No. _____

IN THE

Supreme Court of the United States

DAVID K. HOWELL

Petitioner,

v.

SHAWN HATTON, 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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QUESTION PRESENTED

This Court has repeatedly held that to receive a certificate of appealability ("COA"), a habeas petitioner need only show that "'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck v. Davis*, 137 S. Ct. 759, 773 (2017).

Petitioner David Howell testified at his murder trial that he accidentally killed his wife while intoxicated on methamphetamine, but his lawyer did not present expert testimony to corroborate his account. In her closing argument, the prosecutor called Howell's testimony "garbage" and said that "[u]sually you have a defense expert come in and testify to the effects of methamphetamine . . . but you don't have any of that." Howell alleged in habeas that his lawyer provided ineffective assistance by failing to investigate, prepare and present evidence of his intoxication, including expert testimony.

Is the Ninth Circuit's denial of a COA on Howell's ineffective assistance of counsel claim contrary to this Court's jurisprudence?

PARTIES AND LIST OF PRIOR PROCEEDINGS

The parties to this proceeding are Petitioner David Howell and Respondent Shawn Hatton, Warden of the Correctional Training Facility in Soledad, California. The California Attorney General represents Respondent.

Howell was convicted in the Los Angeles County Superior Court in *People v. Howell*, case no. MA046867, Judge Lisa M. Chung, presiding, in 2011. Judgment was entered against Howell on December 14, 2011. Reporter's transcript of trial, district court docket 50, lodgment 19, at 3301, 3322-3328.

The California Court of Appeal affirmed the judgment on appeal in *People v. Howell*, case no. B237884, on March 26, 2013 in an unpublished opinion. Petitioner's Appendix attached hereto ("Pet. App.") 81-90. That court denied a petition for rehearing on April 17, 2013. Pet. App. 80. On June 19, 2013, the California Supreme Court denied Howell's petition for review in case no. S210235. Pet. App. 79.

The Los Angeles County Superior Court, per the Honorable Carlos A. Chung, denied Howell's habeas corpus petition in *In re David Howell*, case no. MA046867, on December 8, 2014, in a reasoned decision without granting discovery or an evidentiary hearing. Pet. App. 75-78. The California Court of Appeal summarily denied Howell's habeas corpus petition in *In re David Howell on Habeas Corpus*, case no. B261889, on March 10, 2015. Pet. App.

74. The California Supreme Court summarily denied Howell's habeas corpus petition in *Howell (David Kenneth) on Habeas Corpus*, case no. S226409, on August 12, 2015. Pet. App. 73. The California Supreme Court summarily denied a second habeas corpus petition in *Howell (David Kenneth) on Habeas Corpus*, case no. S238977, on February 1, 2017. Pet. App. 72.

On October 4, 2018, United States Magistrate Judge Rozella A. Oliver filed a report recommending that Howell's habeas corpus petition be denied and the action dismissed with prejudice in *Howell v. Hatton*, C.D. Cal. case no. CV 15-3551 PA (RAO). Pet. App. 27-71. On November 20, 2018, United States District Judge Percy Anderson accepted the recommendation, denied the petition, dismissed the action with prejudice, and denied a COA. Pet. App. 24-26. Judgment was entered against Howell on November 21, 2018.

On November 8, 2019, the Ninth Circuit Court of Appeals, per the Honorable Barry G. Silverman and John B. Owens, entered an order denying Howell's motion for a COA in *Howell v. Hatton*, case no. 18-56646. Pet. App. 23.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE(S)

FEDERAL CASES

TABLE OF AUTHORITIES

PAGE(S)

STATE CASES

TABLE OF AUTHORITIES

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

David Howell petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals denying his motion for a COA.

OPINIONS BELOW

The Ninth Circuit's order denying Howell's COA motion is unreported. Pet. App. 23. The district court's judgment and its order accepting the magistrate judge's report and recommendation and dismissing the habeas action against Howell with prejudice are unreported. Pet. App. 25-26.

The opinion by the California Court of Appeal affirming Howell's judgment on appeal is unreported. Pet. App. 81-90. The order by the California Supreme Court denying Howell's petition for review is unreported. Pet. App. 79. The orders by the Los Angeles County Superior Court, California Court of Appeal, and California Supreme Court denying Howell's habeas corpus petitions are unreported. Pet. App. 72-78.

