No. _____

IN THE

Supreme Court of the United States

MICHAEL THOMAS BALINT,

Petitioner,

v.

KELLY SANTORO, ACTING WARDEN,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

During deliberations, the jury issued a compound question as to the elements of Balint's trial defense, duress, as well as the defense of necessity. The trial judge answered the jury's question with one word, "Yes." This was nonresponsive and erroneous. Further, there is no evidence in the record to demonstrate that Balint or his counsel was present for a discussion of the jury's note prior to the trial judge issuing his response. Did the Ninth Circuit incorrectly determine that California's *Dixon* rule procedurally barred Balint's claim that he was denied his constitutional right to be present and have the assistance of counsel at all critical stages of trial?

Further, *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946) states that "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." Did the Ninth Circuit incorrectly hold that the California Court of Appeal's decision on this issue was not an unreasonable application of clearly established federal law as determined by this Court in *Bollenbach*?

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IN THE SUPREME COURT OF THE UNITED STATES

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KELLY SANTORO, ACTING WARDEN,
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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Michael Thomas Balint, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Ninth Circuit's decision affirming the judgment of the district court is unreported. (App. 1a.)

JURISDICTION

The Ninth Circuit entered its memorandum decision and judgment on April 24, 2019. *Id*. This petition is filed within 90 days after that date pursuant to Sup. Ct. R. 13. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution
Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. § 2254(d)

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.

STATEMENT OF THE CASE

1. Statement of Facts

a. The evidence at trial

Michael Thomas Balint is currently serving a life sentence for two liquor store robberies that did not result in death or injury.

At trial, Scott McCaslin testified that on January 18, 2010, he was working as a clerk cashier at Granada Liquor in Long Beach. (ER 174.) McCaslin testified that on that date, a person entered the store and walked straight to the register. (ER 175.) The person produced a gun and asked McCaslin to "give him all the money." (ER 176.) McCaslin identified Balint as the person who entered Granada Liquor in a photographic lineup and in court. (ER 174, 181.) McCaslin also testified that Balint told him to "look at my face" and made the statement "they are making me do this" during the robbery. (ER 239.)

Balint testified in his own defense, and testified that he committed the two robberies. (ER 197.) Balint then testified that the gun came from gang members that he met with earlier in the day, and that the gang members forced him to commit the liquor store robberies. (RT 226.)

b. Jury deliberations

The trial court instructed the jury on the defenses of duress and necessity. (ER 288-89.) The jury retired to deliberate at 2:15 p.m. (ER 110.) Immediately after the jury left the courtroom, Balint's trial counsel, James J. Slevin, waived presence for readback only. (ER 321-22.) Right after attorney Slevin waived

presence for readback, the following exchange occurred between attorney Slevin and the trial court:

> Mr. Slevin: I have to go to the hospital.
>
> The Court: Will you be able to be back within a half-hour?
>
> Mr. Slevin: About that.
>
> The Court: What we will do is, be within a half an hour call, leave your cell phone with my clerk. Make sure you check the verdict forms before you leave. Thank you. We are in recess.

(ER 322.) The next event reflected in the record is the receipt of a jury note at 2:30 p.m., the time of receipt being written on the note itself. (ER 105.) The jury's note read as follows:

> In order to apply the defense of diress [sic] or necessity, Is it necessary to meet ALL the requirements elements listed in the law. (for necessity and diress [sic] defense.)

(*Id.*) The trial court responded to the jury's question with one word: "Yes." (*Id.*) The trial court's response and signature appear on the jury note. (*Id.*) Following the trial court's response, the next event is reflected in the minute order, which states as follows: "3:10 p.m. The jury announce they have a verdict. The attorneys are notified by phone to appear at 3:45 p.m. for reading of the verdict." (ER 110.) At 3:45 p.m., attorney Slevin and Balint are present in the courtroom. (ER 323.) The minute order reflects that the jury entered the room at 3:50 p.m. (ER 110.)

The transcript does not include any discussion of the jury note with counsel or Balint. Rather, it stops at the trial court's comment, "We are in recess," after the jury is excused for deliberations, and resumes when the trial court calls the matter for reading of the verdict. (ER 322.)

Balint was in custody during the trial. (ER 678.) After the jury left to deliberate, Balint was taken from the courtroom to the courthouse lockup by members of the Sheriff's Department, and was not brought back to the courtroom until the verdict was read. (*Id.*) Balint did not meet with his attorney while he was in the lockup during this period. (*Id.*) Attorney Slevin does not remember the events surrounding the jury deliberations in this matter. (ER 680.)

The jury found Balint guilty of second degree robbery (Cal. Penal Code § 211), felon in possession of a firearm (Cal. Penal Code §12021(a)(1)), and having used a firearm within the meaning of California Penal Code § 12022.53(b). (ER 194-95.)[1] The court sentenced Balint to 136 years to life. (ER 336.)

2. State appellate proceedings

Balint appealed his case to the California Court of Appeal ("CCA") on June 9, 2010. (ER 118-19.) Among other issues, his appellate counsel argued that the trial court erred in instructing on necessity as no necessity defense was presented. (ER 364-69.) Additionally, appellate counsel argued that the trial court failed to accurately address the jury's question on the defenses of duress and necessity. (ER

[1] "ER" refers to the Excerpts of Record filed in the Ninth Circuit Court of Appeals, and "CR" refers to the district court clerk's record.

369-70.) Appellate counsel mentioned in a footnote that there was no mention of any discussion between the court and counsel regarding the jury's question in the Reporter's Transcript or in the minute order. (ER 369.)

On April 27, 2011, the CCA rejected both arguments. (ER 387-94.) As to whether the trial court accurately addressed the jury's question, the CCA stated that "The court has a primary duty to help the jury understand the legal principles it is asked to apply. This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information." (ER 393) (citations omitted). Furthermore, the CCA stated, "There is no reasonable likelihood that the jury conflated the two separate instructions into one, so as to require that Balint prove the elements of both affirmative defenses to establish either one, as we also presume that jurors are intelligent people capable of understanding and correlating jury instructions and applying them to the facts of the case." (ER 394.) Accordingly, the CCA held that "The court did not err in answering the jury's question with a simple "yes." (*Id.*)

On July 13, 2011, the Supreme Court of California summarily denied Balint's petition for review. (ER 401.)

3. Federal habeas proceedings

On August 1, 2011, Balint filed a pro se Petition for Writ of Habeas Corpus in the Central District of California, challenging his custody resulting from his

conviction. (ER 494-511.) Balint filed an Amended Petition on September 19, 2011 (ER 514-24), and the operative Second Amended Petition ("SAP") on March 5, 2012 (ER 1-20).

The SAP raised seven grounds for relief. Ground One asserted that the trial court denied Balint his right to presence and counsel during a critical stage of trial when, during jury deliberations, the trial court responded in writing to a jury question without notifying Balint or his counsel. (ER 3, 5-6.) Ground Two asserted that the trial court's response to the jury's question was erroneous. (ER 4.)

On July 24, 2012, the Warden filed an Answer and Return to the SAP. (ER 534-600.) The Warden contended that Ground One of the SAP was not exhausted in the California Supreme Court, and that this ground was procedurally defaulted. (ER 564-70.) Additionally, the Warden contended that Ground Two was procedurally defaulted. (ER 573-75.)

Subsequently, on November 19, 2012, Balint filed a pro se habeas petition in the Los Angeles County Superior Court, arguing the claims presented in Grounds One and Two of the SAP: that he was denied the right to be present and the right to counsel at a critical stage of trial, and that the trial court erred in responding to the jury's note. (ER 423-31.) On December 21, 2012, the Superior Court denied the petition on the merits, finding, with respect to both claims that Balint had failed to show a prima facie case for relief and had failed to meet his burden to establish grounds for relief. (ER 433-34.) On January 14, 2013, Balint filed a habeas petition in the California Court of Appeal, again arguing denial of the right to be

present and the right to counsel at a critical stage, and that the trial court erred in responding to the jury's note. (ER 436-49.) On February 15, 2013, the California Court of Appeal denied the petition without prejudice, mistakenly citing that Petitioner had not demonstrated that he had first sought relief in the Superior Court. (ER 451.) On April 29, 2013, Balint filed a second habeas petition in the California Court of Appeal, with the same claims as the January 14, 2013 petition but also attaching the denial from the Superior Court. (ER 453-71.) On May 16, 2013, the California Court of Appeal summarily denied the petition. (ER 473.)

On June 13, 2013, Balint filed a pro se habeas petition in the California Supreme Court, arguing denial of the right to presence and counsel at a critical stage and that the trial court erred in responding to the jury's note. (ER 475-91.) On August 14, 2013, that court denied the petition on procedural grounds with citations to *In re Clark*, 5 Cal. 4th 750, 767-69 (1993), and *In re Dixon*, 41 Cal. 2d 756, 759 (1953). (ER 493.)

On January 23, 2014, the Honorable Paul L. Abrams, United States Magistrate Judge, appointed counsel to represent Balint. (ER 623-24.) On October 26, 2016, Magistrate Judge Abrams issued a Report and Recommendation ("Report") recommending that the SAP be denied. (App. 16a-49a.) The Report stated that Balint had exhausted Ground One and that the California Supreme Court's denial was based on procedural reasons and not on the merits. (App. 30a.) The Report nonetheless found that Balint's claim in Ground One was procedurally

barred pursuant to the California Supreme Court's denial citing the *Dixon* rule.[2] (App. 31a-32a.) Further, the Report stated that Balint failed to demonstrate cause and prejudice to overcome procedural default as his claim of ineffective assistance of appellate counsel fails on the merits after an analysis under *Strickland v. Washington*, 466 U.S. 668 (1984). (App. 32a-36a.) Additionally, as to Ground Two, the Report concluded that Balint had not made a showing that the jury applied the instruction in a way that resulted in a due process violation. (App. 38a-39a.) Accordingly, the Report concluded that the CCA's denial of this claim was not contrary to or an unreasonable application of clearly established federal law. (ER 39a.) The Report did not address whether the CCA's denial was based on an unreasonable determination of the facts.

On April 3, 2017, Balint filed his objections to the Report and a request for a certificate of appealability ("COA"). (ER 58-76.) On April 20, 2017, Judge O'Connell signed an order accepting the findings of the Report and dismissing Balint's petition with prejudice. (App. 11a.) Judge O'Connell's order agreed with the Report's conclusion that Balint's claim in Ground One was procedurally barred. (App. 14a-15a.) Judge O'Connell additionally analyzed whether Balint demonstrated cause and prejudice to overcome this default, yet concluded that the ineffective assistance of appellate counsel claim for cause and prejudice was without

[2]As the Report found that Ground One was procedurally defaulted based on *Dixon*, it declined to address the issue of whether the claim was also procedurally defaulted based on *Clark*. (*Id.*)

merit. (*Id.*) Judge O'Connell agreed with the Report that the trial court's response was a correct statement of law, and thus appellate counsel was not ineffective for failing to raise the issue. (App. 14a.) Judge O'Connell granted Balint's request for a COA as to Grounds One and Two. (ER 82-84.)

The Ninth Circuit affirmed the denial of Balint's petition, stating that Balint could have raised his right to presence and counsel claim on direct appeal, and thus the application of the *Dixon* procedural bar was appropriate. (App. 2a.) Moreover, the Ninth Circuit concluded that Balint cannot demonstrate prejudice to overcome the default, as it also saw no error the California Court of Appeal's assessment of the trial court's response. (App. 4a.) The Ninth Circuit further concluded that no fundamental miscarriage of justice occurred, as Balint failed to demonstrate how it would be more likely than not that no reasonable juror would have convicted him. (App. 4a-5a.)

Finally, as to Balint's claim in Ground Two, the Ninth Circuit held that the California Court of Appeal's decision on this issue was not an unreasonable application of clearly established federal law as determined by the United States Supreme Court in *Bollenbach*. (App. 6a.)

REASONS FOR GRANTING THE WRIT

In affirming the denial of Balint's habeas petition, the Ninth Circuit decided an important federal question regarding Balint's constitutional rights to be present and to have the assistance of counsel at all critical stages of trial in a way that conflicts with relevant decisions of this Court.

