No. ___-_____

In the Supreme Court of the United States

_____

QUINN ALEXANDER MAREZ, PETITIONER

v.

GUILLERMO VIERA ROSA, RESPONDENT

_____

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

_____

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

_____

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APPENDIX A

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA

v.

QUINN ALEXANDER MAREZ

No. PA59953

November 25, 2015

Before Cynthia L. Ulfig, Superior Court of California, County of Los Angeles

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

The Court has read and considered the PETITION FOR WRIT OF HABEAS CORPUS filed on October 9, 2015. The Court reviewed the petition, all of the attachments, the court file, the transcripts and the court's notes taken during the trial. Based on the review of all the documents, the court's memory of the trial and witness testimony the petition is DENIED.

The petition fails to demonstrate entitlement to extraordinary relief.

The petition raises issues which were not, but could have been raised on appeal. Petitioner has failed to allege facts establishing an exception to the rule barring habeas consideration of claims that were or should have been raised on appeal. (*In re Harris* (1993) 5 Cal. 4th 813, 825-826); *In re Dixon* (1953) 41 Cal.2d. 755, 759)

The issues raised in the petition either were, or could have been raised on appeal. Unless direct remedies are inadequate, one state remedy is ordinarily enough. (*In re Rinegold* (1970) 13 Cal. App. 3d 723, 730-731)

Habeas corpus generally will not lie when the claimed error could have been, but was not, raised on appeal. (*In re Dean* (1970) 12 Cal. App. 3d 264, 267)

Petitioner claims ineffective assistance of appellate counsel. He states no facts that could lead this court to the conclusion that the quality of representation was in any way inadequate.

Appellate counsel is not required to raise issues that in counsel's professional judgment lack merit. (*Jones v. Barnes* 463 U.S. 745)

This Court has reviewed the 5 page letter mailed, by Attorney Douglas W. Otto, to the petitioner on December 22, 2014. (Exhibit 15; pages 175-179). It is clear from the letter that Mr. Otto has a clear understanding of the Habeas Corpus procedure. It is equally clear that in his professional opinion there was no basis for the petition.

Petitioner also claims that his trial attorney was incompetent. The facts underlying his claim are contained in the record and could therefore have been raised on appeal. The petition does not disclose facts from which the court could conclude that the representation by counsel fell below an objective standard of reasonableness under prevailing professional norms. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688). Nor has petitioner presented evidence that but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. (*Id.* at 694).

This court was the trial judge in the case. The court and jurors had the opportunity to hear about the alleged incident that occurred between the victim Koch and the defendant in early 2005. The testimony of Mr. Marez regarding the events that transpired in 2005 and the date of the murder were not credible. The defendant's father, Candido Joe Marez, Jr. also was called to testify to relevant information regarding the case at trial. The jury had the opportunity to review and weigh his testimony as well.

Petitioner has failed to meet his burden of showing that but for counsel's alleged errors, the outcome would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 693-694; *People v. Fosselman* (1983) 33 Cal.3d 572, 584.) Mr. Robert Schwartz (CA bar no: 072571) was the trial attorney for the defendant. Mr. Schwartz is a well-known and highly respected attorney in Los Angeles County. Mr. Schwartz had tried felony

cases, for at least 30 years, when he tried this case. He has always illustrated a clear understanding of the law and how best to represent his client. The Court would not find that his representation of Mr. Marez was in any way incompetent nor that there would have been a different outcome.

Based on the facts of the case, the statements made and actions taken by the various witnesses, as well as, the defendants and police investigation presented to jury; the Court is satisfied that the jury rendered a fair and just verdict. Further, the claims made by counsel in the Habeas Corpus petition are irrelevant and would not change the outcome of the case.

s/ Cynthia L. Ulfig
CYNTHIA L. ULFIG
Judge, Superior Court of California, Los Angeles County

APPENDIX B

THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re QUINN MAREZ on Habeas Corpus

No. S200394

April 3, 2016

DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS

The petition for writ of habeas corpus is denied on the merits. (See *Harrington v. Richter* (2011) 562 U.S. 86, citing *Ylst v. Nunnemaker* (1991) 501 U.S. 797, 803.)

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

QUINN ALEXANDER MAREZ,
Petitioner

v.