JURISDICTION

The Ninth Circuit's order denying Howell's COA motion was filed and entered on November 8, 2019. Pet. App. 23. The district court had

jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely under Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the United States Constitution

"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 defense."

28 U.S.C. § 2253

"**(a)** In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the

United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)."

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

A. Charges and Instructions

Howell was charged in Los Angeles County Superior Court with five crimes allegedly committed on August 24, 2009: the first degree murder of Tammy Howland (Count 1); the aggravated sexual assault of a child (Sarah H.) (Count 2); aggravated sexual assault of a child (Sarah H.) (oral copulation) (Count 3); forcible lewd act upon a child (Sarah H.) (Count 4); and another count of a forcible lewd act upon a child (Sarah H.) (Count 5). Clerk's transcript of trial ("CT") 51-55, 110.[1]

Howell's jury was instructed that "[f]or you to find the person guilty of the crimes in this case, that person must not only intentionally commit the prohibited act, but must do so with a specific intent or mental state." Reporter's transcript of trial ("RT") 2438.[2] The jury was told that "[t]he defendant is guilty of first degree murder if the People have proved that he

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[1] The CT is lodgment 18 of Respondent's Second Supplemental Lodging. *See* district court docket 50 and ECF document 51-1.

[2] The RT is lodgment 19 of Respondent's Second Supplemental Lodging. *See* district court docket 50 and ECF document 51-8.

acted willfully, deliberately, and with premeditation. . . . The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill." RT 2445. The jury was also told that "[t]he People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime." RT 2446. "When the person commits an unlawful killing but does not intend to kill and does not act with conscious disregard for human life, then the crime is involuntary manslaughter." *Id.*

At the time of Howell's trial, California juries could "consider evidence of voluntary intoxication or mental condition in deciding whether defendant actually had the required mental states for the crime." *People v. Steele*, 27 Cal. 4th 1230, 1253 (2002). Defendants could "produce lay or expert testimony to rebut the prosecution's showing of the required mental state." *People v. Mills*, 55 Cal. 4th 663, 672 (2012).

In Howell's case, the defense sought and obtained an instruction on voluntary intoxication. The court told the jurors: "You may consider that evidence only in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation or premeditation, or whether the defendant acted with the specific intent to commit the sex crimes charged in counts two through five." RT 2713-14. The court instructed that a "person is voluntary [sic] intoxicated if he becomes intoxicated by willingly using any

intoxicating drug, drink, or other substance knowing that it could produce an intoxication effect, or willingly assuming the risk of that effect." *Id.*

B. Evidence Presented at Trial

Howell testified that he was a drug addict who spent $400-500 per week on drugs. RT 2161. He testified that his wife used drugs, including on the day of her death when they had sex. RT 2161-62. He testified that he used drugs before and after he killed his wife, and that the killing was an accident. RT 2402-03, 2170. On the day of the homicide, his mind was racing because of his meth use. RT 2163, 2167. He smoked and injected quite a bit of meth. RT 2164-65, 2186. He didn't intend to hurt his wife. RT 2185-86, 2405, 2407. He and his wife "got into it a little bit" when they had sex that day, using handcuffs and duct tape. RT 2162-63. After having sex, he wanted to "get high some more" but Howland objected. RT 2163. He put his arm around her neck so he could use more drugs; she passed out. RT 2164-65. He took more drugs in the bathroom, and when he returned, he discovered that Howland was dead. RT 2166, 2186. His mind was racing and he panicked. He loved her with all his heart. RT 2166. He put a bag over her head because he "couldn't barely look at her face." RT 2167, 2187. He threw a blanket over her; he was confused and his mind was racing. RT 2167. He used more drugs. RT 2168.

Testimony of prosecution witnesses confirmed Howell's drug use. Joshua P. testified that Howell used drugs and that he found pipes in the house. RT 923-24. Deputy Sheriff Kenneth Saylor testified that Howell's house was messy and deplorable. RT 1247. Deputy Medical Examiner Juan Carrillo testified that the Howland had meth in her system; that meth use expedites the aging process, and that she was 34 years old but looked 45. RT 1303-04, 1324, 1324-26, 1334. Deputy Sheriff Edward Godfrey testified that the house was filthy and cluttered. RT 1559.

