unfavorable evidence presented against him, as well as the foundation for [petitioner's] version of the story, defense counsel may have tactically decided it would be best to have the jury hear the recording in its entirety. Because the challenged action may be considered "sound trial strategy," [petitioner] has failed to establish that his counsel was constitutionally ineffective.

Furthermore, even if [petitioner's] counsel's failure to object fell below the requisite standard of reasonableness, he has failed to establish prejudice. . . . As discussed above, the objections he claims

his counsel should have made would probably have been overruled because the evidence was relevant and admissible. Even if his objections were made and sustained, any possible prejudice due to his statements regarding his pending firearms charges and his "gang" of five friends is insufficient to undermine confidence in the outcome of this case.

The California Court of Appeal's conclusion was not objectively unreasonable. First, counsel's failure to request redaction of petitioner's police interview fell within the wide range of professionally competent assistance. The statements petitioner had made about his gun use and possible gang affiliation were relevant and admissible: They were relevant to the allegation under Cal. Penal Code § 12022.1(b) that petitioner committed his instant crimes while he was out on bail for another felony, as well as relevant to the issues of mistake and motive. *See Delgadillo v. Woodford*, 527 F.3d 919, 929 (9th Cr. 2008) (counsel did not render deficient performance by failing to object to evidence that was admissible under California law). Trial counsel also could have reasonably decided that the police interview in its entirety would show the jury that petitioner had nothing to hide and would corroborate petitioner's trial testimony, particularly his testimony that he was not angry with the victim and shot her accidentally.

Second, even assuming that trial counsel should have requested redaction of the interview, petitioner has not demonstrated prejudice. Given that petitioner's statements were admissible under California law, it is not reasonably probable that trial counsel's request for redaction of petitioner's police interview would have been granted. *See Wilson*, 185 F.3d at 991 (counsel's failure to move to exclude evidence of petitioner's prior bad acts did not result in prejudice because it was not reasonable to believe the trial court would have granted the motion to exclude).

And even if the motion for redaction would have been granted, it is not reasonably probable that there would have been an outcome more favorable to petitioner given the strong evidence of his guilt. *See Hardy v. Chappell*, 832 F.3d 1128, 1141 (9th Cir. 2016) (no prejudice under *Strickland* where there was strong or overwhelming evidence of guilt); *Strickland*, 466 U.S. at 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."). The only disputed issue as to petitioner's guilt of second-degree murder was his intent. Yet petitioner admitted during his police interview and his trial testimony that, while he was teasing the victim, he pointed the gun at the victim, knew the gun was loaded, and intentionally cocked the hammer back. (1 CT 114; 2 RT 182-83, 263-64.) As the California Court of Appeal commented, this evidence "easily" established implied malice for a conviction of second-degree murder: By pointing a loaded gun at the victim and cocking the hammer back, even as a joke, petitioner intentionally performed an act, the natural consequences of which are dangerous to human life, with the knowledge of such danger and with conscious disregard for the victim's life. *See Boatman*, 221 Cal. App. 4th at 1263. It therefore was not reasonably probable that the judgment would have been different even had trial counsel successfully requested redaction of petitioner's statements about his bad acts from his police interview.

In sum, the Court of Appeal's conclusion that petitioner failed to show deficient performance and prejudice from trial counsel's performance with respect to petitioner's statements to the police did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law.

D. The trial court's erroneous instruction on circumstantial evidence (Grounds Fourteen and Fifteen).

In Grounds Fourteen and Fifteen, petitioner claims that the trial court gave an

incorrect jury instruction on circumstantial evidence, and that the error violated his federal constitutional rights. (Lodgment 8 at 15-23; Reply Mem. at 53-54.)

The trial court chose between two instructions on circumstantial evidence: CALCRIM No. 224 and CALCRIM No. 225. (2 RT 122-23.) Both instructions "provide essentially the same information on how the jury should consider circumstantial evidence, but CALCRIM No. 224 is more inclusive." *People v. Contreras*, 184 Cal. App. 4th 587, 592 (2010). CALCRIM No. 224 "is the proper instruction unless the only element of the offense that rests substantially or entirely on circumstantial evidence is that of specific intent or mental state," in which case CALCRIM No. 225 should be given. *Id.* In this case, the trial court reasoned that the entire case against petitioner rested on circumstantial evidence and therefore instructed the jury with CALCRIM No. 224. (2 RT 122-23; 3 RT 403-04.)[2]

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[2] **CALCRIM No. 224** reads:

Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.

CALCRIM No. 225 reads:

The People must prove not only that the defendant did the acts charged, but also that he acted with a particular (intent/ [and/or] mental state). The instruction for (the/each) crime [and allegation] explains the (intent/ [and/or] mental state) required.

A[n] (intent/ [and/or] mental state) may be proved by circumstantial evidence.

Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

Also, before you may rely on circumstantial evidence to conclude that the defendant had the required (intent/ [and/or] mental state), you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required (intent/ [and/or] mental state). If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have the required (intent/[and/or] mental state) and another reasonable conclusion supports a finding that the defendant did not, you must conclude that the required (intent/ [and/or]

The California Court of Appeal concluded that the trial court was mistaken. (Lodgment 7 at 38.) The only element of the charged crimes that rested on circumstantial evidence was the element of petitioner's intent or mental state. (*Id.* at 39.) The other elements, such as actus reus, rested on direct evidence, specifically, petitioner's testimony that he owned the gun and pulled the trigger. (*Id.*) Accordingly, the trial court should have given CALCRIM No. 225 rather than CALCRIM No. 224. (*Id.*)

The California Court of Appeal also concluded, however, that the instructional error was harmless under any standard of review. (Lodgment 7 at 40-41.) Because the instruction that was actually given, CALCRIM No. 224, was more inclusive than the instruction that should have been given, the error was not prejudicial. (*Id.* at 41.)

The California Court of Appeal's rejection of this claim was not objectively unreasonable. At the outset, the Court of Appeal's determination that, as a matter of state law, the trial court should have given CALCRIM No. 225 rather than CALCRIM No. 224 does not necessarily mean that the instructional error was of constitutional magnitude. *See Estelle*, 502 U.S. at 71-72 (reiterating that "it is not the province of a federal habeas court to reexamine state court determinations on state law questions"); *Clark v. Brown*, 450 F.3d 898, 904 (9th Cir. 2006) ("The fact that a jury instruction violates state law is not, by itself, a basis for federal habeas corpus relief."); *Miller v. Stagner*, 757 F.2d 988, 993 (9th Cir. 1985) ("Failure to give an instruction which might be proper as a matter of state law does not amount to a federal constitutional violation."). Moreover, petitioner's claim of entitlement to a particular instruction on circumstantial evidence arguably does not rise to the level of a constitutional error because the law generally makes no distinction

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mental state) was not proved by the circumstantial evidence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.

between circumstantial and direct evidence. *See Holland v. United States*, 348 U.S. 121, 140 (1954) (observing that, in criminal cases, circumstantial evidence is "intrinsically no different from testimonial evidence"); *see also Scott v. Perini*, 662 F.2d 428, 433 n.7 (6th Cir. 1981) ("The modern view is that the law generally makes no distinction between direct or circumstantial evidence nor requires particular instruction to the jury, allowing jurors to give evidence the weight which they believe it is entitled.").

But even assuming for purposes of argument that the trial court's use of an incorrect instruction on circumstantial evidence did rise to the level of a constitutional violation, the error would be subject to harmless-error analysis. On federal habeas review, a claim of instructional error is subject to harmless-error analysis "so long as the error at issue does not categorically 'vitiat[e]' all the jury's findings." *See Hedgpeth v. Pulido*, 555 U.S. 57, 61 (2008) (alteration in original); *Babb v. Lozowsky*, 719 F.3d 1019, 1033 (9th Cir. 2013) ("Instructional errors are generally subject to harmless error review."), *overruled on other grounds as recognized by Moore v. Helling*, 763 F.3d 1011, 1021 (9th Cir. 2014). "When a jury instruction is erroneous because it misdescribes the burden of proof, it 'vitiates *all* the jury's findings,' and no verdict within the meaning of the Sixth Amendment is rendered." *Mendez v. Knowles*, 556 F.3d 757, 768 (9th Cir. 2008) (*citing Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993)). Here, harmless-error analysis applies because petitioner's claim of instructional error does not implicate the overarching reasonable-doubt instruction or the prosecutor's burden of proof.

Moreover, where, as here, a state court has determined that an instructional error was "harmless beyond a reasonable doubt" under the standard of *Chapman v. California*, 386 U.S. 18 (1967), "a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable." *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015) (*quoting Fry v. Pliler*, 551 U.S. 112, 119 (2007)) (emphasis in original); *see also Mitchell v. Esparza*, 540 U.S. 12, 18 (2003)

("[H]abeas relief is appropriate only if the [state court] applied harmless-error review in an 'objectively unreasonable' manner."). Under the *Chapman* standard, the instructional error may be held harmless where the reviewing court is "able to declare a belief that it was harmless beyond a reasonable doubt." *See Chapman,* 368 U.S. at 24; *see also Rose v. Clark*, 478 U.S. 570, 580 (1986).

It was not objectively unreasonable for the California Court of Appeal to conclude that the instruction of the jury with CALCRIM No. 224 rather than CALCRIM No. 225 was harmless error. CALCRIM No. 224 fairly and adequately covered the specific issue of circumstantial evidence to prove intent. In addressing circumstantial evidence, CALCRIM No. 224 instructed the jury to consider whether "each fact" had been proven beyond a reasonable doubt, presumably including the fact of whether petitioner had the requisite intent. The absence of the more specific instruction about circumstantial evidence to prove the element of intent did not mislead the jury about the requirements of that element or about the use of circumstantial evidence to prove any element.

Accordingly, the Court is unable to conclude that the Court of Appeal's harmlessness determination "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *See Davis*, 135 S. Ct. at 2199 (*quoting Richter*, 562 U.S. at 103).

E. The trial court's failure to instruct the jury *sua sponte* on the lesser-included offense of voluntary manslaughter (Ground Eleven).