GUILLERMO VIERA ROSA,
Respondent

No. CV 16-2762-DMG (DFM)

July 19, 2019

Before the Honorable Dolly M. Gee, United States District Judge of the United States District Court for the Central District of California

AMENDED REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Amended Report and Recommendation is submitted to the Honorable Dolly M. Gee, United States District Judge, under 28 U.S.C. § 636

and General Order 05-07 of the United States District Court for the Central District of California.[1]

I. BACKGROUND

On February 11, 2010, a Los Angeles County Superior Court jury convicted Petitioner Quinn Alexander Marez and his codefendant Justin Thalheimer of first-degree murder. *See* Clerk's Transcript ("CT") 570-75.[2] On May 10, 2010, the trial court sentenced Petitioner to 28 years to life in prison. *See* CT 606-08.

Petitioner appealed. *See* Lodged Document ("LD") 10. On February 8, 2012, the California Court of Appeal affirmed the judgment in a reasoned opinion. *See* LD 1. On April 25, 2012, the California Supreme Court denied Petitioner's petition for review. *See* LD 17, 18. The United States Supreme Court denied certiorari on October 15, 2012. *See* LD 2 at 6.

On October 9, 2015, Petitioner's retained counsel filed a habeas petition in the Los Angeles County Superior Court, arguing ineffective assistance of trial and postconviction counsel. *See* LD 19. On November 25, 2015, that court denied the petition in a reasoned opinion on the merits and on procedural grounds. *See* LD 3. On December 15, 2015, Petitioner raised the same claim to the California Court of Appeal, which summarily denied it on December 18. *See* LD 4, 20. On December 28,

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[1] The Court issued its original Report and Recommendation on March 28, 2019. *See* Dkt. 48. The Court now withdraws the original Report and Recommendation and issues this Amended Report and Recommendation to address arguments presented in Petitioner's objections (Dkt. 53; hereinafter, "Objections"). Although the Court's principal conclusion is unchanged, the parties will be permitted to file additional objections to this Amended Report and Recommendation.

[2] All citations to electronically-filed documents, except for the Clerk's and Reporter's Transcripts, are to the CM/ECF pagination.

Petitioner raised the same claim to the California Supreme Court, which summarily denied it "on the merits" on April 13, 2016. *See* LD 6.

On April 21, 2016, Petitioner filed the instant Petition, which argues that trial counsel was ineffective for failing to conduct a reasonable and adequate investigation into his mental state. *See* Dkt. 1 ("Petition") at 5. After Respondent moved to dismiss, the Court recommended that the District Court issue an order finding the Petition timely, denying the motion to dismiss, and ordering Respondent to file an Answer. *See* Dkts. 12, 23. The District Court adopted the Report and Recommendation on September 25, 2017. *See* Dkt. 27. The matter is now fully briefed. *See* Dkts. 38 (Answer), 42 (Reply).

II. STATEMENT OF FACTS

The underlying facts are taken from the California Court of Appeal's opinion on direct review.[3] Because Petitioner has not challenged these factual findings, they are presumed to be correct. *See* 28 U.S.C. § 2254(e)(1); *Crittenden v. Chappell*, 804 F.3d 998, 1011 (9th Cir. 2015) (finding that a state court's factual findings are presumed correct unless "overcome . . . by clear and convincing evidence").

A. The Killing of Daniel Koch

In August 2007, Petitioner and Justin Thalheimer were living on the streets with Petitioner's girlfriend, Emily Kent.

[3] In all quoted sections of the state court records, "Marez" has been replaced with "Petitioner."

They were no longer welcome at home because of drug and alcohol abuse.

On the afternoon of August 25, 2007, the trio walked to Limekiln Canyon Park in Northridge with food and a bottle of brandy they had stolen from a grocery store. They encountered Daniel Koch drinking beer at a picnic table near a small creek that ran through the park. Defendants knew Koch, who was homeless and living in the park. The trio sat down with Koch, and the three men began sharing food and alcohol while Kent slept. Other people came by, including Jason Smith, a friend of Koch, who joined in both the conversation and the consumption of alcohol. The four men became intoxicated.

About an hour after Smith arrived, Koch became belligerent when Kent either ignored or refused his repeated requests to pass him the bottle of brandy. Koch cursed at Kent, enraging Petitioner, who advanced on Koch. Smith briefly placed Petitioner in a headlock to stop him from hitting Koch. Kent wanted to leave, and she, Petitioner and Thalheimer headed for the north end of the park, walking roughly parallel to the creek. After five or 10 minutes, Smith left for home through the south end of the park.