Defense pathologist Bonnell corroborated Howell's account that he accidentally killed Howland by placing his elbow around her neck and carotid artery and stated that Howland did not suffocate to death as a result of a bag being placed over her head. RT 2123-24, 2147. Bonnell testified that there was no evidence that a plastic bag was placed on Howland before she died and that the evidence was inconsistent with this theory (the prosecution's theory). RT 2147, 2149. Bonnell explained that the painkillers (opiates) found in Howell's body repress the ability to breathe. RT 2117.

Prosecution pathologist Carrillo admitted that carotid compression was a possible cause of death. RT 1309, 1312, 1317. Carrillo testified that pressure on the carotid artery can knock someone out and kill them. RT 1320. He testified that the defense theory of the cause of death would result

in the same "anatomic presentation" as the prosecution theory. RT 1321, 1330.

Deputy Sheriff Godfrey testified that he found a "Fetish Fantasy Series Lovers Fantasy Kit" in Howell's bedroom, RT 1566, supporting Howell's testimony that he and Howland had used handcuffs and duct tape when having sex before she was killed.

Howell denied raping Sarah H. RT 2177. Defense witness Adina Bush, a social worker, testified that when she spoke with Sarah H. on August 24, 2009, shortly after the offense, Sarah did not tell her that Howell had inappropriately touched her. RT 1905. Bush testified that when she spoke with Sarah two days later, Sarah told her that Howell did not put his penis or hands inside her. RT 1906. Wendy Bradshaw, another social worker and defense witness, testified that when she spoke to Sarah on September 10, 2009, Sarah said she was unsure that Howell penetrated her or that she and Howell had had sex. RT 1923, 1928, 1931.

Sarah H. testified that on August 24, 2009, Howell kissed her neck and mouth, touched her breasts and vagina, and that she felt something go into her vagina although she never saw Howell's penis. RT 955-58, 963-64. Howell had never done these things to her before. RT 955. Afterward, Howell said he was sorry. RT 975. Sarah H. told a nurse that Howell did not put his penis or fingers inside her and she told Bush that Howell did not put

his fingers inside her. RT 1026, 1028, 1038. She did not know if Howell ejaculated. RT 990-91.

Prosecution witness Bridgett Amis, a nurse, testified that when she interviewed Sarah H. on August 27, 2009, Sarah said she had never previously been physically or sexually abused or neglected. RT 1619-20. Sarah told her no object had been used. RT 1675, 1830. Amis' report reflects that Sarah did not suffer "genital discomfort or pain" or bleeding. RT 1821. Criminalist Leslie Thompson testified that no male DNA was found in the external genital sample. RT 1880-81.

In her closing argument, the prosecutor argued that "[t]here is no evidence of drug use in the house." RT 2723. She argued that there were holes in Howell's intoxication defense. "Number one, the defendant took the stand and claimed that he used meth, but he didn't tell us how much meth he used, didn't tell us how long he was using the meth, didn't give any specific details as to how intoxicated he may have been, didn't give any statement that he lost consciousness or had lack of memory of what was going on." RT 2742.

The prosecutor continued: "Usually you have a defense expert to come in and testify as to the effects of methamphetamine or whatever drug it may be on the person, what effect it may have been on the defendant, but you didn't have any of that. Again, this instruction [on intoxication] is causing or

asking you to speculate which you are not allowed to do as jurors." *Id.* She argued: "Defendant's story that he gave you was bogus, was garbage, made no sense, had so many holes in it that he couldn't even explain it on the stand." RT 2752.

In her closing, defense counsel argued that "we don't dispute" that Howell killed his wife, but we "do dispute that this is a first degree or second degree murder. I submit to you that this is a manslaughter where he took action by putting his arm over his wife's head -- neck, I'm sorry -- and causing the stop of the blood flow on both sides of the neck to go to the brain in a matter of five to ten seconds, losing consciousness and beyond that, causing death . . . ." RT 2754-55.