In Ground Eleven, petitioner claims that the trial court erred by failing to instruct the jury on the lesser-included offense of voluntary manslaughter based on a theory of a sudden quarrel or heat of passion (collectively "heat of passion"). (Lodgment 8 at 7-9; Reply Mem. at 49-51.)

The United States Supreme Court has never held that a defendant has a constitutional right to a jury instruction on a lesser offense in a non-capital case. *Cf. Beck v. Alabama*, 447 U.S. 625 (1980) (death sentence is not constitutionally imposed after a jury verdict of guilt on a *capital* offense where the jury was not permitted to consider a lesser included non-capital offense when the evidence supported such a verdict). Moreover, the Ninth Circuit explicitly has held that "the failure of a state court to instruct on a lesser offense [in a non-capital case] fails to present a federal constitutional question and will not be considered in a federal habeas corpus proceeding." *Bashor v. Risley*, 730 F.2d 1228, 1240 (9th Cir. 1984); *see also Solis v. Garcia*, 219 F.3d 922, 929 (9th Cir. 2000) (noting that the Ninth Circuit declined to extend *Beck* to non-capital cases); *Windham v. Merkle*, 163 F.3d 1092, 1106 (9th Cir. 1998) ("Under the law of this circuit, the failure of a state court to instruct on lesser included offenses in a non-capital case does not present a federal constitutional question."). The Ninth Circuit has also held that to extend habeas relief under *Beck* to non-capital cases would create a new rule of criminal procedure in violation of *Teague v. Lane*, 489 U.S. 288, 310 (1989) (new rules of criminal procedure cannot be applied retroactively on federal collateral review to a conviction that is already final). *See Turner v. Marshall*, 63 F.3d 807, 819 (9th Cir. 1995), *overruled on other grounds by Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999).

Although there does appear to be federal precedent for the proposition that the Due Process Clause entitles a defendant to "an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor," such cases have addressed the trial court's denial of a defendant's request for instruction on a particular defense. *See, e.g., Mathews v. United States*, 485 U.S. 58, 63 (1988) (holding that it was not error to deny petitioner's request to raise an entrapment defense because he had admitted all the elements of the charged offenses); *Bashor*, 730 F.2d at 1240; *United States. v. Kenny*, 645 F.2d 1323, 1337

(9th Cir. 1981). Here, petitioner's contention is that the trial court violated his due process rights by failing to *sua sponte* instruct the jury on the lesser-included offense of voluntary manslaughter. Petitioner has not cited and the Court is unaware of any authority for the proposition that it is a violation of due process for the trial court to fail to *sua sponte* instruct the jury on a lesser-included offense.

In the absence of Supreme Court authority holding that a defendant has a constitutional right to have a trial court *sua sponte* instruct the jury on a lesser included offense in a non-capital case, it cannot be said that the California Court of Appeal's rejection of this claim either was contrary to or involved an unreasonable application of clearly established Supreme Court law. *See Knowles*, 556 U.S. at 122; *Wright*, 522 U.S. at 126 (2008); *Brewer*, 378 F.3d at 955.

Even assuming that petitioner's claim were governed by clearly established federal law, it would not have been objectively unreasonable for the state court to reject this claim because the instruction was not warranted by the evidence. (Lodgment 7 at 33.) Moreover, since petitioner's claim of entitlement to an instruction on voluntary manslaughter based on heat of passion underlies some of his other claims, it is necessary to explain in detail why such an instruction was not warranted by the evidence.

A homicide is committed in the heat of passion only if there is a provocation of such a character and degree that it would cause a reasonable person of adverse disposition to act rashly or without due deliberation and reflection, and from his passion rather than from judgment. *See People v Breverman*, 19 Cal 4th 142, 163 (1998). Heat of passion contains both a subjective and an objective component: The killer must subjectively kill under the heat of passion, and the circumstances giving rise to the heat of passion must be sufficient to arouse the passions of an ordinarily reasonable person. *See People v. Manriquez*, 37 Cal. 4th 547, 584 (2005). The provocation must be caused by the victim, or be conduct reasonably believed by the defendant to have been engaged in by the victim. *See People v.*

Lee, 20 Cal. 4th 47, 59 (1999). Words alone may be sufficient to constitute provocation, but they must be "sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." *Id.*

Here, the record did not contain substantial evidence of either the objective or subjective component of heat of passion so as to warrant a jury instruction on voluntary manslaughter. The record did contain some evidence of a quarrel: the victim's text messages to the effect that she was verbally fighting with petitioner, Brenton Boatman's testimony about a fight between the victim and petitioner right before the shooting, and Victoria Williams's statement to the police that she heard "a loud screaming argument" lasting for at least three minutes. (1 RT 107; 3 RT 307, 374-75.) But this evidence was inconclusive as to whether it was the victim who caused the provocation, and it was inconclusive as to the nature of the argument. A jury therefore would have been unable to determine whether the circumstances were sufficient to arouse the passions of an ordinarily reasonable person, so as to meet the objective component of heat of passion. More critically, the subjective component of heat of passion was absent because petitioner never mentioned a fight during his trial testimony, but testified that the only altercation he had with the victim just before he shot her was a playful interaction over a mosquito. (2 RT 180.) In the face of petitioner's own testimony, no reasonable juror could have concluded that he subjectively killed under the heat of passion. *See People v. Moye*, 47 Cal. 4th 537, 553-54 (2009) (instruction on voluntary manslaughter based on heat of passion was not warranted where defendant's own trial testimony contradicted the subjective component); *Manriquez*, 37 Cal. 4th at 585 ("The subjective element of the heat of passion theory clearly was not satisfied, and for that reason the trial court did not err in refusing to instruct the jury as to heat of passion with respect to the killing of [the victim].").