Defendants were still upset with Koch. After crossing a bridge over the creek, they decided to return to make Koch apologize for his rude behavior. When Kent could not dissuade defendants from going back, she elected to wait for them on the other side of the bridge.

Five or 10 minutes later, Thalheimer returned alone to the bridge. He was screaming and carrying a Leatherman tool. Both of his hands were bloody. Kent followed Thalheimer back to the picnic table, where they found Petitioner, holding a Maglite flashlight, which had been in his backpack earlier in the day. Koch was lying face down on the ground, approximately five feet away from the picnic table; he was moaning and covered in blood.

Kent then left the park, not wanting to be a part of what had happened, and walked to a nearby 7–Eleven store, where defendants met up with her some 10 to 20 minutes later. Petitioner was carrying the flashlight. Thalheimer threw his tennis shoes on top of the convenience store. Petitioner left, after announcing he was going back to the park to clean up. While Petitioner was gone, Thalheimer told Kent not to talk about what had happened in the park. Petitioner returned 10 to 20 minutes later, no longer wearing shoes. He telephoned Amanda

Welch to say the trio needed a ride from the 7–Eleven store. Welch arrived and took defendants and Kent with her to buy gas, before returning to the convenience store. Petitioner's father soon showed up to drive his son home, along with Kent. Welch dropped off Thalheimer at a bus stop.

B. The Aftermath of the Killing

The next day, Koch was found dead in the creek that flowed near the picnic table. His body was face down; the back of his head bore signs of trauma. There were drag marks from the picnic table to the creek. He died from a combination of sharp and blunt force trauma, having suffered 52 sharp force injuries, including 42 stab wounds, of which five to the torso were potentially fatal, and his throat had been cut. The sharp force injuries were consistent with a Leatherman tool. Koch further suffered 12 blunt force traumas to his head, which produced multiple skull fractures and bleeding of the brain. A large Maglite flashlight could have caused the blunt force injuries. Koch was determined to have been the major donor of DNA found on the flashlight and Leatherman tool. Petitioner could not be excluded as a minor donor of DNA on the flashlight, while Thalheimer was excluded as a possible additional donor. Koch's blood alcohol level was 0.36 percent at the time of his death.

C. Defendants' Incriminating Statements

On the night of the killing and in the days prior to their arrest, defendants spoke with others, including Kent, Welch, Matthew Ellerbrock, and Rayne Stanis, who attributed to one or both defendants various admissions and incriminatory statements. Welch testified that en route to the bus stop, Thalheimer admitted to her that he had cut or slashed someone's throat at Petitioner's direction. Kent testified that on the day after the killing, Petitioner confided to her that he had hit Koch with a flashlight. The same day, Thalheimer told Kent that he had slit Koch's wrist and neck with the Leatherman tool. Ellerbrock reported to police that four days after the killing he spoke with both defendants at his home. Petitioner admitted he "had bashed in" Koch's head with a Maglight flashlight, and Thalheimer admitted he had stabbed Koch and slit his throat at Petitioner's behest. Stanis was also at Ellerbrock's home at the time. She heard Petitioner tell Ellerbrock that he had killed a homeless man by beating him with a flashlight because he had insulted his girlfriend. Petitioner said he then got Thalheimer involved by "egging him on" so that Thalheimer would finish killing him. Petitioner seemed thrilled and excited as he recounted the killing. Stanis heard Thalheimer admit he had

killed a homeless man by stabbing him and then slitting his throat, although Thalheimer did not want to talk about the murder.

D. Petitioner's Defense

Petitioner testified in his own defense that on the afternoon of August 25, 2007, Thalheimer and Kent joined Koch at a picnic table in Limekiln Canyon Park. Petitioner sat down reluctantly; he did not trust Koch. Kent fell asleep, while the three men shared the food, beer and a bottle of brandy. Jason Smith arrived as it was getting dark. Kent awakened, snatched the bottle of brandy off the table and put it between her legs, which infuriated Koch. He cursed Kent, demanded that she give him the bottle and attempted to pull it away from her. When Petitioner objected, he was restrained by Smith, but managed to free himself. Koch jumped up on the table, started screaming that Kent was a "bitch" and threatened to kill her. Petitioner was angry and intimidated. Kent insisted that the three of them leave. The trio walked away from the picnic table as Koch continued yelling.