Defense counsel argued that the prosecutor "asked you not to believe Mr. Howell" "but Mr. Howell tells you he was a drug addict. There is also drug use with his wife, as well." RT 2758. She argued that "Mr. Howell was focused on getting his next fix and from that focus, from that focus of someone who is a drug addict using hundreds of dollars in weeks, in a month, he put his arm over Miss Howland's neck and caused her death . . . in a very short time period." *Id.* "I submit to you that he is guilty of involuntary manslaughter. There was no intent to kill." She asked the jury "to return a verdict of guilty on the manslaughter and guilty on the molestation charges, but not on the oral cop and not on the penetration." RT 2766.

In rebuttal, the prosecutor argued that Howell was not credible and that his drug use was speculative. RT 2767-68. She said "defendant took the stand. We don't know how much drugs he used that night. We don't know how he paid for the drugs. We don't know the length of time that he was using the drugs, but we do know one thing, that he was not voluntarily intoxicated. He knew exactly what he was doing. Counsel wants you to speculate as to what he may have been doing . . . ." RT 2768.

During deliberations, the jury asked for a read back of the testimony of Bush and Godfrey. RT 2784-85. The jury also asked for a clarification of the difference between first and second degree murder. RT 2785.

Howell was convicted on all counts and sentenced to 72 years to life in state prison. Pet. App. 27. The judgment was affirmed on appeal and his state and federal habeas corpus petitions were denied without discovery or an evidentiary hearing. Pet. App. 25-90. The district court and Ninth Circuit denied a COA. Pet. App. 23-24.

REASONS FOR GRANTING THE WRIT

A. COA Standards

A habeas petitioner has no absolute right to appeal a district court's denial of a petition but instead must obtain a COA to pursue an appeal. *Buck*, 137 S. Ct. at 773. Obtaining a COA "'does not require a showing that the appeal will succeed.'" *Welch v. United States*, 136 S. Ct. 1257, 1263

(2016). To receive a COA, a petitioner "need only demonstrate 'a substantial showing of the denial of a constitutional right.'" *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* "The COA inquiry asks only if the District Court's decision was debatable." *Id.* at 348. This is a "low" standard. *Frost v. Gilbert*, 835 F.3d 883, 888 (9th Cir. 2016) (en banc). A petitioner need only "prove 'something more than the absence of frivolity.'" *Miller-El*, 537 U.S. at 338 (quotation marks omitted).

B. AEDPA Standards

Howell filed his federal habeas petition after the effective date of the Anti-terrorism and Effective Death Penalty Act ("AEDPA"); therefore, his petition is governed by AEDPA. *Woodford v. Garceau*, 538 U.S. 202, 205, 210 (2003). To obtain relief under AEDPA, a petitioner must show that his constitutional rights were violated under 28 U.S.C. § 2254(a) and that § 2254(d) does not bar relief on any claim adjudicated on the merits in state court. *Frantz v. Hazey*, 533 F.3d 724, 735-737 (9th Cir. 2008) (en banc).

Under § 2254(d), a habeas petition challenging a state court judgment:

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–(1)

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

The relevant state court decision for purposes of federal review is the last reasoned decision that resolves the claim at issue. *Curiel v Miller*, 830 F.3d 864, 869 (9th Cir. 2016) (en banc). "When at least one state court has rendered a reasoned decision, but the last state court to reject a prisoner's claim issues an order 'whose text or accompanying opinion does not disclose the reason for the judgment,'" federal habeas courts "'look through' the mute decision and presume the higher court agreed with and adopted the reasons given by the lower court." *Id.* at 870; *see also Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

"'[C]learly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003).

A "'state court decision is "contrary to" clearly established Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases *or* if the state court confronts a set of facts materially indistinguishable from those at issue in a decision of

the Supreme Court and, nevertheless, arrives at a result different from its precedent.'" *Cudjo v. Ayers*, 698 F.3d 752, 761 (9th Cir. 2012) (original emphasis).

A state court unreasonably applies federal law when it identifies the correct governing legal principle but unreasonably applies it to the facts of the case. *Id.*

A state court unreasonably determines the facts under § 2254(d)(2) when its finding of fact is unsupported or contradicted by the record or when the fact-finding process itself was defective. *Brumfield v. Cain*, 135 S. Ct. 2269, 2277-2282 (2015); *Taylor v. Maddox*, 366 F.3d 992, 999-1001 (9th Cir. 2004).