The trial court's cursory, one-word answer to the jury's compound question regarding Balint's duress defense created error that ultimately infected the entirety of Balint's post-conviction proceedings. Had counsel been present when the trial court crafted this response, he could have objected and asked for a more thorough reply. But counsel was not even notified that there was a jury note. Further, Balint was in custody and not present for any discussion of the jury's note. (ER 678.) This Court should grant certiorari to address this important federal question.

Balint had the constitutional right to be present at every stage of his trial. "One of the most basic of the rights guaranteed by the [Constitution] is the accused's right to be present in the courtroom at every stage of his trial." *Illinois v. Allen*, 397 U.S. 337, 338 (1970). Additionally, the Sixth Amendment guarantees a criminal defendant the right to be present, personally or through counsel, when the court responds to jury questions. *Rogers v. United States*, 422 U.S. 35, 38-39 (1975). Additionally, this Court has unequivocally established that a defendant has a Sixth Amendment right to the assistance of counsel at all critical stages of his trial. *United States v. Cronic*, 466 U.S. 648, 659 (1984). This right applies at the formulation of a response to a jury question. *United States v. Barragan-Devis*, 133 F.3d 1287, 1289 (9th Cir.1998), *cf. United States v. Rosales-Rodriguez*, 289 F.3d 1106, 1109-10 (9th Cir. 2002) (holding that a judge's ex parte communication with the jury is a critical stage). Thus, a constitutional error occurred when the trial court responded to the jury's question without notifying Balint or his counsel.

The trial court's error denying Balint's right to counsel at a critical stage of trial is structural, requiring reversal without a showing of prejudice. *See United States v. Cronic*, 466 U.S. 648, 659 (1984) ("The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial"); *Musladin v. Lamarque*, 555 F.3d 830, 835-43 (9th Cir. 2009) ("*Cronic* specifically holds that automatic reversal is required where a defendant is denied counsel at a 'critical stage,' and we cannot depart from that holding.").

Despite this error of constitutional magnitude, the Ninth Circuit determined that this claim was procedurally barred under California's *Dixon* rule. *Dixon* states that habeas relief is barred "where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." *Ex parte Dixon*, 264 P.2d 513, 514 (Cal. 1953). A claim falls into this category if it is based solely on the trial court record. *Id.* Balint's claim is not record-based, however. Balint's right to presence and assistance of counsel claim relies upon evidence outside the record, such as his declaration that he was not present for any discussion of the jury's note. (ER 678.) Therefore, as the *Dixon* procedural bar applies only to record-based claims, Balint's claim cannot be barred by *Dixon*.

In any event, even if this Court agrees that Balint's claim is record-based, Balint demonstrated cause and prejudice to excuse procedural fault by his appellate counsel's failure to raise the claim on direct appeal. "Ineffective assistance of counsel . . . is cause for a procedural default." *Murray v. Carrier*, 477 U.S. 478, 488

(1986). The appropriate standard for determining whether an indigent criminal defendant received the benefit of effective assistance of appellate counsel is the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Smith v. Murray*, 477 U.S. 527, 535-36 (1986) (applying Strickland to claim that appellate counsel failed to discover non-frivolous issues and file a merits brief raising them). Under *Strickland*, "a defendant must prove that (1) his counsel's performance was deficient in violation of the Sixth and Fourteenth Amendments, and (2) he was prejudiced by counsel's deficient performance." *Strickland*, 466 U.S. at 687-88. A defendant is prejudiced by counsel's deficient performance if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability is a probability sufficient to undermine confidence in the outcome" of a proceeding. *Id.* A petitioner need not prove "counsel's actions more likely than not altered the outcome," but rather that "[t]he likelihood of a different result [is] substantial, not just conceivable." *Id.*

Appellate counsel's failure to present a Sixth Amendment right to counsel argument in the opening brief to the California Court of Appeal, or in the subsequent Petition for Review filed in the California Supreme Court, constituted ineffective assistance of counsel. It is apparent from the trial record that counsel was not present or notified of the jury note. There is also no transcript of any discussion relating to the jury note. Appellate counsel appears to have been generally aware of the issue, as she mentioned it briefly in her reply brief, in a

discussion of whether trial counsel failed to object to the instruction on a necessity defense.[3] Appellate counsel stated in a sworn declaration that she had "no strategic reason for not raising any potentially meritorious issue on appeal." (ER 676.) Thus, appellate counsel's failure to brief the issue was not "a deliberate, tactical decision" to forego a particular claim, which would not satisfy the standard for cause. *Smith v. Murray*, 477 U.S. 527, 534 (1986).

Moreover, Balint was prejudiced by appellate counsel's failure to raise the meritorious Sixth Amendment issue. The Ninth Circuit stated that Balint could not have shown prejudice by affirming the California Court of Appeals' conclusion that the trial court's response was "a correct statement of law that could not have misled the jury". (App. 4a.) Yet the Ninth Circuit's decision is in contravention of long-established Supreme Court precedent in *Bollenbach*. *Bollenbach* states that "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy. … [T]he trial judge had no business to be 'quite cursory' in the circumstances in which the jury asked for supplemental instruction." *Bollenbach*, 326 U.S. at 612-13 (emphasis added). *Id.* at 613. Thus, the Ninth Circuit's adoption of the California Court of Appeal's flawed analysis created error

[3] Appellate counsel addressed the issue as follows: "Moreover, as to the court's response to the jury's question, there is no indication that defense counsel was notified of the jury's question, that defense counsel agreed with the court's response, or that counsel was given an opportunity to object prior to the court's response." (ER 767.)

by (1) allowing Balint's constitutional claim to be procedurally barred by California's *Dixon* rule, and further by (2) denying Balint's claim in Ground Two.

The trial court responded with a single word, "yes," to a compound question regarding the elements of Balint's duress defense, as well as elements of the defense of necessity. The jury's question was ambiguous: it is unclear if the jury was asking whether it must find all of the elements of duress or necessity as separately considered defenses, or whether it must find all elements of both duress and necessity to find that either defense applies: "for necessity and diress [sic] defense." Certainly, the jury's focus was on the word "ALL," as it not only was written in capital letters, but also underlined three times.

The trial court's cursory one-word answer failed to provide any guidance to the jury and indeed only added to its confusion. *See Bollenbach* 326 U.S. at 612-13. When a jury expresses confusion on a material issue, as it did here, a trial court's duty extends beyond issuing a "quite cursory" one-word response. Being "technically accurate" is insufficient: the trial court has the *express duty* to clear away the jury's confusion. *See id.* at 612. ("Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria."). Any finding to the contrary is an unreasonable application of *Bollenbach*.

Here, the trial court's ambiguous response to the jury's question affected the jury's analysis of Balint's sole defense and opportunity for acquittal. Balint testified

to committing the robberies, and the only defense presented at trial was an affirmative defense. Yet as evidenced by the note itself, the jury was confused enough by the instructions on the affirmative defenses to ask the court for guidance and clarification. The trial judge's answer was confusing and provided no real guidance to a jury comprised of laypersons, when the trial court in fact had an affirmative duty to provide such guidance. Even the form of the trial court's response—a one word response to a detailed question about Balint's defense—may have conveyed a message to the jury that the judge did not find the defense to be convincing or persuasive. *See United States v. Martinez*, 850 F.3d 1097, 1106 (9th Cir. 2017). The trial court's one-word response to the jury's compound question undoubtedly left a confusing and erroneous impression in the minds of the jurors. *See United States v. Petersen*, 513 F.2d 1133, 1136 (9th Cir. 1975).

Ultimately, the jury returned a verdict soon after receiving the judge's response. Although the jury issued the note at 2:30 p.m. (ER 105), after receiving the trial court's response they issued a guilty verdict at 3:10 p.m. (ER 110). Accounting for the delay between the trial court's receipt of the response, the formulation of an answer, and the receipt of the response by the jury, it is evident that the jury examined the evidence and came to its verdict shortly after receiving the judge's answer as to Balint's defense. Thus, the trial court's answer had a significant prejudicial effect against Balint.

The Ninth Circuit erred by affirming that the trial court's response was "a correct statement of law that could not have misled the jury and is not grounds for

reversal." (App. 4a.) The trial court's cursory response is in direct contravention of the principles established by this Court in *Bollenbach*, and Balint can thus show prejudice to overcome any purported procedural default.

Moreover, Balint is entitled to relief on his claim in Ground Two, as the California Court of Appeal's decision on this issue was an unreasonable application of clearly established federal law in *Bollenbach*. 28 U.S.C. § 2254(d)(1). The Ninth Circuit followed the decision of the California Court of Appeals, while providing no explanation as to why a one-word response to a confusing, compound question on the elements of Balint's trial defense was acceptable. The decision of the Ninth Circuit must be reviewed in light of that court's failure to provide any guidance as to why a one-word response satisfied the principles set forth by this Court's decision in *Bollenbach*.

CONCLUSION

For all the foregoing reasons, petitioner submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

HILARY L. POTASHNER
Federal Public Defender

DATED: July 31, 2019

LISA SHINAR LABARRE
Deputy Federal Public Defender
Counsel of Record

Attorneys for Petitioner

APPENDIX

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NOT FOR PUBLICATION

FILED

APR 24 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL THOMAS BALINT, Petitioner-Appellant, v. KELLY SANTORO, Acting Warden, Respondent-Appellee.	No. 17-55576 D.C. No. 2:11-cv-06307-BRO-PLA MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Beverly Reid O'Connell, District Judge, Presiding

Argued and Submitted April 10, 2019
Pasadena, California

Before: PAEZ and CLIFTON, Circuit Judges, and KATZMANN,** Judge.

Michael Balint appeals the district court's denial of his federal habeas petition. The district court issued a certificate of appealability on two issues: (1) whether Balint was denied counsel and presence at a critical stage of the trial (Ground One) and (2) whether the trial court erred in responding to a question

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

** The Honorable Gary S. Katzmann, Judge for the United States Court of International Trade, sitting by designation.

from the jury (Ground Two). We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm.

1. We review de novo the district court's denial of a petition for habeas relief. *Henry v. Ryan*, 720 F.3d 1073, 1078 (9th Cir. 2013). Findings of fact are reviewed for clear error. *Id.* As the state court did not decide Ground One on the merits, section 2245(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") does not apply. *See Cullen v. Pinholster*, 563 U.S. 170, 186 (2011).

In Ground One, Balint argues he was denied his right to be present and the right to counsel at a critical stage of the trial when the trial court responded to the jury's question. The district court concluded this claim was procedurally defaulted under California's *Dixon* procedural bar.[1]

Balint argues that *Dixon's* procedural bar is inapposite because he could not have raised this claim on direct appeal. The parties agree, however, that the trial record does not reflect that there were discussions between the trial judge and defense counsel regarding the jury's question. Thus, Balint could have raised this claim on direct appeal.

[1] *Dixon* holds that in the absence of special circumstances, habeas relief is barred "where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." *Ex parte Dixon,* 264 P.2d 513, 514 (Cal. 1953).

Balint also argues that this claim is not procedurally defaulted because the California Supreme Court's order cites mutually inconsistent procedural bars. Not so. The California Supreme Court's order denying relief "clearly and expressly state[d] that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263 (1989). Although the California Supreme Court cited both the *Dixon* and *Clark* procedural bars, these rules are not inconsistent.[2] The district court correctly interpreted the order as signifying that Balint "could have raised the claim on direct appeal (*Dixon*), and in any event he also improperly raised the claim in a successive habeas application (*Clark*)." Moreover, as Balint did not raise multiple claims in his June 2013 California Supreme Court petition, there is no confusion as to which claim the bars apply. *Cf. Calderon v. United States District Court (Bean)*, 96 F.3d 1126, 1131 (9th Cir. 1996) (concluding that the California Supreme Court's order was ambiguous because it did not "specify which of [petitioner's] thirty nine-claims the court rejected under [one cited state doctrine], and which it rejected under [another cited state doctrine]").