They walked the hill towards the cement bridge over the creek. Petitioner was still furious with Koch. When Petitioner crossed the bridge, he caught sight of another picnic table, fell to

his knees and began crying. Seeing that picnic table triggered Petitioner's memory of an incident in March 2005, when he was walking through the park. Koch was sitting at the picnic table, and when Petitioner reached the picnic table, Koch blocked his path, insisted Petitioner sit with him, forced him to drink some alcohol and refused to let him leave. Koch then hit Petitioner twice in the back of his head, pulled down Petitioner's pants and then pulled down his own pants. Koch then put his knee on the back of Petitioner's calf. Petitioner managed to get away and ran home. He never told anyone about the incident, which made him feel ashamed and continuously depressed. After the incident, Petitioner began consuming alcohol and missing school.

Remembering the 2005 attempted molestation made Petitioner angry. He remained on the ground for five minutes crying and growing angrier. Petitioner believed Koch's attempts to remove the bottle from between Kent's legs were sexual, and Koch would engage in another sexual assault. When Thalheimer turned to head back to the picnic table, Petitioner took the Maglite flashlight and followed him. Petitioner intended to confront Koch and to ensure Thalheimer's safety.

As Petitioner neared the picnic table, Koch charged and struck Petitioner in the jaw. Petitioner immediately recalled the

attempted molestation. Petitioner did not intend to kill Koch, but, fearing for his life, he struck Koch with the flashlight about 10 times. Koch continued throwing punches until Petitioner fell to the ground. Thalheimer then tackled Koch, and knocked him into the picnic table. Thalheimer repeatedly stabbed Koch with the Leatherman tool until Koch went still. Thalheimer then left with the Leatherman tool and went to find Kent. The two of them returned to the picnic bench, before Kent left the park. Thalheimer dragged Koch's now inert body to the creek. Petitioner dropped the flashlight near the picnic table and left the park. Thalheimer stayed at the park, but he later reunited with Petitioner and Kent at the 7–Eleven store. Petitioner subsequently returned to the park to retrieve a backpack that had been left behind.

Petitioner denied having told Matthew Ellerbrock or Rayne Stanis about the killing. He admitted prior juvenile adjudications for felony grand theft and "felony assault on a peace officer."

E. Justin Thalheimer's Defense

Thalheimer's testimony in his own defense at trial was largely consistent with Petitioner's testimony up to the point where Petitioner became enraged over Koch's behavior towards

Kent. According to Thalheimer, as soon as Petitioner exhibited his anger, Thalheimer moved away from the picnic table and walked towards the creek. Thalheimer was not at all upset with Koch, and he feared Petitioner would do "something crazy". After Jason Smith briefly placed Petitioner in a headlock, Petitioner and Kent decided to leave the park. Thalheimer apologized to Koch for leaving so abruptly and followed Petitioner and Kent towards the north end of the park. Thalheimer left behind the Leatherman tool on the picnic table. As they were walking, Petitioner became hysterical. He insisted they go back and kill Koch because of his behavior towards Kent. Thalheimer steadfastly refused, and Petitioner finally agreed he would be satisfied with an apology from Koch.

When Thalheimer reached the picnic table, he sat down with Koch and persuaded him to apologize when Petitioner arrived. At the same time, Petitioner snuck up on Koch and attacked him in a rage, hitting him with the Maglite flashlight and stabbing him with the Leatherman tool. Petitioner seemed so out of control that Thalheimer did not intervene to stop the attack, fearing Petitioner would harm him too. Thalheimer moved out of the way in shock. Petitioner gave Thalheimer the Leatherman tool, telling him to finish off Koch. Thalheimer

tossed the weapon back to Petitioner and left to find Kent. By the time the two of them returned to the picnic table, Petitioner had dragged Koch's body into the creek and was trying to drown him. Thalheimer admitted throwing his tennis shoes on the roof of the 7–Eleven, concerned about the footprints he had left in the park.

Thalheimer denied having made any admissions or incriminatory statements about the killing to Welch, Kent, Ellerbrock or Stanis. Thalheimer admitted he had prior juvenile adjudications for felony offenses involving moral turpitude. He also admitted he had taken a motor vehicle without authorization. Later in the proceedings, Thalheimer testified that he had admitted in juvenile court to having committed assault with a deadly weapon on a peace officer. The parties stipulated that Thalheimer had a second juvenile adjudication for assault with a deadly weapon on a peace officer. Thalheimer also admitted at trial to having used and sold drugs and to having left a drug treatment center before completing his court-ordered rehabilitation program.

