No. 19-5049

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL WILSON,
Petitioner-Appellant,

v.

HATTON, WARDEN. "et al".
Respondents-Appelees.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-56313
D.C. No. 2:18-cv-06189-MWF-GJS
UNITED STATES COURT OF APPEALS
THE NINTH CIRCUIT
Filed April 2, 2019

Prisoner In Pro Se:
Michael Wilson
Salinas Valley State Prison
FC-B4-201 P.O. Box 1050
Soledad, California 93960

QUESTION(S) PRESENTED

Under the Sixth Amendment to the United States Constitution would "jurists of reason" find it debatable of whether the petition states a valid claim of a denial of a constitutional right, and would that "jurists of reason" find it debatale of whether the district court was correct in it's procedural ruling.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

"et al". Xavier Becerra; Attorney General for the State of California.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the California Appeal court appears at Appendix D to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was 4-2-2019.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: N/A, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(2).

[X] For cases from **state courts:**

The date on which the highest state court decided my case was 5-21-2003. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Under the Sixth Amendment to the United States Constitution as under Part III. Jurisdiction on Writ of Certiorari pursuant to the Supreme Court Rule 10(c). Considerations Governing Review on Certiorari as codified in 28 U.S.C.S. 1257(a), 28 U.S.C. 1291, 28 U.S.C. 1654, 28 U.S.C. 2254, 28 U.S.C. 2253(c)(2), 2244(d).

STATEMENT OF THE CASE

Petitioner and his co-defendant were charged with the willfully, deiberate and premeditated attempted murder of the victim in violation of Penal Code sections 664, subdivision(a) and 187, subdivision(a), and with conspiracy to commit murder in violation of Penal Code section 182, subdivision(a)(1). It was further alleged that during the commission of these offenses, a principle was armed with a firearm within the meaning of Penal Code section 12202, subdivision(a)(1), that petitioner personally discharged a firearm within the meaning of Penal Code section 12022.53, subdivisions (b)(c), and (d). (C.T. 59-63)

Petitioner's jury begun on October 24, 2001, and the victim testified that he and petitioner's co-defendant were in a romantic relationship for approximately three and a half years - but they separated in November 2000. (R.T. 329-331)

On December 2, 2000, the victim drove into the driveway of a friend's house and got out of the car when he immediately saw a red hatchback drive behind him and block his car.

According to the victim's testimony he stated that petitioner got out of the red car when he saw a gun in petitioner's hand to which he turned and ran toward the backyard of the house.

While running toward the backyard of the house the victim heard six or seven shots being fired which two of them struck him in the arm and buttocks. The victim yelled for his friend who help him get inside the house. Before entering the house the victim saw the hatchback drive away. (R.T. 338-350)

The victim initially spoke with the police after the shooting. But when he was question again at the hospital the victim again said that petitioner was the one that shot him. (R.T. 415, 504, 642-643, 647)

On November 9, 2001, the jury found petitioner and his co-defendant guilty of all charges. (C.T. 234-235)

REASONS FOR GRANTING THE PETITION

On certiorari to review a Federal Court of Appeals denial of a petition for federal habeas corpus relief under 28 U.S.C. § 2254 submitted by a state prisoner who asserted that he had received ineffective assistance of counsel at the phase of his state-court trial at which he was sentenced to life -- the California Court of Appeal affirmed the judgment and the California Supreme Court ordered summary denial, as (1) at argument, petitioner had shown beyond any doubt that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the trial proceedings would have been different; and (2) the state did not contest the claim of prejudice.

For purpose of determining whether to grant a petition for federal habeas corpus relief under 28 U.S.C. § 2254 submitted by a prisoner who asserted that he had received ineffective assistance of counsel, in violation of the Federal Constitution's Sixth Amendment, at the phase of his state-court trial (at which the accused was sentenced to life), the conclusion of the state courts involved in the case at hand that the defense counsel's efforts of whereby expressing that it were not for the prejudicial impact of the trial court violating (1) petitioner's sixth amendment right to trial by jury and to compulsory process; and (2) his fourteenth amendment right to due process and a fair trial by refusing to instruct on the defense's theory of a lesser offense that at most petitioner was guilty of assualt with a firearm or with force likely to produce great bodily injury there's reasonable probability that the outcome would have been different.

