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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 8 2019

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

DAVID K. HOWELL, Petitioner-Appellant, v. SHAWN HATTON, Warden, Respondent-Appellee.	No. 18-56646 D.C. No. 2:15-cv-03551-PA-RAO Central District of California, Los Angeles ORDER

Before: SILVERMAN and OWENS, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAVID K. HOWELL,

Petitioner,

v.

SHAWN HATTON,

Respondent.

Case No. CV 15-03551 PA (RAO)

ORDER DENYING CERTIFICATE OF APPEALABILITY

The Court has reviewed the Report and Recommendation of United States Magistrate Judge and the other papers on record in these proceedings. For the reasons set forth in the Magistrate Judge's Report and Recommendation, filed October 4, 2018, the Court finds that the Petitioner has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253, Fed. R. App. P. 22(b); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

IT IS ORDERED that the Certificate of Appealability is denied.

DATED: November 20, 2018

PERCY ANDERSON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAVID K. HOWELL,

Petitioner,

v.

SHAWN HATTON,

Respondent.

Case No. CV 15-03551 PA (RAO)

JUDGMENT

Pursuant to the Court's Order Accepting Findings, Conclusions, and Recommendations of United States Magistrate Judge,

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

DATED: November 20, 2018

PERCY ANDERSON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAVID K. HOWELL,

Petitioner,

v.

SHAWN HATTON,

Respondent.

Case No. CV 15-03551 PA (RAO)

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the First Amended Petition, all of the records and files herein, and the Magistrate Judge's Report and Recommendation (the "Report"). The Court has further engaged in a *de novo* review of those portions of the Report and Recommendation issued on October 4, 2018, to which Petitioner has objected. The Court hereby accepts and adopts the findings, conclusions, and recommendations of the Magistrate Judge.

IT IS ORDERED that the First Amended Petition is denied, and Judgment shall be entered dismissing this action with prejudice.

DATED: November 20, 2018

PERCY ANDERSON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

DAVID K. HOWELL, Petitioner, v. SHAWN HATTON, Respondent.	Case No. CV 15-3551 PA (RAO) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

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

I. INTRODUCTION

In 2011, a jury in the Los Angeles County Superior Court convicted David K. Howell ("Petitioner") of first-degree murder, two counts of aggravated sexual assault of a child under the age of 14, and two counts of forcible lewd act on a child under the age of 14. (Clerk's Transcript ("CT") 158-62.) After Petitioner admitted that he had served a prior prison term, the trial court sentenced him to 72 years to life in prison. (CT 208-13.)

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In 2012, Petitioner appealed to the California Court of Appeal, which affirmed the judgment in a reasoned decision. (Lodg. Nos. 9-12.) A petition for rehearing was denied by the state appellate court. (Lodg. Nos. 13-14.) In 2013, the California Supreme Court denied his Petition for Review summarily. (Lodg. Nos. 1-2.)

Thereafter, in 2014, Petitioner filed a habeas corpus petition in the Los Angeles County Superior Court, which was denied in a written decision. (Lodg. Nos. 3-4.) Subsequent petitions filed in the California Court of Appeal and California Supreme Court were denied summarily. (Lodg. Nos. 5-6, 15-17.) Finally, a second habeas petition filed in the California Supreme Court in 2016 was also denied summarily in February 2017. (Lodg. Nos. 20-21.)

On May 7, 2015, Petitioner, a California state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition"), pursuant to 28 U.S.C. § 2254, raising 17 grounds for relief. (Docket No. 1.) Respondent moved to dismiss the Petition, contending that several claims were unexhausted and one claim was not cognizable. (Docket No. 26.) Petitioner opposed the motion to dismiss. (Docket No. 28.)

On July 7, 2016, the Court filed an Interim Report and Recommendation, finding that Ground Four, part of Ground Ten, and Ground Thirteen of the Petition were unexhausted, and that Ground Seventeen was not cognizable. (Docket No. 34.) The District Court accepted the findings of the Interim Report and ordered Petitioner to either (1) elect to proceed only on the exhausted claims or (2) consent to dismissing the Petition without prejudice so that he could return to state court to exhaust all of this claims. (Docket No. 38.) Instead, Petitioner requested a stay and abeyance to exhaust the unexhausted claims in state court, but also indicated that he would proceed on the currently exhausted claims only were the Court not to grant him a stay and abeyance. (Docket Nos. 39, 41.)

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Thereafter, the Court appointed counsel to represent Petitioner in this action. (Docket No. 45.) After counsel exhausted Petitioner's claims in Grounds Four, Ten, and Thirteen in state court, the Court ordered him to file an amended federal petition. (Docket No. 50.) On February 24, 2017, Petitioner's counsel filed a First Amended Petition ("FAP") and supporting Memorandum ("Memo."), raising the same 16 claims raised in the original Petition, but omitting the claim that the Court had previously determined to be not cognizable. (Docket Nos. 53, 61.) Respondent opposed the FAP, arguing that several of the claims were untimely. (Docket No. 57.) The Court found all the claims to be timely and ordered Respondent to answer the FAP on its merits. (Docket No. 73.)

On January 12, 2018, Respondent filed an Answer to the FAP and a supporting memorandum ("Answer"). (Docket No. 77.) Respondent had previously lodged the relevant state records. (Docket Nos. 16, 27, 51, 58.) Finally, Petitioner filed a Traverse. (Docket No. 88.)

II. PETITIONER'S CLAIMS

The Petition raises the following grounds for relief:

1. The trial court gave "argumentative, contradictory, [and] confusing" jury instructions that "shifted the burden of proof" in violation of Petitioner's constitutional rights.

2. Allowing the jury to return a verdict on an uncharged crime violated Petitioner's constitutional right to due process and a fair trial.

3. The prosecutor used "deceptive and reprehensible methods" that lessened the burden of proof in violation of Petitioner's constitutional rights.

4. The prosecutor violated Petitioner's constitutional rights by using his "right to remain silent against him" at trial.

5. Trial counsel provided ineffective assistance by failing to investigate and present evidence of Petitioner's intoxication.

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6. Trial counsel provided ineffective assistance by failing to investigate and demonstrate that Petitioner was incompetent to stand trial.

7. Trial counsel provided ineffective assistance by failing to object to erroneous jury instructions and verdict forms regarding an uncharged crime.

8. Trial counsel provided ineffective assistance by failing to object to erroneous jury instructions that rendered his trial fundamentally unfair.

9. Trial counsel provided ineffective assistance by failing to request a "pinpoint" jury instruction regarding "unconsciousness due to voluntary intoxication."

10. Trial counsel provided ineffective assistance by failing to request supporting defense theory jury instructions.

11. Trial counsel provided ineffective assistance by failing to impeach "key prosecution witnesses."

12. Trial counsel provided ineffective assistance by failing to object to the prosecutor's "continuous misconduct."

13. Trial counsel provided ineffective assistance by failing to object to the prosecutor's improper attempts to impeach Petitioner by commenting on Petitioner's right to remain silent.

14. Appellate counsel provided ineffective assistance by failing to "fully raise issues" on appeal and failing to "expand the record" to support claims that trial counsel was ineffective.

15. Appellate counsel provided ineffective assistance by failing to "raise non-frivolous claims on direct appeal."

16. The "cumulative effect" of multiple constitutional errors at trial rendered his trial fundamentally unfair.

(FAP, Memo. at 3-50.)

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III. FACTUAL SUMMARY

The Court adopts the factual summary set forth in the California Court of Appeal's opinion affirming Petitioner's conviction on appeal.[1]

People's Evidence

> In the evening on August 23, 2009, [Petitioner] and his wife, Tammy Howland, argued inside their bedroom. Howland exited the bedroom and walked into the kitchen to get something to drink. Howland's 15-year-old son, J.P., asked her if she was okay. She replied that she was okay and walked back into the bedroom. Before J.P. went to sleep in the living room, he heard Howland yell to him to "'please help.'" He did not intervene because he was scared of [Petitioner]. [Petitioner] "used to beat [him]."
>
> That night, [Petitioner] forced Howland's daughter, S.H., to have sex with him. S.H. was 13 years old, and [Petitioner] was not her biological father. While S.H. was sleeping in the living room, [Petitioner] picked her up and carried her into her mother's bedroom. Howland was lying on the bed with a blanket covering her head. She was not moving or making any sounds. [Petitioner] placed S.H. on the bed next to her mother. [Petitioner] kissed S.H. on the neck and mouth and touched her breasts. He removed his and S.H.'s clothing. [Petitioner] placed his mouth on S.H.'s vaginal area. [Petitioner] then "put [her] legs on his shoulders." S.H. felt "something go inside [her] vagina." It was painful, and she started to cry. [Petitioner] said that "if [she] didn't stop crying, he was going to duct tape [her] head next." [Petitioner] was on top of S.H., moving his body back and forth.
>
> J.P. awoke at noon. He tried to open the door to his mother's bedroom, but "there was this chair in the way, which prevented [him] from opening it." [Petitioner], who was inside the bedroom, asked J.P. what he wanted. J.P. replied that he was looking for S.H. [Petitioner] said that S.H. was with him. J.P. went back into the living room.

[1] 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); 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. 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.

[Petitioner] eventually exited the bedroom. He had a "big grin on his face" and "pushed [J.P.] out of the way." [Petitioner] went into the garage and drove away.

J.P. entered his mother's bedroom. Howland was lying in bed on her stomach "with her hands tied behind her back with duct tape." A plastic bag completely covered her head. The bag was secured with duct tape "from her neck to the top of her head." S.H. "was at the edge of the bed on her knees, crying."

Howland was dead. The forensic pathologist who performed an autopsy opined that she had "died as a result of asphyxia, which is the lack of oxygen due to suffocation." The suffocation was caused by the plastic bag over her head.

Defense Evidence

[Petitioner] testified as follows: On August 23, 2009, he and Howland got into an argument about buying a car. Howland wanted to buy the car, but [Petitioner] did not want to buy it. The argument ended, and the couple made up. [Petitioner] took drugs and had sex with Howland. He "wanted to get high some more," but Howland was "complaining and nagging" that he should take a shower and get ready for work. [Petitioner] put his arm around Howland's neck "to put her to sleep." When her body went "limp," he "laid her down [on] the bed." His "intent was just to put her to sleep for a while so [he could] continue and use more drugs." He duct-taped her hands behind her back so that she would be unable "to stop [him] from doing more drugs." [Petitioner] then went into the bathroom, where he smoked and injected methamphetamine. When he exited the bathroom, Howland was dead. [Petitioner] put a plastic bag over her head because he could not bear to look at her face. He put some duct tape around the bag to hold it in place.

[Petitioner] denied having sex with S.H. He testified that she was not inside the bedroom with him.

The defense retained a forensic pathologist to review the autopsy report and photographs. He opined that the cause of death was "consistent with a carotid compression," which occurs when a person uses his forearm to compress the carotid artery in the neck of another person. Peace officers occasionally use this technique to subdue an arrestee. "[Y]ou block blood flow into the head and into the brain without blocking the airway. And the purpose of that is to render the person rapidly unconscious so they can be controlled or handcuffed." If the compression completely obstructs the carotid artery for approximately one minute, the person will die "unless they get defibrillated."

(Lodg. No. 12 at 2-3 (internal citation omitted).)

IV. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Harrington v. Richter*, 562 U.S. 86, 98, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). In particular, this Court may grant habeas relief only if the state court adjudication was contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court or was based upon an unreasonable determination of the facts. *Id.* at 100 (citing 28 U.S.C. § 2254(d)). "This is a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt[.]" *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011) (internal citation and quotations omitted).

A state court's decision is "contrary to" clearly established federal law if: (1) the state court applies a rule that contradicts governing Supreme Court law; or (2) the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court but nevertheless arrives at a result that is different from the Supreme Court precedent. *See Lockyer v. Andrade*, 538 U.S. 63, 73, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (citing *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). A state court need not cite or even be aware of the controlling Supreme Court cases "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002).

A state court's decision is based upon an "unreasonable application" of clearly established federal law if it applies the correct governing Supreme Court law but unreasonably applies it to the facts of the prisoner's case. *Williams*, 529 U.S. at 412-13. A federal court may not grant habeas relief "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*." *Id.* at 411 (emphasis added).

In determining whether a state court decision was based on an "unreasonable determination of the facts" under 28 U.S.C. § 2254(d)(2), such a decision is not unreasonable "merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301, 130 S. Ct. 841, 175 L.Ed.2d 738 (2010). The "unreasonable determination of the facts" standard may be met where: (1) the state court's findings of fact "were not supported by substantial evidence in the state court record"; or (2) the fact-finding process was deficient in some material way. *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012) (citing *Taylor v. Maddox*, 366 F.3d 992, 999-1001 (9th Cir. 2004)).