Accordingly, since petitioner was not entitled to a jury instruction on voluntary manslaughter, he would have been unable to meet his burden of showing that his due process rights were violated by the absence of a jury instruction on a lesser-included offense. *See, e.g., Hopper v. Evans*, 456 U.S. 605, 611 (1982) (noting that, in a capital case, "due process requires a lesser included offense instruction be given *only* when the evidence warrants such an instruction") (emphasis in original); *Solis*, 219 F.3d at 929-30 (denying habeas claim based on failure to instruct on voluntary and involuntary manslaughter where the record did not support either instruction). Habeas relief is therefore unavailable for this claim of instructional error.

F. Trial counsel's failure to elicit mitigating evidence about the fight between petitioner and the victim (Ground Two).

In Ground Two, petitioner claims that his trial counsel was ineffective for failing to investigate and present evidence that petitioner fought with the victim before shooting her. Such evidence, according to petitioner, would have been grounds for trial counsel to request a jury instruction on voluntary manslaughter based on a theory of heat of passion. (Petition Attachment A at 28-31; Reply Mem. at 22-24.)

The evidence supporting a theory of heat of passion, as discussed above, was not substantial. The evidence of the objective component of provocation did not establish that it was the victim who was the cause of the provocation, nor did it establish the nature of the argument between petitioner and the victim. More critically, the subjective component was belied by petitioner's own testimony about the events leading to the shooting, which did not include any genuine argument with the victim.

Petitioner's argument that trial counsel should have developed evidence in support of a theory of heat of passion would have required trial counsel to take

steps to undermine petitioner's own testimony, which reflected that petitioner accidentally shot the victim while playing with the gun (i.e., involuntary manslaughter based on criminal negligence). "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *See Strickland*, 466 U.S. at 691. Given that petitioner's own testimony contradicted a theory of heat of passion, trial counsel was not ineffective for failing to investigate evidence to support it. *See id.* ("And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."); *Mickey v. Ayers*, 606 F.3d 1223, 1242 (9th Cir. 2010) (holding that counsel was not ineffective for failing to investigate mitigating evidence that contradicted petitioner's initial account and commenting, "It is black-letter law that counsel cannot be found deficient for believing what his client plausibly tells him."); *Turner v. Calderon*, 281 F.3d 851, 877 (9th Cir. 2002) (holding that counsel was not ineffective for failing to investigate where there was no evidence that petitioner himself gave counsel cause to believe it would have aided his guilt phase preparation).

In some circumstances, an attorney cannot reasonably rely on his client's account of the crime when it is implausible or countered by strong evidence. *See Phillips v. Woodford*, 267 F.3d 966, 979 (9th Cir. 2001) (trial counsel was ineffective for failing to question defendant's weak alibi account and to investigate other defenses); *Johnson v. Baldwin*, 114 F.3d 835, 838-40 (9th Cir. 1997) (same). Although petitioner's account of an accidental shooting during a playful interaction was countered by other evidence of a quarrel, petitioner's account was not so implausible that trial counsel was ineffective for failing to overrule petitioner and presenting a heat-of-passion theory instead. The strongest evidence of a quarrel, Victoria Williams's statement that she heard a loud screaming argument, was not unassailable: Williams testified that she was sleeping when the exchange started,

was unable to identify who was involved in the argument, was not in the room where the shooting occurred, and was unable to identify where the shot came from. (1 RT 82-85.) The other evidence of a quarrel, the victim's text messages and Brenton Boatman's testimony that the victim and petitioner had been fighting, was inconclusive as to whether the victim's words were sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. Nothing in the record suggests that trial counsel could have uncovered credible evidence sufficient to show the objective component of heat of passion. It therefore would not have been unreasonable for trial counsel not to pursue an underdeveloped theory of voluntary manslaughter, and argue instead, as he did, that petitioner had committed only the lesser crime of involuntary manslaughter based on criminal negligence. (3 RT 436-38, 446.)

In sum, it would ~~not have been~~ objectively unreasonable for the Superior Court to reject this claim because petitioner had failed to show deficient performance and prejudice under the *Strickland* standard.

G. Trial counsel's failure to request jury instructions (Ground Three).

In Ground Three, petitioner claims that his trial counsel was ineffective for failing to request six jury instructions that supported defense theories. (Petition Attachment at 32-66; Reply Mem. at 24-36.)

As discussed below, none of the instructions identified by petitioner was warranted under California law. It therefore would not have been objectively unreasonable for the Superior Court to reject petitioner's ineffective-assistance-of-counsel claim as to each instruction for lack of deficient performance and prejudice.