Donna Levy, a friend of Thalheimer, testified on his behalf that Rayne Stanis and Matthew Ellerbrock said that

Petitioner had boasted to them about the killing, but that Thalheimer had never mentioned it to them.

LD 1 at 3-8 (footnotes omitted).

III. STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a petitioner may obtain relief on federal habeas claims that have been "adjudicated on the merits in state court proceedings" only if the state court's adjudication resulted in a decision: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court "arrives at a conclusion opposite to that reached by [the U.S. Supreme] Court on a question of law or if the state court decides a case differently than [the U.S. Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court "identifies the correct governing legal principle from [the U.S. Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413.

Here, the Los Angeles County Superior Court denied Petitioner's claim in a reasoned opinion both on procedural grounds and on the merits. The California Court of Appeal summarily denied the claim, followed by the California Supreme Court's summary denial "on the merits." The Court thus looks through the silent denials to determine whether the Superior Court's merits adjudication of Petitioner's claim is unreasonable or contrary to clearly established federal law. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).[4]

The U.S. Supreme Court has vigorously and repeatedly affirmed that AEDPA requires federal habeas courts give a heightened level of deference to state court decisions. *See Dunn v. Madison*, 138 S. Ct. 9, 12 (2017) (per curiam). In all, AEDPA "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Hardy v. Cross*, 565 U.S. 65, 66 (2011) (per curiam) (citation omitted). "If this standard is difficult to meet, that is because it was meant to be." *Harrington*, 562 U.S. at 102.

IV. DISCUSSION

Petitioner contends that trial counsel was ineffective in failing to conduct a reasonable and adequate investigation, thereby failing to introduce

[4] The Court thus agrees with Petitioner (*see* Objections at 8-9) that the "any argument or theory" standard of *Harrington v. Richter*, 562 U.S. 86 (2011), does not apply.

a defense that Petitioner lacked premeditation and deliberation, the prerequisites to first-degree murder. *See* Petition at 5.[5]

A. Review Before the Superior Court

On habeas review, Petitioner argued to the Superior Court that trial and postconviction counsel failed to adequately investigate, prepare, and present a defense that Petitioner lacked premeditation and deliberation, the prerequisites to first-degree murder. *See* LD 19. Petitioner noted that despite enduring a "tortured childhood" and sexual assault at the hands of the victim, trial counsel did not develop his social history or retain proper experts. *See id.* at 56. Additionally, trial counsel introduced none of the "abundant and readily available evidence" regarding Petitioner's diminished actuality at the time of the homicide. *Id.* at 67. Petitioner's habeas expert opined that individuals with a similar social history are less able to regulate emotions and engage in deliberative reasoning, especially while intoxicated. *See id.*

The Superior Court denied Petitioner's claim on the merits:

> The petition does not disclose facts from which the court could conclude that the representation by counsel fell below an objective standard of reasonableness under prevailing

[5] To the extent Petitioner challenges the effectiveness of his postconviction counsel, such a claim fails outright because there is no constitutional right to an attorney in state postconviction proceedings. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991). Petitioner argues that *Coleman* was modified in part by *Martinez v. Ryan*, 566 U.S. 1, 9-10 (2012), in which the Supreme Court held that ineffective postconviction counsel may establish cause for a procedural default. *See* Objections at 10-11. *Martinez* has no relevance here insofar as the California Supreme Court denied the Petition on the merits, not on procedural grounds.

professional norms. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688). Nor has petitioner presented evidence that but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different (*Id.* at 694).

The court was the trial judge in this case. The court and jurors had the opportunity to hear about the alleged incident that occurred between the victim Koch and the defendant in early 2005. The testimony of Petitioner regarding the events that transpired in 2005 and the date of the murder were not credible. Petitioner's father, Candido Joe Marez, Jr. also was called to testify to relevant information regarding the case at trial. The jury had the opportunity to review and weigh his testimony as well.

Petitioner has failed to meet his burden of showing that but for counsel's alleged errors, the outcome would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 693-694; *People v. Fosselman* (1983) 33 Cal.3d 572, 584.) Mr. Robert Schwartz (CA bar no: 072571) was the trial attorney for the Petitioner. Mr. Schwartz is a well-known and highly respected attorney in Los Angeles County. Mr. Schwartz had tried felony cases, for at least 30 years, when he tried this case. He has

> always illustrated a clear understanding of the law and how best to represent his client. The Court would not find that his representation of Petitioner was in anyway incompetent nor that there would have been a different outcome.

LD 3 at 1-2.