In applying these standards, a federal habeas court looks to the "last reasoned decision" from a lower state court to determine the rationale for the state courts' denial of the claim. *See Cannedy v. Adams*, 706 F.3d 1148, 1156 (9th Cir. 2013) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991)). There is a presumption that a claim that has been silently denied by a state court was "adjudicated on the merits" within the meaning of 28 U.S.C. § 2254(d), and that AEDPA's deferential standard of review therefore applies, in the absence of any indication or state-law procedural principle to the contrary. *See Johnson v. Williams*, 568 U.S. 289, 298, 133 S.Ct. 1088, 185 L.Ed.2d 105 (2013) (citing *Richter*, 562 U.S. at 99).

Here, Petitioner raised Ground Ten (with the exception of a single sub-claim of ineffective assistance therein) in both the California Court of Appeal and the California Supreme Court on direct appeal. (*See* Lodg. Nos. 1, 9.) The California Court of Appeal rejected Petitioner's claims on the merits in a reasoned opinion, and the California Supreme Court denied them without comment or citation. (*See*

Lodg. Nos. 12, 16.) Accordingly, under the "look through" doctrine, these claims are deemed to have been rejected for the reasons given in the last reasoned decision on the merits, which was the Court of Appeal's decision, and entitled to AEDPA deference. *Ylst*, 501 U.S. at 803; *see also Wilson v. Sellers*, __ U.S. __, 138 S. Ct. 1188, 1194, __ L.Ed.2d __ (2018) (reaffirming *Ylst*'s "look through" doctrine).

Petitioner raised all the remaining claims (including the aforementioned sub-claim contained in Ground Ten) in the California Supreme Court on state habeas review. (*See* Lodg. Nos. 15, 20.) That court denied the claims without comment or citation. (*See* Lodg. Nos. 17, 21.) Because no reasoned state court decision exists as to the denial of these claims, this Court must conduct an independent review of the record to determine whether the California courts were objectively unreasonable in applying controlling federal law. *Walker v. Martel*, 709 F.3d 925, 939 (9th Cir. 2013). Although the federal habeas court independently reviews the record, it must "still defer to the state court's ultimate decision." *Libberton v. Ryan*, 583 F.3d 1147, 1161 (9th Cir. 2009) (internal quotations and citation omitted). As such, AEDPA deference applies to all of Petitioner's claims.

V. DISCUSSION

A. Ground One: Jury Instructional Error

In Ground One, Petitioner claims that the trial court committed several errors in instructing the jury that violated his constitutional rights to due process and a fair trial. (FAP, Memo. at 3-9.) First, he contends that the court "highlight[ed]" the first-degree murder instructions to the jury, which shifted the prosecutor's burden of proof. (FAP, Memo. at 3-5.) Second, he argues that the court's instruction on voluntary intoxication was erroneous. (FAP, Memo. at 5-6.) Third, he claims that the trial court's instruction on involuntary manslaughter failed to account for the possibility that he acted only with criminal negligence while "sexual role playing." (FAP, Memo. at 6-7.) Fourth, he asserts that the court erred by giving two separate instructions on the use of circumstantial evidence. (FAP, Memo. at 8.) Finally, he

argues that jury was not instructed that it "must all agree" to a specific theory of first-degree murder. (FAP, Memo. at 8.)

The California Supreme Court denied these claims without explanation on collateral review. (*See* Lodg. Nos. 15-17.)

1. *Applicable Federal Law*

Challenges to jury instructions based solely on alleged errors of state law do not state cognizable claims in federal habeas corpus proceedings. *See Estelle v. McGuire*, 502 U.S. 62, 71-72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) ("[T]he fact that [an] instruction was allegedly incorrect under state law is not a basis for habeas relief."). Rather, a claim of instructional error warrants federal habeas relief only if the error "so infected the entire trial that the resulting conviction violates due process." *Waddington v. Sarausad*, 555 U.S. 179, 191, 129 S.Ct. 823, 172 L.Ed.2d 532 (2009) (internal quotations omitted). In making that determination, the instructional error "must be considered in the context of the instructions as a whole and the trial record." *Estelle*, 502 U.S. at 72. A habeas petitioner must show that there was a "reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Middleton v. McNeil*, 541 U.S. 433, 437, 124 S.Ct. 1830, 158 L.Ed.2d 701 (2004) (per curiam) (internal quotations omitted); *see also Waddington*, 555 U.S. at 191 ("[I]t is not enough that there is some slight *possibility* that the jury misapplied the instruction.") (internal quotations omitted). Even if a constitutional error occurred, federal habeas relief is unavailable unless the error caused prejudice, i.e., the error had a substantial and injurious effect or influence in determining the jury's verdict. *Hedgpeth v. Pulido*, 555 U.S. 57, 61-62, 129 S.Ct. 530, 172 L.Ed.2d 388 (2008) (per curiam) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)).

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2. *First-Degree Murder Instructions*

At the close of evidence, the trial court instructed the jury on the elements of first-degree murder, second-degree murder, and involuntary manslaughter (CALCRIM Nos. 520, 521, 580). (CT 137-39.) During deliberations, the jury sent a note asking, "Could we get the difference between first and second degree murder clarified by the judge?" (CT 152.) After consulting with counsel for each side, the court gave the following written response: "First Degree Murder requires the People to prove that the Defendant acted willfully, deliberately and with premeditation as defined in Calcrim 521. For second degree murder, refer to Calcrim 520." (CT 153; Reporter's Transcript ("RT") 2785-87.)

Petitioner contends that the court's answer to the jury's question violated his rights by "highlight[ing]" first-degree murder over second-degree murder. (FAP, Memo. at 4.) He argues that the court's instruction capitalized the first letter in each word of first-degree murder, but not in the subsequent reference to second-degree murder, and referred the jury to an instruction that was titled, "First Degree Murder," without a corresponding instruction entitled, "Second Degree Murder." (FAP, Memo. at 4.) Petitioner does not, however, assert that any of the legal principles in the instructions were erroneous under California law or offer any applicable Supreme Court case law suggesting that the trial court's capitalization of certain letters so infected the trial that the resulting conviction violated due process. *See Waddington*, 555 U.S. at 191. Thus, the state court's rejection of this claim was reasonable. *See, e.g.*, *Gonzalez v. Uribe*, No. ED CV 10-859-GHK E, 2011 WL 5417122, at *17 (C.D. Cal. Jul. 22, 2011) (finding instruction that "arguably highlighted the prosecution's theory of the case" did not violate due process because it "did not in any way lessen the prosecution's burden of proof"), *report and recommendation adopted*, 2011 WL 5325772 (C.D. Cal. Nov. 6, 2011).

Petitioner also claims that CALCRIM No. 520 failed to explain to the jury that they must find Petitioner guilty of second-degree murder if the prosecution did

not prove beyond a reasonable doubt the elements of first-degree murder. (FAP, Memo. at 4-5.) But this exact principle was covered in another instruction. CALCRIM No. 521 stated that the prosecution had the "burden of proving beyond a reasonable doubt that the killing was first degree murder" and the failure to meet this burden required the jury to find Petitioner "not guilty of first degree murder." (CT 138.) The burden of proof necessary for a conviction of first-degree murder was repeated in CALCRIM No. 640, explaining to the jury how it should complete the homicide verdict forms. (CT 139-40.) In deciding whether an instruction violated due process, the Court is required to consider the instructions as a whole. *See Cupp v. Naughten*, 414 U.S. 141, 146-47, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973) (holding that a challenged instruction "may not be judged in artificial isolation, but must be viewed in the context of the overall charge"). In so doing, the Court finds that the instructions as a whole adequately explained to the jury the burden of proof necessary to distinguish the degrees of murder. Accordingly, the state court reasonably rejected this claim.

3. *Voluntary Intoxication Instructions*

The trial court instructed the jury on voluntary intoxication in relevant part as follows:

> You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation, or whether the defendant acted with the specific intent to commit the sex crimes charged in counts 2 through 5. Voluntary intoxication does not apply to negate the implied malice supporting the crime of second degree murder.

(CT 148.)

Petitioner contends that the last sentence in the instruction was not part of California's standard instruction in CALCRIM No. 625 and, thus, was erroneous. (FAP, Memo. at 5.) The trial court's additional language, however, accurately reflected California law because the jury may consider evidence of Petitioner's

voluntary intoxication only for the limited purpose of deciding whether Petitioner "premeditated, deliberated, or harbored *express* malice aforethought." *See* Cal. Penal Code § 29.4(b) (italics added); *see also People v. Lam*, 184 Cal.App.4th 580, 585, 108 Cal.Rptr.3d 877, (2010) (citing cases that "have held a voluntary intoxication instruction does not apply to negate implied malice"). Because the instruction on voluntary intoxication was a correct statement of law, he is not entitled to relief. *See Spivey v. Rocha*, 194 F.3d 971, 977 (9th Cir. 1999) (holding that habeas relief not warranted on instructional error claim where challenged instruction was a correct statement of state law).

Petitioner also challenges the instruction because it does not include a scienter requirement that the defendant act with an *unlawful* intent to kill. (FAP, Memo. at 5.) Under the facts of this case, however, there is no logical argument that the jury could have used any evidence of intoxication to negate a lawful intent to kill (e.g., acting in self-defense or defense of others). Thus, there is no reasonable likelihood that the jury interpreted CALCRIM No. 625 in a way that violated the Constitution. *Middleton*, 541 U.S. at 437. Accordingly, the state court reasonably rejected this claim.

4. *Involuntary Manslaughter Instructions*

At trial, the court instructed the jury on the crime of involuntary manslaughter in relevant part as follows:

> When a 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.
>
> The difference between other homicide offenses and involuntary manslaughter depends on whether the person was aware of the risk to life that his actions created and consciously disregarded that risk. An unlawful killing caused by a willful act done with full knowledge and awareness that the person is endangering the life of another, and done in conscious disregard of that risk is murder. An unlawful killing resulting from a willful act committed without intent to kill and without conscious

> disregard of the risk to human life is involuntary manslaughter.
>
> The defendant committed involuntary manslaughter if:
>
> 1. The defendant committed a crime, Battery, that posed a high risk of death or great bodily injury because of the way in which it was committed;
>
> AND
>
> 2. The defendant's acts unlawfully caused the death of another person.

(CT 138.)

Petitioner asked the trial court to include language in the instruction that would have allowed the jury to find Petitioner guilty of involuntary manslaughter if he acted with "criminal negligence" in the killing of Howland. (RT 2701-02.) The court denied the request, ruling that such language would only be appropriate if there was evidence that Petitioner acted with criminal negligence in the commission of a lawful act. (RT 2703.) Petitioner claims that this was error. (FAP, Memo. at 6-7.)

Here, there was no evidence at trial supporting a theory that Petitioner committed involuntary manslaughter by acting with criminal negligence in the commission of a lawful act toward Howland. Even Petitioner's asserted defense at trial—that he put her to sleep by a chokehold so he could continue to do drugs—would not fit this theory, as his acts would clearly amount to a battery. In light of the record, omitting the requested language in the instruction did not violate Petitioner's constitutional rights because it was not supported by the evidence. *See Hopper v. Evans*, 456 U.S. 605, 611, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982) (holding due process requires giving jury instruction "only when the evidence warrants such an instruction"). Furthermore, by finding Petitioner guilty of murder, the jury clearly determined that Petitioner acted with the intent to kill. Thus, any error in the involuntary manslaughter instruction was harmless. *See, e.g.*, *People v. DeJesus*, 38 Cal.App.4th 1, 17-22, 44 Cal.Rptr.2d 796 (1995) (finding failure to

give involuntary manslaughter instruction was harmless because jury necessarily found by its first-degree murder verdict that the killing was intentional when it found the killing to be willful, deliberate and premeditated); *People v. Polley*, 147 Cal.App.3d 1088, 1091-92, 195 Cal.Rptr. 496 (1983) (finding failure to give involuntary manslaughter instruction based upon evidence the defendant killed his wife accidentally while trying to commit suicide himself was harmless because the jury's verdict of first degree murder necessarily resolved the issue of express malice, i.e., intent to kill).