Balint argues that even if this claim is defaulted, he has demonstrated cause and prejudice to excuse any procedural default because his appellate counsel was

[2] *Clark* holds that "the court will not consider repeated applications for habeas corpus presenting claims previously rejected" and that the "court has also refused to consider newly presented grounds for relief which were known to the petitioner at the time of a prior collateral attack on the judgment." *In re Clark*, 855 P.2d 729, 740 (Cal. 1993).

ineffective for failing to raise Ground One on direct appeal and that he was prejudiced by his counsel's deficient performance. Ineffective assistance of appellate counsel is evaluated under the *Strickland* standard. *See Smith v. Murray*, 477 U.S. 527, 535–36 (1986). Under *Strickland*, a defendant must show that (1) counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Even assuming Balint's ineffective assistance of appellate counsel claim is exhausted, Balint cannot show prejudice. The California Court of Appeal concluded that even if Balint had objected to the trial court's response to the jury's question, the response was "a correct statement of law that could not have misled the jury and is not grounds for reversal." We see no error in this conclusion. Because Balint cannot show prejudice, he cannot overcome California's *Dixon* rule.

Finally, Balint argues that even if the procedural default is not excused by cause and prejudice, failure to consider Ground One on the merits would result in a fundamental miscarriage of justice. To obtain review, he "must show that it is more likely than not that no reasonable juror would have convicted him in the light

of [] new evidence." *Lee v. Lampert*, 653 F.3d 929, 938 (9th Cir. 2011) (internal quotation marks and citation omitted). "This exacting standard permits review only in the extraordinary case, but it does not require absolute certainty about the petitioner's guilt or innocence." *Id.* (internal quotation marks and citation omitted).

Balint argues that he has provided new evidence of constitutional error through his declaration that he was not present when the trial judge formulated an answer to the jury's question. Nonetheless, he fails to demonstrate how, in light of the declaration, it is more likely than not that no reasonable juror would have convicted him.

Therefore, we affirm the district court's judgment that Ground One is procedurally barred under California's *Dixon* rule.

2. Because Balint filed his petition after April 24, 1996, his claim in Ground Two is governed by AEDPA. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997). AEDPA "bars relitigation of any claim adjudicated on the merits in state court, subject only to the exceptions in §§ 2254(d)(1) and (2)." *Harrington v. Richter*, 562 U.S. 86, 98 (2011) (internal quotation marks omitted). These exceptions require a petitioner to show that the prior litigation either "(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." *Id.* at 97–98 (citing 28 U.S.C. § 2254(d)).

In Ground Two, Balint argues that the trial court erred in responding to the jury's question without clearing up the instructional confusion expressed by the jury. He contends that the California Court of Appeal's decision was an unreasonable application of *Bollenbach v. United States*, 326 U.S. 607, 608 (1946).[3] The California Court of Appeal's decision on this issue was not an unreasonable application of clearly established federal law as determined by the United States Supreme Court in *Bollenbach*.

He also argues that the California Court of Appeal's determination was an unreasonable determination of the facts. The California Court of Appeal did not make a factual determination, but rather reached a legal conclusion that there was no reasonable likelihood that the jury conflated the two separate instructions into one.

AFFIRMED.

[3] *Bollenbach* states that "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach*, 326 U.S. at 612–13.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

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- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MICHAEL THOMAS BALINT, Petitioner, v. WARDEN, NORTH KERN, Respondent.	No. CV 11-6307-BRO (PLA) **JUDGMENT**

Pursuant to the order accepting findings, conclusions, and recommendation of the magistrate judge, IT IS ADJUDGED that the Petition is denied and dismissed with prejudice.

DATED: April 20, 2017

HONORABLE BEVERLY REID O'CONNELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MICHAEL THOMAS BALINT, Petitioner, v. WARDEN, NORTH KERN, Respondent.	No. CV 11-6307-BRO (PLA) **ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

On October 24, 2016, the United States Magistrate Judge issued a Report and Recommendation ("R&R"), recommending that the Petition be denied and dismissed with prejudice. On April 3, 2017, petitioner filed Objections to the R&R.

The Magistrate Judge in the R&R concluded, inter alia, that petitioner's denial of counsel claim in Ground One of the Petition was procedurally barred, and that petitioner could not overcome the procedural bar because his "cause and prejudice" argument based on ineffective assistance of appellate counsel lacked merit. (See R&R at 15-21). Petitioner objects to the R&R's analysis of his "cause and prejudice" argument. In particular, petitioner argues that "clear Ninth Circuit and Supreme Court authority" dictate that the failure to notify counsel before responding to a jury question "regarding the law is structural [error] mandating reversal" under United States

v. Cronic, 466 U.S. 468, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).[1] (Objections at 8). Petitioner alternatively argues that, based on the Ninth Circuit's recent decision in United States v. Martinez, 850 F.3d 1097 (9th Cir. 2017), the trial court's alleged error was not harmless. (Objections at 9-11).

In Martinez, the defendant was on trial for being a removed alien found in the United States, and the jury was tasked with making two findings: whether the defendant was guilty of being a removed alien found in the United States, and, if so, whether the defendant had been "'removed from the United States after December 3rd, 2010.'"[2] Id. at 1099. During deliberations, the jury sent a note to the judge asking about the significance of the December 3rd date, and without notifying counsel, the judge responded: "It is a matter for the court to consider, not the jury. The jury has to consider whether the defendant was deported or removed after that date." (Id. at 1100). On appeal, the Ninth Circuit concluded that the trial court violated the defendant's constitutional rights by responding to the jury note without notifying counsel and considered whether the error was harmless by applying the three factors set forth in United States v. Frazin, 780 F.2d 1461, 1470 (9th Cir. 1986): (1) the probable effect of the message actually sent; (2) the likelihood that the court would have sent a different message had it consulted with the defense beforehand; and (3) whether any changes in the message that the defense might have obtained would have affected the verdict in any way. Martinez, 850 F.3d at 1105. After determining that the trial court's response was misleading and confusing and, had counsel been notified, a more accurate response would have been formulated, which could have had an effect on the verdict, the Martinez court concluded that the error was constitutionally harmful, and vacated the sentence. (Id. at 1106-09).

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[1] In Cronic, the Supreme Court held that the denial of counsel at a critical stage of trial was structural error. 466 U.S. at 659, n.25.

[2] If the jury found that the defendant was removed after December 3, 2010, the statutory maximum sentence for his illegal reentry conviction would increase from two to twenty years. Martinez, 850 F.3d at 1105.

Here, to the extent petitioner contends that both Supreme Court and Ninth Circuit authority hold that a trial court's error in responding to a jury note without notifying counsel amounts to structural error, his contention is mistaken. In Martinez, the Ninth Circuit specifically declined to decide whether the error in that case was structural, and noted that "we have never held that such error is structural error." See Martinez, 850 F.3d at 1103, 1105 (also noting "our previous cases suggest that the question whether the failure to consult counsel about a mid-deliberations jury note is structural error turns on both the nature of the jury's request and the need for counsel's participation in formulating a response."). In any event, "[o]n a federal question, the decisions of the lower federal courts, while persuasive, are not binding on state courts." Forsyth v. Jones, 57 Cal.App.4th 776, 782, 67 Cal.Rptr.2d 357, 361 (Cal. App. 4 Dist. 1997). On the other hand, while the decisions of the United States Supreme Court are binding on state courts (see id.), petitioner has not cited to -- and the Court is not aware of -- any Supreme Court authority holding that a trial court's response to a jury question without notification to counsel amounts to structural error.

Thus, with respect to petitioner's cause and prejudice argument that appellate counsel was ineffective for failing to raise the denial of counsel claim, had the claim been raised, the California Court of Appeal was not bound by any Supreme Court authority to conclude that the trial court's alleged error was structural and reversal was required. Rather, as the R&R explains, had the appellate court considered the denial of counsel claim and assessed the alleged error for harmlessness, there is no reasonable probability that the appellate court would have found the error to be constitutionally harmful in light of its determination that the trial court's response "was a correct statement of law that could not have misled the jury," and that "[n]o more elaborate response was necessary." (See Lodgment No. 6 at 13).[3] Accordingly, the Court concludes that

[3] The Court notes that, in Martinez, the Ninth Circuit based its determination in part on the fact that, had defense counsel been consulted before the trial court responded to the jury note, counsel would have "specifically requested that the trial court instruct the jury" in a different manner. 850 F.3d at 1099. Specifically, defense counsel would have "asked that the court's response 'provide proper guidance on the deliberative significance of the date finding, including that it had to be proven beyond a reasonable doubt'"; "would have ensured that the jury was (continued...)

petitioner's claim that appellate counsel was ineffective for failing to raise the "denial of counsel" claim, and that this ineffective assistance serves as cause and prejudice for overcoming the procedural default of Ground One, lacks merit.

CONCLUSION

Based on the foregoing and pursuant to 28 U.S.C. § 636, the Court has reviewed the relevant filings, the Magistrate Judge's Report and Recommendation, and petitioner's Objections to the Report and Recommendation. The Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections have been made. The Court concurs with and accepts the findings and conclusions of the Magistrate Judge.

ACCORDINGLY, IT IS ORDERED:

1. The Report and Recommendation is accepted.
2. Judgment shall be entered consistent with this Order.
3. The clerk shall serve this Order and the Judgment on all counsel or parties of record.

DATED: April 20, 2017

HONORABLE BEVERLY REID O'CONNELL
UNITED STATES DISTRICT JUDGE

[3](...continued)
instructed not merely to 'consider' the date of removal, but to make an affirmative determination about it"; and "likely would have recommended that the note exclude any mention of the court's role in considering the previous conviction or removal dates." Id. at 1107. The Ninth Circuit determined that "[t]here is no reason to think that the judge would have refused to incorporate counsel's uncontroversial suggestions, which would have resulted in a clearer and more accurate response to the jury's question." Id. Here, in contrast, defense counsel signed a declaration under penalty of perjury that, had he been "presented with the question, 'in order to apply the defense of duress or necessity, it is necessary to meet ALL the requirements or elements listed in the law (for necessity and duress defense),' [he] would *not* have requested argument" and "[his] answer to the question would have been 'yes,'" just as the trial court in fact responded. (See Docket No. 97, Exhibit B). Thus, assuming *arguendo* that the trial court in petitioner's case did in fact fail to notify counsel, because petitioner's counsel agrees with the trial court's response of "yes," there is no likelihood that the trial court would have sent a different message to the jury if defense counsel had been consulted, which further bolsters the harmless error determination.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MICHAEL THOMAS BALINT, Petitioner, v. WARDEN, NORTH KERN, Respondent.	No. CV 11-6307-BRO[1] (PLA) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

The Court submits this Report and Recommendation to the Honorable Beverly Reid O'Connell, United States District Judge, pursuant to 28 U.S.C. Section 636 and General Order 05-07 of the United States District Court for the Central District of California. For the reasons set forth below, the Magistrate Judge recommends that the Petition for Writ of Habeas Corpus be dismissed with prejudice.

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[1] On May 7, 2013, this matter was transferred from the calendar of District Judge R. Gary Klausner to the calender of District Judge Beverly Reid O'Connell.

I.

SUMMARY OF PROCEEDINGS

On May 21, 2010, a Los Angeles County Superior Court jury found petitioner guilty of two counts of second degree robbery (Cal. Penal Code § 211), and one count of being a felon in possession of a firearm (Cal. Penal Code § 12021(a)(1)). The jury also found true the allegations that, in connection with the two robbery counts, petitioner personally used a firearm within the meaning of California Penal Code § 12022.53(b). (Reporter's Transcript ("RT") 193-95; Clerk's Transcript ("CT") 86-91, 112-13). On June 9, 2010, in a bifurcated proceeding, the trial court found true the allegations that petitioner suffered prior convictions and served prior prison terms within the meaning of California Penal Code §§ 667(a)(1) and 667.5(b). Petitioner received a sentence of 136 years to life in state prison. (RT 199-202, 204-07; CT 108-13).