Under Part III. Jurisdiction on Writ of Certiorari pursuant to the Supreme Court Rule 10(c). Considerations Governing Review on Certiorari as codified in 28 U.S.C.S. 1257(a), 28 U.S.C. 1291, 28 U.S.C. 1654, 28 U.S.C. 2254, 28 U.S.C. 2253(c)(2), 28 U.S.C. 2244(d).

The issue of whether a state procedural rule is adequate to foreclose federal review is itself a federal question. Lee v. Kenna, 534 U.S. 362, 375, 122 S.Ct. 877 151L.Ed. 2d 820 (2002)(quoting Douglas v. Alabama, 380 U.S. 415, 422, 85 S.Ct. 1074, 13 L.Ed. 2d 934 (1965)).

Rather, "the relevant inquiry is whether petitioner had the opportunity to litigate his claim, not whether he did in fact do so or even whether the claim was correctly decided." Ortiz-Sandoval v. Gomez, 81 F.3d 891, 899 (9th Cir. 1996).

Petitioner Michael Wilson ("Hereafter Petitioner") appeals from the district court's denial of his claim raised in his petition for a writ of habeas corpus under 28 U.S.C. § 2254.

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") which applied to all petition for writ of habeas corpus filed after it's enactment. Jeffies v. Wood, 11 F.3d 1484,

1499 (9th Cir. 1997); Lindh v. Murphy, 521 U.S. 320, 326, 117 S.Ct. 1495, 146 L.Ed. 2d 481 (1997). The instant petition was filed enactment of the AEDPA.

AEDPA'S statute of limitation prescribe when state prisoners may apply for writs of habeas corpus in federal courts. The statute of limitation are not jurisdictional, and do require courts to dismiss claims as soon as the "clock has run." Day v. McDonough, 547 U.S. 198, 208, 126 S.Ct. 1675, 164 L.Ed. 2d 376 (2006). In Souter v. Jones, the court held that "where an otherwise time-barred petitioner can demonstrate that it is more than than not that no reasonable juror would have him guilty beyond a reasonable doubt, the petitioner should be allowed to pass through the gateway and argue the merit of his underlying constitutional claims." 395 F.3d 577, 602 (6th Cir. 2005) This "gateway actual innocence claim" do not require the granting of the writ, but instead permits the petitioner to present his original petition as if he had filed it late. Id. at 596.

The Supreme Court consistently acknowledge that exception to these rules of unreviewability must exist to prevent violation of fundamental fairness. (Federal courts retain the authority to issue the writ ... when a constitutional violation probably has caused the conviction of one innocent of the crime."); Dugger v. Adams, 489 U.S. 401, 414, 109 S.Ct. 1211, 103 L. Ed. 2d 435 (1989) ("Habeas review of a defaulted claim is available, if the failure to consider the claim would result in a fundamental miscarriage of justice.")

Cf. Miller-El v. Cockrell, 537 U.S. 322, 340 (2003)(a federal court can disagree with a state court credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.")

A state court decision is "contrary to" Supreme Court precedent if "the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases." Williams v. Taylor, 529 U.S. 362, 405 (2000). An "unreasonable application" of Supreme Court precedent is not one that is merely "incorrect or erroneous," Lockyer v. Andrade, 538 U.S. 63, 75 (2003), see also Williams, 529 U.S. at 410; rather, "[t]he pivotal question is whether the state court's application of the [relevant Supreme Court precedent] was unreasonable," Harrington v. Richter, 562 U.S. 86, 101 (2011)(emphasis added). If "fairminded jurists could disagree' on the correctness of the state court's decision," that decision is not unreasonable. Id. at 101 (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). A state court summary denial is an "unreasonable application" of Supreme Court precedent only if "there was no reasonable basis," id. at 98, for the decision in light of the "argument or theories [that] ... could have supported[] the state court's decision," id. at 102.

Where a state court of last resort issues a postcard denial of a habeas petition, the federal court "look through" the summary denial and considers the last reasoned decision by a state court. Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991); see also Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002).