5. *Circumstantial Evidence Instructions*

At trial, the court instructed the jury on the use of circumstantial evidence in CALCRIM Nos. 224 and 225. (CT 131.) Petitioner claims this was error because the instructions should not be used in tandem. (FAP, Memo. at 8.) While it is true that CALCRIM No. 224 refers to the use of circumstantial evidence more broadly than the narrowly focused instruction in CALCRIM No. 224, which pertains to the application of circumstantial evidence to intent or mental state, both instructions are correct under state law. *See Cabrera v. McDowell*, Case No. 14-cv-02494-YGR (PR), 2016 WL 3523844, at *14 (N.D. Cal. June 28, 2016) (noting that CALCRIM Nos. 224 and 225 both instruct the jury on the proper use of circumstantial evidence and are accurate statements of the law). Petitioner has made no credible argument as to how either instruction separately, or both together, violated his federal due process rights or prejudiced the outcome of his case.

6. *Juror Unanimity*

Finally, Petitioner claims that instructing the jury with CALCRIM Nos. 520 and 521 provided alternative theories for first-degree murder and the jurors were not instructed "that they must all agree to a specific version of first-degree murder." (FAP, Memo. at 8-9.) The Court does not agree that CALCRIM Nos. 520 and 521 presented separate versions of first-degree murder; but, rather, simply provided a means for determining whether the killing was murder (CALCRIM No. 520) and

then a means for determining which degree of murder was committed (CALCRIM No. 521).

In any event, California "characterize[s] first-degree murder as 'a single crime as to which a verdict need not be limited to any one statutory alternative.'" *Sullivan v. Borg*, 1 F.3d 926, 929 (9th Cir. 1993) (quoting *Schad v. Arizona*, 501 U.S. 624, 630-31, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991)); *see also People v. Santamaria*, 8 Cal.4th 903, 918, 35 Cal.Rptr.2d 624, 884 P.2d 81 (1994) ("It is settled that as long as each juror is convinced beyond a reasonable doubt that defendant is guilty of murder as that offense is defined by statute, it need not decide unanimously by which theory he is guilty."). More importantly for Petitioner's attempts to garner federal habeas relief, there is no clearly established Supreme Court precedent indicating that the Constitution requires unanimous agreement on the means by which each element of a crime is satisfied. *See Schad*, 501 U.S. at 630-32 (holding there is no constitutional right to unanimity regarding whether first degree murder was premeditated murder or felony murder). As such, this claim fails.

For these reasons, all of Petitioner's claims in Ground One were reasonably rejected by the state court and, thus, do not merit federal habeas relief.

B. Ground Two: Conviction for Uncharged Crime

In Ground Two, Petitioner contends that the jury was allowed to convict him of an "uncharged greater crime" in violation of his right to due process and a fair trial. (FAP, Memo. at 9.) He argues that, because there was "no mention of" premeditated first-degree murder prior to jury instructions being given after the close of evidence, the court lacked jurisdiction to convict him of that offense. (FAP, Memo. at 10.)

1. *Background*

In Count One of the indictment, Petitioner was charged with murder, in violation of California Penal Code § 187(a), for unlawfully "and with malice

aforethought" killing Tammy Howland. (CT 51.) After the close of evidence, the trial court instructed the jury on several theories of homicide: first-degree murder; second-degree murder; and involuntary manslaughter. (CT 137-40.) In closing argument, the prosecutor argued that Petitioner was guilty of first-degree murder because he acted not only with malice aforethought and an intent to kill, but with premeditation and deliberation. (RT 2732-37, 2752-53, 2772.) After which, the jury returned a guilty verdict for first-degree murder "in violation of Penal Code Section 189, as charged in Count 1 of the Information." (CT 158.)

The California Supreme Court denied these claims without explanation on collateral review. (*See* Lodg. Nos. 15-17.)

2. *Federal Law and Analysis*

The Sixth Amendment guarantees a criminal defendant the fundamental right to be clearly informed of the nature and cause of the charges against him in order to permit adequate preparation of a defense. *Cole v. State of Ark.*, 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948); *Lincoln v. Sunn*, 807 F.2d 805, 812 (9th Cir. 1987) (holding that the Sixth Amendment guarantees criminal defendants the fundamental right "to be informed of the nature and the cause of the accusation"); *see also Jackson v. Virginia*, 443 U.S. 307, 314, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) ("[A] conviction upon a charge not made . . . constitutes a denial of due process").

Generally, adequate notice of a charge—i.e., a description of the charge in sufficient detail to prepare a defense—is provided to a defendant in the information. *James v. Borg*, 24 F.3d 20, 24 (9th Cir. 1994). The Ninth Circuit has found in other instances that notice may be adequate under the Constitution even if provided to a defendant after the start of the trial. *See, e.g., Calderon v. Prunty*, 59 F.3d 1005, 1010 (9th Cir. 1995) (finding defendant received adequate notice during prosecutor's opening statement and evidence produced at trial); *Stephens v. Borg*, 59 F.3d 932, 935-36 (9th Cir. 1995) (finding defendant received adequate notice

during jury instructions); *Morrison v. Estelle*, 981 F.2d 425, 428 (9th Cir. 1992) (finding defendant received adequate notice during the course of trial). The "critical consideration is whether the introduction of the new theory changes the offense [originally] charged or so alters the case that the defendant has not had a fair opportunity to defend." *Lincoln v. Sunn*, 807 F.2d 805, 813 (9th Cir. 1987) (internal citations omitted).

Here, the information unambiguously charged Petitioner with "unlawfully, and with malice aforethought" murdering Tammy Howland. (CT 51.) In California, there is a single statutory offense of "murder" and the degree is not an element of the crime. *People v. Visciotti*, 2 Cal.4th 1, 61, 5 Cal.Rptr.2d 495, 825 P.2d 388 (1992). Thus, an accusatory pleading charging murder need not specify the degree or the manner in which the murder was committed. *People v. Thomas*, 43 Cal.3d 818, 829 n.5, 239 Cal.Rptr. 307, 740 P.2d 419 (1987); *see also People v. Nakahara*, 30 Cal.4th 705, 712, 134 Cal.Rptr.2d 223, 68 P.3d 1190 (2003) ("Felony murder and premeditated murder are not distinct crimes, and need not be separately pleaded."). The California Supreme Court has determined that this manner of pleading comports with the due process requirement that a defendant have adequate notice of the charges against him. *People v. Silva*, 25 Cal.4th 345, 368, 106 Cal.Rptr.2d 93, 21 P.3d 769 (2001).

Petitioner points to no clear federal Supreme Court authority that contradicts this precedent. Further, even were the Court to consider relevant Ninth Circuit cases, it would not affect the conclusion.[2] Here, the prosecution's theory that

[2] Ninth Circuit precedent, even if "well established" is not sufficient, in the absence of Supreme Court authority, to be the source of habeas relief under Section 2254(d) (1). *See Moses v. Payne*, 555 F.3d 742, 759-61 (9th Cir. 2009); *Quintero v. Long*, Case No.: 1:13-cv-01251-JLT, 2015 WL 7017004, at *10 (E.D. Cal. Nov. 12, 2015) ("[T]he fact that there may be Ninth Circuit authority to support a petitioner's claim of the right to habeas relief . . . is insufficient to meet AEDPA's exacting standard of review.").

Petitioner willfully and with premeditation and deliberation murdered Howland by binding her hands behind her back and asphyxiating her with a plastic bag taped around her head and neck was consistent throughout the presentation of evidence at trial. Moreover, the legal theory of first-degree murder was made explicit during the court's instructions to the jury and the prosecutor's argument in closing and, in no way, altered the case so as to violate Petitioner's right to a fair opportunity to present a defense to that charge. *See, e.g.*, *Barr v. Runnels*, No. CIV S-05-2091 LKK EFB P, 2010 WL 3634935, at *15-16 (E.D. Cal. Sept. 14, 2010) (rejecting claim that "open" murder charge in information deprived petitioner of a "fair opportunity to defend"), *report and recommendation adopted*, 2008 WL 268902 (E.D. Cal. Jan. 28, 2008); *Carr v. Ochoa*, No. EDCV 08-80-VBF (OP), 2010 WL 669250, at *9 (C.D. Cal. Feb. 22, 2010) (finding adequate notice of first-degree murder where information charged defendant with "murder in violation of California Penal Code section 187(a)").

Accordingly, the state court's rejection of Petitioner's claims in Ground Two of the Petition was not contrary to, or an unreasonable application of, clearly established federal law and, as such, the claim fails to merit habeas relief.

C. Ground Three: Prosecutorial Misconduct

In Ground Three, Petitioner claims that the prosecutor used "deceptive and reprehensible methods" to convict Petitioner in violation of his right to due process and a fair trial. (FAP, Memo. at 11; Traverse at 31-33.) Petitioner contends there was a litany of misconduct, including improper questioning of witnesses, inappropriate pleas to the jurors' emotions, and misstatements of the law and evidence. (FAP, Memo. at 11-18.)

The California Supreme Court denied this claim without explanation on collateral review. (*See* Lodg. Nos. 15-17.)

Allegations of prosecutorial misconduct are governed by the standard set forth by the Supreme Court in *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct.

2464, 91 L.Ed.2d 144 (1986). *See Parker v. Matthews*, 567 U.S. 37, 45, 132 S.Ct. 2148, 183 L.Ed.2d 32 (2012) (per curiam) (identifying *Darden* as "[t]he 'clearly established Federal law'" relevant to claims of prosecutorial misconduct). In *Darden*, the Supreme Court explained that prosecutorial misconduct does not rise to the level of a constitutional violation unless it "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

To determine whether a prosecutor's comments amount to a due process violation, the reviewing court must examine the entire proceedings so that the remarks may be placed in their proper context. *Boyde v. California*, 494 U.S. 370, 384-85, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). In making this determination, the reviewing court must be mindful that the standard set forth in *Darden* is a "very general one." *Parker*, 567 U.S. at 48. Consequently, it "leav[es] courts more leeway . . . in reaching outcomes in case-by-case determinations." *Id.* (citations and internal quotations omitted). Thus, to establish that a state court's application of the *Darden* standard is unreasonable, the petitioner must show that the state's decision "'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 47 (quoting *Richter*, 562 U.S. at 103). Assuming, however, that a petitioner can establish that the prosecutor engaged in misconduct, habeas relief is warranted only if the petitioner can show that the misconduct had a substantial and injurious impact on the jury's verdict. *Karis v. Calderon*, 283 F.3d 1117, 1128 (9th Cir. 2002) (citing *Brecht*, 507 U.S. at 638).

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Petitioner claims that the prosecutor committed misconduct by "yell[ing] at him" during cross-examination, which drew an admonishment from the trial court. (*See* RT 2169-72.) The United States Supreme Court has found that the use of inflammatory statements and the badgering of a defendant on cross examination can constitute prosecutorial misconduct in violation of a defendant's right to a fair trial. *See Berger v. United States*, 295 U.S. 78, 84, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). In that case, however, the Supreme Court found that the prosecutor had misstated facts to witnesses, assumed facts not in evidence, and made up witness statements during cross-examination. *Id.* The Court found the prosecutor had acted in such an "indecorous and improper manner" in questioning the witnesses that the only remedy was likely "the granting of a mistrial." *Id.* at 85.

Similar conduct by the prosecutor did not occur here. In response to defense counsel's objection that the prosecutor was yelling at Petitioner, the trial court instructed the prosecutor that he would not tolerate questioning that could "be construed as yelling." (RT 2169-70.) After several more questions, defense counsel again objected, and the court told the prosecutor "for a little lower volume." (RT 2172.) Thereafter, the prosecutor continued his examination without further objection and, presumably, in compliance with the court's instructions. The prosecutor's conduct did not approach a level that would have warranted a mistrial, let alone violated Petitioner's right to a fair trial.

Petitioner contends that the prosecutor committed misconduct by violating the "Golden Rule" in asking the jurors to put themselves in the victim's position and imagine the pain she was in. (FAP, Memo. at 12.) During closing argument, the prosecutor argued, "[b]ut imagine if someone has their arm around you and they are now pulling onto you so tightly that it causes you to either pass out or die, you are going to fight. You are going to struggle with that person. . . . Any person would try and get away from that type of hold being in that much pain." (RT 2726-27.)