B. Relevant Law

Strickland provides the clearly established law governing Petitioner's ineffective assistance claim. Under *Strickland*'s two-pronged approach, an individual must show "counsel's performance was deficient" and "the deficient performance prejudiced the defense." 466 U.S. at 687.

Counsel's representation is deficient if it falls "below an objective standard of reasonableness," as measured by prevailing professional norms. *Id.* at 687-88. Because "it is all too easy" for courts to second guess errors in hindsight, *id.* at 689, *Strickland* mandates a "strong presumption" that counsel acted "for tactical reasons rather than through sheer neglect," *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam). To overcome this strong presumption, Petitioner must show counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

With respect to prejudice, Petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable

probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Th[is standard] requires a substantial, not just conceivable, likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (internal quotation marks and citation omitted).

In evaluating ineffective assistance of counsel claims brought under AEDPA, a federal court "must ask whether the state court was unreasonable in its application of *Strickland*, a question different from asking whether defense counsel's performance fell below *Strickland*'s standard." *Bemore v. Chappell*, 788 F.3d 1151, 1162 (9th Cir. 2015). "AEDPA review must [therefore] be doubly deferential" for ineffective assistance of counsel claims, in order "to afford both the state court and the defense attorney the benefit of the doubt." *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (per curiam) (citations omitted). "The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." Bemore, 788 F.3d at 1162 (citing Richter, 562 U.S. at 105).[6] "Surmounting Strickland's high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

C. Analysis

Petitioner claims that trial counsel was deficient because he failed to sufficiently investigate and present evidence regarding Petitioner's mental

[6] Petitioner objects that the quoted language is inapplicable after the Supreme Court's decision in *Wilson*. *See* Objections at 4. The Court disagrees. *Wilson* confirmed that federal habeas courts should employ a "look through" presumption, but it did not eliminate the "doubly deferential" review of ineffective assistance claims. As recently explained by the Eleventh Circuit, "the more precise question [after *Wilson*] may be whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standards under the state court's reasoning." *Melton v. Attorney General*, 769 F. App'x 803, 807 n.5 (11th Cir. 2019) (citing *Wilson*, 138 S. Ct. at 1191-92).

state. *See* Petition at 5.[7] Petitioner argues that had counsel obtained experts to look into his background and mental health, counsel could have presented powerful evidence to the jury that Petitioner acted with rage instead of premeditation and deliberation, the prerequisites to first degree murder. *See id.*

1. Deficient Performance

"There is no clear Supreme Court case law always requiring a mental health investigation at the guilt . . . phase." *Gonzalez v. Wong*, 667 F.3d 965, 991 (9th Cir. 2011). Nevertheless, "[t]rial counsel has a duty to investigate a defendant's mental state if there is evidence to suggest that the defendant is impaired." *Douglas v. Woodford*, 316 F.3d 1079, 1085 (9th Cir. 2006). Petitioner's trial counsel sufficiently fulfilled this duty in the instant case.

Trial counsel conducted an investigation into Petitioner's mental health. In denying Petitioner's habeas petition, the Superior Court had before it a letter written by Douglas W. Otto, Petitioner's original habeas counsel. Otto wrote that he explored Petitioner's claim that trial counsel had failed to investigate the issue of Petitioner's molestation by the victim in 2005. *See* Dkt. 2-2 at 27-29. Otto learned that trial counsel referred Petitioner to Dr. Hy

[7] Petitioner objects that the Superior Court acted unreasonably when it did not hold an evidentiary hearing and instead "relied largely on [its] memory of the trial and knowledge of trial counsel." Objections at 22-28. These claims (along with several others mentioned) were not raised in the Petition. Regardless, the Ninth Circuit has explained that evidentiary hearings are not a per se requirement for a state court to reasonably determine that a petitioner's allegations are not credible or do not justify relief. *See Lambert v. Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004). The relevant question is whether the Superior Court's view of the record absent an evidentiary hearing was objectively reasonable in its finding of no deficiency or prejudice. *See Williams*, 529 U.S. at 409-11. As explained below, the Court believes it was.