1. CALCRIM No. 570 and No. 522: Voluntary manslaughter based on heat of passion.

CALCRIM No. 570 (Voluntary Manslaughter: Heat of Passion) states in

pertinent part, "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion." CALCRIM No. 522 (Provocation: Effect on Degree of Murder) states in pertinent part, "Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide."

Petitioner's theory of voluntary manslaughter is that, as discussed above, he shot the victim during a heated argument. (Petition, Attachment A at 47-66.) As support, petitioner again cites the victim's text messages, Brenton Boatman's trial testimony, and Victoria Williams's statement to the police. (1 RT 107; 3 RT 307, 374-75.) For the same reasons discussed above, however, this evidence did not warrant an instruction on voluntary manslaughter. The evidence did not establish that it was the victim who was the cause of the provocation, nor did it establish the nature of the argument between petitioner and the victim. More critically, the subjective component of the heat of passion theory was belied by petitioner's own testimony about the events leading to the shooting, which did not include any genuine argument with the victim. Any request by trial counsel for these instructions therefore would have been futile and meritless. The failure to make a futile or meritless legal argument does not constitute ineffective assistance of counsel. *See Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996); *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994); *Morrison v. Estelle*, 981 F.2d 425, 429 (9th Cir. 1992); *Shah v. United States*, 878 F.2d 1156, 1162 (9th Cir. 1989).

2. CALCRIM No. 3404 and No. 510: Excusable homicide based on accident.

CALCRIM No. 3404 (Accident) states in pertinent part that a defendant is not guilty of a crime if he acted without the intent required for that crime, but acted instead accidentally. CALCRIM No. 510 (Excusable Homicide: Accident) states in

pertinent part that a defendant is not guilty of murder or manslaughter if he killed someone as a result of accident or misfortune. California Penal Code § 195 provides in pertinent part that a homicide is excusable when "committed by accident and misfortune, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent."

Petitioner's theory of excusable homicide based on accident is that he killed the victim by doing a lawful act by lawful means. Specifically, he testified that he shot the victim accidentally while they were playing or joking around with the gun. (2 RT 181-82.) In explaining why such trial counsel should have argued such conduct constituted "a lawful act by lawful means," petitioner points out that the jury was instructed that, for purposes of the crime of involuntary manslaughter based on criminal negligence, the act of pointing a loaded gun at the victim was alleged to be a lawful act committed with criminal negligence. (2 CT 325.) Petitioner therefore claims that trial counsel should have taken the next logical step of requesting instructions consistent with a theory that the killing was excusable because he committed a lawful act by lawful means. (Petition Attachment A at 36-42.)

It would not have been objectively unreasonable for the Superior Court to reject this claim of ineffective assistance of trial counsel. Petitioner's theory of accident and excusable homicide was not supported by any evidence in the trial record. By petitioner's own account, the gun went off accidentally while he was pointing the gun, in a playful manner, at the victim. If petitioner's account were to be believed, it did not amount to an excusable homicide by accident during the commission of a lawful act by lawful means. Rather, since the killing was committed during gun play, it was involuntary manslaughter based on the commission of a lawful act with criminal negligence. *See People v. Sica*, 76 Cal. App. 648, 651 (1926) (rejecting defendant's argument that an accidental shooting during play constituted an excusable homicide and stating that "where the death of

a human being results from playing or skylarking with or the reckless handling of firearms, it is involuntary manslaughter, the killing being the result of the commission of a lawful act which might produce death, without due caution and circumspection"); *see also In re Dennis M.*, 70 Cal. 2d 444, 461 (1969) (unintentional death during careless gun play was involuntary manslaughter under a theory of criminal negligence); *People v. Freudenberg*, 121 Cal. App. 2d 564, 580 (1953) (same). The rationale for this classification is that firearms are considered dangerous weapons that require a high degree of care, so a death caused by a defendant's finger accidentally slipping on the gun during play will be held to be an insufficient excuse. *See Freudenberg*, 121 Cal. App. 2d at 580.

Based on petitioner's testimony reflecting an unintended death during gun play, the jury was correctly instructed on involuntary manslaughter based on a theory of a lawful act committed with criminal negligence. Trial counsel was not ineffective for failing to request jury instructions on accident and excusable homicide, as they were not supported by any evidence.

3. CALCRIM No. 983 and No. 580: "Misdemeanor manslaughter" theory of involuntary manslaughter.

CALCRIM No. 983 (Brandishing Firearm or Deadly Weapon: Misdemeanor) defines the offense of brandishing a firearm in violation of California Penal Code § 417. CALCRIM No. 580 (Involuntary Manslaughter) is the standard instruction for involuntary manslaughter.

Petitioner's theory of involuntary manslaughter is that the victim was killed without malice during the commission of an unlawful act not amounting to a felony, specifically, the misdemeanor of brandishing a firearm. (Petition Attachment A at 36, 47.) The jury was not instructed on this "misdemeanor manslaughter" theory of involuntary manslaughter. *See People v. Lee*, 20 Cal. 4th 47, 61 (1999) (brandishing a firearm, a misdemeanor, can be the basis for an

instruction on involuntary manslaughter). Rather, the jury was instructed on involuntary manslaughter based on a separate theory that the killing occurred during the commission of a lawful act in an unlawful manner, i.e., with criminal negligence. (3 RT 412-14; 2 CT 325-26.) Petitioner claims that trial counsel was ineffective for failing to request an instruction on "misdemeanor manslaughter" as a theory of involuntary manslaughter. (Petition Attachment A at 33-36, 42-45.)