Petitioner filed a direct appeal, and on April 28, 2011, the California Court of Appeal affirmed the conviction.[2] (Lodgment Nos. 3, 6). On July 13, 2011, the California Supreme Court denied review. (Lodgment Nos. 7, 8).

While his direct appeal was pending, petitioner filed a habeas petition in the Los Angeles County Superior Court, which was denied on October 1, 2010. (Lodgment Nos. 9, 10). After his appeal was denied, petitioner filed a second habeas petition in the superior court, which was denied on August 26, 2011. (Lodgment Nos. 11, 12).

On September 12, 2011, petitioner filed a habeas petition in the California Court of Appeal, which was denied on September 23, 2011. (Lodgment Nos. 13, 14). On September 19, 2011, petitioner filed a second petition in the California Court of Appeal, which was denied on September 30, 2011. (Lodgment Nos. 15, 16).

On October 5, 2011, petitioner filed both a habeas petition and a petition for writ of mandate in the California Supreme Court. The habeas petition was denied on February 15, 2012, and the petition for writ of mandate was denied on April 25, 2012. (Lodgment Nos. 17-20).

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[2] The court of appeal stayed the 25-years-to-life sentence on Count Three (being a felon in possession of a firearm), but affirmed the judgment in all other respects. (Lodgment No. 6).

On August 1, 2011, petitioner filed his federal Petition in this Court. On September 19, 2011, he filed an Amended Petition, and on March 5, 2012, he filed the operative Second Amended Petition ("SAP"). The SAP alleges seven grounds for relief. On July 24, 2012, respondent filed an Answer and Return. In the Answer, respondent argues, inter alia, that Ground One of the SAP was not exhausted in the California Supreme Court. (Answer at 14-16). On September 20, 2012, petitioner filed a Reply.

On August 29, 2013, petitioner filed a "Notice of State Court Exhaustion" ("Notice"). Petitioner indicates in the Notice that, after filing the SAP, he subsequently exhausted his claim in Ground One by filing four additional habeas petitions in the California courts: (1) a petition in the Los Angeles County Superior Court, denied on December 21, 2012; (2) a petition in the California Court of Appeal, denied on February 15, 2013; (3) another petition in the California Court of Appeal, denied on May 16, 2013; and (4) a petition in the California Supreme Court, denied on August 14, 2013, with citations to In re Clark, 5 Cal.4th 750, 767-69 (1993), and In re Dixon, 41 Cal.2d 756, 759 (1953). (See Lodgment Nos. 21-28).

On January 23, 2014, the Court appointed counsel to represent petitioner as to Ground One of the SAP. (Docket No. 53). On June 6, 2014, respondent filed a Supplemental Brief to Answer and Return to Second Amended Petition, arguing that Ground One is both procedurally barred and fails on the merits. (Docket No. 64). On April 16, 2015, petitioner filed a Response to Respondent's Supplemental Brief. (Docket No. 84). On December 18, 2015, respondent filed a Reply to Petitioner's Response. (Docket No. 97). On July 15, 2016, petitioner filed a Response to respondent's December 18, 2015, Reply. (Docket No. 107). On August 9, 2016, petitioner filed a Notice of Supplemental Authority in Support of Petitioner's Response to Respondent's Reply. (Docket No. 108).

This matter has been taken under submission, and is ready for decision.

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II.

STATEMENT OF FACTS

The Court adopts the following factual summary set forth in the California Court of Appeal's Opinion affirming petitioner's conviction.[3]

> At trial, Milan Kothari testified that on January 18, 2010, he was working as a clerk at Happy Liquor on Magnolia Avenue in Long Beach. At 8:30 p.m., Kothari was cleaning outside near the door when he saw [petitioner], dressed in black, walk in alone and go to the beer cooler. No one else was in the store. Kothari went back inside to the cash register, and [petitioner] approached the register with a can of beer he had grabbed from the cooler. When Kothari began to ring up the beer, [petitioner] pulled out a gun (about a foot long, "old style," with a long neck) from his pants under his jacket and pointed it at Kothari, saying, "'Don't move, don't touch anything, and give me the money'" in a serious and threatening tone. Kothari was afraid and raised his hands, saying, "'I'm not moving or touching anything.'" [Petitioner] repeated, "'Give me the money.'" Kothari said, "'I've got to open the register, if you want the money,'" opened the register, and gave [petitioner] the cash drawer, which contained $300-$400. There was money under the drawer and [petitioner] asked for that money too. Kothari put the money on the counter, and [petitioner] said, "'Don't move. Don't do anything,'" took the money, and left the store. Kothari did not see anyone waiting for [petitioner]. On January 22, 2010, Kothari identified [petitioner] as the armed robber in a six-pack photographic lineup, and Kothari identified [petitioner] in court. The prosecutor played a security videotape of the robbery. On cross-examination, Kothari said [petitioner] did not appear to be nervous or stressed.
>
> Scott McCaslin testified that on the same night, January 18, 2010, he was working as a clerk/cashier at Granada Liquor in Long Beach. At about 9:50 p.m., McCaslin was behind the counter when he saw [petitioner] walk in the door alone, wearing "a longish" hooded coat and dark clothes. McCaslin was alone in the store and saw no one outside.[4] [Petitioner] walked directly to the register. McCaslin

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[3] The Court "presume[s] that the state court's findings of fact are correct unless [p]etitioner rebuts that presumption with clear and convincing evidence." Tilcock v. Budge, 538 F.3d 1138, 1141 (9th Cir. 2008) (citations omitted); 28 U.S.C. § 2254(e)(1). Because petitioner has not rebutted the presumption with respect to the underlying events, the Court relies on the state court's recitation of the facts. Tilcock, 538 F.3d at 1141. This presumption applies even if the finding was made by a state court of appeals, rather than by a state trial court. Pollard v. Galaza, 290 F.3d 1030, 1035 (9th Cir. 2002). However, to the extent that an evaluation of petitioner's individual claims depends on an examination of the trial record, the Court herein has made an independent evaluation of the record specific to those claims.

[4] On cross-examination, McCaslin stated all he could see from behind the counter was the (continued...)

asked him what he wanted, and [petitioner] pulled out an old, worn sawed-off shotgun from under his coat, held it out toward McCaslin, and rested it on the countertop close to the register. [Petitioner] asked McCaslin to give him all the money in an agitated, angry tone. McCaslin immediately opened the register and began to pull out money. He was afraid because he believed he was going to be shot. McCaslin put the large bills on the countertop, and without being told, bent down to get a cash box below the register. [Petitioner] yelled, "Stop, stop right there, get up slowly" at McCaslin and put the gun very close to McCaslin's head. McCaslin slowly stood back up, with the gun about an inch from his face, pointed at his left temple. McCaslin gave [petitioner] about $400 from the register, and [petitioner] left. McCaslin saw nobody outside. About a week later, McCaslin identified [petitioner] in a six-pack photographic lineup. McCaslin also identified [petitioner] in court. The prosecutor played a security videotape of the robbery.

[Petitioner] testified in his own defense. He admitted that he committed the two liquor store robberies on January 18, 2010, with a gun that came from members of the Eastside Longos gang with whom he met earlier in the day.[5] Since July 2009, [petitioner] had worked as a paid informant for the Long Beach Police Department, supervised by Detective Timothy Luke Everts. On the day of the robberies he met with Eastside Longos members at an empty apartment, where he saw people doing drugs and two guns. [Petitioner] needed to get some information for Detective Everts so he could get some money to pay a tax he owed on behalf of a Mexican mafia member [petitioner] met in state prison. The gang members were friendly at first, but after they took drugs, they began to tell [petitioner] that the person he worked for owed them money. They threatened [petitioner], beat him, threatened his life and his family (his mother, his four-year-old daughter, and his girlfriend) and told [petitioner] he would have to rob as many people as possible to get the money [petitioner's] boss owed them. They would let [petitioner] go home if someone vouched that he would get them the money. [Petitioner] called his girlfriend, Annette Hernandez, and she arrived at the apartment. The gang members separated them and took Hernandez into another room. [Petitioner] did not see them threaten Hernandez. The gang members threatened [petitioner] and put a shotgun in his mouth. The shotgun was the gun in the video, and it was not [petitioner's] gun.

Two gang members, "Dopey" and his father, forced [petitioner] out of the apartment and into a car. Dopey was armed with a handgun and had the shotgun in his lap. They drove to the liquor stores and forced [petitioner] to commit the robberies, using the shotgun. At the time of the robberies, [petitioner] thought the shotgun

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[4](...continued)
area right outside the front door; he could not see the parking lot.

[5] [Petitioner] admitted that he had been convicted of four felonies.

worked, but Dopey emptied the slugs out before the first robbery, and [petitioner] discovered later that the gun didn't work.

Dopey and his father would park the car near to the liquor stores (on a side street a quarter-block away at Happy Liquor, and in an alley about 22 feet away from Granada Liquor) and wait for [petitioner] to return. He did not plan to return the money to the liquor stores, but did plan to report it to the authorities. At Happy Liquor, Dopey got out of the car with [petitioner] and handed him the shotgun, telling him to conceal the gun while on the street, to go in there and make it quick, and not to go out the back door, or his family would be hurt. After each robbery, [petitioner] immediately handed the shotgun back to Dopey and his father.

During the second robbery, [petitioner] told McCaslin to look at his face, and said that he was being forced to commit the robbery.

After each robbery, Dopey and his father drove [petitioner] back to the apartment. Hernandez was still back at the apartment, and he was worried about her welfare. When they returned to the apartment after the second robbery, [petitioner] was beaten again, and then they let him go home, telling him to come back the next day to commit some more robberies for them. [Petitioner] had no doubt that if he had not committed the robberies, Dopey and his father would kill him and harm his family and his girlfriend.

[Petitioner] called Detective Everts the day after the robbery, telling him it was an emergency and he needed to meet with him. Detective Everts put him off, and [petitioner] called again and said there was a shotgun involved and repeated that he needed to see him as soon as possible. When Detective Everts met [petitioner] on January 21, 2010, he immediately arrested [petitioner]. After Detective Everts showed [petitioner] a photograph of himself in a liquor store with the shotgun, he told Detective Everts about the robberies. Later, [petitioner] identified the people who kidnapped him in a photograph.

McCaslin testified that [petitioner] told him to look at his face, and that [petitioner] said, "'They are making me do this.'" [Petitioner] claimed he told Kothari, "look at me, they're forcing me to do this," but Kothari testified that [petitioner] did not tell him he was being forced to commit the robbery.

Hernandez testified that on January 18, 2010 she met [petitioner] at the apartment and "he looked really scared. I never seen him like that before," and he still looked scared when he left. Hernandez stayed at the apartment for a few hours talking to a girl she knew, and she saw [petitioner] leave, come back, leave, come back again, and leave when they told him to go. She took a taxi home after everyone left. Someone mentioned something about having a hostage that night, but Hernandez was not forced to stay there. She was not afraid for her safety because an Eastside Longos member was the father of her child.

> Detective Everts testified that [petitioner] worked for him as a confidential informant, and was paid for each piece of information that resulted in an arrest or finding evidence. [Petitioner] was not working for Detective Everts on January 18, 2010. [Petitioner] called him on January 19, 2010 and told him that he had met the Eastside Longos members at the apartment, and that they were high on heroin, disrespected him, and stole his bike. [Petitioner] called Detective Everts again that day and on January 20, 2010 without mentioning the liquor store robberies.
>
> On January 21, 2010, Detective Everts arrived at work and found in his email an attachment of a surveillance video showing [petitioner], dressed in black, holding a shotgun on a liquor store clerk. After Detective Everts learned that another robbery had taken place, he telephoned [petitioner], arranged to meet with him, arrested [petitioner] when he arrived at the meeting place, and took [petitioner] to the station. When he asked [petitioner] what had happened at the apartment, [petitioner] told Detective Everts that he had met Dopey a month earlier and tried to buy a handgun from him. Dopey refused, but called [petitioner] on January 18, 2010 and asked him to come to the apartment to hang out. When [petitioner] arrived, he saw that Dopey and a woman were high on heroin. They confronted [petitioner] and claimed he was a snitch, and he owed them a debt. Dopey took out a sawed-off shotgun and put the shotgun in [petitioner]'s mouth. [Petitioner] was beaten up, and Dopey told him to call someone he trusted, so [petitioner] called Hernandez. When she arrived, [petitioner] was forced to change his clothes, and Dopey and his father drove him around the city. [Petitioner] thought that Dopey got out of the car and committed a robbery, and he saw Dopey hit a young black male with the shotgun.
>
> Detective Everts showed [petitioner] a still photograph from the surveillance video and said he knew what had happened that night. After staring at the photograph, [petitioner] told Detective Everts that he was involved in the robberies and had used a shotgun. [Petitioner] was upset and crying.
>
> Long Beach Police Officer Jesus Fragoso testified that after [petitioner's] arrest on January 21, 2010, he interviewed Hernandez. Hernandez said she was not forced to stay at the apartment on January 18, 2010 and left on her own without anyone trying to stop her.