A prosecutor commits misconduct when they invite the jurors to put themselves in the place of the victim because it "inappropriately obscure[s] the fact that [the jury's] role is to vindicate the public's interest in punishing crime, not to exact revenge on behalf of an individual victim." *Drayden v. White*, 232 F.3d 704, 712-13 (9th Cir. 2000); *see also Fields v. Woodford*, 309 F.3d 1095, 1109 (9th Cir. 2002) (finding the prosecutor's closing argument to "think of yourself as" the victim and then describing the crimes from their "perspective" was improper) (as amended). Here, however, the clear purpose of the prosecutor's argument was not to create undue sympathy for the victim or exacerbate anger toward the assailant, but to undercut Petitioner's testimony that when he grabbed Howland around the neck and attempted to get her to pass out, she did not struggle or fight Petitioner at all. (*See* RT 2726-27.) Thus, the Court does not find the prosecutor's comments to be misconduct in this instance. *See Butler v. Montgomery*, Case No.: 16cv39-GPC-MDD, 2016 WL 8732566, at *26 (S.D. Cal. Oct. 11, 2016) (finding no misconduct when the prosecutor comments were directed toward "the strength of the evidence . . . and the severity of the crime" and not "an appeal[ ] for revenge"), *report and recommendation adopted*, 2017 WL 1347330 (S.D. Cal. Apr. 12, 2017). Further, even if they were, they did not "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 182.

Petitioner claims that the prosecutor referred to evidence that was not presented at trial in her closing argument. (FAP, Memo. at 13.) In closing, the prosecutor stated that S.H. told Detectives Bruner and O'Quinn that Petitioner had committed the "same sex acts" on her that she testified to at trial. (RT 2745.) Petitioner argues that this was not true. At trial, S.H. testified that she told the detectives what Petitioner had done to her "in the bed" on the day in question. (RT 1016.) Detective Bruner also testified that S.H. told her and Detective O'Quinn that Petitioner had sexually assaulted her that day. (RT 1262-63.) Thus, it appears that the record supports the prosecutor's statement in closing argument or, at least,

that the prosecutor's statement was a reasonable inference drawn from the record. "It is not misconduct for the prosecutor to argue reasonable inferences based on the record." *United States v. Atcheson*, 94 F.3d 1237, 1244 (9th Cir. 1996).

In a similar argument, Petitioner also asserts that the prosecutor committed misconduct during closing argument by calling the defense expert a "hired gun," stating that there was no evidence of drug use, and that Petitioner got the plastic bag to put over Howland's head from the bed. (FAP, Memo. at 13-15.) Prosecutors are afforded "wide latitude" in closing argument, including "latitude that embraces reasonable inferences from the evidence presented at trial." *United States v. Sayetsitty*, 107 F.3d 1405, 1409 (9th Cir. 1997). Again, these arguments by the prosecutor were based on reasonable inferences taken from the record.

Petitioner also contends that the prosecutor "misquoted the law" regarding the degrees of homicide causing the jury to be "confused as to what separates" first-degree murder from second-degree murder. (FAP, Memo. at 15-18.) The Court does not agree, as the prosecutor clearly told the jury that both degrees of murder required malice, but that to find Petitioner committed first-degree murder they must determine there was willful deliberation and premeditation "on the part of the defendant." (RT 2733-37.) Moreover, any confusion caused by the prosecutor's explanation of the differing types of homicide was remedied by the trial court, which gave proper instructions to the jury on first-degree murder, second-degree murder, and involuntary manslaughter. (CT 136-39.) The court further instructed the jury that "[y]ou must follow the law as I explain it to you" and if "you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." (CT 128.) Without evidence to the contrary, a jury is presumed to have followed the court's instructions." *Weeks v. Angelone*, 528 U.S. 225, 234, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000). Thus, Petitioner has failed to demonstrate that any prejudice from the purported error in the prosecutor's closing argument. *See Carranza v. Martel*, 722 F.App'x 612, 615 (9th Cir. 2018) (rejecting

prosecutorial misconduct claim where the trial court correctly defined the crimes and instructed the jury to "follow the court's instructions").

Finally, to the extent Petitioner alleges that the cumulative impact of these instances of misconduct violated Petitioner's right to a fair trial, *see United States v. Nobari*, 574 F.3d 1065, 1081-82 (9th Cir. 2009) ("[C]onsider[ing] the [prosecutorial misconduct] errors together to determine whether reversal is required."), the Court reaches the same conclusion; any errors, even considered together, did not infect the trial with such unfairness as to make the resulting conviction a denial of due process. *See, e.g., Wood v. Ryan*, 693 F.3d 1104, 1116-17 (9th Cir. 2012) (holding allegations of prosecutorial misconduct did not "rise to the level of a due process violation even when considered in the aggregate"). Accordingly, the state court's rejection of this claim was objectively reasonable.

D. Ground Four: *Doyle* Violation

In Ground Four, Petitioner claims that the prosecutor violated his right to a fair trial by using his constitutional right to remain silent against him during his testimony at trial in violation of *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).[3] (FAP, Memo. at 19; Traverse at 24-30.)

1. *Background*

At trial, Petitioner testified in his own defense. (RT 2158-68.) According to Petitioner, after he and his wife had an argument, they made up and he did some drugs and then had sex with her. (RT 2162.) He testified that they used handcuffs and duct tape as part of their sex play. (RT 2162-63.) Afterwards, he "put her to sleep" by putting his arm around her neck because she was "nagging" him to go to work and he wanted to continue to do more drugs. (RT 2163-65.) After she passed

[3] The essence of the holding in *Doyle* is that a prosecutor commits prosecutorial misconduct if she attempts to use a defendant's post-arrest silence for impeachment purposes. *See Greer v. Miller*, 483 U.S. 756, 764-65, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987).

out, he bound her hands behind her back with duct tape so she could not stop him from doing more drugs, if she woke up. (RT 2164-65.) After he injected and smoked more drugs, he checked on her and realized that she was dead. (RT 2165-66.)

Later, "after [he] knew that she was gone," he placed a plastic bag around her head and wrapped it with tape because he could "barely look at her face." (RT 2167.)

On cross-examination, the prosecutor attempted to discredit Petitioner's story by suggesting it was made up to fit the physical evidence of his wife's death presented at trial. The prosecutor asked Petitioner, the following:

[Prosecutor]:	The first that we hear this version as to what happened from you is today; correct?
[Petitioner]:	Yes, ma'am.
[Prosecutor]:	You've had an opportunity to sit through and listen to all the witnesses that have testified?
[Petitioner]:	Yes, ma'am.
[Prosecutor]:	You heard [J.P.] –
[Petitioner]:	Yes, ma'am.
[Prosecutor]:	– his testimony? You heard [S.H.]'s?
[Petitioner]:	Yes, ma'am.
[Prosecutor]:	You heard the deputies that arrived at the home – Deputy Saylor, Sergeant Clark, Lieutenant Godfrey; correct?
[Petitioner]:	Yes, ma'am.
[Prosecutor]:	You heard from the coroner, Dr. Carrillo, who testified as to cause of death?
[Petitioner]:	Yes, ma'am.

[Prosecutor]: Did you read over any reports prior to testifying today?

[Petitioner]: Not that I recall.

[Prosecutor]: Did you read over the autopsy report prior to testifying today?

[Petitioner]: Yeah, I had some paperwork. Yes, ma'am.

[Prosecutor]: When did you read it over?

[Petitioner]: That was, like – I don't know, like, quite a while ago. Like, I don't know, nine, 12 months ago.

[Prosecutor]: You were also at the preliminary hearing; correct?

[Petitioner]: Yes, ma'am.

[Prosecutor]: And you heard Dr. Juan Carrillo testify at that time; correct?

[Petitioner]: I believe so, yes.

(RT 2187-89.)

2. *The Relevant State Court Decision*

Petitioner first raised a claim that the prosecutor's cross-examination of him violated his right to remain silent on direct appeal. (Lodg. No. 9 at 24.) In his argument, Petitioner conceded that there was "no mention in the record of [Petitioner] specifically being advised of his *Miranda* rights," but urged the appellate court to assume they were given because "[s]uch advisements are mandated" by law. (Lodg. No. 9 at 25 n.17.) The California Court of Appeal denied the claim, finding that because trial counsel failed to object to the prosecutor's questions the claim was forfeited. (Lodg. No. 12 at 4.) The appellate court also noted that trial counsel was not ineffective for failing to object to the prosecutor's questions because the record was devoid of evidence that demonstrated Petitioner had been given his *Miranda* rights. (Lodg. No. 12 at 4.)

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Thereafter, Petitioner sought review in the California Supreme Court, presenting the issue of whether the defense had met its burden of proof as to establishing that Petitioner had been given *Miranda* advisements as a pre-requisite to his claim that the prosecutor's questioning impinged on his right to remain silent. (Lodg. No. 1 at 2-3, 5-7.) The California Supreme Court denied review without comment. (Lodg. No. 2.)

Petitioner presented his claim of *Doyle* error in his original Petition for Writ of Habeas Corpus in this Court. (*See* Docket No. 1.) The Court found, however, that the claim was unexhausted because Petitioner had "not fairly present[ed] the broader claim that the prosecution's conduct during his cross-examination amounted to a *Doyle* error" to the California Supreme Court. (Docket No. 34, Interim Report and Recommendation at 6-7; Docket No. 38, Order Accepting Findings, Conclusions, and Recommendations of United States Magistrate Judge.)

Shortly thereafter, Petitioner obtained, for the first time, evidence that he had been given and had asserted his *Miranda* rights prior to his trial (i.e., a transcript of his interview with police detectives after he was arrested in Utah). (*See* Docket 39, Motion for Stay and Abeyance, Attachment A.) Petitioner then filed an exhaustion petition in the California Supreme Court, specifically asserting his claim of *Doyle* error and attaching evidence of his assertion of his *Miranda* rights. (Lodg. No. 20.) The California Supreme Court denied the petition without comment. (Lodg. No. 21.)

Respondent urges the Court to find that the relevant decision for purpose of this Court's review on federal habeas corpus is the California Court of Appeal's decision denying the *Doyle* claim on procedural grounds issued on direct appeal. (Answer at 22.) Respondent contends that the California Supreme Court's subsequent denial of Petitioner's state habeas petition in 2017 was simply an affirmation of the state appellate court's procedural reason for denying the claim nearly four years earlier and, as such, the Court should find the claim to be

procedurally barred from federal habeas review. (*See* Answer at 22-25.) The Court is not inclined to agree.

It is undisputed that Petitioner's initial *Doyle* claim presented on appeal in state court did not include evidence that Petitioner had been given his *Miranda* rights—a necessary component to obtaining relief under *Doyle*.[4] In fact, the California Court of Appeal explicitly held that counsel could not have been ineffective for failing to object to any claimed *Doyle* violation because the record was "devoid of any evidence that [Petitioner] was given *Miranda* warnings." (Lodg. No. 12 at 4.) The much later petition raising a *Doyle* claim in the California Supreme Court specifically included and referenced evidence that Petitioner had been given and asserted his right to remain silent prior to his trial. (*See* Lodg. No. 20.)

The Ninth Circuit has found that a habeas petitioner potentially raises a "new" claim when newly-presented evidence "fundamentally alter[s]" the nature of the original claim or places the case in a significantly different and substantially improved evidentiary posture than it was when the state courts considered it. *Dickens v. Ryan*, 740 F.3d 1302, 1319 (9th Cir. 2014) (en banc). For example, in *Aiken v. Spalding*, the Ninth Circuit found that newly presented evidence of an expert's sound test that "substantially improve[d] the evidentiary basis" for the petitioner's previously presented federal constitutional claims required the petitioner to return to state court to exhaust his new claim. 841 F.2d 881, 883 (9th Cir. 1988).

Here, the Court finds that Petitioner's 2017 petition in the California Supreme Court containing evidence of his invocation of his *Miranda* rights

[4] "In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings," the Constitution does not prohibit the use of a defendant's post-arrest silence to impeach him at trial. *Fletcher v. Weir*, 455 U.S. 603, 607, 102 S.Ct. 1309, 1312, 71 L.Ed.2d 490 (1982).

fundamentally altered the nature of the claim by placing it in a significantly stronger evidentiary posture than his original claim on appeal to the California Court of Appeal. Moreover, the California Supreme Court gave no indication that it was affirming the lower court's decision on the same rationale. Thus, the Court will not apply *Ylst*'s look through doctrine and assume that the California Supreme Court's "silent denial" of the "new" claim indicated that it was denying the claim for the same procedural reasons that the California Court of Appeal did in denying the original claim years earlier. *See Ylst*, 501 U.S. at 803 ("Where 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.") (emphasis added); *see also Paul v. Kernan*, Case No. CV 15-07399 CJC (AFM), 2016 WL 8504497, at *6 (C.D. Cal. Dec. 7, 2016) ("The look-through rule does not apply to newly-added claims."), *report and recommendation adopted*, 2017 WL 1025166 (C.D. Cal. Mar. 15, 2017). Instead, the Court will treat the California Supreme Court's unexplained denial of the "new" *Doyle* claim to be a denial on the merits and the relevant decision for purposes of AEDPA review.[5] *Johnson v. Williams*, 568 U.S. at 298. Accordingly, the Court will conduct an independent review of the record to determine whether the California Supreme Court was objectively unreasonable in applying controlling federal law when it denied Petitioner's claim. *Walker*, 709 F.3d at 939; *see also Bemore v. Chappell*, 788 F.3d 1151, 1161 (9th Cir. 2015), *cert. denied*, 136 S.Ct. 1173 (2016) & 136 S.Ct. 1831 (2016) ("A habeas court must conduct an 'independent review' of the record to determine what theories could have supported the state court's decision.").