It would not have objectively unreasonable for the Superior Court to reject this argument of ineffective assistance of trial counsel. First, an instruction on involuntary manslaughter based on the misdemeanor of brandishing a firearm was unwarranted because the evidence established that petitioner did more than merely brandish a firearm. Rather, petitioner pointed a loaded gun at the victim and intentionally cocked back the hammer. (2 RT 182-83.) Petitioner therefore committed assault with a firearm, a felony. *See People v. Raviart*, 93 Cal. App. 4th 258, 263 (2001) ("Assault with a deadly weapon can be committed by pointing a gun at another person, but it is not necessary to actually point the gun directly at the other person to commit the crime.") (citation omitted); *People v. Laya*, 123 Cal. App. 2d 7, 16 (1954) ("The mere pointing of a gun at a victim constitutes an assault with a deadly weapon, whether or not it is fired at all."). Trial counsel did not render deficient performance by failing to request an instruction based on brandishing a firearm where the evidence supported a finding that petitioner committed nothing less than assault with a firearm.

Second, even assuming for purposes of argument that trial counsel's performance was deficient because he failed to request the instruction, petitioner has not demonstrated prejudice. In *Lee*, the California Supreme Court held that the "misdemeanor manslaughter" instruction was warranted by the evidence in that case, but the omission of the instruction was harmless error. The California Supreme Court's reasoning was that the jury still had an opportunity to convict the defendant of involuntary manslaughter (because it had been instructed on

involuntary manslaughter based on an alternative theory of criminal negligence), but the jury necessarily rejected the underlying premise that the defendant lacked the intent to kill by convicting him of voluntary manslaughter. *See Lee*, 20 Cal. 4th at 62-63. Similarly here, the jury had an opportunity to find petitioner guilty of only the lesser offense of involuntary manslaughter based on a theory of criminal negligence, but rejected the premise that petitioner lacked the intent to kill and convicted him of first-degree murder. Although petitioner's conviction eventually was reduced to second-degree murder, the record supported petitioner's conviction for that crime because, as the Court of Appeal commented, the record "easily" supported a finding of implied malice, or the intent to do some act, the natural consequences of which are dangerous to human life, with knowledge of that danger and conscious disregard for human life. *See Boatman*, 221 Cal. App. 4th at 1263. Accordingly, it was not reasonably probable that but for trial counsel's failure to request an instruction of involuntary manslaughter based on a misdemeanor, the outcome would have been different.

H. The prosecutor's alleged misconduct in mischaracterizing the evidence and lowering his burden of proof (Ground Six).

In Ground Six, petitioner claims that the prosecutor committed misconduct by mischaracterizing the evidence of a fight between petitioner and the victim as evidence of premeditated first-degree murder rather than as evidence of provocation for voluntary manslaughter under a heat-of-passion theory. As a result, the prosecutor failed to satisfy his burden of proving beyond a reasonable doubt the absence of heat of passion. (Petition Attachment A at 73-88; Reply Mem. at 37-41.)

Under California law, if the issue of provocation is "properly presented" in a murder case, then the prosecutor has the burden of proving beyond a reasonable doubt the absence of heat of passion in order to establish the murder element of

malice. *See People v. Rios*, 23 Cal. 4th 450, 462 (2000) (citing *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975), and California cases). Unless the prosecutor's own evidence suggests provocation, it is the defendant's obligation as a threshold matter to "proffer some showing" on the issue "sufficient to raise a reasonable doubt of his guilt of murder." *See Rios*, 23 Cal. 4th at 461.

The issue of provocation was not properly presented in this case because, as discussed above, the evidence presented at trial was insufficient to show that petitioner subjectively killed the victim under the heat of passion, and insufficient to show that the circumstances were enough to arouse the passions of an ordinarily reasonable person. Most notably, the subjective component of heat of passion was belied by petitioner's own trial testimony to the effect that he had no genuine quarrel with the victim before he shot her. Since the threshold evidentiary requirement was not met, the prosecutor had no burden to prove beyond a reasonable doubt the absence of heat of passion in order to establish the murder element of malice.

In sum, it would not have been objectively unreasonable for the Superior Court to reject this claim because the prosecutor did not commit misconduct.

I. Sentencing counsel's alleged failure to prepare for a motion for new trial (Ground Eight).

In Ground Eight, petitioner claims that his sentencing counsel was ineffective for failing to adequately prepare for a motion for new trial. (Petition Attachment A at 93-107; Reply Mem. at 43-45.)