(Lodgment No. 6 at 3-7) (footnotes in original [renumbered]).

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III.

PETITIONER'S CONTENTIONS

1. Petitioner was denied the right to be represented by counsel during a critical stage of the trial proceeding. (SAP at 3, 5-6).

2. The trial court erred in responding to the jury's question concerning jury instructions. (SAP at 4).

3. The trial court erred in instructing the jury on the defense of necessity. (SAP at 7-8).

4. Petitioner's trial counsel was ineffective for failing to move for a new trial based on insufficient evidence, and appellate counsel was ineffective for failing to raise this issue on appeal. (SAP at 9).

5. The trial court erred in denying petitioner's motion for a new trial based on witness intimidation, and appellate counsel was ineffective for failing to raise this issue on appeal. (SAP at 10-12).

6. Petitioner's appellate counsel was ineffective for not raising on appeal the argument that trial counsel failed to object to an instruction that did not apply to petitioner's theory of defense. (SAP at 13, 15).

7. Petitioner's appellate counsel was ineffective for not raising on appeal the argument that trial counsel failed to "point out . . . that others involved were not held to answer, even though it [was] alleged that others supplied [the] mens rea." (SAP at 14, 16).

IV.

STANDARD OF REVIEW

The Petition was filed after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA"). Pub. L. No. 104-132, 110 Stat. 1214 (1996). Therefore, the Court applies the AEDPA in its review of this action. See Lindh v. Murphy, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997).

Under the AEDPA, a federal court may not grant a writ of habeas corpus on behalf of a person in state custody "with respect to any claim that was adjudicated on the merits in State court

proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). As explained by the Supreme Court, section 2254(d)(1) "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). In Williams, the Court held that:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412-13; see Weighall v. Middle, 215 F.3d 1058, 1061-62 (9th Cir. 2000) (discussing Williams). A federal court making the "unreasonable application" inquiry asks "whether the state court's application of clearly established federal law was objectively unreasonable." Williams, 529 U.S. at 409; Weighall, 215 F.3d at 1062. The Williams Court explained that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Williams, 529 U.S. at 411; accord: Lockyer v. Andrade, 538 U.S. 63, 75-76, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). Section 2254(d)(1) imposes a "highly deferential standard for evaluating state-court rulings," Lindh, 521 U.S. at 333 n. 7, and "demands that state court decisions be given the benefit of the doubt." Woodford v. Visciotti, 537 U.S. 19, 24, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (per curiam). A federal court may not "substitut[e] its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d)." Id.; Early v. Packer, 537 U.S. 3, 11, 123 S. Ct. 362, 154 L. Ed. 2d 263

(2002) (per curiam) (holding that habeas relief is not proper where state court decision was only "merely erroneous").

The only definitive source of clearly established federal law under the AEDPA is the holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court decision. Williams, 529 U.S. at 412. While circuit law may be "persuasive authority" for purposes of determining whether a state court decision is an unreasonable application of Supreme Court law, Duhaime v. Ducharme, 200 F.3d 597, 600-01 (9th Cir. 1999), only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied. Williams, 529 U.S. at 412; Moses v. Payne, 555 F.3d 742, 759 (9th Cir. 2009). Furthermore, under 28 U.S.C. § 2254(e)(1), factual determinations by a state court "shall be presumed to be correct" unless the petitioner rebuts the presumption "by clear and convincing evidence."

A federal habeas court conducting an analysis under § 2254(d) "must determine what arguments or theories supported, or, [in the case of an unexplained denial on the merits], 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 [the Supreme Court]." Harrington v. Richter, 562 U.S. 86, 102, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). In other words, to obtain habeas relief 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." Id. at 103.

The United States Supreme Court has held that "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991). Here, petitioner exhausted his claim in Ground One of the SAP when he filed his last round of habeas petitions in the California courts. (Lodgment Nos. 21-28). The California Supreme Court denied the claim with citations to Clark (barring successive and "piecemeal" presentation of habeas claims), and Dixon (barring claims that could have been raised on appeal). Respondent argues, inter alia, that the denial based on Clark and

Dixon renders Ground One procedurally defaulted. (Docket No. 64 at 2-6). As explained in more detail infra, the Court agrees and denies Ground One as procedurally barred.

Next, petitioner presented on direct appeal the claims set forth in the SAP as Grounds Two and Three. The California Court of Appeal issued a reasoned opinion rejecting these claims, while the California Supreme Court issued a summary denial. Accordingly, for Grounds Two and Three, this Court reviews the appellate court's opinion under the AEDPA standard. See Ylst, 501 U.S. at 803; Shackleford v. Hubbard, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000) (district court "look[s] through" to the last reasoned decision as the basis for the state court's judgment).

As for Ground Four, petitioner exhausted this claim in habeas petitions filed in the California Court of Appeal and California Supreme Court. Both courts issued summary denials. (Lodgment Nos. 13-14, 17-18). Because no state court has provided a reasoned decision addressing the merits of the claim, the Court must conduct "an independent review of the record" to determine whether the rejection was objectively unreasonable. Haney v. Adams, 641 F.3d 1168, 1171 (9th Cir. 2011); Murdoch v. Castro, 609 F.3d 983, 990-91 n.6 (9th Cir. 2011) (en banc). In other words, the Court must determine "what arguments or theories . . . could have supported[] the state court's decision," and then ask "whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]." Richter, 562 U.S. at 102.

Petitioner presented the claims in Grounds Five, Six, and Seven in habeas petitions filed in the Los Angeles County Superior Court, California Court of Appeal, and California Supreme Court. (Lodgment Nos. 11, 13, 17). The superior court denied the claims on the merits as well as on procedural grounds (citing, inter alia, Dixon for the proposition that petitioner could have raised the claims on appeal). (Lodgment No. 12). The California Court of Appeal and California Supreme Court summarily denied the claims. Because, using the "look through" doctrine, the superior court's denial was based on both the merits as well as procedural grounds, and because the claims clearly fail on the merits, in an abundance of caution, the Court will conduct a de novo review of Grounds Five through Seven. See Berghuis v. Thompkins, 560 U.S. 370, 390, 130 S.Ct. 2250, 2265, 176 L.Ed.2d 1098 (2010) (where it is unclear whether AEDPA deference applies,

court may deny writ of habeas corpus under § 2254 by engaging in de novo review because habeas petitioner will not be entitled to writ under § 2254 if claim can be rejected on de novo review).

V.

DISCUSSION

GROUND ONE: DENIAL OF RIGHT TO COUNSEL AT CRITICAL STAGE OF TRIAL

Petitioner asserts in Ground One that the trial court denied petitioner his right to counsel during a critical stage of trial when, during deliberations, the trial court responded in writing to a jury question without notifying petitioner or his counsel.[6] (SAP at 3).

A. Relevant Facts and Procedural History

The record shows that, after both the prosecution and defense rested and outside the presence of the jury, the trial court noted that the defense had requested a duress instruction and the prosecution had requested an instruction on the defense of necessity, "which is the alternative." (RT 146). In response to the trial court's question if either party had any objection to the giving of these instructions, both sides answered no. The court then asked defense counsel, "You would agree with me, would you not, there is no substantial evidence for any lesser [included offense] since [petitioner] admitted to the robberies and to the gun, it's just he has the defense of necessity or duress." Defense counsel answered, "Correct," and the prosecutor agreed. (RT 147). The court then gave the jury instructions on the two defenses.

As given in petitioner's trial, the duress instruction (CALJIC No. 4.40) provides:

> A person is not guilty of a crime when he engages in conduct, otherwise criminal, when acting under threats or menaces under the

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[6] Under the Sixth Amendment, a criminal defendant is entitled to counsel at "critical stages" of a criminal proceeding. Lafler v. Cooper, __ U.S. __, 132 S.Ct. 1376, 1392, 182 L.Ed.2d 398 (2012) (citing United States v. Wade, 388 U.S. 218, 226, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967)). A "critical stage" is any stage "where substantial rights of a criminal accused may be affected." Hovey v. Ayers, 458 F.3d 892, 901 (9th Cir. 2006) (quoting Mempa v. Rhay, 389 U.S. 128, 134, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967)); see also Bell v. Cone, 535 U.S. 685, 695-96, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) (a critical stage denotes a step of a criminal proceeding that holds significant consequences for the accused).

> following circumstances: [¶] 1. Where the threat and menace are such that would cause a reasonable person to fear that his life would be in immediate danger if he did not engage in the conduct charged, and [¶] 2. If this person then actually believed that his life was so endangered. [¶] This rule does not apply to threats, menaces, and fear of future danger to his life.

(RT 158; CT 64).

The necessity instruction (CALJIC No. 4.43) provides:

> A person is not guilty of a crime when he engages in an act, otherwise criminal, through necessity. The defendant has the burden of proving by a preponderance of the evidence all of the following facts necessary to establish the elements of this defense, namely: [¶] 1. The act charged as criminal was done to prevent a significant and imminent evil, namely, a threat of bodily harm to oneself or another person; [¶] 2. There was no reasonable legal alternative to the commission of the act; [¶] 3. The reasonably foreseeable harm likely to be caused by the act was not disproportionate to the harm avoided; [¶] 4. The defendant entertained a good-faith belief that his act was necessary to prevent the greater harm; [¶] 5. That belief [w]as objectively reasonable under all the circumstances; . . . [¶] 6. The defendant did not substantially contribute to the creation of the emergency; and [¶] 7. The defendant reported to the proper authorities immediately after attaining a position of safety from the peril.

(RT 158-59; CT 65).

On May 21, 2010, after the instructions were given, the jury retired to deliberate at 2:15 p.m. The reporter's transcript reflects that immediately after the jury left the courtroom, petitioner's counsel informed the court that he had to go to the hospital but would be back in around half an hour. (RT 192; CT 90).

The clerk's transcript reflects that at 2:30 p.m., the jury submitted the following question to the court: "In order to apply the defense of d[u]ress or necessity, is it necessary to meet ALL the requirements elements listed in the law. ([F]or necessity and d[u]ress defense.)" (CT 85). The trial court responded in writing: "Yes." (Id.). There is nothing in the reporter's transcript or clerk's transcript reflecting any discussion with either party about the jury's question.

The clerk's transcript shows that at 3:10 p.m., the jury announced that a verdict had been reached, and that the attorneys for the parties were notified by phone to appear at 3:45 p.m. for

the reading of the verdict. At 3:50 p.m., with the parties present, the jury's verdict was read. (CT 90).

In his direct appeal, petitioner, who was represented by appellate counsel, raised the issue that the trial court's answer incorrectly instructed the jury that they needed to find all the elements of both the necessity and duress defenses before finding that either one applied. (Lodgment No. 3 at 24-26). In the reply brief, appellate counsel noted: "[A]s to the court's response to the jury's question, *there is no indication that defense counsel was notified of the jury's question*, that defense counsel agreed with the court's response, or that counsel was given an opportunity to object prior to the court's response." (Lodgment No. 5 at 2) (emphasis added). Appellate counsel did not, however, argue that petitioner was denied counsel when the trial court responded to the jury's question.