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[5] For this reason, the Court will not address Respondent's argument that the *Doyle* claim was forfeited by trial counsel's failure to object at trial. The California Supreme Court's unexplained order did not give any indication that it was applying a procedural bar in denying the claim. (*See* Lodg. No. 21.)

3. *Federal Law and Analysis*

Due process requires that a defendant be able to exercise his "constitutional right to remain silent and not be penalized at trial for doing so." *United States v. Negrete-Gonzales*, 966 F.2d 1277, 1280-81 (9th Cir. 1992). To protect the right to remain silent, a defendant's silence "at the time of arrest and after receiving *Miranda* warnings" cannot be used to impeach him should he choose to testify at trial. *Doyle*, 426 U.S. at 618-19; *see also United States v. Caruto*, 532 F.3d 822, 827 (9th Cir. 2008) ("Following *Doyle*, this court has held that a defendant who has received *Miranda* warnings can, thereafter, remain silent without running the risk that the prosecutor will comment upon that fact." (internal quotations omitted)). "The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony." *Wainwright v. Greenfield*, 474 U.S. 284, 292, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986).

Typically, a claim of *Doyle*-error arises when the prosecutor seeks to impeach a testifying defendant with his post-arrest, post-*Miranda* silence. The facts in *Brecht* are illustrative. In *Brecht*, the defendant shot the victim in the back and then fled the state. *Brecht*, 507 U.S. at 623. After being arrested, he was returned to the state where the shooting occurred, advised of his *Miranda* rights, and charged with first-degree murder. *Id.* at 624. At trial, Petitioner took the stand and admitted the shooting, but claimed it was an accident. *Id.* On cross-examination, the prosecutor asked him, "In fact the first time you have ever told this story is when you testified here today was it not?" *Id.* at 625 n.2. The prosecutor also asked, "Did you tell anyone about what had happened . . . ?" *Id.* The Supreme Court held these questions constituted *Doyle* error:

> The first time petitioner claimed that the shooting was an accident was when he took the stand at trial. It was entirely proper—and probative—for the State to impeach his testimony by pointing out that petitioner had failed to tell anyone *before* the time he received his *Miranda*

> warnings at his arraignment about the shooting being an accident. Indeed, if the shooting was an accident, petitioner had every reason—including to clear his name and preserve evidence supporting his version of the events—to offer his account immediately following the shooting. On the other hand, the State's references to petitioner's silence after that point in time, or more generally to petitioner's failure to come forward with his version of events at any time before trial, crossed the *Doyle* line. For it is conceivable that, once petitioner had been given his *Miranda* warnings, he decided to stand on his right to remain silent because he believed his silence would not be used against him at trial.

Id. at 628-29 (emphasis added) (internal citation omitted).

The prosecutor in the case at bar committed the same error. After Howland's death, Petitioner fled to Utah and was later arrested there in January 2010. (*See* Docket 39, Motion for Stay and Abeyance, Attachment A.) At that time, he invoked his *Miranda* rights and asked for an attorney. (*Id.*). The prosecutor's subsequent question on cross-examination of Petitioner at trial— "[t]he first that we hear this version as to what happened from you is today; correct?"—clearly violated the dictates of *Doyle* because it encompassed the time period after Petitioner had exercised his right to remain silent. *See Brecht*, 507 U.S. at 629 ("[D]ue process is violated whenever the prosecution uses for impeachment purposes a defendant's post-*Miranda* silence.").

Even so, a *Doyle* violation must be reviewed under a harmless error standard. *Brecht*, 507 U.S. at 629; *Hurd v. Terhune*, 619 F.3d 1080, 1089-90 (9th Cir. 2010). Habeas relief is only available where, after reviewing the facts as a whole, the court concludes that the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637. "In making this determination, the court considers '(1) the extent of [the] comments . . . , (2) whether an inference of guilt from silence was stressed to the jury, and (3) the extent of other evidence suggesting [the] defendant's guilt.'" *Hurd*, 619 F.3d at 1090 (quoting *United States v. Velarde Gomez*, 269 F.3d 1023, 1034-35 (9th Cir.2001) (en banc)).

Here, the prosecutor's improper comment was limited to a single question posed to Petitioner on cross-examination.[6] Furthermore, during her closing argument, the prosecutor did not suggest that Petitioner's testimony was a lie because he had not told anyone previously that he killed Howland by accident. Rather, she argued that his story was a lie because it was not supported by the evidence, the details of his testimony were inconsistent, and his action of fleeing the state immediately after Howland's death contradicted the truthfulness of his explanation.[7] (RT 2723-32.) Finally, the evidence against Petitioner was quite

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[6] To the extent that Petitioner is arguing that the prosecutor's follow-up questions regarding the fact that Petitioner's testimony was given after he had heard all of the state's witnesses and evidence also constituted *Doyle* error, the Court does not agree. The Supreme Court has explained the "[o]nce a defendant takes the stand, he is subject to cross-examination impeaching his credibility just like any other witness." *Portuondo v. Agard*, 529 U.S. 61, 70, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000) (internal quotations omitted).

> Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate—and indeed, given the inability to sequester the defendant, sometimes essential—to the central function of the trial, which is to discover the truth.

Id. at 73. Thus, the prosecutor's attempts to impeach Petitioner by noting that he had heard other witnesses' accounts of the evidence prior to testifying did not violate clearly established Supreme Court law. *See, e.g., Maxwell v. Cate*, 2011 WL 7758270, at *23-25 (S.D. Cal. Sept. 8, 2011) (finding prosecutor's attempts "to suggest Petitioner was tailoring his testimony to the evidence presented by the other witnesses" was not improper); *Nguyen v. Felker*, 2009 WL 1246693, at *11-12 (N.D. Cal. May 5, 2009) (finding prosecutor's comments that defendant "had two years to think about this story" after hearing testimony at the preliminary hearing "concerned [defendant's] credibility as a testifying witness, and not his silence" and, thus, "were not *Doyle* error").

[7] Though the prosecutor did suggest that Petitioner's story was "ma[d]e up" after having been able to listen to all the witnesses and read all the reports (RT 2731),

substantial, if not overwhelming. Not only did he admit to killing Howland, but his account of how it happened was far-fetched on its face and unsupported by any physical evidence. Howland was discovered dead on the bed with her hands bound behind her back and a plastic bag duct-taped around her neck and head, so that it could not be removed without being cut off with a knife. (*See* RT 736-38, 978-81.) Further, the medical examiner confirmed that Howland died due to asphyxiation from the plastic bag and not from any type of neck hold, due to the fact that there were no injuries suggesting strangulation was the cause of death. (RT 1295, 1304, 1309, 1314, 1316-19, 1332-33.) Thus, an examination of all the relevant factors supports a finding that the *Doyle* violation was harmless in this instance.

In denying Petitioner's claim, the California Supreme Court reasonably could have determined that Petitioner was not prejudiced from the prosecutor's isolated question violating Petitioner's right to remain silent. *Compare Brecht*, 507 U.S. at 638 (holding *Doyle* error was harmless when prosecutor's references to post-*Miranda* silence comprised only two pages of lengthy transcript and evidence of guilt was weighty, if not overwhelming), *with Hurd*, 619 F.3d at 1090 (finding *Doyle* error was not harmless when prosecutor argued defendant's post-*Miranda* silence extensively in opening statement and closing argument). Under the facts of this case, the state court's decision was not contrary to, or an unreasonable application of, clearly established federal law. Thus, Petitioner is not entitled to relief.

E. Grounds Five Through Thirteen: Ineffective Assistance of Trial Counsel

In Grounds Five through Thirteen, Petitioner raises numerous claims of ineffective assistance of trial counsel.

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this argument properly challenged the credibility of Petitioner's testimony. *See Portuondo*, 529 U.S. at 70, 73.

1. *Applicable Federal Law*

To establish a claim for ineffective assistance of counsel, Petitioner must prove: (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

An attorney's performance is deemed deficient if it is objectively unreasonable under prevailing professional norms. *Strickland*, 466 U.S. at 687-88. The Court, however, must review counsel's performance with "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Id*. at 689. Indeed, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id*.

With respect to the prejudice component, a petitioner need only show whether, in the absence of counsel's particular errors, there is a "reasonable probability" that "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. But in making the determination, the Court "must consider the totality of the evidence before the judge or jury." *Id*. at 695.

The Court may reject an ineffective assistance claim upon finding either that counsel's performance was reasonable or the claimed error was not prejudicial. *See, e.g., Strickland*, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."); *LaGrand v. Stewart*, 133 F.3d 1253, 1271 (9th Cir. 1998) (noting that failure to meet either prong is fatal to an ineffective assistance claim).

2. *Evidence of Intoxication*

In Ground Five, Petitioner claims that trial counsel provided ineffective assistance by failing to investigate and present evidence of Petitioner's intoxication.

(FAP, Memo. at 21-28; Traverse at 5-24.) He argues that, despite presenting a defense of voluntary intoxication, counsel provided no evidence of intoxication other than Petitioner's own testimony regarding his methamphetamine use. (FAP, Memo. at 24.) Petitioner faults counsel for not having an expert witness testify as to the effects of long-term drug use on Petitioner's ability to "appreciate the consequences of his risky behavior." (FAP, Memo. at 27.)

At trial, defense counsel argued that the killing was accidental, telling the jury that Petitioner only intended to put Howland to sleep, not kill her. (RT 2754-55.) Therefore, he asked the jury to return a verdict of manslaughter based on the fact that Petitioner lacked the intent to kill. (RT 2758.) Under the facts of the case, including Petitioner's own testimony that that he and Howland had engaged in sex acts that included the use of handcuffs and duct tape, this was a reasonable defense strategy. Although Petitioner agues, in hindsight, that counsel should have emphasized Petitioner's substantial drug use, this is not a situation in which counsel was unaware of the information. In arguing for a manslaughter verdict, counsel told the jury that Petitioner was a "drug addict" who was simply "focused on getting his next fix" when he accidentally killed Howland. (RT 2758.) Counsel reasonably could have concluded that too much emphasis on Petitioner's drug use would have undermined the argument that the killing was unintentional. In short, the Court finds that counsel made reasonable tactical choices in presenting a defense for Petitioner. *See Strickland*, 466 U.S. at 690-91 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."); *see also Gerlaugh v. Stewart*, 129 F.3d 1027, 1033 (9th Cir. 1997) (rejecting claim that counsel was deficient because "[c]ounsel knew about the evidence and looked into it, but chose as a tactical matter not to use it").

In any event, Petitioner has failed to show any prejudice from the failure to present additional evidence regarding Petitioner's drug addiction. Although Petitioner offers a laundry-list of possible effects of substance abuse, he fails to

present any evidence that he was actually suffering from any of these effects or explain how they would have changed the outcome of his case. Thus, his claim is far too speculative to warrant relief. *See Totten v. Merkle*, 137 F.3d 1172, 1175 (9th Cir. 1998) (rejecting 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").

As for his claim that counsel was deficient in failing to provide expert testimony on the subject of drug disorders, it also fails. Petitioner has not provided an affidavit from any potential expert that would have given testimony likely to affect the verdict in this case. *See Wildman v. Johnson*, 261 F.3d 832, 839 (9th Cir. 2001) (finding that speculation that a helpful expert could be found or would testify on petitioner's behalf insufficient to establish prejudice); *Dows v. Wood*, 211 F.3d 480, 486 (9th Cir. 2000) (rejecting claim of ineffective assistance of counsel where petitioner failed to present an affidavit establishing that the alleged witness would have provided helpful testimony for the defense).

3. *Evidence of Incompetence*

In Ground Six, Petitioner contends that trial counsel provided ineffective assistance by failing to investigate and demonstrate that Petitioner was incompetent to stand trial. (FAP, Memo. at 28-30.)