As in this case, the California supreme Court denied review on May 21, 2003, and there is no evidence that petitioner sought a writ of certiorari in the United States Court. Accordingly, petitioner's state conviction became "final" 90 days later, i.e., on August 19, 2003, and his limitations period commenced running the next day. See 28 U.S.C. § 2244(d)(1)(A); Zepeda v. Walker, 581 F.3d 1013, 1016 (9th Cir. 2009).

However, because the state court denied relief on procedural grounds and did not reach the merits of petitioner's ineffective assistance of counsel claim, this Court review of that claim is de novo, rather than subject to ARDPA's deferential standard that applies to "any claim that was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d); see James v. Ryan, 733 F.3d 911, 914 (9th Cir. 2013) ("Where a state court does not reach the merits of a federal claim, but instead relies on a procedural bar later held inadequate to foreclose federal habeas review, we review de novo." (internal quotation marks omitted)). cert. denied, __ U.S. __, 134 S. Ct. 2697, 189 L.Ed. 2d 740 (2014); Scott v. Ryan, 686 F.3d 1130, 1133 (9th Cir. 2013) (per curiam) (applying "de novo " review, rather than AEDPA deference under § 2254(d), "because, although the claims were presented to the state postconviction court, that court dismissed the claims on purely procedural grounds"). see also Chaker v. Crogan, 428 F.3d 1215, 1221 (9th Cir. 2005) (applying de novo standard of review to a First Amendment habeas claim that was denied solely on procedural grounds by state court); Lewis v. Mayle, 391 F.3d 989, 996 (9th Cir. 2004) (de novo review, rather than AEDPA's deferential standard, applies to a claim that was not adjudicated on the merits in state court); Nulph v. Cook, 333 F.3d 1052, 1056 (9th Cir. 2003) (AEDPA applies to petition but to petitioner's due process claim because state court did not reach it's merits).

AEDPA none-the-less governs any factual determinations made by state court, which are "presumed to be correct" and can only be rebutted "by clear and convincing evidence" 28 U.S.C. § 2254(e)(1); see Khalifa v. Cash, 594 Fed.Appx 339, 341 (9th Cir. 2014) ("[E]evn reviewing [petitioner's] constitutional claim de novo, AEDPA still mandates that factual determinations by the state court are presumed correct and can be rebutted only by clear and convincing evidence." (internal quotations marks omitted)); Lewis, 391 F.3d at 996 (reviewing "de novo whether [petitioner] waived his right to conflict free counsel, while deferring to any factual findings made by the state court under 28 U.S.C. § 2254(c)(1)").

Now, applying an amended version of 2254(d)(1) enacted in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the California Supreme Court's decision was "was contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States.

Although the California Supreme Court denied the petition without explanation, it's decision is never-the-less subject to § 2254 review. See Cullen v. Pinholster, 131 S.Ct. 1388, 1402 ("Section 2254(d) applies even where there has been a summary denial." (citing Harrington v. Richter, __ U.S. __ 131 S.Ct. 770, 786 (2011))).

James v. Kentucky, 466 U.S. 341, 348-349, 104 S.Ct. 1830, 80 L.Ed. 2d 346 (1984); and (3) where the prisoner had good "cause" for not following the state procedural rule and was "prejudice[d]" by not having done so, Sykes, supra, at 87, 97 S.Ct. 2497.

Thus the Court has applied federal standards to determine whether there has been a "fundamental miscarriage of justice." See, e.g., Schlup v. Delo, 513 U.S. 298, 314-317, 115 S.Ct. 851, 130 L.Ed. 2d 808 (1995). And the Court has also looked to state practice to determine the factual circumstances surrounding the application of a state procedural rule, while determining as a matter of federal law whether that rule is "firmly established [and] regularly followed." Ford, supra, at 424-425, 111 S.Ct. 850.

We 'look through' the mute decision and presume the higher court agreed with and adopted the reasons given by the lower court." Curiel v. Miller, 830 F.3d 864, 870 (9th Cir. 2016) (en banc) (quoting Ylst v. Nunnemaker, 501 U.S. 797, 802-06 (1991)).