The California Court of Appeal rejected petitioner's claim that the trial court's response to the jury question was erroneous. In its opinion, the court stated that because the record was silent as to any discussion about the jury's question, and therefore it could not be determined whether defense counsel raised any objection to the trial court's response, the court presumed that the trial court performed its duty under Section 1138 of the California Penal Code,[7] which states:

> After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. *Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called*.

Cal. Penal Code § 1138 (emphasis added). (See Lodgment No. 6 at 13).

The court of appeal also determined that petitioner was barred from challenging the trial court's response to the jury question on the ground that petitioner failed to object in the trial court, and further concluded that, in the alternative, even assuming an objection was made, the trial

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[7] In making this presumption, the court of appeal relied on Section 664 of the California Evidence Code, which states: "It is presumed that official duty has been regularly performed."

court did not err because the response was a correct statement of law. (Lodgment No. 6 at 13-14).

B. Analysis Regarding Procedural Default

As stated above, petitioner exhausted his claim in Ground One of the SAP in his last round of habeas petitions filed in the California courts. The superior court denied the claim on the grounds that "[t]here is nothing in the petition or in the record which casts a doubt on the accuracy and reliability of the proceedings and petitioner cannot show a fundamental miscarriage of justice," and that petitioner had failed to show a prima facie case for relief. (Lodgment No. 22). The court of appeal denied the claim in a summary denial. (Lodgment No. 26). The California Supreme Court denied the claim citing Clark and Dixon. (Lodgment No. 28).

Under AEDPA, the Court must consider the last reasoned decision given by the state courts. See Amado v. Gonzalez, 758 F.3d 1119, 1130 (9th Cir. 2014). Here, the California Supreme Court's denial based on Dixon and Clark is the last reasoned state court decision. See Curiel v. Miller, 830 F.3d 864, 870 (9th Cir. 2016) ("We have no cause to treat a state court's summary order with citations as anything but a 'reasoned' decision, provided that the state court's references reveal the basis for its decision."). Because the California Supreme Court's denial was based on procedural reasons and not on the merits, the Court addresses respondent's argument that Ground One is procedurally barred.

1. The state court's denial clearly and expressly rests on state procedural bars

In order for a claim to be procedurally defaulted for federal habeas corpus purposes, the opinion of the last state court rendering a judgment must "clearly and expressly" state that its judgment rests on a state procedural bar. See Harris v. Reed, 489 U.S. 255, 263, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). The citation to Clark stands for the proposition that the state court will not consider repeated applications for habeas relief that present either claims previously rejected or claims that were known to the petitioner at the time the prior habeas application was filed. Clark, 5 Cal.4th at 767-69. The Dixon rule bars California state courts from granting habeas relief to a prisoner who failed to pursue the claims raised in his habeas petition on direct appeal from his conviction. Dixon, 41 Cal.2d at 759.

Petitioner argues that Clark and Dixon are inconsistent procedural bars because, with the Clark citation, the California Supreme Court indicated that petitioner improperly raised his claim in a successive habeas application, while with the Dixon citation, the court indicated that petitioner should have raised his claim in his direct appeal. According to petitioner, because of the incongruous nature of the Clark and Dixon rules -- i.e., indicating on one hand, that petitioner should have raised his claim in an earlier habeas application, and on the other hand, that petitioner should have raised his claim on direct appeal -- the California Supreme Court did not "clearly and expressly" state that its judgment rests on a state procedural bar. (Docket No. 84 at 2-4).

The Court disagrees. By citing both Dixon and Clark, it appears the California Supreme Court gave alternative or additional reasons for its denial of petitioner's claim: petitioner could have raised the claim on direct appeal (Dixon), and in any event he also improperly raised the claim in a successive habeas application (Clark). In other words, the court's use of the Dixon rule to deny the claim did not negate the court's additional reliance on the Clark rule. Accordingly, the citations to Dixon and Clark did not render the court's decision unduly ambiguous. Thus, the Court concludes that the California Supreme Court clearly denied petitioner's claim on procedural grounds as set forth in Dixon, 41 Cal.2d at 759, and Clark, 5 Cal.4th at 767-69.

2. The Dixon rule is adequate and independent

Next, "the application of the state procedural rule must provide 'an adequate and independent state law basis' on which the state court can deny relief." Park v. California, 202 F.3d 1146, 1151 (9th Cir.), cert. denied, 531 U.S. 918 (2000), quoting Coleman v. Thompson, 501 U.S. 722, 729-30, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). "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); see Morales v. Calderon, 85 F.3d 1387, 1393 (9th Cir. 1996). In order for a procedural bar to be adequate, state courts must employ a "firmly established and regularly followed state practice." Ford v. Georgia, 498 U.S. 411, 423-24, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991).

The Court first considers the denial based on Dixon. The Dixon rule is applied by California courts when it is "apparent from the record as a whole that the matters of which petitioner

complains were before the trial court." Dixon, 41 Cal. 2d at 762. The California Supreme Court, in In re Robbins, 18 Cal.4th 770, 814 n.34, 77 Cal.Rptr.2d 153 (1998), further explained that:

> When a petitioner attempts to avoid the bar[ ] of Dixon … by relying upon an exhibit (in the form of a declaration or other information) from outside the appellate record, we nevertheless apply the bar if the exhibit contains nothing of substance not already in the appellate record.

In this case, petitioner's habeas petition filed in the California Supreme Court raising the claim in Ground One that resulted in the Dixon/Clark denial does not reference any evidence outside of the record on appeal. (See Lodgment No. 21). Examining the record as a whole at the time that petitioner's appeal was filed, the Court finds that the denial of counsel claim was apparent from the record -- or, more appropriately, was apparent from the absence in the record of any information showing that the parties were notified before the trial court responded to the jury question -- and could have been raised on appeal. See, e.g., People v. Neufer, 30 Cal.App.4th 244, 35 Cal.Rptr.2d 386 (Cal.App. 2 Dist. 1994) (claim raised on direct appeal that trial court responded to jury question without notifying defense counsel).

The independence and adequacy of California's Dixon rule has recently been addressed by the United States Supreme Court. In Johnson v. Lee, the Supreme Court held that California's Dixon rule is well-established and regularly followed, and therefore adequate to bar federal habeas review. See Johnson v. Lee, __ U.S. __, 136 S.Ct. 1802, 1805-06, 195 L.Ed.2d 92 (2016) (per curiam). Accordingly, petitioner's claim in Ground One is procedurally barred unless he can establish cause for the default and actual prejudice, or demonstrate that the failure to consider the claim will result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 750.

3. Petitioner has not shown cause and prejudice for the procedural default

Because the Dixon rule is independent and adequate, federal habeas review of petitioner's right to counsel claim is barred unless petitioner can demonstrate cause for his procedural default and actual prejudice as a result of the alleged violation of federal law. See Coleman, 501 U.S. at 750; Smith v. Baldwin, 510 F.3d 1127, 1146 (9th Cir. 2007). To satisfy his burden of demonstrating "cause" for the procedural default, petitioner must show "that some objective factor

external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986).

Here, petitioner asserts that his appellate counsel's ineffectiveness demonstrates cause and prejudice. (Docket No. 84 at 10). According to petitioner, the denial of counsel claim in Ground One was apparent from the record and should have been raised on direct appeal, especially given the Dixon citation by the California Supreme Court. Petitioner submits a declaration from his appellate counsel in which appellate counsel states that she "had no strategic reason for not raising any potentially meritorious issue on appeal." (Docket No. 84, Exhibit A). Petitioner also points out that appellate counsel was apparently aware of the denial of counsel issue because she mentioned in the reply brief that there was no indication that defense counsel was notified about the jury question. (Id. at 12-13). Petitioner argues that appellate counsel's deficient performance resulted in actual prejudice, as there is a reasonable probability that the outcome of the direct appeal would have been different had appellate counsel included the claim that petitioner was denied counsel at the critical stage when the trial court responded to the jury question. (Id. at 14-16).

On the other hand, respondent asserts that petitioner's cause and prejudice argument based on ineffective assistance of appellate counsel must fail for lack of exhaustion because petitioner never presented his appellate IAC claim to the California Supreme Court. (Docket No. 97 at 9-10). See Edwards v. Carpenter, 529 U.S. 446, 452, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000) ("'[A] claim of ineffective assistance,' . . . generally must 'be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.'") (citing Murray, 477 U.S. at 489). Respondent further asserts that even assuming that the exhaustion requirement is satisfied because, at this point, there are no available state remedies -- i.e., assuming that the California Supreme Court would deny the appellate IAC claim on a procedural ground rather than on the merits -- the appellate IAC claim itself would then be procedurally barred unless petitioner could show cause and prejudice for that procedural default. (Docket No. 97 at 11-19). See Gray v. Netherland, 518 U.S. 152, 161, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996) ("Because '[the exhaustion] requirement . . . refers only to remedies still

available at the time of the federal petition,' it is satisfied 'if it is clear that [the habeas petitioner's] claims are now procedurally barred under [state] law[.]'") (citations omitted); Edwards, 529 U.S. at 453 ("To hold, as we do, that an ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted is not to say that that procedural default may not *itself* be excused if the prisoner can satisfy the cause-and-prejudice standard with respect to *that* claim.") (emphasis in original). Lastly, respondent argues that, in any event, petitioner's appellate IAC claim fails on the merits. (Docket No. 97 at 20-21).

The Court has considered the parties' numerous arguments concerning procedural default. With respect to petitioner's claim of cause and prejudice based on appellate IAC, the Court agrees with respondent's argument that, even assuming petitioner can show that his appellate IAC claim is exhausted and is not itself procedurally barred, petitioner nevertheless fails to show cause and prejudice for the procedural default of Ground One because his claim of appellate IAC fails on the merits.

Claims alleging ineffective assistance of appellate counsel are reviewed according to the the two-part test outlined by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which requires that a petitioner demonstrate both deficient performance and prejudice. See Morrison v. Estelle, 981 F.2d 425, 427 (9th Cir. 1992) (finding the standard for assessing the performance of trial and appellate counsel is essentially the same under Strickland). To establish deficient performance, a petitioner "must show that counsel's performance was objectively unreasonable, which in the appellate context requires the petitioner to demonstrate that counsel acted unreasonably in failing to discover and brief a merit-worthy issue." Moormann v. Ryan, 628 F.3d 1102, 1106 (9th Cir. 2010). Prejudice "means that the petitioner must demonstrate a reasonable probability that, but for appellate counsel's failure to raise the issue, the petitioner would have prevailed in his appeal." Id.

Petitioner has the burden of satisfying both prongs of the Strickland standard. Strickland, 466 U.S. at 687; Cheney v. Washington, 614 F.3d 987, 995 (9th Cir. 2010). Moreover, because petitioner must prove both deficient performance and prejudice, a federal court "need not determine whether counsel's performance was deficient before examining the prejudice suffered

by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." Strickland, 466 U.S. at 697.

Here, to show prejudice under Strickland, petitioner must demonstrate a reasonable probability that, had appellate counsel included the denial of counsel claim in the direct appeal, he would have prevailed in his appeal. Petitioner cannot make such a showing for the reasons set forth below.

Under California law, if a trial court responds to a jury question without input from counsel, it must be determined if the trial court's error is harmless beyond a reasonable doubt. See People v. Jennings, 53 Cal.3d 334, 384-385, 279 Cal.Rptr. 780 (1991); People v. Knighten, 105 Cal. App. 3d 128, 133, 164 Cal. Rptr. 96 (Cal. App. 1 Dist. 1980) ("While denial of counsel at the critical stage of a criminal proceedings is not prejudicial as a matter of law, prejudice will be presumed if the denial may have affected the substantial rights of the accused. Only the most compelling showing to the contrary will overcome the presumption. The court must be able to declare a belief the denial of counsel was harmless beyond a reasonable doubt.").