"Counsel's failure to move for a competency hearing violates the defendant's right to effective assistance of counsel when there are sufficient indicia of incompetence to give objectively reasonable counsel reason to doubt the defendant's competency, and there is a reasonable probability that the defendant would have been found incompetent to stand trial had the issue been raised and fully considered." *Stanley v. Cullen*, 633 F.3d 852, 862 (9th Cir. 2011) (internal quotations omitted). Defense counsel does not act deficiently when there is "no reason to doubt" the defendant's competency. *Hibbler v. Benedetti*, 693 F.3d 1140, 1150 (9th Cir. 2012).

Here, Petitioner offers no evidence that Petitioner was incompetent at the time of trial, other than Petitioner's unelaborated request to speak with a psychiatrist. Nor has he offered any post-trial evidence suggesting Petitioner has ongoing mental impairments that hinders his ability to understand the nature of legal proceedings and act in a rational manner. As such, his claim if far too speculative to warrant relief. *See, e.g., Alexander v. Dugger*, 841 F.2d 371, 375 (11th Cir. 1988) (finding Petitioner had not met his burden of demonstrating prejudice because he "made only conclusory allegations that he was incompetent to stand trial").

Moreover, an examination of the trial record shows no evidence of mental incompetence at the time of his trial. In fact, the evidence is to the contrary. Petitioner testified at trial and did not exhibit any signs of irrationality or any difficulty coherently responding to questions posed by his counsel and the prosecutor. *See Sully v. Ayers*, 725 F.3d 1057, 1071 (9th Cir. 2013) (finding defendant's trial testimony, which was "detailed" and "cogent," "strongly undermine[d] any claim that [he] was incompetent"). Accordingly, counsel was not ineffective for failing to request a competency examination.

4. *Erroneous Jury Instructions*

In Grounds Seven and Eight, Petitioner asserts that trial counsel was ineffective for failing to object to erroneous jury instructions and verdict forms that allowed him to be convicted of an uncharged crime. (FAP, Memo. at 30-33.) These are the same allegations of instructional error alleged in Grounds One and Two of the Petition. Because the Court has determined that there was no instructional error, Petitioner's claim that counsel was deficient for failing to object to the instructions necessarily fails. *See Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005) ("[T]rial counsel cannot have been ineffective for failing to raise a meritless objection.").

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In Ground Nine, Petitioner contends that trial counsel was deficient for failing to "request a pinpoint instruction" on the "unconsciousness due to voluntary intoxication." (FAP, Memo. at 34.) There simply was no evidence, however, that would have supported giving such an instruction. Petitioner's testimony alone clearly demonstrated that he was not "unconscious" at the time of the killing or at any relevant time. Thus, any request for this instruction would have been futile. "[T]he failure to take a futile action can never be deficient performance." *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996).

In Ground Ten, Petitioner claims that counsel should have requested instructions on voluntary manslaughter while acting in "heat of passion" due to provocation. (FAP, Memo. at 35-37.) On appeal, the California Court of Appeal rejected this claim, finding that "[c]ounsel's performance was not deficient because . . . the evidence d[id] not support a theory of provocation." (Lodg. No. 12 at 8.) The appellate court noted that Petitioner's "testimony contained no indication that [his] actions reflected any sign of heat of passion." (*Id*. at 7.) Rather, Petitioner testified that he and Howland had "ma[d]e up" and "weren't even arguing in the bedroom." (*Id*.)

Petitioner points to no objective evidence supporting an instruction that he was only guilty of involuntary manslaughter because he was acting in the heat of passion due to Howland's provocations when he killed her. Therefore, counsel had no duty to request any such instructions. *See, e.g., Boatman v. Beard*, 2017 WL 3888225, at *20 (C.D. Cal. June 19, 2017) ("Trial counsel was not ineffective for failing to request jury instructions . . . not supported by any evidence."). Accordingly, the state court's rejection of this claim was objectively reasonable.

Petitioner also faults counsel for not asking for a limiting instruction on the "fresh complaint" evidence, (i.e., testimony by several witnesses that S.H. told them

that she had been sexually assaulted by Petitioner).[8] (FAP, Memo. at 37-38.) He argues that counsel should have asked for an instruction explicitly telling the jury that this evidence could not be used as proof of the alleged sexual misconduct. (*Id.* at 38.) The California Court of Appeal rejected the claim because counsel may have strategically chosen not to request the instruction so as to not highlight the evidence against Petitioner. (Lodg. No. 12 at 6.)

The Court does not find this decision to be objectively unreasonable. *See Musladin v. Lamarque*, 555 F.3d 830, 846 (9th Cir. 2009) ("In general, the decision not to request a limiting instruction is solidly within the acceptable range of strategic tactics employed by trial lawyers in the mitigation of damning evidence." (internal quotations omitted)); *Camero v. Salazar*, No. 1:05-cv-00034 ALA (HC), 2008 WL 4104247, at *9 (E.D. Cal. Sept. 3, 2008) ("Petitioner has failed to overcome the strong presumption that his trial attorney's decision not to object to the evidence of fresh complaint, and not to request a limiting instruction, was sound trial strategy."). In any event, Petitioner has not remotely demonstrated any prejudice from counsel's failure to ask for a limiting instruction in this instance. S.H. testified in detail regarding the sexual assault and, thus, the jury's decision on Petitioner's culpability likely came from a consideration of her testimony and not from any supporting "fresh complaint" evidence.

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[8] Under the fresh complaint doctrine, "proof of an extrajudicial complaint, made by the victim of a sexual offense, disclosing the alleged assault, may be admissible for a limited, nonhearsay purpose—namely, to establish the fact of, and the circumstances surrounding, the victim's disclosure of the assault to others—whenever the fact that the disclosure was made and the circumstances under which it was made are relevant to the trier of fact's determination as to whether the offense occurred." *People v. Brown*, 8 Cal.4th 746, 749-50, 35 Cal.Rptr.2d 407, 883 P.2d 949 (1994). The jury may consider the evidence "for the purpose of corroborating the victim's testimony, but not to prove the occurrence of the crime." *People v. Ramirez*, 143 Cal.App.4th 1512, 1522, 50 Cal.Rptr.3d 110 (2006).

5. *Inconsistent Statements*

In Ground Eleven, Petitioner claims that trial counsel provided ineffective assistance by failing to impeach S.H. with inconsistencies in her statements about the sexual assault. (FAP, Memo. at 38-39.) Petitioner points to several instances where S.H. denied any sexual contact with Petitioner—or was unsure whether sexual contact had occurred—in interviews with social workers prior to trial, but then claimed that he assaulted her in her testimony at trial. He faults counsel for not emphasizing these discrepancies.

In closing argument, defense counsel attempted to convince the jury that there was insufficient physical evidence of sexual assault to convict Petitioner. (RT 2762-65.) Obviously, counsel was unsuccessful, and the jury ultimately believed S.H.'s testimony. The jury made this determination after evaluating S.H.'s testimony, as well as her previous statements in which she had denied the sexual assault. Thus, despite changing her story, the jury found her to be a credible witness. It is not reasonably likely that had counsel focused more on S.H.'s inconsistent statements on cross-examination or in closing argument that the jury would have found otherwise. Certainly, Petitioner points to no evidence to support such a finding. Thus, the Court does not find counsel acted objectively unreasonable under prevailing professional norms. *Strickland*, 466 U.S. at 687-88.

6. *Prosecutorial Misconduct*

In Ground Twelve, Petitioner contends that trial counsel provided ineffective assistance by failing to object to the prosecutor's "continuous misconduct." (FAP, Memo. at 40-41.) These are the same allegations of prosecutorial misconduct alleged in Ground Three of the Petition; the prosecutor yelled at Petitioner, asked confusing questions, and violated the "Golden Rule." Because the Court has determined that there was no misconduct at trial by the prosecutor that rose to the level of a constitutional violation, Petitioner's claim that he was prejudiced by counsel's failure to object necessarily fails. *See Strickland*, 466 U.S. at 700.

7. *Doyle Error*

Finally, in Ground Thirteen, Petitioner argues that trial counsel provided ineffective assistance by failing to object to the prosecutor's *Doyle* violation. (FAP, Memo. at 41-42; Traverse at 30.) Here, counsel may well have acted below prevailing professional norms by failing to object to the prosecutor's rather obvious attempt to impeach Petitioner with his post-arrest, post-*Miranda* silence. "Deficient performance alone, however, is not enough to render counsel's representation constitutionally ineffective." *Turner v. Calderon*, 281 F.3d 851, 873 (9th Cir. 2002). Rather, Petitioner must also demonstrate that "absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695.

In analyzing the underlying *Doyle* error, the Court has already determined that the error was not prejudicial. First, the prosecutor's improper comment infringing on Petitioner's right to remain silent was limited to a single question posed to Petitioner on cross-examination. Moreover, as detailed previously, the evidence against Petitioner was quite substantial, if not overwhelming. The victim, who died from asphyxiation alone in the bedroom with Petitioner, was found with duct tape and a plastic bag around her head. Petitioner admitted to killing Howland. His self-serving explanation of how it happened was unsupported by the physical evidence.

Under these circumstances, the Court finds that, even had counsel objected to the prosecutor's improper question and the court admonished counsel and instructed the jury to disregard the prosecutor's question, there is no reasonable probability that the outcome of the trial would have been different. Because there was no prejudice from the *Doyle* violation itself, there was no prejudice from trial counsel's failure to make a timely objection to the improper comment. *See Lewis v. Small*, No. CV 11-6726-AG (PJW), 2012 WL 5391280, at *7 (C.D. Cal. Aug. 27, 2012) (rejecting claim that counsel was ineffective for failing to object to

prosecutor's *Doyle* error because the court "had already determined that any misconduct by the prosecutor was harmless"), *report and recommendation adopted*, 2012 WL 5389913 (C.D. Cal. Oct. 31, 2012).

In sum, Petitioner has not demonstrated that the state court's rejection of any of his claims of ineffective assistance of counsel were contrary to, or an unreasonable application of, clearly established federal law. Thus, Petitioner is not entitled to relief on these grounds.

F. Grounds Fourteen and Fifteen: Ineffective Assistance of Appellate Counsel

In Grounds Fourteen and Fifteen, Petitioner claims appellate counsel was ineffective for failing to raise numerous claims on direct appeal and, in other instances, failing to perfect the record to fully support those claims that he did raise. (FAP, Memo. at 43-47; Traverse at 30-31.)

A criminal defendant enjoys the right to the effective assistance of counsel on appeal. *Evitts v. Lucey*, 469 U.S. 387, 391-97, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). The standard for determining whether trial counsel rendered ineffective assistance applies equally to determining whether appellate counsel rendered ineffective assistance. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). To establish a claim for ineffective assistance of appellate counsel, Petitioner "must show that appellate counsel's representation fell below an objective standard of reasonableness, and that, but for counsel's errors, a reasonable probability exists that he would have prevailed on appeal." *Hurles v. Ryan*, 752 F.3d 768, 785 (9th Cir. 2014) (citing *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989)).

Appellate counsel has no constitutional duty, however, to raise every issue where, in the attorney's judgment, the issue has little or no likelihood of success. *Jones v. Barnes*, 463 U.S. 745, 751-53, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); *Pollard v. White*, 119 F.3d 1430, 1435 (9th Cir. 1997). In fact, "the weeding out of

weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy." *Bailey v. Newland*, 263 F.3d 1022, 1028-29 (9th Cir. 2001) (internal quotations omitted). Consequently, a petitioner is entitled to relief only if counsel failed to raise a "winning issue" on appeal. *Id*. at 1033–34.

Petitioner contends that appellate counsel failed to raise claims corresponding to Grounds One, Two, Three, Five, Six, Seven, Eight, Nine, and Eleven in this FAP. (FAP, Memo. at 46.) For the reasons outlined above, the Court has already concluded there is no merit to any of these claims. Because there was no reasonable likelihood that any of these claims would have prevailed on appeal, Petitioner cannot show that appellate counsel was deficient in failing to raise the issues or that he was prejudiced from appellate counsel's failure to do so. *See Wildman*, 261 F.3d at 840 ("[A]ppellate counsel's failure to raise issues on direct appeal does not constitute ineffective assistance when appeal would not have provided grounds for reversal."); *Turner*, 281 F.3d at 872 (holding that failure to raise untenable issues on appeal does not fall below *Strickland* standard).