The one-year limitations period that governs the petition is set forth in 28 U.S.C. § 2244(d)(1), and petitioner does not dispute that the applicable limitations period is that set forth in subpart (d)(1)(A). Therefore, petitioner's judgment became "final" on the date on which is state direct appeal became final. The California Supreme Court denied review on May 21, 2003, and there is no evidence that petitioner sought a writ of certiorari in the United States Supreme Court. Accordingly, petitioner's state conviction became "final" 90 days later, i.e., on August 19, 2003, and his limitations period commenced running the next day. See 28 U.S.C. § 2244(d)(1)(A); Zepeda v. Walker, 581 F.3d 1013, 1016 (9th Cir. 2009).

"A state habeas petition is 'pending' as long as the ordinary state collateral review process continues." Trigueros v. Adams, 658 F.3d 983, 988 (9th Cir. 2011) (citing Carey v. Saffold, 536 U.S. 214, 219-20 (2002)).

In Clay v. United States, 537 U.S. 522, 123 S.Ct. 1072, 155 L.Ed. 2d 88, the Court held that a federal conviction become final "when this Court affirm a conviction on the merits on direct review or denies a petition for writ of certiorari," or, if a petitioner does not seek certiorari, "when the time for filing a certiorari petition expires."

In Jimenez v. Quarterman, 555 U.S. 113, 119-20, 129 S.Ct. 681, 172 L.Ed. 2d 475 (2009), the Supreme Court extended it's reasoning in Clay to "the similar language of § 2244(d)(1)A)," holding that AEDPA's limitations period was "reset when a state prisoner was granted leave to file an out-of-time direct appeal. The judgment in those circumstances became final only at "conclusion of the out-of-time direct appeal, or the expiration of the time for seeking review of that [out-of-time direct] appeal." Jimenez, 555 U.S. at 121.

Thus, both Clay and Jimenez "suggested that the direct review process either 'concludes' or 'expires,' depending on whether the petitioner pursues or forgoes direct appeal to this Court." Gonzalez v. Thaler, 565 U.S. 134, 140-41, 132 S.Ct. 641, 653, 181 L.Ed. 2d 619 (2012).

In Gonzalez v. Thaler, the Supreme Court considered when a judgment becomes final under § 2244(d)(1)(A) "if a petitioner does not appeal to a State's highest court." Id. at 653. The Court held that "for a state prisoner who does not seek review in a State's highest court, the judgment become 'final' on the date that the time for seeking review expires." Id. at 646. The Court clarified what it had suggested in Clay and Jimenez: the "two prong" of § 2244(d)(1)(A)'s finality determination--either (1) the conclusion of direct review or (2) the expiration of the time for seeking such review -- apply to distinct categories of petitioners. Id. at 653. For petitioners who pursue direct review to the U.S. Supreme Court under the first prong, judgment becomes final at the conclusion of direct review, i.e., when the Supreme Court "affirms a conviction on the merits or denies a petition for certiorari." Id. at 653 "For all other petitioners, the judgment becomes final [under the second prong] at the 'expiration of the time for seeking such review' -- when the time for pursuing direct review in this Court, or in state court, expires." Id. at 653-54.

Moreover, because "federal habeas courts" have a duty to "independently [review] the basis for the state court's decision," a district court must "obtain and review the relevant portions ofthe state court record," or hold an evidentiary hearing, as necessary to discharge it's duty. Nasby v. McDaniel, 853 F.3d 1049, 1053 (9th Cir 2017).

In analyzing the issue of waiver, we must be mindful that documents filed pro se to be liberally construed. Erickson v. Pardus, 551 U.S. 89, 94 (2007).

As the OSC explained, the petition itself establishes that petitioner was represented by appointed counsel on his state direct appeal (Attorney Kross), regardless of any asserted inaction by Attorney White. In addition, the California Court of Appeal's decision show that Attorney Kross, in fact, raised sufficiency of the evidence and jury instruction claims in that appeal, including a challenge to the failure to instruct on lesser related offenses. Thus, the petition does not appear to raise any issue capable of serving as a basis for habeas relief.

The relevant inquiry is not what defense counsel could have done, but rather whether the choices made by defense counsel were reasonable. Bobbitt v. Calderon, 151 f.3d 1170, 1173 (9th Cir. 1994).