When a federal court concludes that the state court decision is contrary to or an unreasonable application of federal law, or is based on an unreasonable factual determination, it reviews the claim *de novo* in assessing whether the petitioner's constitutional rights were violated[3] and it can consider evidence not presented in state court. *Brumfield*, 135 S. Ct. at 2276.

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[3] *Panetti v.Quarterman*, 551 U.S. 930, 953 (2007); *Frantz*, 533 F.3d at 735; *Maxwell v. Roe*, 628 F.3d 486, 506 (9th Cir. 2010).

C. The Court Should Grant a COA on Howell's Ineffective Assistance of Counsel Claim

Howell alleges in Ground Five of his habeas petition that his trial lawyer provided prejudicially deficient performance by failing to investigate, prepare and present evidence of his methamphetamine intoxication, including expert testimony, to raise a reasonable doubt that he had the intent required for first degree murder and the other charges. Petition, district court docket 53-4, at 21-28; traverse, district court docket 88, memorandum at 5-24.

Howell raised this claim in habeas petitions filed in all three levels of the California state courts; each petition raised the same arguments under *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny, and each relied on the same evidence and supporting documents. District court docket 16, lodgments 3, 6.

The relevant state court ruling is the reasoned decision by the Los Angeles County Superior Court. Pet. App. 75-78; *Wilson*, 138 S. Ct. at 1192. The Superior Court summarily denied relief, holding that "[t]rial counsel engaged in sound trial tactics and strategy when she opted not to call [an intoxication] expert" because calling such an expert "would only highlight the fact that the petitioner was coherent and aware of his actions, making him

even more culpable in the jury's eyes." Pet. App. 77.[4] The magistrate judge likewise found "that counsel made reasonable tactical choices in presenting a defense for Petitioner." Pet. App. 61. According to the magistrate judge, "[c]ounsel reasonably could have concluded that too much emphasis on Petitioner's drug use would have undermined the argument that the killing was unintentional." *Id.*

The report is mistaken. The record does not support a finding that counsel made a reasonably informed decision to forego testimony by a drug expert or to curtail an investigation of evidence of Howell's intoxication to try to raise a reasonable doubt that he had the required specific intent. Howell made specific, detailed allegations in state court of counsel's deficient performance and of the evidence that was available to support an intoxication defense. He submitted portions of the Diagnostic and Statistical Manual of Mental Disorders, 5th edition ("DSM-5") with his state petitions to show the type of information counsel could readily find had she conducted a reasonable investigation and the kind of testimony a properly prepared mental health expert could have given at trial. He quoted language explaining that meth intoxication impairs perception, attention, thinking, judgment, psychomotor

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[4] The Superior Court did not rule on the question of prejudice, and therefore this issue is reviewed *de novo*. *Rompilla v. Beard*, 545 U.S. 374, 390 (2005).

behavior, and interpersonal behavior. *See* district court docket 16, lodgment 6.

Howell thus alleged a prima facie case for relief in state court, all that was needed for the state court to issue an order to show cause and order an evidentiary hearing. *People v. Duvall*, 9 Cal. 4th 464, 474-75 (1995); *Nunes v. Mueller*, 350 F.3d 1045, 1054 (9th Cir. 2003). He was not required to prove his claims at the pleading stage. *Id.* The state court's summary denial, made without affording Howell discovery or a hearing, is contrary to and an unreasonable application of *Strickland*, 466 U.S. 668, and is also based on an unreasonable determination of facts. *Nunes*, 350 F.3d at 1054. "While there may be instances where the state court can determine without a hearing that a criminal defendant's allegations are entirely without credibility or that the allegations would not justify relief even if proved, that was certainly not the case here." *Id.* at 1055; *Howard v. Clark*, 608 F.3d 563, 569 (9th Cir. 2010) (California Superior Court unreasonably applied *Strickland* by ruling that trial counsel performed effectively without the benefit of "an affidavit or testimony from [petitioner's] trial counsel").