Petitioner also asserts that appellate counsel was ineffective because had he expanded the evidentiary record on appeal to include the *Miranda* transcript after Petitioner's arrest in Utah, Petitioner would have prevailed on his claim that trial counsel was ineffective for failing to object to the *Doyle* error. (FAP, Memo. at 43-44.) The Court disagrees. Although, on appeal, the California Court of Appeal may have rejected Petitioner's claim that trial counsel was ineffective because he failed to present proof that Petitioner was *Mirandized*, the California Supreme Court later rejected the same claim that included the relevant transcripts. On collateral review, the California Supreme Court rejected Petitioner's *Doyle* claim and the related ineffective assistance of trial and appellate claims on their merits. (*See* Lodg. Nos. 20-21.)

In short, there is no reasonable possibility that Petitioner's ineffective assistance of trial counsel claim would have prevailed, even had the full record

been presented on appeal. Accordingly, appellate counsel's failure to obtain the transcript did not prejudice Petitioner. *See Miller v. Zatecky*, 820 F.3d 275, 276-77 (7th Cir. 2016) (denying habeas relief for ineffective appellate counsel claim where state court decided on collateral review merits of underlying issues that petitioner argued should have been raised by counsel on appeal), *cert. denied*, 137 S.Ct. 1579 (2017); *see also Wang v. Davis*, Case No. 2:15-CV-09883-JGB, 2018 WL 1989510, at *5 (C.D. Cal. Mar. 12, 2018) (rejecting ineffective assistance of appellate counsel claim because "[p]etitioner obtained on collateral review the only possible relief that success on his ineffective-assistance claim could have gotten him: consideration of his underlying claims by the state appellate courts"), *report and recommendation adopted*, 2018 WL 1989509 (C.D. Cal. Apr. 26, 2018).

This claim was reasonably rejected by the state courts and, thus, fails to merit habeas relief.

G. Cumulative Error

Finally, in Ground Sixteen, Petitioner claims that the accumulation of the combined constitutional errors at trial prejudiced the outcome of his trial. (FAP, Memo. at 47-49; Traverse at 33-34.) The California Supreme Court denied this claim summarily on collateral review. (*See* Lodg. Nos. 17, 21.)

Even if no single error is sufficiently prejudicial to warrant habeas relief, the cumulative effect of several errors at trial may still prejudice a defendant so much that his conviction must be overturned. *Parle v. Runnels*, 387 F.3d 1030, 1045 (9th Cir. 2004). Where there is only one error, however, a claim of cumulative error must fail. *United States v. Solorio*, 669 F.3d 943, 956 (9th Cir. 2012).

Here, though the prosecutor committed *Doyle* error by commenting on Petitioner's right to remain silent, this Court has concluded that the error was harmless in light of the brevity of the violation and the overwhelming evidence of Petitioner's guilt. The Court has found no other instances of constitutional error. Because a single error cannot give rise to a claim of cumulative error, this claim

necessarily fails. *See id*. ("There can be no cumulative error when a defendant fails to identify more than one error."); *Anh Vu Nguyen v. Wingler*, 468 F.App'x 662, 663 (9th Cir. 2011) ("Where there was only one harmless error, as in this case, there was no error to cumulate, and the cumulative error doctrine did not apply."); *United States v. Laurienti*, 611 F.3d 530, 551 (9th Cir. 2010) (rejecting cumulative error claim where defendants identified only one error, which was found to be harmless).

VI. RECOMMENDATION

For the reasons discussed above, IT IS RECOMMENDED that the District Court issue an Order (1) accepting and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: October 4, 2018

Rozella A. Oliver

ROZELLA A. OLIVER
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in Local Civil Rule 72 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.

Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

Change court

Court data last updated: 04/10/2017 03:23 PM

Docket (Register of Actions)

HOWELL (DAVID KENNETH) ON H.C.
Case Number S238977

Date	Description	Notes
12/16/2016	Petition for writ of habeas corpus filed	Petitioner: David Kenneth Howell Pro Per (Exhibits attached with petition)
12/19/2016	Received:	Notice of Document Discrepancy. David Kenneth Howell, Petitioner Pro Per
02/01/2017	Petition for writ of habeas corpus denied	

Click here to request automatic e-mail notifications about this case.

Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

Change court

Court data last updated: 02/26/2016 02:38 PM

CV 15-3551-PA (RAO)
Lodged Doc.#17
(Pet Denial_S226409)

Docket (Register of Actions)
HOWELL (DAVID KENNETH) ON H.C.
Case Number S226409

Date	Description	Notes
05/11/2015	Petition for writ of habeas corpus filed	Petitioner: David Kenneth Howell Pro Per 1 volume of lodged exhibits with petition.
08/12/2015	Petition for writ of habeas corpus denied	

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LD 17

Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

2nd Appellate District

Change court

Court data last updated: 07/16/2015 10:35 AM

Docket (Register of Actions)

In re DAVID HOWELL on Habeas Corpus
Division 6
Case Number B261889

Date	Description	Notes
02/10/2015	Petition for a writ of habeas corpus filed.	
03/10/2015	Petition denied (jacket denial)	G-Y-P
03/10/2015	Case complete.	

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

David Howell Petitioner	No. MA046867
vs.	
People of the State of California	**DENIAL OF WRIT OF HABEAS CORPUS**
Respondent	

The court has read and considered the Writ of Habeas Corpus received on 9/18/14. The Writ of Habeas Corpus is DENIED.

MISINSTRUCTION ON ELEMENTS OF OFFENSES AND ABUSE OF TRIAL COURT'S DISCRETION

Petitioner's claim that the trial court highlighted first degree murder when responding to a jury question fails to raise a prima facie case for relief. Specifically, his claim that the first letters of the phrase "First Degree Murder" were capitalized and thus unduly influenced the jury is without merit and speculative at best.

His claim that there was no proper instruction on second degree murder is also without merit since the record clearly shows that the court properly instructed the jury on second degree murder.

In addition, despite petitioner's claim of error, the court properly instructed the jury that "Voluntary intoxication does not apply to negate the implied malice supporting the crime of second degree murder."

Petitioner claims instructional error because the court instructed the jury that both deliberation ***and*** premeditation had to be negated by intoxication in order for the jury to convict on something less than first degree murder. The claim is without merit and fails to raise a prima facie case for relief.

The court properly defined "criminal negligence" as it applied to involuntary manslaughter.

The court properly instructed the jury that voluntary intoxication could not negate "implied malice."

The fact that the court gave CALCRIM 224 and CALCRIM 225 is harmless error at best.

The fact that the charging information did not specifically charge first degree murder is of no consequence. The People are not required to plead the degree of murder in the charging document.

PROSECUTORIAL MISCONDUCT

Petitioner's claim that the prosecutor yelled during cross examination fails to establish a prima facie case for relief.

Petitioner's claim that the prosecutor asked the jury to place themselves in the victim's position when she argued, "But imagine if someone has their arm around you and they are now pulling onto you so tightly that it causes you to either pass out or die, you are going to fight. You are going to struggle with that person." While the prosecutor technically placed the jury in the victim's shoes, it was not for the purpose of engendering sympathy or arousing passion. She simply made the point that a person would struggle in that situation. Thus, the petitioner fails to establish a prima facie case for relief.

The petitioner claims the prosecutor argued facts outside of the evidence, specifically: 1) The child victim's disclosure of sexual assault to detectives, 2) whether certain witnesses were paid or not, and 3) her argument that there was no evidence of drug use by the petitioner.

Attorneys are allowed great latitude in closing arguments, and the jury is presumed to understand that the attorneys' statements are not evidence. That being said, none of the arguments warrants the granting of a Writ of Habeas Corpus.

Petitioner's claim that the prosecutor's statement during closing argument indicating that an intent to kill is necessary for malice aforethought was improper fails to establish a prima facie case for relief.

Nor is the prosecutor's comment on the defense's failure to call logical witnesses, namely a narcotics effort enough to establish a prima facie case for relief.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Trial counsel's alleged failure to call an expert to testify to the effects of methamphetamine are without merit. The transcript shows that the petitioner, although under the influence of methamphetamine, had a clear appreciation for his actions. For example, the prosecutor highlighted the fact that the petitioner fled the state immediately after the murder, thus underscoring his consciousness of guilt. To call an expert would only highlight the fact that the petitioner was coherent and aware of his actions, thus making him even more culpable in the jury's eyes. Trial counsel engaged in sound trial tactics and strategy when she opted not to call such an expert.

Trial counsel's alleged failure to object to a verdict of first degree murder when the degree was not alleged in the information is without merit.

Defense counsel's alleged failure to impeach Sarah H. for inconsistencies is without merit. The transcripts shows that trial counsel clearly highlighted various inconsistencies, such as where the victim slept, and whether she made disclosures of sexual assaults to various people.

Defense counsel's alleged failure to object to prosecutorial misconduct is also without merit, since there was no significant prosecutorial misconduct. Whatever misconduct there may have been in argument was technical and brief in nature. To object would have only served to highlight the prosecutor's argument.

INEFFECTIVE ASSISTENCE OF APPELLATE COUNSEL

Appellate counsel's alleged failure to raise "Doyle Error" is without merit. As the appellate court acknowledged there was nothing in the record to indicate the petitioner had ever been Mirandized. To argue that investigation may have shown that he might have been Mirandized is speculative at best.

Appellate counsel's alleged failure in raising the issue of "confusing, argumentative, contradictoryh" jury instructions is without merit. The contested jury instructions were a proper statement of the law.

Appellate counsel rightfully did not raise the issue of prosecutorial misconduct for the reasons previously stated.

Appellate counsel's alleged failure to raise the issue of a first degree verdict form in light of the fact first degree murder was not charged is likewise meritless, since the prosecutor does not have to plead the theory or degree of murder.

CUMULATIVE ERROR

Appellant's claim of cumulative error based on all the alleged violations above are without merit and fails to establish a prima facie case for relief.

Dated: 12/8/2014

Charles Chung
Judge of the Superior Court

Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

Change court

Court data last updated: 06/12/2015 12:18 PM

Docket (Register of Actions)

PEOPLE v. HOWELL
Case Number S210235

Date	Description	Notes
04/25/2013	Received premature petition for review	Defendant and Appellant: Kenneth Howell Attorney: Edward H. Schulman
04/26/2013	Case start: Petition for review filed	Defendant and Appellant: Kenneth Howell Attorney: Edward H. Schulman
05/17/2013	Record requested	
05/21/2013	Received Court of Appeal record	two doghouses (volumes 1 and 2)
06/19/2013	Petition for review denied	
06/24/2013	Returned record	2 doghouses

Click here to request automatic e-mail notifications about this case.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION 6 April 17, 2013

Pamela Hamanaka
Office of the Attorney General
300 South Spring Street
Los Angeles, CA 90013

THE PEOPLE,
Plaintiff and Respondent,
v.
KENNETH D. HOWELL,
Defendant and Appellant.

B237884
Los Angeles County No. MA046867

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH HOWELL,

Defendant and Appellant.

2d Crim. No. B237884
(Super. Ct. No. MA046867)
(Los Angeles County)

Kenneth David Howell appeals from the judgment entered after his conviction by a jury of first degree murder (Pen. Code, §§ 187, subd. (a), 189),[1] two counts of aggravated sexual assault upon a child (§ 269, subds. (a)(4) & (a)(5)), and two counts of lewd act on a child by use of force. (§ 288. subd. (b)(1). Appellant admitted that he had served one prior prison term. (§ 667.5, subd. (b).) He was sentenced to prison for an indeterminate term of 55 years to life plus a consecutive determinate term of 17 years.

Appellant contends that the prosecutor improperly used his post-arrest silence to impeach him. He also contends that (1) the trial court erroneously instructed the jury, and (2) defense counsel was ineffective because she failed to object to some instructions and failed to request other instructions. We affirm. However, we direct the trial court to correct an omission in the abstract of judgment.

[1] All statutory references are to the Penal Code.

Facts

People's Evidence

In the evening on August 23, 2009, appellant and his wife, Tammy Howland, argued inside their bedroom. Howland exited the bedroom and walked into the kitchen to get something to drink. Howland's 15-year-old son, J. P., asked her if she was okay. She replied that she was okay and walked back into the bedroom. Before J.P. went to sleep in the living room, he heard Howland yell to him to " 'please help.' " He did not intervene because he was scared of appellant. Appellant "used to beat [him]."