A claim of ineffective of counsel is cognizable as a denial of the Sixth Amendment right to counsel, which guarantees not only assistance, but effective assistance, of counsel. Strickland v. washington, 466 U.S. 668, 80 L.Ed. 2d 674, 104 S.Ct. 2052.

In the federal courts, the right of self-representation has been protected by statute since the beginning of our Nation. Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92, enacted by the First Congress and signed by President Washington one day before the Sixth Amendment was proposed, provided that 'in all courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel ....' The right is currently codified in 28 U.S.C. § 1654.

In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it. See California v. Green, 399

U.S. 149, 176, 90 S.Ct. 1930, 1944, 26 L.Ed. 2d 489.

For purpose of determining whether to grant a petition for federal habeas corpus relief under 28 U.S.C. 2254 submitted by a state prisoner who asserted that he received ineffective assistance of counsel, in violation of the Federal Constitution's Sixth Amendment.

Pursuant to the judgment of a state court if the state court is in violation of the constitution or law or traeties of the United States. 28 U.S.C. 2254(a); Williams v. Taylor, 529 U.S. 362, 375 fn. 7, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000). Thus, it is governed by it's provisions 28 U.S.C. 2241(d); 2254(d).

Under 28 2254(a), petitioner's federal habeas corpus of Ineffective Assistance of Counsel under the Sixth Amendment is consolidated with that of his co-defendant is a petition from judgment entered upon a conviction by jury trial, and such petition is authorized by 28 U.S.C. 2241(d); 2254(d).

A criminal defendant has right not only to counsel on appeal. (Douglas v. California (1963) 372 U.S. 353, 356-357, 83 S.Ct. 814 816, 9 L.Ed. 2d 811) but to competent counsel on a appeal. (Evitts v. Lucey (1985) 469 U.S. 387, 105 S.Ct. 830 83 L.Ed. 2d 821).

"[T] he fundamental question in determining whether the combined effect of trial errors rendered the criminal defense "far less persuasive, 'and thereby had a 'substantial and injurious effect or influence' on the jury's verdict." Parle v. Runnels, 505 F.3d 922, 928 (9th Cir 2007) (quoting Chambers v. Mississippi, 410 U.S. 284, 294 (1973) and Brecht v. Abrahamson, 507 U.S. 619, 637 (1973)).

When the government violate the right to effective assistance when it interfers in certain ways with the ability of counsel to make independent decision about how to conduct the defense. Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed. 2d 592 (1976).

"For a state procedural rule to be 'independent,' the state law basis for the decision must not be interwoven with federal law." La Crosse v Kernan, 244 F.3d 702, 704 (9th Cir. 2001) (citing Michigan v. Long, 463 U.S. 1032, 1040-41, 103 S.Ct. 3469, 77 L.Ed. 2d 1201 (1983)).

(Strickland v. Washington (1984) 466 U.S. 668, 687; People v. Cunningham (2001) 25 Cal,4th 926, 1003; People v. Kraft (2000) 23 Cal.4th 978, 1068.) Further, as our Supreme Court has held, "if the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal. (People v. Mendoza Tello (1997) 15 Cal.4th 264, 266-268.)" (People v.Kraft, supra, 23 Cal.4th at pp. 1068-1069; accord, People v. Huggins (2006) 38 Cal.4th 175, 206.)

If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that

course should be followed." (Strickland v. Washington, supra, 466 U.S. at p. 697; accord; People v. Carrasco (2014) 59 Cal.4th 924, 982; In re Champion (2014) 58 Cal.4th 965, 1007.)

Whether a defendent's conduct satisfied the definition is an issue for the jury to resolve (People v. Babcock (1993) 14 Cal.App.4th 383, 388); in reviewing the jury's determination, we must be mindful that each case must be decided on it's own facts. (People v. Gilbert (1992) 5 Cal.App4th 1372, 1381).

(People v. Johnson (1980) 26 Cal.3d 557, 578; accord, Jackson v. Virginia (1979) 443 U.S. 307, 319.) Substantial evidence is evidence that is "reasonable, credible, and of solid Value." (people v. Johnson, supra, at p. 578.)