As set forth above, although the California Court of Appeal did not consider the denial of counsel issue because it was not raised as a claim in the direct appeal, the court of appeal did consider whether the trial court's response to the jury question was erroneous. In finding the trial court's response proper, the court of appeal stated the following:

> [W]e conclude the trial court's response was a correct statement of law that could not have misled the jury and is not grounds for reversal. The jury's question was whether "to apply the defense of duress *or* necessity" (italics added), it was necessary for [petitioner] to meet all the listed elements of either defense, and the simple answer "yes" was correct. The jury's use of "and" in the succeeding parenthetical does not mean that the jury conflated the two defenses. No more elaborate response was necessary. "The court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.]" (People v. Beardslee (1991) 53 Cal.3d 68, 97.) The jury received two separate instructions on duress (listing two elements) and necessity (listing seven elements). At the outset of deliberations,

> the trial court instructed the jury to consider the instructions as a whole and each in light of all the others. We presume the jury understood and applied this principle. (People v. Pinholster (1992) 1 Cal.4th 865, 919, overruled on another point in People v. Williams (2010) 49 Cal.4th 405, 459.) There is no reasonable likelihood that the jury conflated the two separate instructions into one, so as to require that [petitioner] prove the elements of both affirmative defenses to establish either one, as we also presume that jurors are intelligent people capable of understanding and correlating jury instructions and applying them to the facts of the case. (People v. Carey (2007) 41 Cal.4th 109, 130.) The court did not err in answering the jury's question with a simple "yes."

(Lodgment No. 6 at 13-14) (italics in original).

Based on the reasoning above, had appellate counsel presented the denial of counsel claim, in all likelihood the court of appeal would have found the alleged error to be harmless beyond a reasonable doubt. In other words, because the court of appeal determined that the trial court's response to the jury question was a correct statement of law, there is no reasonable probability that the court of appeal would have granted relief on the denial of counsel claim.[8] Accordingly, petitioner cannot show Strickland prejudice.

Because petitioner's appellate IAC claim fails on the merits under Strickland, petitioner has failed to demonstrate cause and prejudice to excuse the procedural default based on his appellate counsel's failure to argue on appeal that petitioner was denied counsel at a critical stage in the proceeding. Absent a showing of a fundamental miscarriage of justice, petitioner's claim in Ground One is procedurally defaulted.

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[8] The Court notes that the Los Angeles County Superior Court on habeas review rejected the denial of counsel claim on the grounds that petitioner had not shown "the existence of an issue which [had] a reasonable potential [of] s[u]ccess" and had not shown a fundamental miscarriage of justice. (Lodgment No. 22).

4. Petitioner has not shown a fundamental miscarriage of justice

The Supreme Court has recognized an exception to the requirement that petitioner demonstrate both "cause" and "prejudice," where petitioner can demonstrate that failure to consider the procedurally defaulted claims will result in a fundamental miscarriage of justice because he is actually innocent of the crimes of which he was convicted. See, e.g., Murray, 477 U.S. at 496; Noltie v. Peterson, 9 F.3d 802, 806 (9th Cir. 1993). In order to qualify for this "miscarriage of justice" exception, however, petitioner must "support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." Schlup v. Delo, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995) (recognizing that such evidence "is obviously unavailable in the vast majority of cases"). Further, to meet the requisite standard that a constitutional violation probably has resulted in the conviction of one who is actually innocent, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence." 513 U.S. at 327. "The evidence of innocence must be so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." Lee v. Lampert, 653 F.3d 929, 937-38 (9th Cir. 2011) (quoting Schlup, 513 U.S. at 316) (internal quotations omitted).

Here, petitioner asserts that he suffered a fundamental miscarriage of justice because the trial was not free of nonharmless constitutional error. In other words, petitioner argues that because he was denied counsel at a critical stage in the criminal proceeding, he was presumptively prejudiced by the trial court's error of responding to the jury note without notifying the defense. (Docket No. 84 at 16-17).

Petitioner has not set forth any new, reliable evidence showing that he is actually innocent or that fundamentally calls into question the reliability of his conviction. Accordingly, his miscarriage of justice claim fails. Based on the above analysis, the Court concludes that

petitioner's claim in Ground One is procedurally barred pursuant to the California Supreme Court's denial citing the Dixon rule.[9]

GROUND TWO: THE TRIAL COURT ERRED IN RESPONDING TO A JURY QUESTION

In Ground Two, petitioner asserts that the trial court's response to the jury question was erroneous.

To succeed on a claim of instructional error, a petitioner must show not only that error occurred, but that it so infected the entire trial that the resulting conviction violated due process. Estelle v. McGuire, 502 U.S. 62, 71-72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203 (1977). "[I]t must be established not merely that the instruction is undesirable, erroneous or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." Cupp v. Naughten, 414 U.S. 141, 146, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). In making this determination, the reviewing court must not view the instruction in isolation, but should consider it in the context of the trial record and the instructions as a whole. Estelle, 502 U.S. at 72.

Even if there is some ambiguity in an instruction, that alone does not amount to a due process violation. See Waddington v. Sarausad, 555 U.S. 179, 190, 129 S.Ct. 823, 172 L.Ed.2d 532 (2009). Rather, in the event of an ambiguity, the habeas court must inquire whether there was a "reasonable likelihood" that the jury has applied the challenged instruction in a way that violates the United States Constitution. Estelle, 502 U.S. at 72 & n.4; Boyde v. California, 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990).

After a careful review of the record, the Court concludes that the California Court of Appeal's denial of this claim was not objectively unreasonable. The jury asked whether in applying "the defense of duress *or* necessity," it was necessary to satisfy all of the listed elements for the defenses, to which the trial court responded "yes." (CT 85) (emphasis added). In the context of

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[9] Because Ground One is procedurally defaulted based on the Dixon denial, the Court declines to address the issue of whether Ground One is also procedurally defaulted based on the Clark denial.

the juror question, the use of the disjunctive "or" when referring to the two defenses indicates that the jurors considered the necessity instruction as an alternative to the duress instruction. Although the jury in the parenthetical portion of the question referenced the defenses of necessity "and" duress, without more, there is no basis for presuming that the jurors misunderstood the trial court's response to the question to mean that all elements of both defenses had to be met before either defense could apply, or that the two defenses could only be applied jointly, and not separately. Thus, it was not unreasonable for the court of appeal to conclude that the jury's use of "and" in the parenthetical was not an indication that the jury improperly conflated the two defenses. In concluding that the trial court's response was not an incorrect statement of the law, the court of appeal also noted that the jury was instructed to consider the instructions as a whole and each in light of all the others. It is presumed that the jury understood and properly applied this principle. See Weeks v. Angelone, 528 U.S. 225, 234, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000) ("A jury is presumed to follow its instructions."). Petitioner has not made a showing that the jury applied any instruction in a way that resulted in a due process violation.

The court of appeal's denial was not contrary to Supreme Court precedent, or an unreasonable application of clearly established federal law. 28 U.S.C. § 2254. Habeas relief is denied for Ground Two.

GROUND THREE: INSTRUCTIONAL ERROR

Petitioner asserts in Ground Three that the trial court erred in instructing the jury on the defense of necessity because it was not supported by the evidence and was inconsistent with his defense of duress. (SAP at 7-8).

A. The California Court of Appeal's Opinion

On direct appeal, the California Court of Appeal rejected petitioner's claim of instructional error on procedural grounds as well as on the merits. In finding that instructing the jury on the defense of necessity was not improper, the court of appeal stated the following:

> A trial court must instruct on legal "principles closely and openly connected with the facts of the case, and which are necessary for the jury's understanding of the case [citations]," including "an affirmative

defense . . . even in the absence of a request, 'if it appears the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.' [Citation.]" (People v. Boyer (2006) 38 Cal.4th 412, 468-469.) The duty to instruct arises only if the defense is supported by substantial evidence. (People v. Garvin (2003) 110 Cal.App.4th 484, 488.) In deciding whether the evidence supporting an instruction is substantial, the court determines whether "'"there is *any evidence deserving of any consideration whatever*,"'" and does not weigh the credibility of witnesses. (People v. Flannel (1979) 25 Cal.3d 668, 684, overruled on another ground in In re Christian S. (1994) 7 Cal.4th 768, 777.)

"'To justify an instruction on the defense of necessity, a defendant must present evidence sufficient to establish that [he] violated the law (1) to prevent a significant and imminent evil, (2) with no reasonable legal alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief that the criminal act was necessary to prevent the greater harm, (5) with such belief being objectively reasonable, and (6) under circumstances in which [he] did not substantially contribute to the emergency. [Citations.]' [Citation.]" (People v. Galambos (2002) 104 Cal.App.4th 1147, 1160.) The defendant must also show that he "*immediately* reported to the proper authorities when he attained a position of safety from the immediate threat from which he needed to escape." (People v. Farley (1996) 45 Cal.App.4th 1697, 1712.) [Petitioner] states "no evidence was presented to support such a defense," without explaining how the evidence was inconsistent with the defense.

At trial, however, [petitioner] testified that the gang members threatened his life and the lives of his family and his girlfriend (a significant and imminent evil); that they kidnapped him and forced him to commit the robberies using the shotgun (he had no reasonable legal alternative without creating the greater danger of harm to the lives of others); that he was concerned for the welfare of Hernandez back at the apartment (it was reasonable to fear for her safety); and that he did not participate through any fault of his own (he did not substantially contribute). [Petitioner] also testified that he called Detective Everts the next day and said it was an emergency involving a shotgun (he reported to the proper authorities after attaining a position of safety). Substantial evidence supported the giving of a necessity instruction.

To establish the defense of duress "[t]he defendant must show that the act was done under such threats or menaces that he had (1) an actual belief his life was threatened and (2) reasonable cause for such belief. [Citation.]" (People v. Heath (1989) 207 Cal.App.3d 892, 900.) The danger to the defendant's life must be immediate and imminent, giving him no time to formulate a reasonable course of conduct or criminal intent, thus negating the element of intent to commit the crime. (Ibid.) This is different from a necessity defense, which contemplates a threat in the immediate future, leaving the defendant "the time, however limited, to consider alternative courses of conduct" and therefore not negating intent. (Id. at p. 901.) While the defenses are different, they are related, so that the evidence at

> trial, including a defendant's own testimony, may justify giving both instructions. (Id. at p. 902.)
>
> Substantial evidence supported the giving of both instructions. [Petitioner] testified that the gang members threatened his life (sticking a shotgun in his mouth) if he did not commit the robberies, and, armed with a handgun, drove him to the liquor stores, forcing him to commit the robberies using the shotgun. This testimony is consistent with duress, as described in the instruction. The robbery victims, however, both testified that there was no one else in the store, and they saw no one outside, during the robberies. This testimony was substantial evidence supporting a conclusion that [petitioner] did not reasonably believe his life was in imminent danger at the time of the robberies as required for duress, because the threatened harm was in the immediate future, permitting him at least a brief period during which he could escape or call police. The jury could therefore also have concluded that the evidence supported a necessity defense, as [petitioner] had time, however limited, while in the liquor stores and out of the presence of the gang members, to consider alternative courses of conduct. (People v. Condley (1977) 69 Cal.App.3d 999, 1009-1013.)
>
> In People v. Heath, supra, 207 Cal.App.3d at p. 902, the court concluded "[a]ppellant's own testimony presents sufficient justification to warrant instructions on both the duress and necessity defenses." The defendant testified that a loaded gun was held to him in a vehicle (an imminent threat justifying a duress instruction) *and* that he then left the vehicle and walked to a residence where he committed a burglary. "Once appellant was outside the immediate presence of [the man who held the loaded gun to him in the vehicle], the threat became one in the immediate future allowing appellant an opportunity, albeit brief, to balance his options, which is the very essence of the necessity defense." (Ibid.) Similarly, in this case, if the jury did not believe that [petitioner] actually believed his life was in imminent danger at the time of the robberies, or if the jury did not believe that his belief was reasonable, the giving of the necessity instruction provided an additional rationale for the jury to acquit [petitioner]. "Appellant actually benefitted from both instructions because his own testimony negated the imminent harm element consistent with the duress defense." (Ibid.) The giving of both instructions did not result in a miscarriage of justice.

(Lodgment No. 6 at 9-11) (footnote omitted, emphasis in original).