That night, appellant forced Howland's daughter, S.H., to have sex with him. S.H. was 13 years old, and appellant was not her biological father. **(3RT 942, 944)**~ While S.H. was sleeping in the living room, appellant picked her up and carried her into her mother's bedroom. Howland was lying on the bed with a blanket covering her head. She was not moving or making any sounds. Appellant placed S.H. on the bed next to her mother. Appellant kissed S.H. on the neck and mouth and touched her breasts. He removed his and S.H.'s clothing. Appellant placed his mouth on S.H.'s vaginal area. Appellant then "put [her] legs on his shoulders." S.H. felt "something go inside [her] vagina." It was painful, and she started to cry. Appellant said that "if [she] didn't stop crying, he was going to duct tape [her] head next." Appellant was on top of S.H., moving his body back and forth.

J.P. awoke at noon. He tried to open the door to his mother's bedroom, but "there was this chair in the way, which prevented [him] from opening it." Appellant, who was inside the bedroom, asked J.P. what he wanted. J.P. replied that he was looking for S.H. Appellant said that S.H. was with him. J.P. went back into the living room.

Appellant eventually exited the bedroom. He had a "big grin on his face" and "pushed [J.P.] out of the way." Appellant went into the garage and drove away.

J.P. entered his mother's bedroom. Howland was lying in bed on her stomach "with her hands tied behind her back with duct tape." A plastic bag completely covered her head. The bag was secured with duct tape "from her neck to the top of her head." S.H "was at the edge of the bed on her knees, crying."

Howland was dead. The forensic pathologist who performed an autopsy opined that she had "died as a result of asphyxia, which is the lack of oxygen due to suffocation." The suffocation was caused by the plastic bag over her head.

Defense Evidence

Appellant testified as follows: On August 23, 2009, he and Howland got into an argument about buying a car. Howland wanted to buy the car, but appellant did not want to buy it. The argument ended, and the couple made up. Appellant took drugs and had sex with Howland. He "wanted to get high some more," but Howland was "complaining and nagging" that he should take a shower and get ready for work. Appellant put his arm around Howland's neck "to put her to sleep." When her body went "limp," he "laid her down [on] the bed." His "intent was just to put her to sleep for a while so [he could] continue and use more drugs." He duct-taped her hands behind her back so that she would be unable "to stop [him] from doing more drugs." Appellant then went into the bathroom, where he smoked and injected methamphetamine. When he exited the bathroom, Howland was dead. Appellant put a plastic bag over her head because he could not bear to look at her face. He put some duct tape around the bag to hold it in place.

Appellant denied having sex with S.H. He testified that she was not inside the bedroom with him.

The defense retained a forensic pathologist to review the autopsy report and photographs. He opined that the cause of death was "consistent with a carotid compression," which occurs when a person uses his forearm to compress the carotid artery in the neck of another person. Peace officers occasionally use this technique to subdue an arrestee. "[Y]ou block blood flow into the head and into the brain without blocking the airway. And the purpose of that is to render the person rapidly unconscious so they can be controlled or handcuffed." If the compression completely obstructs the carotid artery for approximately one minute, the person will die "unless they get defibrillated."

Impeachment of Appellant by Post-Arrest Silence

After appellant had testified as to his version of events, on cross-examination the prosecutor asked, "The first that we hear this version as to what happened from you is today;

correct?" Appellant answered, "Yes, Ma'am." Appellant contends that the prosecutor used his post-arrest silence to impeach him in violation of the principles of *Doyle v. Ohio* (1976) 426 U.S. 610 [96 S.Ct. 2240, 49 L.Ed.2d 91]. "In *Doyle,* the United States Supreme Court held that it was a violation of due process and fundamental fairness to use a defendant's postarrest silence following *Miranda* warnings[2] to impeach the defendant's trial testimony. [Citation.]" (*People v. Collins* (2010) 49 Cal.4th 175, 203.)

Appellant "did not object on *Doyle* grounds below, and thus has forfeited this claim." (*People v. Tate* (2010) 49 Cal.4th 635, 692.) But appellant argues that defense counsel's failure to object denied him his constitutional right to the effective assistance counsel. The standard for evaluating a claim of ineffective counsel is set forth in *Strickland v. Washington* (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674]: "First, [appellant] must show that counsel's performance was deficient. . . . Second, [appellant] must show that the deficient performance prejudiced the defense."

Appellant has not shown that counsel was deficient. *Doyle* error occurs only when the prosecutor impeaches "a defendant's exculpatory trial testimony with cross-examination about his or her postarrest silence after receiving *Miranda* warnings. [Citation.]" (*People v. Tate*, *supra*, 49 Cal.4th at pp. 691-692.) The record is devoid of any evidence that appellant was given *Miranda* warnings. Appellant concedes that "there is no mention in the record of appellant specifically being advised of his *Miranda* rights." But he argues that it must be assumed he was so advised because "[s]uch advisements are mandated." We disagree. "A defendant who is never questioned need not be Mirandized . . . ." (*People v. Delgado* (1992) 10 Cal.App.4th 1837, 1843.) Appellant has not referred us to any evidence in the record showing that he was questioned by law enforcement officials. Thus, "we have no basis whatsoever to assume that [appellant] was given his [*Miranda*] rights." (***Ibid.***) "Because there was no sound legal basis for objection, counsel's failure to object to the admission of the evidence cannot establish ineffective assistance." (*People v. Cudjo* (1993) 6 Cal.4th 585, 616.)

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

Limiting Instruction for Fresh-Complaint Evidence

Pursuant to the fresh-complaint doctrine, the trial court permitted the prosecutor to present evidence that, several days after appellant's sexual assault, S.H. complained about it to law enforcement officials. "[T]he trial court upon request must instruct the jury to consider such evidence only for the purpose of establishing that a complaint was made, so as to dispel any erroneous inference that the victim was silent, but not as proof of the truth of the content of the victim's statement. [Citations.]" (*People v. Brown* (1994) 8 Cal.4th 746, 757.) Appellant contends that his counsel was ineffective because she failed to request a limiting instruction.

To establish deficient performance by counsel, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 688.) Appellant has failed to make the requisite showing. A reasonable attorney could have concluded that a limiting instruction would be detrimental to appellant because it would highlight the fresh-complaint evidence. (See *People v. Hinton* (2006) 37 Cal.4th 839, 878 ["Defendant also complains that counsel's failure to request a limiting instruction concerning his prior murder conviction demonstrated ineffective assistance, but counsel may have deemed it unwise to call further attention to it"]; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 934 ["the decision not to request [a limiting instruction] was a reasonable tactical choice by defense counsel to avoid directing the jury to focus on the evidence . . . ."].)

CALCRIM No. 318

Appellant maintains that the trial court erred in giving CALCRIM No. 318, which provided: "You have heard evidence of statements that a witness made before the trial. If you decide that the witness made those statements, you may use those statements in two ways: [¶] 1. To evaluate whether the witness's testimony in court is believable; [¶] AND [¶] 2. *As evidence that the information in those earlier statements is true.*" (Italics added.) The Bench Notes to CALCRIM No. 318 state that it should be used "when a testifying witness has been confronted with a prior inconsistent statement." (1 Judicial Council of Cal., Crim. Jury Instns. (2012) p. 96.) Appellant argues that the italicized portion of the

instruction wrongly informed "the jury that they *could in fact consider* [S.H.'s fresh-complaint evidence] as proof of the alleged misconduct." (Bold and capitalization omitted.)

The evidence supported the giving of CALCRIM No. 318 because S.H. had made prior inconsistent statements to Sergeant Kenneth Clark and a social worker. In his opening brief, appellant acknowledges that S.H. "gave inconsistent accounts" of the incident. On the same day that her mother was killed, S.H. told Clark that she "went to her parents' bedroom around sunrise," "got into bed with her mother and father," and "slept there." S.H. did not say that appellant had carried her into the bedroom and had sexually assaulted her. She explained that she had not disclosed this information to Clark because she was embarrassed and scared of appellant.

On the same day that S.H. spoke to Clark, she told a social worker that she was in her own bedroom when she heard appellant leave the house. At that point, she went into her mother's bedroom and found her mother dead on the bed. S.H. mentioned nothing about appellant's sexual assault. Two days later, S.H. told the social worker that appellant had "just touch[ed] her on the surface." At trial, on the other hand, S.H. testified that she felt "something go inside [her] vagina" when appellant was on top of her.

Appellant is in effect contending that the trial court should have modified the instruction sua sponte to make clear that it did not apply to S.H.'s fresh-complaint evidence. The contention is forfeited because defense counsel did not object below. "[D]efendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions." (*People v. Daya* (1994) 29 Cal.App.4th 697, 714.)

We reject appellant's contention that defense counsel was deficient because she failed to object. As discussed in the preceding section of this opinion, counsel may have had good reason for not wanting to highlight the fresh-complaint evidence.

No Duty to Instruct Sua Sponte on Voluntary Manslaughter

Appellant argues that the trial court had a duty to instruct sua sponte on the lesser included offense of voluntary manslaughter. Appellant "submits there was sufficient evidence to warrant sua sponte voluntary manslaughter instructions predicated on either an

unintentional killing committed with conscious disregard for human life upon a sudden quarrel or in the heat of passion *or* an intentional killing committed under such circumstances."

" '[T]he factor which distinguishes the "heat of passion" form of voluntary manslaughter from murder is provocation. The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations]. The provocative conduct by the victim . . . must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.]" (*People v. Manriquez* (2005) 37 Cal.4th 547, 583-584.)

"[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support. Accordingly, we . . . consider whether there was substantial evidence in this case to support a verdict of manslaughter based on heat of passion. In our view, [no] such evidence existed here." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) According to appellant, he applied pressure to Howland's carotid artery because she was "complaining and nagging" that he should stop taking drugs and get ready for work. Howland's conduct was not "sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.]" (*People v. Manriquez*, *supra*, 37 Cal.4th 583-584.)

Furthermore, appellant's "testimony contained no indication that [his] actions reflected any sign of heat of passion . . . . There was no showing that [he] exhibited anger, fury, or rage; thus, there was no evidence that defendant 'actually, subjectively, kill[ed] under the heat of passion.' [Citation.]" (***Ibid.***) (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 585.) Appellant testified that the argument about the car had ended and he and Howland had "ma[d]e up." Appellant continued: "We weren't even arguing in the bedroom." "[M]y mind was just focused on I want to do more drugs." "

In any event, "[b]y finding [appellant] was guilty of first degree murder, the jury necessarily found [appellant] premeditated and deliberated the killing. This state of mind, involving planning and deliberate action, is manifestly inconsistent with having acted under the heat of passion . . . and clearly demonstrates that [appellant] was not prejudiced by the failure" to instruct sua sponte on voluntary manslaughter. (*People v. Wharton* (1991) 53 Cal.3d 522, 572.)

Counsel's Failure to Request CALCRIM No. 522
and an Instruction on Voluntary Manslaughter

CALCRIM No. 522 provides: "Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also consider the provocation in deciding whether the defendant committed murder or manslaughter.]" CALCRIM No. 522 "is a pinpoint instruction that need not be given on the court's own motion." (*People v. Rogers* (2006) 39 Cal.4th 826, 880.) Appellant claims that his counsel was ineffective for failing to request this instruction as well as an instruction on voluntary manslaughter.

Counsel's performance was not deficient because, as explained above, the evidence does not support a theory of provocation. Moreover, as a matter of trial tactics, a reasonably competent attorney could have decided not to request the instructions because they were inconsistent with the defense theory. As counsel explained in closing argument, the defense theory was that appellant was guilty of involuntary manslaughter because he had no intent to kill Howland. This theory was based on appellant's testimony that he had intended "just to put her to sleep for a while so [he could] continue and use more drugs." " ' "Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation] . . . ." ' " (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.) In any event, appellant has failed to establish the requisite prejudice because he has not shown "that there is a reasonable probability that, but for counsel's [allegedly] unprofessional

errors, the result of the proceeding would have been different." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.)

Abstract of Judgment

Neither party has directed this court's attention to an omission in the abstract of judgment. Both parties agree that, as to the indeterminate term, appellant was sentenced to 25 years to life for first degree murder (count 1) plus a consecutive term of 15 years to life for each of the two counts of aggravated sexual assault upon a child (counts 2 and 3). Thus, the total indeterminate term is 55 years to life. The abstract of judgment does not show that the indeterminate terms on counts 2 and 3 are consecutive to the indeterminate term on count 1.

Disposition

The judgment is affirmed. The trial court is directed to amend the abstract of judgment to show that each indeterminate term of 15 years to life for the two counts of aggravated sexual assault upon a child (counts 2 and 3) shall run consecutively to the indeterminate term of 25 years to life for first degree murder (count 1). The court is further directed to transmit a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Lisa M.Chung, Judge

Superior Court County of Los Angeles

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Pamela C. Hamanaka, Deputy Attorney General, for Plaintiff and Respondent.