The district court should have granted relief on the existing record;[5] at a minimum, it should have ordered an evidentiary hearing to allow Howell to further prove his entitlement to relief. "Because the factual basis for [Howell's] claim was adequately proffered to the state court, he is entitled to an evidentiary hearing [because] he has not previously received a full and fair opportunity to develop the facts of his claim and he presents a 'colorable claim' for relief." *Earp v. Ornoski*, 431 F.3d 1158, 1169 (9th Cir. 2005).

The Report and Recommendation does not compel a different conclusion. The Report states that "[c]ounsel reasonably could have concluded that too much emphasis on Petitioner's drug use would have undermined the argument that the killing was unintentional." Pet. App. 61. But expert testimony that Howell's judgment, thinking and perception were impaired because of intoxication would have been consistent with the accident defense presented at trial and would have bolstered the argument that he did not form the required specific intent.

The Report quotes *Strickland* for the point that "[s]trategic choices made after thorough investigation of law and facts relevant to plausible

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[5] *Bemore v. Chappell*, 788 F.3d 1151, 1160, 1176 (9th Cir. 2015); *Williams v. Woodford*, 859 F. Supp. 2d 1154, 1162 (E.D. Cal. 2012) (opinion by Chief Ninth Circuit Judge Kozinski).

options are virtually unchallengeable." *Id.* But the record here does not show that trial counsel made a "thorough investigation of law and facts"; Howell has not received a hearing in state or federal court and was unable to submit a declaration from trial counsel in state court as an incarcerated, indigent, *pro se* petitioner.

The Report quotes *Gerlaugh v. Stewart*, 129 F.3d 1027, 1033 (9th Cir. 1997), as "rejecting [the] claim that counsel was deficient because 'counsel knew about the evidence and looked into it, but chose as a tactical matter not to use it.'" *Id.* But the habeas petitioner there had a state post-conviction hearing where trial counsel explained that "[h]e believed the [allegedly wrongly omitted] testimony could backfire." 129 F.3d at 1032-33. There is no such evidence of trial counsel's knowledge or reasoning with regard to the evidence Howell contends was unreasonably omitted.

The Report states that Howell fails to show prejudice because "he fails to present any evidence that he was actually suffering from any . . . effects [of substance abuse] or explain how they would have changed the outcome of his case." Pet. App. 61-62. This overlooks Howell's trial testimony of his drug use and its effects on the day of the offense -- *e.g.*, he was confused and his mind was racing -- and the prosecutor's exploitation of the lack of corroborating expert testimony in her closing. *See Weeden v. Johnson*, 854 F.3d 1063, 1072 (9th Cir. 2017) (finding prejudice on claim of ineffective

assistance for failure to investigate and present mental state defense to first-degree murder charge because "testimony from a qualified expert 'would have added an entirely new dimension to the jury's assessment' of the critical issue of [defendant's] mens rea").

The Report cites *Totten v. Merkle*, 137 F.3d 1172, 1175 (9th Cir. 1998), as "rejecting [a] claim of ineffective assistance because it was 'only speculative that the presentation of a mental impairment defense based on methamphetamine use was likely to change the outcome of the jury verdict." Pet. App. 62. But "Totten's testimony at trial was full of inconsistencies," 137 F.3d at 1175; Howell's was not. Further, as shown above, Howell's prosecutor highlighted the lack of corroborating expert testimony in her closing, demonstrating the prejudice from counsel's deficient performance. *Buck*, 137 S. Ct. at 776.

The Report faults Howell for not providing "an affidavit from any potential expert that would have given testimony likely to affect the verdict in this case." Pet. App. 62. But the *pro se*, indigent, incarcerated Howell was in no position to submit an expert declaration to support his claim in state court and, as shown above, his citations to the DSM-5 and published opinions granting relief on claims like his were sufficient to describe the type of expert testimony that could have been given at trial and to state a prima facie claim for relief. Howell has at least met the low threshold for a COA.

CONCLUSION

For the foregoing reasons, the Court should grant Howell's petition, reverse the judgment of the Ninth Circuit, and grant a COA on the ineffective assistance of counsel claim.

Respectfully submitted,

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DATED: February 4, 2020

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