"That the evidence might lead to a different verdict does warrant a conclusion that the evidence supporting the verdict is insubstantial." (People v. Holt (1997) 15 Cal.4th 619, 699.)

"It appears 'that upon no hypothesis what-so-ever is there sufficient substantial evidence' to support [the conviction]." (People v. Bolin (1998) 18 Cal.4th 297, 331.)

Court have differed concerning the proper standard for assessing prejudice with respect to this type of error. (Compare People v. Ngo, supra, 225 Cal.App.4th at pp. 162-163 [suggesting "'reasonable likeihood'" standard is appropriate] with People v. ZararteCastillo, supra, 244 Cal.App.4th at pp. 1168-1169 [applying beyond-a-reasonable-doubt standard of Chapman v. California (1967) 386 U.S. 18, 24]; see People v. Lee (1987) 43 Cal.3d 666, 668-669 [applying Chapman standard to giving of contradictory and partailly inaccurate instructions regarding intent-to-kill element of attempt murder]; Ho v. Carey (9th Cir. 2003) 332 F.3d 587, 592 ["reasonable likeihood" standard employed for ambiguous instruction inappropriate where disputed instruction erroneous on face].)

The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (Sullivan v. Louisiana (1993) 508 U.S. 275, 279).

'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' (People v. Cunningham (2001) 25 Cal.4th 926, 1003: see generally Strickland v. Washington (1984) 466 U.S. 668, 687-694.)

In other words, "in assessing a Sixth Amendment attack on trial counsel's adequacy mounted on derict appeal, competency is presumed unless the record affirmatively excludes a rational basis for the trial attorney's choice." (People v. Musselwhite (1998) 17 Cal.4th 1216, 1260.)

A state law ground is interwoven with federal law in those cases where application of the state procedural rule requires the state court to resolve a question of federal law. Park v. California, 202 F.3d 1146, 1152

(9th Cir. 2000) (citing Ake v. Oklahoma, 470 U.S. 68, 75, 105 S.Ct. 1087, 84 L.Ed. 2d 53 (1985)).

("Where a state court does not reach the merits of a federal claim, but instead relies on a procedural bar later held inadequate to foreclose federal habeas review, we review de novo." (internal quotation marks omitted)). cert. denied, --U.S.-- 134 S.Ct. 2697, 189 L.Ed. 2d 740 (2014); Scott v. Ryan, 686 F.3d 1130, 1133 (9th Cir.2013) (per curiam) (applying "de novo review rather than AEDPA deference under § 2254(d).

Nulph v. Cook, 333 F.3d 1052, 1056 (9th Cir. 2003) (AEDPA applies to petition but not to petitioner's due process claim because state court did not reach it's merits).

A claim of ineffective assistance of counsel is cognizable as a denial of the Sixth Amendment right to counsel, which guarantees not only assistance, but effective assistance of counsel. Strickland, 466 U.S. 686, 104 S.Ct. 2052.

A habeas petitioner's failure to develop a claim in state-court proceedings will be excuse and a hearing mandated if he can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearingg. Cf. McCleskey v. Zant, 499 U.S., at 494, 111 S.Ct. , at 1470; Murray v. Carrier, 477 U.S. at 496, 106 S.Ct., at 2649-2650.

Federal habeas corpus relief is so long as 'fairminded jurists could disagree' on the correctness of the state court's decision. Id. at 786 (citing Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed. 2d 938 (2004).

As to each issue, the Court addresses not what is prudent or appropriate, but what is Constitutionally compelled, as held in United states v. Cronic, 446 U.S. 648, 665, n.38, 104 S.Ct. 2039, 80 L.Ed. 2d 657.

As said in Sibron v. New Nork, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed. 2d 917 (1981), it is certainly preferable to have that review now on direct appeal, rather than later.

CONCLUSION

Remand for the district court to conduct an analysis of the substantiality of petitioner's ineffective-assistance-of-counsel ("IAC") claim pursuant to Martinez v. Ryan, 566 U.S. 1 (2012).

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Executed on JUNE 6, 2019

Signature Michael Wilson