B. Relevant Federal Law and Analysis

Petitioner's claim of instructional error fails. First, as the California Court of Appeal pointed out, petitioner's counsel agreed to the giving of an instruction on the necessity defense. Additionally, the court of appeal reasonably concluded that the challenged instruction was supported by substantial evidence. In particular, petitioner testified that gang members threatened

his life, and the lives of his family and his girlfriend, if he did not commit the robberies; that two of the gang members kidnapped him at gunpoint and drove him to the liquor stores to commit the robberies; and that during the robberies, he was worried about his girlfriend's welfare because she was at the gang members' apartment. (RT 64-65, 67-70). Petitioner also testified that he called Detective Everts the next day to tell him what happened. (RT 71). As explained in the court of appeal's opinion, this evidence reasonably related to the elements of the necessity defense. (See RT 158-59; CT 65). Nor has petitioner explained how the necessity defense was inconsistent with his duress defense. As such, it was not improper for the trial court to give the necessity instruction.[10]

For the above reasons, the state court's denial was not contrary to, or an unreasonable application of, Supreme Court precedent. 28 U.S.C. § 2254. Habeas relief for Ground Three is denied.

GROUND FOUR: INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL

In Ground Four, petitioner asserts that, while his trial counsel moved for a new trial on the ground of witness intimidation (discussed infra in Ground Five), counsel was nevertheless ineffective for failing to move for a new trial pursuant to California Penal Code § 1181(6).[11] Petitioner further asserts that his appellate counsel was ineffective for failing to raise this IAC issue on appeal. (SAP at 9).

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[10] The Court notes that it could have implicated petitioner's due process rights had the instruction not been given. See Bradley v. Duncan, 315 F.3d 1091, 1098-1100 (9th Cir. 2002) (the failure to instruct on a theory of defense may constitute a violation of due process if substantial evidence was presented to support that defense).

[11] California Penal Code § 1181(6) provides in relevant part: "When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial . . . [¶] . . . [w]hen the verdict or finding is contrary to law or evidence[.]"

A. Ineffective Assistance of Trial Counsel

Again, the two-step analysis in Strickland v. Washington, 466 U.S. 668, governs ineffective assistance claims. A Strickland inquiry pursuant to 28 U.S.C. § 2254(d) is very deferential. Richter, 562 U.S. at 105 ("The standards created by Strickland and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so. The Strickland standard is a general one, so the range of reasonable applications is substantial.") (citations omitted). Thus, when Section 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." Id. Moreover, "because the Strickland standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." Knowles v. Mirzayance, 556 U.S. 111, 129 S.Ct. 1411, 1420, 173 L.Ed.2d 251 (2009).

Under California law, in reviewing a motion for a new trial, the trial court must weigh the evidence independently, but also presume the correctness of the verdict and proceedings supporting it. People v. Davis, 10 Cal.4th 463, 523-24, 41 Cal.Rptr.2d 826, 859 (1995). The trial court "should [not] disregard the verdict . . . but instead . . . should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict." People v. Robarge, 41 Cal.2d 628, 633 (1953).

Petitioner has failed to demonstrate that the state courts' rejection of this claim was objectively unreasonable as there is no reasonable probability that, had his trial counsel moved for a new trial under Section 1181(6), the trial court would have found the evidence insufficient to sustain the verdict. Petitioner admits that he committed the robberies but argues that because he only did so under duress, he should not have been found guilty. The jury heard the evidence from the victims describing how petitioner carried out the liquor store robberies while armed with a gun, as well as petitioner's testimony that gang members forced him to commit the crimes by threatening his life and the lives of his family and girlfriend. (See RT 28-32, 41-50, 64-73). Although petitioner argues that the jury should have believed his testimony and found him not guilty, the jurors were free to make their own credibility determinations and to resolve evidentiary conflicts. See Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995) (it is "the province of the jury

to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict"). In other words, the jurors were free to discount as not credible petitioner's excuse that he had been threatened and committed the crimes under duress. Given the evidence presented at petitioner's trial, and the fact that on a motion for a new trial the trial court is to presume the correctness of the verdict and the trial proceedings, it is not reasonably likely that, had his trial counsel moved for a new trial pursuant to Section 1181(6), the trial court would have granted it. Accordingly, because the failure to take a futile action cannot support a claim of ineffective assistance, petitioner's claim is without merit. See Wilson v. Henry, 185 F.3d 986, 990 (9th Cir. 1999) (to show prejudice under Strickland from failure to file a motion, 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); Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996) (failure to take futile action can never be deficient performance).

B. Ineffective Assistance of Appellate Counsel

Petitioner asserts that his appellate counsel was constitutionally ineffective for failing to argue on appeal that trial counsel was prejudicially deficient for not moving for a new trial pursuant to California Penal Code § 1181(6). Based on the reasons discussed above, petitioner's claim is without merit. Because there was no reasonable probability that trial counsel would have succeeded on a motion for a new trial, in turn, there is no likelihood that any relief would have been granted on appeal had appellate counsel raised a related ineffective assistance claim. Thus, because arguing such a claim on appeal would likely have been futile, petitioner cannot show Strickland prejudice. Rupe, 93 F.3d at 1445.

Petitioner has not shown that the state courts' denial was contrary to, or an unreasonable application of, the Strickland standard. Richter, 562 U.S. at 102; 28 U.S.C. § 2254. Habeas relief for Ground Four is denied.

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GROUND FIVE: DENIAL OF MOTION FOR A NEW TRIAL

In Ground Five, petitioner asserts that the trial court erred in denying his motion for a new trial based on evidence of witness intimidation, and that appellate counsel was ineffective for failing to raise this issue on appeal. (SAP at 10, 12).

A. Relevant Facts

Petitioner's trial counsel made a motion for a new trial as follows:

> [Trial counsel]: Your honor, my client is advising me now he has information which would be grounds, he believes, for a new trial. I have not reviewed the information nor done any investigation related to it. So I'd like to --
>
> [The Court]: What are those grounds for new trial? Talk to me.
>
> [Trial counsel]: That his witness was intimidated prior to testifying by members of the group that had allegedly kidnapped [petitioner] and forced him to commit the robberies and she then -- when she testified did not testify as to everything that was within her knowledge and that there is information that she withheld.
>
> [The Court]: You are talking about the girlfriend?
>
> [Trial counsel]: The girlfriend. The information would have assisted him had she felt free to testify, which she apparently did not.
>
> [The Court]: Anything else?
>
> [Trial counsel]: No, Your Honor.

(RT 202-03). The prosecution opposed the motion without any argument. The trial court then denied the new trial motion as follows:

> Based upon the evidence in this case there is no basis for a new trial motion. Even if assuming, arguendo, that [petitioner] is able to sustain the idea that the girlfriend somehow is intimidated by the gang, which she testified that she is not in order to testify a certain way.
>
> This case involves the robbery of two individuals that are store clerks that independently identified him, that [petitioner] independently admitted to the jury and that the issue, in this case, was that [petitioner] was coerced and under duress and the jury disbelieved

> that. And he took the stand and testified. The jury just -- this is the court's opinion -- the jury did not believe his testimony.
>
> If there is any future evidence, you could always file a writ of habeas corpus. I receive them all the time in prison. I'll be happy to entertain that.
>
> At this point in time hearing the proffer and motion for new trial, that is respectfully denied.

(RT 203-04).

B. Analysis

To the extent petitioner asserts that he is entitled to habeas relief because the trial court violated California law in denying his motion for a new trial, his assertion fails. It is well established that habeas relief is not available for state law errors that are not of a constitutional dimension. See Estelle, 502 U.S. at 67-68; Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (federal habeas relief is unavailable for alleged error in the interpretation or application of state law).

Nor does the record reflect any federal due process violation. Petitioner asserts that the new evidence concerning his girlfriend -- that she had not testified truthfully because she had been threatened by the gang members, and if she had testified truthfully, she would have offered facts that supported petitioner's defense of duress -- was grounds for a new trial. (SAP at 10, 12). Even assuming the girlfriend's change in testimony was credible, however, there is no reasonable probability that additional testimony supporting the duress defense would have resulted in a different verdict. As the trial court pointed out, both robbery victims identified petitioner as the culprit and petitioner admitted to his role. Although petitioner testified that he was coerced into committing the crimes and therefore he should not have been found guilty, it is obvious that the jury did not find his story credible. Given the evidence in this case, even if petitioner's girlfriend had testified that she had been threatened by the same gang members whom petitioner alleged coerced him into committing the robberies, and further testified in a manner that supported petitioner's theory of defense, it is not likely that the jury would have accepted petitioner's duress defense and acquitted him. Accordingly, petitioner cannot show that the trial court improperly denied his motion for a new trial.

Petitioner's claim of ineffective assistance of appellate counsel likewise fails. Even if appellate counsel had argued on appeal that the trial court erroneously denied the motion for a new trial, there is no reasonable probability the argument would have been successful. See Moormann, 628 F.3d at 1106.

Pursuant to the Court's de novo review, habeas relief for Ground Five is denied.

GROUNDS SIX AND SEVEN: INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

In Ground Six, petitioner asserts that appellate counsel was ineffective for not arguing on appeal that trial counsel failed to object to the instruction on the defense of necessity. (SAP at 13, 15).

Petitioner's claim fails. As explained supra, the necessity instruction was supported by substantial evidence. Thus, it was not improperly given in petitioner's trial. It follows that there is no reasonable probability that appellate counsel could have successfully challenged the instruction on appeal. See Moormann, 628 F.3d at 1106.

In Ground Seven, petitioner contends that appellate counsel was ineffective for not arguing on appeal that trial counsel "failed to point . . . that others involved were not held to answer, even though it [was] alleged that others supplied [the] mens rea." (SAP at 14). In support, petitioner argues that appellate counsel failed to address whether trial counsel had "fully and completely investigate[d]" the case by making inquiries to the District Attorney's Office concerning the extent of the police investigation or looking into what efforts were being made to locate and question the individuals whom petitioner asserts forced him to commit the crimes. (SAP at 14, 16). According to petitioner, because the individuals he accused of forcing him to commit the robberies were arrested but never charged, his trial counsel failed to "take the proper procedures to ensure that petitioner['s] rights were respected." (SAP at 16).

To the extent petitioner's underlying claim faults trial counsel for not investigating why additional individuals were not prosecuted for the robberies, his claim is without merit. "Prosecutors have broad discretion to decide who to charge, and for what crime. That discretion is limited in that a prosecutor may not bring criminal charges against an individual without probable

cause to believe that the charges are valid." People v. Watts, 76 Cal.App.4th 1250, 1260, 91 Cal.Rptr.2d 1 (Cal.App. 1 Dist. 1999). Although petitioner maintains his innocence, he has not demonstrated that he was unlawfully charged by the prosecution with the robberies -- especially given that he admits to committing the robberies and he was identified by the victims as the culprit. Nor has petitioner explained how his trial counsel could have prevented petitioner from being charged. Additionally, petitioner's complaints about his trial counsel's investigation of the case are vague and conclusory. To the extent petitioner contends his trial counsel should have conducted further investigation, he fails to identify any specific information or facts that would have been obtained, or explain how further investigation as he describes would have produced a different result at trial. As such, his underlying claim of ineffective assistance for failure to investigate lacks merit. See James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) (rejecting ineffective assistance of counsel claim and stating, "[c]onclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief"); United States v. Smith, 924 F.2d 889, 896 (9th Cir. 1991) ("[U]nsupported and conclusory claims are not sufficient to show error."). In turn, his claim of ineffective assistance of appellate counsel similarly lacks merit. Given the strong evidence against petitioner, there is no reasonable probability that, had his appellate counsel raised a claim of ineffective assistance of trial counsel for failure to investigate as petitioner describes, the claim would have met with any success.

Pursuant to the Court's de novo review, habeas relief for Grounds Six and Seven is denied.

VI.

RECOMMENDATION

It is recommended that the District Judge issue an Order: (1) accepting this Report and Recommendation; and (2) directing that judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: October 26, 2016

PAUL L. ABRAMS
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to file Objections as provided in the Local Rules Governing Duties of Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.