After the jury's verdict, petitioner relieved his trial counsel and hired new counsel for purposes of sentencing ("sentencing counsel"). (3 RT 514.) Petitioner wanted sentencing counsel to file a motion for new trial based on ineffective assistance of trial counsel and prosecutorial misconduct, but sentencing counsel disagreed. (ECF No. 1-2 at 4; 3 RT 490.) Petitioner therefore brought a motion

under *People v. Marsden*, 2 Cal. 3d 118 (1970), to relieve sentencing counsel. (ECF No. 1-2 at 3-27; 3 RT 489-513.)

During the *Marsden* hearing, petitioner argued that sentencing counsel had failed to properly consider filing a motion for new trial because he had not obtained and reviewed a copy of petitioner's trial transcript. (ECF No. 1-2 at 7-8; 3 RT 393-94.) Sentencing counsel explained that, after having spoken numerous times with trial counsel and petitioner, he believed a motion for new trial would have a "slim chance for success." (ECF No. 1-2 at 9; 3 RT 495.) The only arguable issue that sentencing counsel had been able to identify was trial counsel's failure to investigate petitioner's hospitalization for drug withdrawal a few days after his arrest. (ECF No. 1-2 at 9-10; 3 RT 495-96.) Petitioner's hospitalization record, however, could not support a motion for new trial because it was not newly-discovered evidence as required by California law, but rather was newly-obtained evidence that the defense knew about before the trial began. (ECF No. 1-2 at 10-11; 3 RT 496-97.) Thus, the issue of trial counsel's performance with respect to the mental state evidence would have to be raised as an issue on appeal. (ECF No. 1-2 at 11; 3 RT 497.) And even as to that issue, sentencing counsel was doubtful because he had listened to audiotapes of petitioner's post-arrest police interviews and had heard nothing consistent with odd behavior. (ECF No. 1-2 at 19; 3 RT 505.) The trial court agreed with sentencing counsel's assessment, denied petitioner's *Marsden* motion, and made the hospitalization record a part of the appellate record. (ECF No. 1-2 at 23-26; 3 RT 509-12.)

Petitioner claims that sentencing counsel was ineffective for limiting his review to the mental state evidence and failing to review petitioner's trial transcript for other issues that would have supported a motion for new trial, such as ineffective assistance of trial counsel on other grounds and prosecutorial misconduct. (Petition Attachment A at 94.) Petitioner's allegations of ineffective assistance of trial counsel and prosecutorial misconduct in this regard are the same

as those in Grounds One to Seven. (*Id.* at 95.)

Sentencing counsel did not render deficient performance by failing to employ petitioner's method of reviewing the trial transcript before declining to file a motion for new trial. No particular method was binding on sentencing counsel so long as he adequately apprised himself of the facts of petitioner's case. *See Richter*, 562 U.S. at 106 ("There are . . . countless ways to provide effective assistance in any given case. . . . Rare are the situations in which the 'wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach.") (citations omitted). Sentencing counsel investigated possible grounds for a motion for new trial by the method of talking numerous times to trial counsel, talking repeatedly to petitioner, listening to petitioner's police interviews, and talking to witnesses and people close to petitioner. Petitioner has not shown that this method was insufficient for sentencing counsel to adequately apprise himself of the facts.

Moreover, sentencing counsel's investigation of the possible grounds for a motion for a new trial did not result in prejudice. Each ground of ineffective assistance of trial counsel and prosecutorial misconduct that petitioner apparently alleges as grounds for a new trial are meritless for the reasons discussed above. Thus, there would have been no reasonable probability that sentencing counsel would have made a different decision and filed a motion for a new trial, even had he reviewed the trial transcript, nor would there have been a reasonable probability of a different outcome even had sentencing counsel filed it. Indeed, the trial court commented during the *Marsden* hearing that it would not have granted a motion for new trial based on petitioner's allegations of ineffective assistance of trial counsel and prosecutorial misconduct. (ECF No. 1-2 at 22; 3 RT 508.) A motion for new trial under these circumstances would have been meritless and futile. *See Wilson*, 185 F.3d at 991 (counsel's failure to file a motion for a new trial that "almost certainly would have failed" cannot be prejudicial under *Strickland*).

In sum, it would not have been objectively unreasonable for the Superior Court to reject this ineffective-assistance-of-counsel claim because petitioner had failed to show deficient performance and prejudice under the *Strickland* standard.

J. Appellate counsel's alleged failure to raise meritorious issues (Ground Nine).

In Ground Nine, petitioner claims that his appellate counsel was ineffective for failing to raise meritorious claims on appeal. (Petition, Attachment A at 107-13; Reply Mem. at 45-46.)

The *Strickland* standard also applies to claims of ineffective assistance of appellate counsel. Petitioner must show that the performance of appellate counsel fell below an objective standard of reasonableness and that, but for appellate counsel's unprofessional errors, there is a reasonable probability that petitioner would have prevailed on appeal. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000). With respect to appellate counsel's failure to raise any of the other grounds in this Petition as issues on appeal, petitioner's underlying claims have been shown to be meritless and invalid, for the reasons discussed above. *See Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985) ("[Petitioner] claims as well that appellate counsel's failure to argue the issues presented above constituted ineffective assistance of counsel. In view of the fact that those claims have been shown to be invalid [petitioner] would not have gained anything by raising them."). It therefore was not objectively unreasonable for the Superior Court to reject petitioner's claim of ineffective assistance of appellate counsel because petitioner had failed to show deficient performance and prejudice under the *Strickland* standard.