Malinek, a clinical and forensic psychologist. *See id.* at 28. Dr. Malinek provided Otto with the raw data of an analysis of two separate personality tests, the Minnesota Multiphasic Personality Inventory ("MMPI") and the Millon Clinical Multiaxial Inventory ("MCMI").[8] *See id.*; Dkt. 2-4 at 45 ("I gave [Petitioner] 2 personality tests and the reports were faxed to your office, along with the answer sheets and results of a cognitive screening test."). Dr. Malinek stated that no report was prepared "because the results of the personality tests were not favorable." Dkt. 2-2 at 28. Otto wrote that trial counsel "wouldn't have wanted to introduce such a report at trial" and that "it became clear to me that [trial counsel] had not been ineffective in that he had actually explored the issue of your molestation by [the victim] in a professional way." *Id.* In addition, according to Petitioner's habeas counsel, Dr. Malinek believed Petitioner lied about the molestation and "malingered" his psychological tests. *See* Dkt. 2, Memorandum of Points and Authority ("MPA") at 72. Given this information, trial counsel's strategic choice not to pursue a more detailed mental health investigation or have Dr. Malinek testify was not unreasonable under *Strickland*. *See Atwood v. Ryan*, 870 F.3d 1033, 1062-63 (9th Cir. 2017) (finding trial counsel's decision to not conduct further investigation of petitioner's background and mental state was not unreasonable given the evidence available at the time).

[8] Petitioner's expert references both tests in her declaration supporting the Petition. *See* Dkt. 2-4 at 3.

Petitioner argues that Dr. Malinek should have run more tests and that he was not properly trained in sexual victimization. See MPA at 71-72. But as pointed out by Respondent, Dr. Malinek is frequently relied on as an expert witness or nontestifying expert witness in cases that deal with trauma and sexual victimization. *See, e.g., Murillo v. ABM Indus. Inc.*, No. F070023, 2017 WL 6032590, at *9 (Cal. Ct. App. Dec. 6, 2017) (administering MMPI and MCMI tests to alleged sexual assault victim). Although Petitioner now prefers a different expert, "[t]he choice of what type of expert to use is one of trial strategy and deserves 'a heavy measure of deference.'" *Turner v. Calderon*, 281 F.3d 851, 876 (9th Cir. 2002) (quoting *Strickland*, 466 U.S. at 691). Petitioner has not presented evidence demonstrating that Dr. Malinek was unqualified to assess Petitioner. Counsel's reliance on Dr. Malinek was thus "within the wide range of professionally competent assistance." *Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990).

Petitioner also claims trial counsel did not present a defense that he lacked the specific intent to commit first degree murder. See MPA at 73-75. To the contrary, trial counsel spent ample time arguing that by acting in the heat of passion, Petitioner could not have premeditated the victim's killing. See RT 6372-73, 6393-95. For instance, counsel argued in closing that if the jury "look[ed] at the full picture," they would conclude "that this had to be a killing of passion, a killing of rage, a killing in—upon a sudden quarrel or in

the heat of passion." RT 6372. Indeed, counsel's strategy was to argue fervently for voluntary manslaughter.

2. Prejudice

Petitioner also has not met his burden to establish that the State court's prejudice finding was unreasonable. To establish a legal defense to first degree murder, "a defendant must prove that he lacked the ability to premeditate and deliberate." *Douglas*, 316 F.3d at 1087.

Petitioner contends that his prior sexual assault by the victim "was not in any real dispute," but that without an expert, "the jury had no basis for understanding what humanly reaction might be expected from a sexual assault victim confronted by events that trigger recall of a prior attack." MPA at 77. To the contrary, the prosecution argued that Petitioner fabricated the attempted sexual molestation, a position shared by Dr. Malinek. Petitioner presumes without explanation that the jury credited his testimony regarding the alleged assault, an assumption that was rejected by the Superior Court:

"The court and jurors had the opportunity to hear about the alleged incident that occurred between the victim Koch and the defendant in early 2005. The testimony of Petitioner regarding the events that transpired in 2005 and the date of the murder were not credible." LD 3 at 2. The Superior Court's conclusion was not unreasonable.

Moreover, there was extensive evidence that Petitioner's actions were premeditated and reflected significant forethought. Several witnesses

attributed various admissions and incriminatory statements to Petitioner and his codefendant, Thalheimer. Welch testified that Thalheimer admitted that he slashed someone's throat at Petitioner's direction. See RT 1837-41, 1851, 1881-82, 1889-93, 1914. Petitioner told Ellerbrock that he had "bash[ed] in" Koch's head with a Maglite flashlight. CT 317. Ellerbrock also testified that Petitioner was "yelling at [Thalheimer] to finish off the job," and Thalheimer admitted he stabbed Koch and slit his throat at Petitioner's urging. CT 317-22; see also RT 3090-96, 3104-07, 3648-57, 4216-18. Stanis heard Petitioner tell Ellerbrock that he had killed a homeless man by beating him with a flashlight because he had insulted his girlfriend. See RT 2116-17. Stanis also said that Petitioner seemed thrilled and excited to recount details of the murder. See RT 2113-20, 2137, 2163, 3090-91. The killing also suggested premeditation: Koch was highly intoxicated and Petitioner personally administered 12 blunt force injuries before inflicting 52 stab wounds or encouraged Thalheimer to finish off Koch by inflicting them.