Judge Au But agrees w/ cumulative See Pg. 42 L. 1-15

K. The alleged cumulative effect of multiple errors (Grounds Four, Five, Seven, and Ten).

In Grounds Four, Five, Seven, and Ten, petitioner claims that the cumulative

effect of multiple errors during his criminal proceeding was prejudicial. (Petition Attachment A at 66-73, 88-93, 113-18; Reply Mem. at 36-37, 41-43, 46-49.)

As discussed above, however, the only arguable constitutional error in this case was an incorrect jury instruction on circumstantial evidence, and it was not objectively unreasonable for the California Court of Appeal to conclude that it was harmless. Therefore, no accumulation of errors could take place. *See United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) ("One error is not cumulative error."); *Nguyen v. Wingler*, 468 F. App'x 662, 663 (9th Cir. 2011) ("Where there was only one harmless error, as in this case, there was no error to cumulate, and the cumulative error doctrine did not apply.").

L. Petitioner's request for an evidentiary hearing.

Finally, petitioner requests an evidentiary hearing to resolve his claims. (Reply at 54.)

However, as noted above, the Supreme Court held in *Pinholster*, 563 U.S. at 180, that review of state court decisions under § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." By its express terms, § 2254(d)(2) restricts federal habeas review to the record that was before the state court. *See also Pinholster*, 563 U.S. at 185 n.7 (noting that an unreasonable determination of fact under § 2254(d)(2) must be unreasonable "in light of the evidence presented in the State court proceeding," and stating that "[t]he additional clarity of § 2254(d)(2) on this point . . . does not detract from our view that § 2254(d)(1) also is plainly limited to the state-court record."). Thus, federal courts may not consider new evidence on claims adjudicated on the merits in state court unless the petitioner first satisfies his burden under § 2254(d) and then satisfies his burden under § 2254(e)(2). *See Pinholster*, 563 U.S. at 181-85; *Holland v. Jackson*, 542 U.S. 649, 652-53 (2004). The Court's findings above that petitioner is not entitled to federal habeas relief under the AEDPA standard of

review are dispositive of petitioner's request for an evidentiary hearing as to those claims. As to any other claims, "an evidentiary hearing is *not* required on issues that can be resolved by reference to the state court record." *See Totten*, 137 F.3d at 1176 (emphasis in original). The Court has been able to resolve petitioner's claims by reference to the state court record.

Accordingly, the Court recommends denial of petitioner's request for an evidentiary hearing.

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) accepting and adopting this Report and Recommendation; (2) denying petitioner's request for an evidentiary hearing; and (3) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: June 19, 2017

ALEXANDER F. MacKINNON
UNITED STATES MAGISTRATE JUDGE

APPENDIX

C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BENJAMIN JAMES BOATMAN, Petitioner, v. JEFFREY A. BEARD, Respondent.	Case No. ED CV 15-02271 GW (AFM) **JUDGMENT**

Pursuant to the Order Accepting Findings and Recommendations of the United States Magistrate Judge,

IT IS ORDERED AND ADJUDGED that the Petition is denied and the action is dismissed with prejudice.

DATED: September 1, 2017

GEORGE H. WU
UNITED STATES DISTRICT JUDGE

APPENDIX

D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BENJAMIN JAMES BOATMAN,

Petitioner,

v.

JEFFREY A. BEARD,

Respondent.

Case No. EDCV 15-02271-GW(AFM)

ORDER RE CERTIFICATE OF APPEALABILITY

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts reads as follows:

> (a) **Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) **Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Under 28 U.S.C. § 2253(c)(2), a Certificate of Appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." The Supreme Court has held that this standard means a showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (internal quotation marks omitted).

Here, after duly considering petitioner's contentions in support of the claims alleged in the Petition, including in his objections to the Report and Recommendation, the Court finds that petitioner has not satisfied the requirements for a Certificate of Appealability. Accordingly, the Certificate is DENIED.

DATED: September 1, 2017

GEORGE H. WU
UNITED STATES DISTRICT JUDGE

APPENDIX

E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 20 2018

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

BENJAMIN JAMES BOATMAN, Petitioner-Appellant, v. JEFFREY A. BEARD, Respondent-Appellee.	No. 17-56452 D.C. No. 5:15-cv-02271-GW-AFM Central District of California, Riverside ORDER

Before: McKEOWN and N.R. SMITH, Circuit Judges.

The motion (Docket Entry No. 4) for leave to file an oversized request for a certificate of appealability is granted.

The request for a certificate of appealability (Docket Entry No. 5) is denied because 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.

APPENDIX

F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 12 2018

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

BENJAMIN JAMES BOATMAN, Petitioner-Appellant, v. JEFFREY A. BEARD, Respondent-Appellee.	No. 17-56452 D.C. No. 5:15-cv-02271-GW-AFM Central District of California, Riverside ORDER

Before: HAWKINS and SILVERMAN, Circuit Judges.

The application to file a petition in excess of 15 pages (Docket Entry No. 9) is granted.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 10).

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

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