Furthermore, as noted by the California Court of Appeal, the trial court gave a heat of passion instruction, which included the sentence: "In deciding whether the provocation was sufficient, consider whether a [sober] person of average disposition would have been provoked and how such a person would react in the same situation knowing the same facts." LD 1 at 26. The trial court further instructed that "[h]eat of passion does not require anger, rage or any specific emotion. It can be any violent or intense emotion

that causes a person to act without due deliberation and reflection." *Id.* at 29. Last, the trial court instructed the jury that, in considering whether Petitioner acted in imperfect self-defense, "[i]f you find Daniel Koch threatened or harmed [Petitioner] in the past, you may consider that information in evaluating [Petitioner's] beliefs." *Id.*

On this record, Petitioner has not shown that but for counsel's alleged errors, the outcome would have been different.

V. CONCLUSION

Habeas relief is unwarranted. IT IS THEREFORE RECOMMENDED that the District Judge issue an Order: (1) accepting this Amended Report and Recommendation; and (2) directing that judgment be entered denying the Petition and dismissing this action with prejudice.

s/ Douglas F. McCormick
DOUGLAS F. McCORMICK
United States Magistrate Judge

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

QUINN ALEXANDER MAREZ,
Petitioner

v.

GUILLERMO VIERA ROSA,
Respondent

No. CV 16-2762-DMG (DFM)

August 30, 2019

Before the Honorable Dolly M. Gee, United States District Judge of the United States District Court for the Central District of California

ORDER ACCEPTING AMENDED REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Under 28 U.S.C. § 636, the Court has reviewed the Petition, the other records on file herein, and the Amended Report and Recommendation of the

United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Amended Report and Recommendation to which objections have been made. The Court accepts the report, findings, and recommendations of the Magistrate Judge.

IT IS THEREFORE ORDERED that Judgment be entered denying the Petition on the merits and dismissing this action with prejudice.

s/ Dolly M. Gee
DOLLY M. GEE
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

QUINN ALEXANDER MAREZ,
Petitioner

v.

GUILLERMO VIERA ROSA,
Respondent

No. CV 16-2762-DMG (DFM)

August 30, 2019

Before the Honorable Dolly M. Gee, United States District Judge of the United States District Court for the Central District of California

JUDGMENT

Pursuant to the Court's Order Accepting the Amended Report and Recommendation of United States Magistrate Judge,

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

s/ Dolly M. Gee
DOLLY M. GEE
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

QUINN ALEXANDER MAREZ,
Petitioner

v.

GUILLERMO VIERA ROSA,
Respondent

No. CV 16-2762-DMG (DFM)

August 30, 2019

Before the Honorable Dolly M. Gee, United States District Judge of the United States District Court for the Central District of California

ORDER DENYING CERTIFICATE OF APPEALABILITY

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts provides:

> (a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.
>
> (b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Under 28 U.S.C. § 2253(c)(2), a Certificate of Appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." The Supreme Court has held that this standard means a showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were

"'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (citation omitted).

Here, the Court finds and concludes that Petitioner has not made the requisite showing with respect to the claims alleged in the Petition. Accordingly, a Certificate of Appealability is denied.

s/ Dolly M. Gee
DOLLY M. GEE
United States District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

QUINN ALEXANDER MAREZ,
Petitioner-Appellant

v.

GUILLERMO VIERA ROSA,
Respondent-Appellee

No. 19-56127

November 20, 2020

Before the Honorable Sandra Segal Ikuta and the Honorable Eric David Miller, United States Court of Appeals for the Ninth Circuit

ORDER

The request for a certificate of appealability (Docket Entry No. 2) 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, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

s/ Sandra Segal Ikuta
SANDRA SEGAL IKUTA
United States Court of Appeals for the Ninth Circuit

s/ Eric David Miller
ERIC DAVID MILLER
United States Court of Appeals for the Ninth Circuit